

# **Seminar on the promotion of good governance and fighting corruption in the area of transport infrastructure development in the South Caucasus**



## **Corruption in public procurements**

## **Introduction: Why a public procurement is considered as a risk area ?**

Mainly because:

- ◆ PP engages *important funds* (15 % of Gross Domestic Product in OECD);
- ◆ PP is *a technical process* which involves many actors;
- ◆ PP constitutes *a major intersection* between the public and the private sector

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## **But also...**

- ◆ *Complexity* of the PP laws;
- ◆ *Lack of knowledge or dishonesty* of the public buyers;
- ◆ *Lack of controls*;
- ◆ *Economic circumstances*

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...and the possible irregularities are numerous

Corruption is generally linked to other crimes

◆ **Main irregularities:**

- Bribery;
- Favouritism;
- Illegal taking of interest

◆ **Other crimes:**

Money laundering, tax evasion, accounting crimes, fraud, collusion, political party financing, conflict of interest, organised criminal associations, blackmail...

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## The reasons of the frauds

- ◆ Frauds are expanding if benefits > risks;
- ◆ Fraud's mechanisms are generally simple, but it often need technical knowledge (legal or psychology...)

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## Why are the frauds possible ?

- ◆ Frauds => *complicities* between one or several decision-makers (PP officials, companies, consultants, architects, suppliers...and bankers);
- ◆ Frauds profit from *lacks* of rules, *lacks* of controls, *heaviness* and *slowness of proceedings*...

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- ◆ That's why most of the Governments take measures *to prevent, control, detect and sanction corruption in PP*.
- ◆ But, firstly, it's necessary to have an overall vision of the main areas of risks in PP.

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## 1- Typology of risks in public procurements

- ◆ *Each link* in the chain or process flow is vulnerable !
- ◆ Risks may occur:
  - 📖 In the *pre-bidding* phase;
  - 📖 In the *bidding* phase;
  - 📖 In the *post-bidding* phase.

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### 1-1 Risks in the pre-bidding phase

- ◆ **Main risks:**
  - 📖 Before the decision to contract;
  - 📖 Before the invitation to bid;
  - 📖 During the choice of procedure

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## **a) Risks before the decision to contract**

- ◆ Procurement officials have to assess the needs and the costs  
=> They have to select a *consultant agency*

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## **Main risks**

- ◆ Conflict of interests;
- ◆ The consultant agency belongs to a bidder;
- ◆ Always the same research consultant;
- ◆ False surveys...

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## What for ?

- ◆ Embezzlement;
- ◆ Deficiency of needs assessment;
- ◆ Choice of procedure;
- ◆ Choice of tender.

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## b) Risks before the invitation to bid

- ◆ Three main risks:
  - 📖 Needs assessment;
  - 📖 Definition of requirements;
  - 📖 Decision to contract

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## Risks linked with needs assessment

- ◆ Lack of adequate needs assessment;
- ◆ Deficient business cases;
- ◆ Failure to budget realistically;
- ◆ Interference of high-level officials;
- ◆ Informal agreement on contract.

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## Definition of requirements

- ◆ **Technical specifications:**
  - 📌 Too precise (tailored for one company);
  - 📌 Too vague or not based on performance requirements
- ◆ **Selection and award criteria:**
  - 📌 Not clearly and objectively defined;
  - 📌 Not established and announced in advance of the closing of the bid;
  - 📌 Unqualified companies being licensed...

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## Decision to contract

- ◆ It may be *influenced or distorted*:
  - 📖 lack of information;
  - 📖 or too many information;
  - 📖 or too late information...

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## c) Risks during the choice of procedure:

- ◆ First, there are methods *to avoid PP process*:
  - 📖 By transferring to a *private organism* which doesn't have to respect the PP laws;
  - 📖 By *splitting up* the contract

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◆ There are also methods *to avoid bidding*:

📖 By using *non-competitive procedures* on the basis of legal exceptions

For example: “extreme urgency”,  
“exceptional circumstances”,  
“military secret”...

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◆ There are lastly *fraud methods for all the procedures*:

📖 Lack of information about bidding;

📖 Lack of access to the information;

📖 Time frame not sufficient for insuring a level playing field;

📖 Lack of competition or collusive bidding...

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## 1-2 Risks in the bidding phase

There are critical risks to integrity at all stages:

### **a) Invitation to bid:**

- Invitation not provided in a consistent manner;
- 📅 Absence of public notice for the invitation to bid;
- 📅 Sensitive or non-public information disclosed.

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## **b) Risks in award**

- ◆ *Lack of access* to records on the procedure;
- ◆ *Lack of transparency* or/and conflict of interest during the evaluation process;
- ◆ *Lack of transparency* during the approval process.

