

Zero tolerance to corruption in PPP procurement

A checklist of key issues ¹

Note prepared by the Project Team on Zero Tolerance to Corruption under the leadership of Marc Frilet

Scope of the proposed list

Many issues which may lead to corruption in PPPs are similar to the same concerns that may lead to corruption in other ways in which the public and the private sector interact.

For the most part, international organizations, NGO's and/or national laws address all of these concerns; some are de jure and others are de facto – they may be part of soft laws or they may have become international standards, depending on the situation. Overall, non-compliance with regulations often triggers criminal liability.

For the purposes of our Project, we will focus on the key issues which are more specific to PPPs.

What issues are more specific to PPP?

During the life cycle of PPP projects often lasting for decades from start to finish, the numbers of issues that may lead to corruption are very high.

The team proposes, as a first step, to focus on PPP procurement taking into account the existing formulation of best practices as well as the various programs that may have an impact on the matter such as the Well Prepared Project program.

Within PPP procurement, the team will focus on competitive bidding for selection of the private investor/operator since this system is generally considered as being the rule by modern governance standards.

As a second step, the team will identify additional issues for Zero Tolerance for the other project phases (Project planning, prioritization, implementation (including Project changes), disputes avoidance and resolution), etc.

What is specific in PPP competitive bidding?

From a pure technical point of view regarding procurement procedures, the broad range of situation that may lead to corruption is *prima facie* different. We propose an initial distinction, based on the aggregated experience of well-respected working groups and stakeholders surveys in developing countries which deserve to be further discussed.

– For PPP belonging to the PFI family where the return of investment comes entirely from the Public Authority and where the private investor is not in charge of delivering a full public service, the modern procurement techniques are generally considered satisfactory. This includes prequalification or pre-selection and often two stages of tender (as provided for instance in UNCITRAL procurement laws). However our collective experience shows that this approach is not immune from corruption risks.

– For PPP belonging to the Concession PPP family where the private investor is in charge of delivering a full public service and recovers entirely or mainly from end users, it is in most cases necessary in addition to enter into a well-organized competitive dialogue or a competitive negotiation. This leads to more complex and

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inclusive awarding criteria which may trigger further corruption risks and reinforced or additional standards to be complied with.

On the basis of the above consideration, we propose a list of main issues taking into account the comments received from the Team and Editors up to June 11th.

GROUP OF ISSUES 1: Risks of inadequate institutional and legal framework

An institutional framework limiting corruption risk needs to comply with governance, integrity and efficiency standards. Due to the different legal approach to regulation and law making process, in various countries some distinctions may be necessary between civil law and common law countries.

A proposed standard would include:

Governance:

- Fairness/impartiality: promotion of ethical guiding principles facilitating clear and simple wording and interpretation of other standards at all stages (for example: clear separation of duties for bid preparation, bid evaluation, procurement compliance and possible certification, audit and protest);
- Different public bodies and committees adapted to the needs distinguishing preparation and evaluation stages and taking into account the nature of the issues at stake (for example: financial, technical, legal, environmental, community, tax, public service status, authorizations etc.);
- Transparent by-laws for the proceedings of different bodies and committees with adequate resources and staff;
- Participation of an independent third party (for example: probity officer, ethic board);
- Transparency in publication and circulation of information during the bidding process;
- Electronic information exchange (via a database that is easily accessible on multiple platforms) and other smart technology techniques

Integrity:

- General policy on conflicts of interests including the: obligations to disclose and report, as well as remedies.
- Confidentiality duties
- Duty to comply with code of conduct (public sector best interest standard and public sector fiduciary duties)
- Code of conduct of the private sector
- Prevention of collusion risks specific to the highly concentrated nature of most PPP markets.
- Internal control systems and their implementation.
- Conflict of interest between the financial advisors and the financial institutions
- Immunity of civil servants and politicians

Efficiency:

- Process adapted to context allowing for negotiations to take place at arm's length.
- Condition of selection and status of advisors and consultants
- Duty to provide outcomes specified contractually.
- Compliance audits and reports
- Data request and data collection
- Efficient protest mechanisms including independent reporter facilitating judicial or other forms of neutral decision.

Judicial review:

- Independent judiciary with a clear and consistent legal framework which may need features specific to PPPs

GROUP OF ISSUES 2: Risks of non-transparent procurement procedure

A proposed standard would include:

- Choice of the procurement method
- Minimum and maximum preparation time for bidders at different stages
- Procurement steps and selection criteria to be published in advance and included in the RFP
- Limitation on ex parte communication, and controlled interaction between procuring authorities and bidders
- When exchanges with one of several bidders are the best procurement option (mostly for Concession PPP): public information on the conditions and limits of the exchanges: what can be discussed? What is intangible? How the composite criteria for BAFO are organized?
- Blacklist of corrupt advisors and organizations

GROUP OF ISSUES 3: Risks of lack of information transmitted to bidders on zero tolerance to corruption

A proposed standard would include:

- Corrupt practices including consequences of their infringement: distinction between active corruption and passive corruption: differentiation of corruption definition depending on the parties, and procuring authority, advisors, industrial sponsors, financial sponsors/investors.
- Statement of compliance and integrity to be signed by the bidders
- On-going compliance guaranties within the successful bidders organization and main contractors and sub-contractors
- Debarment and their consequences
- Public officials and private companies acting in concert: preventive measures to hold officials accountable and sanctions should preventive measures fail.
- Private competitors acting in concert: preventive measures to inhibit "bid rigging" through competitors submitting poor bids in exchange for winning others later (and other similar practices by competitors) and sanctions should preventive measures fail.

GROUP OF ISSUES 4: Risks of corruption arising from third party or indirect mechanisms

A proposed standard would include:

- Statement of compliance and integrity to be signed by subcontractor consultants and any third party involved in the bidding process.
- Possible disclosure of preparation and bidding costs paid or borne by subsidiaries and third parties

REFERENCES TO BE COLLECTED BY THE PROJECT TEAM

- *A compilation of existing regulations, procedures, UN national or international as well as NGO including proposed best practices and related tools will be carried out and.*
- *Their main conclusions and propositions will be summarized to avoid any duplication and facilitate cross-fertilisation*