

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT¹

This paper presents an overview on the Peruvian policies against collusion and corruption in public procurement. It has been written to be presented as a country contribution to Session V of the IX Global Forum on Competition, organized by the OECD Competition Committee.

Public procurement in Peru accounts for approximately 11% of the Peruvian GDP and the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement. Taking this into account, corruption constitutes a very important issue for policymakers. In fact corruption is a matter of concern for the whole society. According to a survey by Ipsos APOYO Opinión y Mercado S.A. for Proética² in the year 2008, corruption of officials and authorities is seen by more than half of the head of households interviewed as a major problem of the Peruvian State, especially in Lima. Furthermore, the majority of the people interviewed considered that the government and other institutions of the State are not committed to combat corruption.

Although important legal reforms have been introduced in order to deter corruption in all areas of the government, these reforms have not specifically addressed the linkages between collusion and corruption in procurement. There is little interaction between the Competition Authority (the Defense of Competition Commission of the National Institute for the Defense of the Competition and the Protection of Intellectual Property Rights - INDECOPI), the Public Procurement Agency (the Supervisory Body of State Contracting - OSCE) and other anti-corruption entities in Peru and there have been only few cases sanctioned by the Competition Authority that specifically involved collusion in public procurement (and none of these cases were related to corruption).

The aforementioned indicates that a more collaborative approach between the different government entities in charge of prosecuting corruption and collusion is needed in order to tackle the problem of collusion/corruption in public procurement.

I. SIZE AND POLICY OBJECTIVES

1. What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

Public procurement amounted PEN 41 851 876 628 (approximately, USD 14 303 443 824 or EUR 9 724 941 409) in 2008, which represents 11.08% of the Peruvian GDP of that year.³

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The opinions expressed herein are those of the authors and do not necessarily represent the position of the Management Board and/or the Commissions within INDECOPI.

² Proética is a non for profit civil association that aims at contributing to combat corruption, its causes and manifestations in Peru. See: <http://www.proetica.org.pe/>.

³ Source: <http://www.seace.gob.pe/>.

Public procurement is regulated by the State Procurement Law (approved by Legislative Decree N° 1017) and its Regulations (approved by Supreme Decree N°184-2008-EF). Article 4 of the Regulations establishes the following policy objectives of public procurement:

- a) **Promotion of Human Development:** Public procurement shall contribute to human development in the country according to universally accepted standards on the matter.
- b) **Morality:** Public procurement shall be subject to the rules of honesty, truth, justice and probity.
- c) **Free Competition:** Public procurement processes shall include regulations or processes that encourage the most comprehensive, objective and impartial competition, as well as pluralism and participation of bidders.
- d) **Impartiality:** The agreements and decisions of officials and areas in charge of the procurement process shall be adopted in strict application of the law. In addition, technical criteria shall be considered in order to provide a fair treatment to bidders and contractors.
- e) **Reasonableness:** Contracts in public procurement shall be reasonable in both quantitative and qualitative terms in order to meet the public interest and the expected result.
- f) **Efficiency:** Public procurement contracts shall include conditions for the best price, quality and delivery time, as well as the best use of resources. Contracts shall consider criteria of speed, economy and efficacy.
- g) **Advertising:** Public procurement processes shall be advertised and disseminated adequately and appropriately in order to guarantee the concurrence of potential bidders.
- h) **Transparency:** All procurement shall be based on objective criteria and qualifications; they shall have a purpose and be accessible to the bidders.
- i) **Economy:** Criteria of simplicity, austerity and saving shall be applied in all stages of the selection process and in the agreements and resolutions about them, avoiding unnecessary and costly requirements.
- j) **Technological Effect:** Goods, services and the execution of public works shall be of suitable quality and delivered using modern technologies so that they can effectively fulfill the purposes for which they are required, from the moment they are hired, and for a specific and predictable period of time, with the possibility of being adapted, integrated and boosted if necessary.
- k) **Fair and Equal Treatment:** All bidders shall have participation and access to contract with government entities under similar conditions. The existence of privileges and advantages is prohibited.
- l) **Equity:** Benefits and rights of the parties shall keep a reasonable relationship of equivalence and proportionality, without affecting the powers that belong to the State in the defense of the general interest.
- m) **Environmental Sustainability:** Criteria to ensure environmental sustainability shall be applied in all procurement processes, while avoiding negative environmental impacts according to the rules about the matter.