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### 1-3 Risks in the post-bidding phase:

The most frequent risks to the integrity of the PP process include:

- 📁 The *insufficient monitoring of the contractor* (a);
- 📁 The *lack of supervision of the public officials* (b)

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#### a) The insufficient monitoring of the contractor

- ◆ There is too often a *lack of supervision* over the quality and timing of the process:
- 📁 *Substantial change* in contract conditions (more time, higher prices);
- 📁 *Product substitution or sub-standard work* or service no meeting contract specifications.

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- ◆ There is too often a lack of supervision of the *subcontractors*  
Subcontractors and partners are chosen in a non-transparent way or non kept accountable

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## **b) The lack of supervision of public officials**

- ◆ **During the execution:**

- 📖 Lack of controls of *the reality of the works, goods or services;*
- 📖 Lack of controls of *the additional clauses.*

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## **During order and payment:**

- ◆ *False accounting and cost misallocation* or cost migration between contracts;
- ◆ *Late payments* of invoices, postponement of payments to have prices reviewed;
- ◆ *False or duplicate invoicing* for goods and services not supplied and for interim payments in advance of entitlement.

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## **2- Some measures to prevent, control, detect and investigate bribery in PP**

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## 2-1 Preventive measures

- ◆ They must be *strengthened*:
  - 📖 Procurement rules must be *simple, clear and stable*;
  - 📖 Good practices for *promoting publicity, transparency and competition before and after contract attribution*;
  - 📖 *Training of personnel* for rules, regulations, integrity and best practices.

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### a) Procurement rules

- ◆ **Formal aspects:**  
Procurement rules must be:
  - 📖 *Stable* => security and transparency;
  - 📖 *Clear* => no ambiguous terms;
  - 📖 *Exhaustive* => all the public buying;
  - 📖 *Within the reach of all* => publicity and codification.

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### ◆ **Content:**

Three main principles:

- 📖 *Freedom* of access to the PP;
- 📖 *Equality of treatment* of the bidders;
- 📖 *Transparency* of the procedures

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### **But also...**

- ◆ *Impartiality* of the PP officials =>
  - 📖 separation of duties;
  - 📖 composition of the tendering commission;
- ◆ *Competence* of the tenders:
  - 📖 Technical;
  - 📖 Legal: sentenced companies should be forbidden to tender

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## **b) Promoting publicity, transparency and competition before and after contract attribution**

### **◆ What means ?**

- 📖 General standard of the State service;
- 📖 Code of Public procurement;
- 📖 Code of ethics.

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## **c) Training of personnel:**

- ◆ By *making aware* of rules and regulations;
- ◆ By *improving professionalism* of buyers;
- ◆ By *promoting good practices*  
For example: guidelines...
- ◆ By *reporting dishonest practices*

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## 2-2 Controls

- ◆ They are generally *numerous*:
  - 📁 *Internal controls* by tendering administration (hierarchic and legality controls, inspections);
  - 📁 *External controls* by private auditors or judges

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### **But these controls are too often inefficient**

- ◆ Too formal;
- ◆ Too late;
- ◆ Lack of means (personnel, competences);
- ◆ Uncoordinated;
- ◆ Interference of high-level officials..

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## That's why they must be improved and coordinated

- ◆ *Improved* by increasing professionalism of control organs;
- ◆ *Coordinated* by setting up cooperation mechanisms and harmonization of the procedures;
- ◆ *Focused* on the whole procurement process and structure.

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## 2-3 Detection mechanisms:

- ◆ They must be *established* by:
  - 📁 Mapping the risks;
  - 📁 Reporting to the PP authorities.

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## a) Mapping the risks

### ◆ Objectives:

- 📖 taking into account of *illegal acts but also insufficient monitoring or money wasting*;
- 📖 Recommending *strategy, methods and tools*.

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### First step: it's necessary to identify

- ◆ *Risks sectors*: civil engineering, energy, arms trade, banks, health sector...
- ◆ *Risks activities*: PP but also town planning, subsidies...

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## **In a second time, identification of the risks factors within the PP unit:**

- ◆ Failure of functioning;
- ◆ Delegation of powers;
- ◆ Lacks of code of ethics, guidelines...
- ◆ Conflicts of interests...

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## **In a third time, identification of the risks functions and of the risks “human profiles”**

### **◆ The risks functions:**

Monitoring of contracts, accountants, engineers, computer operators... and all the decision-makers;

### **◆ The risks “human profiles”:**

Lack of training, conflict of interests, lack of professional prospects...

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## Mapping the risks must permit to make a inventory of:

- ◆ Internal procedures;
  - ◆ Decision-making;
  - ◆ Laws in force
- ... And to identify the malfunctioning.

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## Mapping the risks may confirm suspicious...

- ◆ For example:
  - 📖 Always the *same enterprise* is designed => favoritism ?
  - 📖 *Same prices* for the bidders => collusive bidding ?
  - 📖 *Links* between the buyer and the bidder => taking to interest ?

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**Finally, mapping the risks may conduct to improve the functioning of the buying unit**

- ◆ Training;
- ◆ Declaration of conflicts of interests;
- ◆ Declaration of assets;
- ