

# Integrity and efficiency in sustainable public contracts

Corruption, conflicts of interest, favoritism and inclusion of non-economic criteria  
in the award and execution of public contracts

Paris, 19<sup>th</sup> December, 2012

## *Introduction*

The workshop on “*Integrity and efficiency in sustainable public contracts*”, chaired by Gabriella Racca (University of Turin) and Christopher R. Yukins (George Washington University), was held within the framework of the international research network “Public Contracts in Legal Globalization” (PCLG, [www.public-contracts.net](http://www.public-contracts.net)). This network has been organizing collective research on issues and developments related to public contracts since 2007. Its proceedings are held in English and French.

This workshop is the second one on the theme of *Integrity and efficiency in sustainable public contracts*. The aim of the Paris workshop is to continue the research and discussions started in the workshop of Turin and to coordinate the forthcoming collective book on the issue of corruption in the field of public procurement. Prof. Racca pointed out that the collection of papers is still open and she invited all participants to submit contributions or case-studies by the 15<sup>th</sup> of March.

The first workshop was held in Turin in June 2012. This workshop was organized around the presentation of the research overview (including research outputs) the general scope of a forthcoming collective book, and of some key papers and main ideas related to the topic of integrity in public contracts.

In order to connect both workshops and to provide continuity to the discussions, Gabriella Racca highlighted the considerations made in Turin on the different research networks on European administrative law [Ius Publicum Network Review ([www.ius-publicum.com](http://www.ius-publicum.com)); Research Network on EU Administrative Law (Renueal: [www.reneual.eu](http://www.reneual.eu))] or public contracts [Procurement Law Academic Network (Plan: [www.planpublicprocurement.org](http://www.planpublicprocurement.org))]. She focused on to the need to pool and coordinate the efforts across these networks to maximize the outcomes of legal research. Professor Racca also mentioned

the need to disseminate research through a closer cooperation with political institutions, especially at the European Union level.

Professor Racca recalled the Turin initiative to create a common blog for the study of the issue of integrity in public contracts (<http://integrityinpubliccontracts.blogspot.it>), inviting all participants to the seminar and all scholars otherwise interested to actively contribute to this blog and looks forward the connection of the blog to the website of the network.

Professor Yukins mentioned that there are different generations in the research on public procurement law: once the first step of description of the domestic law is completed, a second step can be taken towards more international cooperation, building on comparative and analytical perspectives. Then, the lessons drawn for instance from the American and the EU experiences can be shared. Such communication goes beyond the law schools to encompass practitioners and lawyers. Professor Yukins also drew attention on the regulatory changes myopia. There is a risk indeed that in focusing research on issues related to regulatory changes, issues where little changes are made are left in the shadows while they remain problematic over time. Illustrations of this may well be off-set contracts as corruption vehicles.

#### *Presentation 1*

Professor Gabriella Racca and Professor Roberto Cavallo Perin (Turin)

Professor Racca presented a summary of the Turin workshop. She emphasized the two sides of integrity in public contracts: transparency and accountability. She explained that the collective book is expected to go deeper in the analysis of each of them. The contributions will provide a critical appraisal of the two sides of integrity: *ie* both with regard to the ‘vertical’ relationships between the Public Administration and the bidders (corruption) and the ‘horizontal’ relationships amongst bidders (collusion or bid rigging). Corruption and collusion represent a particularly dangerous source of waste of money and they cannot be tolerated, particularly in time of economic crisis. The collective book shall look at a set of instruments to prevent this waste and to increase the efficiency of the procurement system.

Moving on to more specific topics, and presenting her preliminary ideas for the development of one of such instruments, Professor Racca firstly focused on the reputation risk for the public and the private actors involved in the regulation and daily practice of public contracts. She presented the premise that any illicit and especially corruptive practice would discredit its performer and cause the reprobation of the citizens. The aim would thus be to rebuild a sense of shame as a consequence of the social stigma for

corrupt practices. Public officials have to be faithful to the Nation, solely pursuing the public interest. Professor Racca therefore suggested to conceptualize corruption as a betrayal of the commitment that public officials owe the State. Since the violation of this duty of faithfulness represents a strong rejection of the link between the public official and the State, she suggested that it should trigger a consequent and symmetric limitation of the rights conferred as part of this infringed link, *ie* as a reduction of the consideration received in exchange for the duties owed the State. Those rights are basically connected to the citizenship that such officials enjoy as members of the community (such as health or education benefits).

Then, Prof. Racca focused on three main topics: (1) the transparency of the procurement system, (2) the objectivity of the award procedure and (3) compliance of contract execution to the awarding conditions.

1) The notion of transparency seems different in the European and in the American systems. She pointed out some of the complex barriers to full transparency, especially in Europe. Transparency, in the European regulation, still needs to be strengthened. Firstly, a complete and easily accessible database systems which would enable every citizen to be aware of all the information related to a specific contract is still missing. Secondly, language diversity constitutes a significant barrier to a complete a really transnational transparency. The European procurement system generally has different concerns rather the American one and seems to be less radical in the pursuit of transparency.

2) Objectivity in the procurement selection is strictly connected to integrity. Objectivity might be jeopardized when the award of the contract depends on discretionary criteria. To that extent, the most economically advantageous tender criterion might be distorted: abuses seem easy to commit, especially relating to the issue of highly discretionary scores (e.g. the esthetical qualities in works contracts). In the US, problems with the scores may happen since they are used only as guides and are open to interpretation. Problems of accountability in this process may arise. Transparency and objectivity may actually be highly complex to achieve. Even more so, transparency and the information that transparency makes widely available to market participants may even foster distortions of competition – as it can create the context for the market participants to collude.

As a connected, but separate matter, it was suggested that bidders' past performance lacks a determining weight in the award procedure: it evaluated only as a matter of technical and professional standing. This is a consequence of the sharp division between the characteristics of the tenderers (as undertakings) and their tenders (as specific offers) that characterizes the European procurement system as defined by the CJEU's case-law, which sets aside the selection of the bidder from the objective evaluation of the bid. 'Award

criteria' relate only to the identification of the most economically advantageous tender. Consequently all the evaluation regarding the experience, the qualification and the means of ensuring proper performance of the contract are related to the suitability of the bidder and they do not have the status of "award criteria".

3) Professor Racca finally highlighted a further problem linked to the lack of transparency in certain parts of the procurement cycle and, more specifically, after award of the contract-which enhancement would be key as an effective tool to ensure accountability. Therefore she underlined the strict integrity implications related to the correct performance of the contract. An incorrect execution involves the problem of the so-called 'perfect crime'. In Italy, for instance, some bidders are in a position to submit very favorable bids to the procuring authorities as they know that no full performance of the contract will be requested from them. This can be the result of corruption or incompetence among procuring officials.

### *Presentation 2*

Professor C Yukins and Professor D Gordon (George Washington U Law School): 'Integrity and Efficiency in Sustainable Public Contracts – The Case for a Transatlantic Dialogue'

Professor Yukins gave his presentation and later in the workshop Professor Gordon commented further on part of the slides. Professor Yukins made ten comments on the Proposal for a Directive on public procurement [COM(2011)896 final, 20 December 2011] comparing it with the American experiences and suggesting ways in which Europe and the USA could learn from each other and try to develop a more common approach to public procurement if and when desirable.

#### 1. Public procurement's aim: benefit for economic operators

It is surprising that the aim of public procurement is expressed in terms of benefit for economic operators. Indeed, other systems such as the Chinese or the American ones consider that public procurement needs to work efficiently to the benefit of the government. This is also reflected in the role of the law towards the economy: the aim of the law is to be operational, to make the economy run better.

Note from Professor Gordon: this emphasis on the benefits from competition and the internal market is not without irony. It does not seem that all the efforts from the European Commission to develop the internal market have bore their fruit so far.