II. CORRUPTION

1. *What is the cost of corruption?*

The Ministry of Justice estimates that the cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement; i.e. around PEN 12 555,56 millions in 2008 (approximately, USD 4 291,03 millions or EUR 2 917,48 millions).⁴ Furthermore, Kaufmann et. al. (2008) report that Peru ranks 106th among a sample of 208 countries when considering the control of corruption.

2. *What factors facilitate corruption? Do some factors appear to be more important than others?*

According to a study by the Ministry of Justice, three major factors that enable the emergence of corruption can be identified: formal factors, cultural factors and material factors.⁵

Among the *formal factors*, the following are mentioned:

- The lack of a clear separation between the public and private spheres;
- The existence of a legal system that is not adequate to the national reality;
- The practical ineffectiveness of public institutions.

Some of the most important *cultural factors* identified are:

- The wide social tolerance for the enjoyment of privileges due to a prevalence of private gain versus civic morality;
- The existence of a widespread culture of illegality as a way of functioning in which there is social tolerance towards a corrupt environment;
- The lack of change in the organizational and regulatory systems despite the evolution of States.

And among the *material factors* mentioned, we have:

- The gap between the resources of public administration and social dynamics;
- The gap between actual and formal responsibility of public officials;
- The gap between actual social power and formal access to political influence.

Additional factors that might help corruption mentioned in the same study are the following:

- The low probability of detecting corrupt acts, the slight punishment for corrupt activities and the absence of social sanctions for corrupt individuals;
- The lack of independence of judges responsible for monitoring political corruption and the lack of respect for judicial decisions;

⁴ Ministerio de Justicia del Perú (2007).

⁵ Ibid.

- The weak credibility of the institutional order, which is caused mainly by the inability to effectively address social problems;
- The lack of a public career which promotes sound institutions and the compliance of the duties of public employees;
- The informality that characterizes the Peruvian economy, which is closely related to the high cost of complying with the law.

Finally, the lack of transparency in the management of financial resources in regional and local governments (which is possible due to the fact that regional and local governments are not obliged by law to publish their financial accounts) is an additional factor that might facilitate corruption in public procurement. This situation is exacerbated by the fact that people who work in regional and local governments is not properly trained and some of them are not familiarized with the State Procurement Law, especially in local governments.⁶

3. How do transparency programs help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

Transparency programs certainly help fight corruption since they make it possible to monitor the development of the procurement processes, thereby helping anti-corruption officials to uncover illegal conducts. In Peru, several reforms have been implemented in order to increase transparency in procurement. One of the most important initiatives in this regard is the implementation of the National Plan to Combat Corruption⁷, which includes several provisions to increase transparency in the government functions. The plan includes seven goals and other various strategies which are summarized next:⁸

1. Goal 1: Promoting the strengthening of the System to Combat Corruption.

- Improving and strengthening mechanisms that promote accountability, access to information, promotion of ethics and transparency in public administration;
- Administrative simplification as a strategy for combating corruption;
- Strengthening the human resources system for the prevention of corruption;
- Strengthening the State procurement system in order to prevent corruption;
- Developing strengths in the supervisory and control bodies.

2. Goal 2: Institutionalizing good governance practices, ethics, transparency and the fight against corruption in public services.

- Strengthening a National Coordinated System to Combat Corruption;
- Coordinating and monitoring multi-sectoral policies against corruption, at regional and local levels.

⁶ According to Juan Carlos Rivera, official of the Presidency of the Council of Ministers and member of the Multi Sectoral Working Group monitoring the National Plan to Combat Corruption, interviewed on 14 December 2009.

⁷ Established by Supreme Decree N° 004-2006-JUS, issued on 25 January 2006.

⁸ Presidencia del Consejo de Ministros (2008).

3. *Goal 3: Articulating an effective and comprehensive legal strategy against corruption*

- Strengthening and modernizing the judicial system;
- Improving transparency in the administration of justice;
- Implementing and optimizing the supervisory bodies of the judicial system to strengthen the fight against corruption;
- Establishing an effective legal framework to combat corruption.

4. *Goal 4: Promoting practices in the business sector to combat corruption*

- Developing a culture of ethics in the business sector;
- Establishing measures which encourage practices that prevent corruption in the business sector.

5. *Goal 5: Promoting the active participation of media in combating corruption*

- Ensuring the independence of the media and strengthening its role in spreading ethical values.

6. *Goal 6: Obtaining the commitment of society to actively participate and monitor the fight against corruption*

- Developing an anti-corruption culture in society, reinforced by ethical values;
- Facilitating citizen surveillance in the fight against corruption;
- Setting up a social-political alliance against corruption.

7. *Goal 7: Developing concerted international efforts to combat domestic corruption.*

- Applying international agreements referred to the fight against corruption into national legislation;
- Promoting the strengthening of reciprocity and judicial cooperation between countries.

As a result of the application of the National Plan, several laws have been enacted in the last few years.⁹ Among the preventive measures, the following laws have been enacted:

- Supreme Decision N° 160-01-JUS (11 April 2001), which creates the working group of National Anti-Corruption Initiative;
- Law N° 26850, State Procurement Law;
- Law N° 27482, Law governing public statements of income and assets of State officials;
- Law N° 27806, Law of Transparency and Access to Public Information;

⁹ Ministerio de Justicia del Perú (2007).

- Law N° 27815, Ethics Code and its Regulations;
- Law N° 28024, Law of Management of Interests;
- Nepotism Law;
- Mechanisms for transparency and citizen participation;
- Creation of committees of ethics and transparency;
- Creation of the Special Commission for Comprehensive Reform of Justice Administration (CERIAJUS).
- Measures proposed by the Presidency of the Council of Ministers.
- Creation of a fund to manage the money recovered from illegal activities against the State (FEDADOI).

Among the sanctioning measures, the following laws have been enacted:

- Creation of the Directorate of Police Corruption, by Ministerial Resolution 1000-2001-IN/PNP;
- Law N° 27978, Law of Leniency;
- Establishment of six corruption anti-courts and six anti-corruption chambers;
- Establishment of Decentralized Anticorruption Public Prosecutor's Offices;
- Establishment of the Anti-Corruption Subsystem;
- Appointment of an Ad-Hoc Attorney for the Fujimori/Montesinos cases.

4. Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction?

Firms are not required to certify that they have not bribed an official during the procurement process. Nonetheless, they are required to submit a sworn statement in which they declare under oath that:

- a) They are not prevented from participating in public procurement processes according to what is established in Article 10 of the Public Procurement Law;
- b) They know, accept and submit to the terms, conditions and procedures of the selection process;
- c) They are responsible for the veracity of the documents and information presented by them in the selection process;
- d) They promise to maintain their bids during the selection process and to sign the contract in case they win the process;
- e) They know and understand the sanctions contained in the Public Procurement Law, its Regulations and Law N° 27444, General Administrative Procedure Law.

Regarding the sanctions that can be applied to individuals who have engaged in corruption or bribery (either as perpetrator or as participant in the offense) Article 28 of the Penal Code establishes that the following sanctions:

- Imprisonment;
- Restriction of freedom;
- Limitation of rights;
- Fine.

It should be mentioned that the length of imprisonment depends on the offense described in each particular case. For instance, in the case of collusion, the sentence of imprisonment shall be neither less than three nor more than 15 years¹⁰; while in other cases, the sentence of imprisonment shall be neither less than four nor more than six years¹¹. Furthermore, according to the provisions of Article 92 of the Penal Code, together with the sentence, the aggrieved party is entitled to initiate civil proceedings against the offender in order to claim for civil damages.

