Preventing Corruption in the Official Arms Trade

Report No 3

Integrity Pacts: detailed review of recent experience

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3. The experience of doing large IPs in Colombia and thoughts on the approach to Integrity Pacts for defence sector

Notes from discussion with Rosa Ines Ospina of TI Colombia and lawyer Santiago Jaramillo-Caro . May 2004

1. The experience of bidders and government with IPs

1.1 Bidders initial perceptions:

1) Why do I have to sign if I am not corrupt?

This was very difficult at the beginning, with both public sector and with bidders. Her reply developed into agreeing that the bidder was no doubt perfect, but was that also the perception of people generally in Colombia. If it was, then to put effort into measuring that perception. TPC also stresses that this is an ethical commitment rather than a legal one

2) Why do I have to do this if it's already specified in the law?

This is the second question that new bidders come to. It's true, almost all the IP is within the law (except arbitration). Even if you do sign, government officials are not allowed to go further than the law: eg, in law, you can probably still bid for contracts even if debarred by a previous IP. The TPC answer to this is that it is a case of clearly taking an ethical stance and demonstrating your commitment against corruption, to your staff, to the other bidders and to the public.

3) How are you going to get real consequences, when often the people who cheat don't care about the law anyway?

This is the next question that comes. Rosa does not try to give a definitive answer, as there has not yet been a test with arbitration. The other issue has been around making information public. There had been some resistance to this, on the grounds that making potentially confidential information public might be illegal.

After this, people have stopped asking questions and just got on with doing the pacts. They have taken the view that if TPC are there and there is scrutiny of the bidding documents, then the higher quality will be a good thing. There is also a sometimes naïve view from each bidder that their

particular slant on the best bidding specification will be the one chosen. This can lead to some disappointment on the part of the bidder.

4) Major example

Personal Communication systems. Two bidders, trying to protect a 'duoploy agreement' that they had already extended for several years without competition. There was a huge legal fight, with TPC supporting a re-tender.

1.2 Government Ministry initial perceptions:

For officials, Items 1 and 2 above are pretty much the same.

1.3 Later company reactions

Almost all bidders, including US multinationals, are now regularly accepting the IP. Only one company, IBM, has continued over time to express its discomfort, although it has signed up to some (To check)

2. Technical evaluation

TPC have used experts in each of the major IPs done to date. Generally they use a small team: an internal technically competent person, an external technical expert, and a legal expert. The extent to which they are used depends on the complexity of the IP. In a complex one, the TI 'team' could be involved for much of the time over a 5 month period. In others, the technical expert would be brought in for reviewing the bidding documents, and possibly that would suffice. In another, the technical expert was brought to Colombia on three separate occasions. The external expert is usually sought from overseas, as this gives greater credibility. Way in which technical experts have been used. Now that TPC have built up a substantial body of experience, they often find that they know as much about corruption risk in thje technical specification as the outside expert does. Nonetheless, they still choose to use the external expert to give credibility.

The other source of expertise is the bidders themselves. Once they have accustomed themselves to the process, they are quicker than anyone in pointing out the areas where they feel they are perhaps disadvantaged.

The first work is reviewing the bidding documents. Increasingly these are available from the Ministry in draft form, before the official date, and this gives more time for review. This phase is usually time-constrained: often there are only a few weeks from document availability to the hearing.

The TPC team involvement depends somewhat on the political support. Sometimes the Ministry personnel want the TPC team to be on hand for all documents and all meetings, sometimes it is more formal and periodic.

TPC have a practice of using individual experts rather than consulting companies. They haven't yet had a case where they have needed more than one outside technical expert.

3. Payment to TPC and TPC's contract

TPC's practice has been to ask for payment by the government, rather than from anyone else. They have not asked bidders to pay. The costs varies depending on complexity: very roughly, TPC's team costs about US$3000 per month, and a large procurement can last about 5 months. The most expensive part of the team is usually the legal expert.

In Mexico, they have a different practice for payment. The TI Chapter takes one third payment from the Government, one third from the bidders and one third from a generous grant given to TI by the State oil company Petroleos de Mexico.

The contract that TPC has with the government is a sensitive matter. Being a contract, it should therefore also be tendered, not let sole source to TPC. It should also follow Government law, which gives all sorts of rights to the government, eg the contractor cant just walk away if they think something is wrong. TPC have had extensive discussions with other Ministries on this matter, and do now have a special contract (To check: Rosa, is this right?)

4. Disclosure of agents and payments

This is not required in Colombian law. It has been discussed quite often with TPC, but IPs in Colombia so far do not require this. The lawyers agree that this is an important measure that would have a significant impact.

5. Publication of information and public hearings

Colombian law, particularly the recent changes, require a lot of bid information to be put out in the public domain, specifies public hearings and clarification opportunities, and allows scrutiny and challenge of the evaluation. It seems to me that this is probably a lot more open than in most other countries.

This level of public disclosure should be written in to IPs to be used in other countries.

6. Confidentiality of documents

By the same public exposure laws and clauses referred to above, most information is public. The law does allow for some exemptions on grounds of confidentiality, either commercial or technical, but the emphasis is strongly towards disclosure.

The defence sector is granted exemption, but almost never uses it.

7. Legal status of the pact

The legal status of the pact has been the subject of much discussion, both in Colombia and in the rest of TI. The position, at least as regards Colombia, is now believed to be clear, if complex.