#### 2. Flexible new procurement procedures

The competitive dialogue model is based on the *principal-agent* theory. It also refers to a very different role for discretion in the procurement process. In Europe, there is an endemic distrust towards the use and misuse of discretion by public officials. In the USA, by contrast, discretion is perceived as necessary to

achieve good technical solutions. The agent is relied on because he is more experienced about the specifics of a given market and is in a better position to discuss and negotiate the terms of the contracts. There is however a problem in the principal-agent relationship when it is applied to public procurement. One sees very well who the agent is: the procurement official in charge of the award of the contract. But who is the principal? Who is the person for whom the agent acts? Is it the government? Users? Citizens? Actually, there is another problem in the principal-agent relationship: the problem of trust in the agent. It can be partially fixed with transparency and information which need to be transferred to the principals about the agent's dealings.

Note from Professor Gordon: the tradition in the USA has been to award public contracts on the basis of the lowest price. However with the Second World War and its exceptional circumstances, non-price factors have been taken into account in the contract awards. Slowly negotiations have been accepted after the War, culminating in non-price factors and discussions being fully accepted in 1984. But the EU is nowhere near.

Following a discussion between Professor Yukins and Professor Gordon, it does not seem that this evolution towards more acceptance of negotiation would be the outcome of a conscious/strategic linkage with the development of an efficient system of anti-corruption – even though there may have been some interplays in the evolution of the system of procurement and that of anti-corruption.

### 3. Aggregation of demand and the Central Purchasing Agencies (CPAs)

Europe sees CPAs as a way to improve the professionalism in procurement. In the USA, CPAs have been at the center of scandals. Indeed CPAs are agencies which lack a core mission, a clear managerial focus and therefore dysfunction may arise.

### 4. Self-cleaning and black listing

While Europe tries to identify 'evil contractors', contractors to be excluded from procurement because of their wrong habits, the USA look into identifying incompetent contractors and debar them. Once these are identified, the American system encourages these incompetent contractors to build into their internal governance proper mechanisms of anti-corruption. The American system seeks thus to make contractors responsible.

The UK has been using a similar technique with the Ministry of Justice Guidance on adequate procedures, issued to implement the UK Bribery Act 2010. The USA lobbied the UK to try to develop common standards: legal harmonization on this matter allows to increasing the effectiveness of the systems of anti-corruption. Professor Yukins showed a table of seven similarities between the USA and the UK systems (standards and procedures; knowledgeable leadership; exclude risky personnel; training; monitor, evaluate, reporting hotline; incentives and discipline; adjust program to risks). He suggested that the next step for further harmonization would lie with the system of restitution and compensation techniques in favor of the

victims.

#### 5. Labels (sustainable)

Labels can constitute barriers to entry (problem of assessing contractors' technical qualifications) and further discussions on harmonizing them would be needed.

#### 6. SMEs

It seems as if there is a political rhetoric seeking to promote SMEs. However questions arise: where are the statistics showing the importance of SMEs for the economy? Why would big contractors be preferred again and again in procurement? Is there more or less conscious bias in their favor? If yes, why so?

#### 7. Direct payment to subcontractors

There is a problem with this system because payment by the main contractor is its own tool to manage its relationships with its subcontractors. Disturbing this brings a lot of practical issues about the role of the procuring authorities in the procurement and the determination of the price.

#### 8. Conflicts of interest

Conflicts of interest proliferate, with a whole range of differences between rules, people and situations. Conflicts of interest are based on the asymmetry of information between the agent and its principal. Principals thus need to monitor their agents and sanction them if the agent abuses its position. Here it seems that there are two possible explanations. Besides this economic explanation based on the moral hazard present with the asymmetry of information, a political or legitimacy information may be added. There is a need to ensure that public procurement is legitimate from a democratic standpoint. Legitimacy would work as a proxy because of the lack of real possibility to properly monitor the agents.

#### 9. Sanctions of violations of mandatory, social, labor or environmental law

The Bush administration got rid of this system: there are problems of expertise among the government's officials to be able to properly monitor such violations.

#### 10. International procurement markets

Very difficult to enforce. Domestic preferences are very disruptive.

### *Presentation 3*

Dr Gian Luigi Albano (Consip): 'Public Procurement Market(s) Structure and Collusion: The Role of Demand Aggregation'

Dr Gian Luigi Albano suggested that collusion and corruption in public procurement can be analyzed by means of a similar analytical framework. Both phenomena hinge on involved parties agreeing on an informal contract that needs a long-term relationship to be sustained.

Dr Albano suggested that collusion may become a relevant issue when demand aggregation dramatically

reduces the set of potential participants. More generally, procurement markets do possess certain features - such as predictability and relative stability of demand over time – which make cartels easy to build and more stable than in other markets.

Dr Albano emphasized that demand aggregation can still be implemented so as to foster participation of smaller firms by using lots and by facilitating joint bidding. However, experience of joint bidding around the world has shown that this can be used for anti-competitive purposes. Thus one natural question arises: should we regulate joint bidding or should we have a system of *laissez faire* where only problematic situations (or suspicions about joint bidding) should be reported to competitive authorities?

The presentation emphasized the need to take a more inter-temporal approach to the concept of competition in public procurement. One may want to take a softer approach to competition today so as to maintain a decent level of competition tomorrow. If one is too strict today, there are then few winners who remain in the procurement markets as the losers will leave the market altogether, hence leaving procurement authorities with very few options among their suppliers (and competition) in the next round.

The time element is also present in framework agreements, when they are incomplete. Two-stage frameworks are here considered where competition is reopened after the first stage. If the first number of bidders is low, it is likely that an agreement among bidders is easy to reach (as their gain from collusion goes up). The further design of the selection can be tricky to address. Distinction between the bidders and their asymmetry needs to be drawn. Discussions with the audience arose regarding the meaning of asymmetry between bidders at this stage: asymmetry in terms of the freedom of the bidders, of their position in the next call off, of bargaining powers, of the changes that they are allowed to bring to their bid in the coming round? Considerations linked to questions such as the contract completeness come into play.

Central Purchasing Bodies (CPBs) have here a difficult role: are they supposed to act as market regulators? Or as a machine to prevent collusion? The idea would be that CPBs have no discretionary powers: there should be a mandatory reporting (for instance based on certain algorithms results) to the competition authorities which then would have discretion to carry out their own investigations.

#### *Presentation 4*

Despina Pachnou (OECD): ‘OECD Principles of Integrity’

At the OECD level, there are two big groups of principles: a) integrity principles of public procurement; and b) principles against bid rigging.

Integrity involves four aspects: a) transparency understood as information transfer; b) good management and professionalism among the procurement officials; c) prevention of misconduct (through information and cooperation with monitoring agencies such as the audit office, competition agency or prosecuting authorities); d) accountability and control involving i.e. civil society.

Domestic systems are scanned either through peer-review programs or joint studies. At the end of these processes, states are presented with options to choose from. If required, OECD then provides capacity building to implement the choices that the states would have decided to follow.

Finally, the integrity principles date back from 2008 and they may well be in need of updating.

### *Discussion*

Professor Gordon commented that transparency is more than information. Transparency can be affected by the lack of uniformity in the procurement system: the complexity and the fragmentation of the procurement system may result in opacity although the technical information may well be available somewhere – but finding its location is a barrier as well as using it properly. Transparency may also mean clarity in non-price factors and objectivity in their reading. Furthermore transparency may be linked to the need for procurement authorities to explain their choices when remedies are used by losers of the competition. In many cases, courts strike off the decision for having been held on unreasonable grounds.

Connected to the OECD assessment, is the Methodology of Assessment of National Public Systems (MAPS).<sup>1</sup> Laurence Folliot-Lalliot (Paris X) questioned their flexibility. If it is correct that the MAPS are very detailed and can lead to some rigidity in their interpretation, they are meant to assess the development of procurement system over time and therefore should be used in a flexible way. Furthermore, they are based on self-assessment and voluntary acceptance. Re-evaluation of their working may well happen in the future.

Further discussions were held on the relationships between transparency and documents disclosure (e.g. in relation to the rights of defence) and the duty to give information. The idea that transparency has to be defined with regard to the aims of the specific organisation relying on it and fostering it was put forward.

Further discussions on the relationships between transparency and predictability in the bidding process started. The question of the disclosure of the justifications on which the decision to award the contract to

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<http://www.oecd.org/development/aideffectiveness/commonbenchmarkingandassessmentmethodologyforpublicprocurementsystems/version4.htm>



one bidder is illustrated with the case of a senior procurement official in the air force who had improperly close relationships with Boeing. In that case, she had taken a range of subjective decisions in awarding contracts. Problem of evidencing the justification behind these decisions arose: clearly, on the facts, her judgement had been affected by her relationships with Boeing. As a result, her decisions were deemed unacceptable and were made void.