Finally, regarding the sanctions that can be applied to firms that have engaged in corruption or bribery, Article 105 of the Penal Code establishes that the Judge should apply all or some of the following sanctions:

- Closure of premises or facilities, temporarily or permanently. The temporary closure will not exceed five years;
- Dissolution and liquidation of the firm;
- Suspension of the activities of the firm for a term which does not exceed two years;
- Prohibition on the firm to perform in the future activities of the class of those in whose practice the crime was committed, aided or concealed.

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

In Peru, there are Special Criminal Courts in charge of prosecuting crimes against public administration and bribery of officials. These courts are also in charge of prosecuting offenses committed by public officials engaged in a public procurement processes.¹²

The Peruvian Competition Authority does not have any power in the prosecution of corruption cases.

III. COLLUSION

1. What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?

¹⁰ According to Article 384 of the Penal Code, the official or public servant who, in contracts, supplies, auctions, price competitions or other similar transaction in which he is involved because of his office or because he is part of a special committee, defrauded the State or any State entity or agency, according to the law, arranging with stakeholders in agreements, adjustments, liquidations or supplies shall be punished by imprisonment of not less than three nor more than 15 years.

¹¹ According to Article 399 of the Penal Code, the official or public servant who improperly, directly or indirectly or through a simulated act, is concerned, for oneself or a third party, by any contract or transaction in which he is involved because of his office, shall be punished by imprisonment of not less than four or more than six years and disqualification as established under subsections 1 and 2 of Article 36 of the Penal Code.

¹² Administrative Order No. 024-2001-CT-PJ, which was issued on 31 January 2001.

In addition to the factors identified in economic theory, such as concentration, the existence of barriers to entry, cross-ownership and other links among competitors, regularity and frequency of orders, low buyer power, the existence of a stable demand, product homogeneity, symmetry among firms, etc.,¹³ additional factors that might facilitate collusion in procurement processes in Peru are the following:

- *Difficulty in monitoring bidders and their actions.* While in principle, detailed information about the procurement process (such as the bidder's name, number of bidders, bids, etc.) should exist in the records of the procurement process; this information is not always readily available for the Competition Authority and/or third parties. Furthermore, if the Competition Authority needs this sort of information, it should make a formal requirement to the Public Procurement Agency and it is not clear whether the information will be easily to process for the Public Procurement Agency;
- *Supply concentration.* The average number of bidders in public procurement processes is small, which according to economic theory facilitates collusion. In addition, given that the procurement processes are frequent, interaction between the bidders is constantly repeated over time. For example, it has been detected that many bidders are repeated in some processes under different names and items;¹⁴
- *Corruption.* As it is widely recognized, corruption could also facilitate collusion in public procurement, which is particularly worrying considering the high percentage of corruption in of the Peruvian GDP;
- *Legal limits (caps) on the price offered by bidders according to the State Procurement Law.* In the case of construction works, the State Procurement Law establishes that bids shall not be lower than 90% of the reference price nor exceed it by more than 10%. According to the Competition Authority, this legal provision ultimately reduces competition and could even facilitate collusion because all bidders know that nobody will place a bid above or below the limits established by the law. In fact, we can assume that a bidder that wishes to win the procurement process will respect the limitations specified in the law. However, if bidders want to collude, they can either agree to bid the lowest value allowed by the law (which is not a punishable conduct by the Competition Authority since the bids respect legal specifications) or some of them can agree to deliberately bid below or above the limits so they are disqualified from the tender, thereby enabling the remaining bidders to win the process.¹⁵

2. What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement?

¹³ Motta (2004), pp. 142 – 166.

¹⁴ According to Santiago Antúnez de Mayolo, former Executive Chairman of the Supervisory Body of State Contracting – OSCE, interviewed on 15 December 2009.

¹⁵ INDECOPI (2004a, 2004b, 2004c, 2005).

Since INDECOPÍ's inception in 1993, only three cases of bid rigging in public procurement have been effectively detected and sanctioned. None of these cases involved a case of corruption.

- *Bid rigging in the procurement of oil barrels*

The Competition Authority sanctioned two local producers of 55 gallon barrels for bid rigging in a procurement process organized by a State-owned refinery. Rheem Peruana S.A and Envases Metálicos S.A. were two local producers of oil barrels. Petroperu is a state-owned refinery and one of main buyers of oil barrels sold by the above mentioned companies.

Between the years 1995 and 1996, both Rheem Peruana S.A. and Envases Metálicos S.A. offered equal prices and almost equal quantities of barrels to Petroperu in three different procurement processes. The Competition Authority considered that the exact matching of prices and quantities was an important element to presume the existence of an agreement, especially taking into account that in the previous years the companies offered different prices and the total amount of barrels requested by Petroperu.

- *Bid rigging in the tender for public works and the construction of a electricity distribution network*

The Competition Authority sanctioned five construction firms (Villa Rica S.A. Contratistas Generales; E y R S.A. Contratistas Generales; J & J Ingenieros Asociados S.A.; JERRSA Contratistas Generales and Contratistas antares S.A.) for bid rigging in the public tender organized by a municipality for the renewal of a local road.

In this case, the Competition Authority considered four events as evidence of the collusive agreement: (i) all firms presented a budget for the works with uniform amounts of direct costs and profits; (ii) similarity of details in the filling of the formats of the proposals, such as the letter fonts and punctuation marks; (iii) evidence that the tender documents were acquired by the bidders in consecutive order and on the same date, and (iv) some of the bidders rented their equipment and machinery from other bidders, which might be considered as an unusual behavior among supposed competitors.

Similar events were considered by the Competition Authority in the analysis of a procurement process organized by Electro Sur Este (a state-owned electricity distribution company) for the construction of distribution network in the downtown area of Puerto Maldonado. In this case, three firms (Inti, Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas) were sanctioned for colluding in the process described above.

3. Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?

Certificates of independent bid determination are not employed in public procurement processes in Peru.

If firms have engaged in collusion, they can be sanctioned by Competition Authority. Sanctions imposed by it depend on whether the conduct is qualified as minor, severe or very severe. Sanctions may include fines as well as other corrective measures, such as the cessation of activities.

In addition, according to Article 237 of the Regulations of the State Procurement Law, the State Procurement Court may impose additional sanctions to providers, participants, bidders and contractors if they participate in practices that restrict free competition, including the following:

- Temporary deprivation of the right to participate in State procurement processes. This prohibition cannot be less than six months nor more than three years.
- Permanent prohibition to participate in the State procurement processes.¹⁶

Furthermore, Article 105 of the Penal Code states that if a Criminal Judge verifies that a person or his organization has been used for committing or concealing a crime, he is obliged to impose a sanction to this entity, which may include the prohibition to conduct activities similar to those in which the crime was committed. Thus, assuming that a company was found liable in a process linked to the commission of a crime (not necessarily the corruption of officials) for events directly related to a public procurement or acquisition process, the Judge may prohibit that company from participating in such activities for a time period (not exceeding five years) or permanently.

IV. FIGHTING COLLUSION AND CORRUPTION

1. What cases from your jurisdiction have involved both corruption and collusion in public procurement?

There has not been any prosecuted case involving both corruption and collusion in public procurement in Peru.

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

In the cases sanctioned by the Competition Authority (see see Section III, question 2), the sectors involved in bid rigging of procurement tenders were: public works (construction of a local road and construction of an electricity distribution network) and provision of oil barrels to a State-owned refinery. It should also be mentioned that the Competition Authority is currently investigating an allegation of bid rigging in the public procurement processes organized by ESSALUD (the Peruvian social health insurance company) for the acquisition of medical oxygen between January 1999 and June 2004. Furthermore, there

¹⁶ It should be mentioned that the Court will also impose this sanction when a person, within a period of four years, has received two or more sanctions which together add 36 or more months of temporary prohibition.

have been five investigations of bid rigging in public procurement processes which were later dismissed by the Competition Authority: three involving local government contracting agencies and two involving state-owned companies.¹⁷

3. *When individuals or firms have engaged in bribery or corruption, are they able to receive leniency in your jurisdiction?*

According to Peruvian legislation, leniency schemes may benefit individuals or firms who have committed criminal offenses using public resources or with the intervention of officials or public servants. In this sense, individuals or public officials who have engaged in bribery or corruption may obtain benefits such as the exemption from punishment or suspension of the execution of the penalty, among others.¹⁸

V. ADVOCACY

1. *What steps have been taken to improve the efficiency of the public procurement process in your jurisdictions?*

Within the framework of implementing the trade promotion agreement signed with the United States, a new State Procurement Law was issued in November 2008. The new law aims at establishing standards designed to maximize value for taxpayer money used in the public procurement of goods, services and works, in a timely manner and with the required levels of prices and quality.

Among the most important changes introduced by the new law, the following can be mentioned:

- a) Corporate purchasing and reverse auction, where appropriate, will be preferred. Furthermore, contracting entities will contract directly through the Catalog of Framework Agreements;
- b) Guidelines for the preparation and updating needs of the reference value are determined;
- c) Special schemes for micro and small enterprises are maintained;
- d) Infringements of suppliers, participating bidders and/or contractors that deserve sanctions are established;
- e) Additional functions of OSCE are incorporated. Examples of such new functions are the promotion of the reverse auction and the need to inform the National Control System about the cases in which rules of public procurement are violated, as long as there are reasonable causes to believe that State resources were mismanaged or a crime was committed.

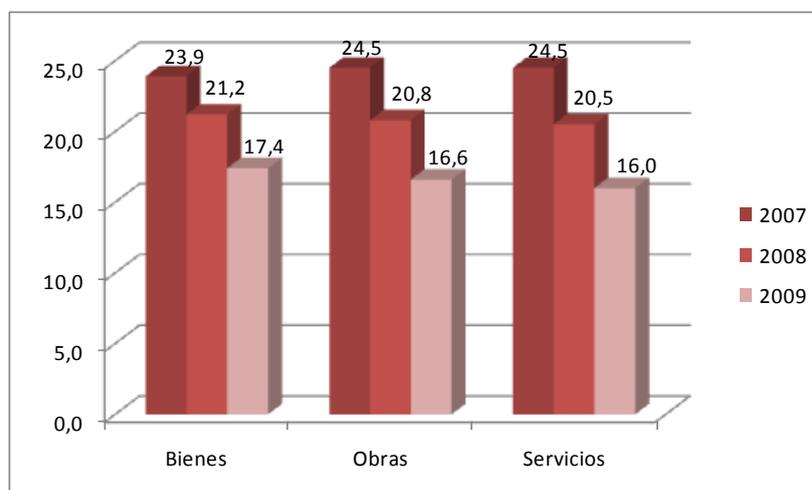
¹⁷ The above statistics are a very limited sample of the potential cases that might exist in other sectors and therefore should not be considered as a definite indication of the potential scope of allegations of collusion and corruption in public procurement.

¹⁸ See Subsection 1 of Article 1 of Law N° 27378, issued on 21 December 2000.

The changes introduced appear to be promoting positive results, such as the reduction in the average duration of the public procurement processes (see Figure 1).

Figure 1

Average Duration of Public Procurement Processes (in days)



Source: OSCE.

Furthermore, new software has been recently installed in OSCE which will help the organism monitor public procurement processes online. For instance, the software detects if a contracting entity purchases a specific item at a significantly higher price than the one offered for the same item to another contracting entity.

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

The cases that have been sanctioned by the competition Authority of INDECOPI are related to collusion between bidders only (see Section III, question 2). No analysis of corruption was made by the Competition Authority since it has no power to prosecute this type of offenses.

In all these cases, the only sanctions implemented were fines ranging from 0.5 tax units per firm (approximately, USD 414 or EUR 388) in the case of a local municipality against five firms devoted to civil construction activities and 20 tax units per firm (approximately, USD 18 018) in the case of Petroperu against Rheem Peruana S.A. and Envases Metálicos S.A.¹⁹

¹⁹ The value of the tax units, as well as the exchange rates corresponds to the year in which the sanctions were imposed (1999 and 1997, respectively).

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