First, the pact is expressed as a private contract between the bidders. It does not bind the government. Thus it is a solid contract between the bidders, but in Colombia the Government is not bound in to those contractual clauses. Separately, the Government can require that all the relevant officials sign a no bribery statement, and they have done that. Thus the pact between the bidders is solid, whilst between the bidders and the government it is actually expressed through two different pacts: between bidders, and within government.

There are two sets of consequences on the bidders: penalties under the law and penalties under the IP.

Under the law, there are three sorts of consequences:

- Offending against the procurement law of 1993. This has heavy penalties on conviction, and can include prohibition from biding for up to 5 years
- Criminal consequences, including jail
- Disciplinary consequences, following investigation by the Attorney general's office (who investigate the conduct of public officials) or the General Controllers office (who investigate the misuse of public funds)

Under the IP, if someone transgresses, then they can be taken to arbitration, and if found guilty can then be sued by the other bidders for breach of contract.

If you are found guilty by the arbitrator there is no immediate causal connection to the Ministry taking action against you: see Section 8 below.

The general legal status of the IP was supported by being specifically mentioned in the Government's development plan of 1999, as being a useful tool to apply. These development plans have the status of law, so this was a semi legal sanctioning of the IP. The IP was also supported by the senior Constitutional Court in Colombia.

8. Arbitration and sanctions

Arbitration is an integral part of the IP. Usually, arbitration through the Colombian Chamber of Commerce is specified. Arbitration in Colombia is well accepted and very common, so there is a large body of experience and it is an accepted part of the legal scene. There have been some pacts where arbitration through the ICC has been discussed.

So far there have been no challenges going through arbitration. There has been one case where a claim was filed for arbitration (connected with maintenance services for the Senate, where pressure was being exerted on the contractors to pay a certain person). However, the case has very recently been withdrawn as the claimant did not want to pay the costs of arbitration (some $1000 to $2000).

There is a potential issue of what might happen if a bidder was found guilty by the arbitrator, but declined to accept any consequences: eg did not pay the fines to the other bidders, or did not accept to terminate the contract, or did not accept to be debarred from later contracts with the Ministry and continued to present himself as a bidder.

In these cases, the answer depends on the sanction. In the case of payment due to the other bidders, the guilty bidder is in breach of his contractual obligations to the m and can be sued by them. In the case of not terminating the contract, the Ministry may find that there has been enough information in the judgement to enable them to activate one or more of the contract termination clauses in the contract. Alternatively, the Colombian law n corruption specifies certain sorts of offence as being reason enough to terminate the contract regardless of what the contract says. In the case of debarment, again it is up to the ministry to decide if the outcome of the arbitration enables them to refuse to accept the contractor for new bids.

9. Issues of Conflict of Interest for TI Berlin and for TPC

There have been a number of conflict of interest situations that TPC have had to address, and may face other NGO groups acting as monitor.

First, taking money for the work, and whether this compromises TPC. Within this is the question of what sort of a contract TPC has with the Government? TPC has addressed this by developing a special sort fo contract, as discussed above, but still faces questions of conflict because of taking money from the Government.

Second, what if the company bidding – or advising a bidder – is also a corporate member of TPC? TPC's answer is to be very restrictive on who can be a corporate member, and generally to refuse them (eg KPMG and PWC applied to join, but were refused as they often advise bidders)

Third, what if one of the bidders is a corporate member of TI Internationally? One such case has arisen, where a bidder in Colombia thought TPC was being too strict and complained to Berlin.

In general, TPC's good reputation has carried them through these sorts of issues.

10. Political will

A very strong view from TPC that unless there is evident political will you shouldn't start doing an IP.

- First because the bidders are very sensitive to the political climate, and will be aware if the government is not supporting you. As a result you will lower your standing with them.

- Second, because you will need much more time and effort to fix meetings, see the right people, etc, if you don't have a very strong guide from the top

- Third, because you will always have an obstructive bureaucracy to deal with (either they think they're doing it right and don't see why they should change, or they know it is a corrupt process and want even less to change)

11. Views of other NGOs and Civil Society groups

I spoke with the Colombian Chamber of Commerce (who have 56 local chambers across the country) and with the University of Rosario, who have an active Anti-Corruption department. These are really the only sizeable organisations apart from TPC in the country.

Both viewed TPC positively and were generally positive about Integrity Pacts.

12. Overview of defence specific issues compared with current large IPs

Specific defence aspects that came up:

- Defence having occasional very large contracts and then a large routine load of ordinary sized contracts. TPC and the Government are heavily focused on making sure processes are good for all the normal contracts. These set the cultural tone, and of course influence the climate heavily when a big contract comes around.

- Exemptions for defence. This is widespread and probably unnecessary. TPC have directly demonstrated to MoD that stuff they considered secret was already in the public domain.

- The military hierarchy. Lower grade military staff (who are the ones who prepare technical specifications) will just obey their superiors in changing something, and will not challenge

- Technical requirements are harder to challenge: both because they can be very sophisticated, but also because the military superiors can claim that only 'this' specification will allow them to do their job.

The need for speed. Two reasons: 1) Short Presidential time in which to make a difference, so procurements are rushed through, and 2) Congressional approval only lasts for one fiscal year, after which you lose the financial allocation.