In Europe, disclosure of the grounds for decision-making is also problematic. Dr A Sanchez Graells (Hull) gave here illustrations from the CJEU case law on debriefing. Disclosing the full copies of evaluation reports of the bids (including technical and financial information) to all competitors, is questionable. Training of the procurement official in identifying what is confidential or not – based on the indications from the bidders – seems to be highly needed. Too much disclosure can indeed be problematic: first, it may ease cartel building; secondly, bidders can gather information on their competitors across various procurement procedures in various member states; thirdly, public and private actors have different time windows.

Professor Spyridon Flogaitis (Athens) mentioned that the market does not want transparency and determination on the basis of the lower price. Huge problems of funding of political parties come into the picture as well, which needs to be tackled. Corruption can also be more diffuse: as such the procurement of one contract can happen in a formally proper manner, but the whole system may have been corrupted (for instance because potential bidders have shared the market or because one market player has an historical advantage and may be the only provider of a technology).

Pierre Raynaud (ESA) explained some of the key features of public procurement that the ESA awards. There are specific detailed techniques related to subcontracting for instance (eg code of best practice and in some cases the ESA reviews the neutrality of the selection process of subcontractors when the main contractor is bidding for some of the subcontracts).

Further discussions were held on the specifics in the health care sector. Specificities may be connected to the high stakes for health and patients' lives. They may also be connected to the choices and preferences that doctors or some specialists may have when it comes to defining the technologies they require in order to carry out their functions. Sometimes, a very limited number of providers can deliver the required services/goods. The World Bank developed specific guidelines in this sector. However, the question arises whether a distinction could be made between various aspects of health care provision: is it the same to identify the quality for needles and the number of rooms available in the hospital? Are there objective differences between services linked to health care on the one hand and management of hospital and infrastructures on the other hand?

János Bertók (OECD, Senior Policy Analyst - Head of Integrity Unit) drew the attention of the procurement process. The OECD Convention on Anti Bribery is effectively enforced in half of the Member States for instance. Political funding remains a problem. The single market exists on paper but there is only very little cross-border procurement.

The link between public procurement and industrial policy / protection of the economy seems to be very much alive.

#### *Closing remarks*

Professor Gordon concluded the workshop. He summed up the key interventions and the main points in the discussions.

Participants and organizers thanked Professor Jean-Bernard Auby for welcoming the workshop in Paris.

Report: Yseult Marique (University of Essex)

#### *Addendum*

##### *Information on the network “Public Contracts in Legal Globalization”*

Gilles Villier (from the Global legal Studies between Asia and Europe ([http://www.glsn.msh-paris.fr/gis\\_en.html](http://www.glsn.msh-paris.fr/gis_en.html))) gave a brief overview of research project he is involved with: the question of off-set contracts as mandatory or conditional contract prior to PPPs started in African and Asian countries. Gilles Villier would like to invite cooperation on that topic in the framework of the World Bank Forum on PPPs and their Law, Justice and Development week 2012

(<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23215067~pagePK:210058~piPK:210062~theSitePK:445634,00.html>).

Professor Jean-Bernard Auby (Science Po) communicated the new projects of the network as follows:

June 2013	in Lisbon	– implementation of contracts
Dec 2013	in Paris	– implementation of contracts
June 2014	in Firenze	– contractual disputes, sanctions and mechanisms of resolution
Dec 2014	in Paris	– contractual disputes, sanctions and mechanisms of resolution

Professor Simone Torricelli (Firenze) presented the new publication of the network: International Journal

of Public Contracts (cooperation between Science Po and a Brazilian research group).

Main topic: public contracts

No special issues

Publication in French, Italian, Spanish or Portuguese

Welcoming papers from young researches

With a peer-review committee

Including a list of books for review

Following the discussions on the draft for the first issues, following suggestions have been made:

- page number to be added;
- suggested referencing to be mentioned;
- abstract in English.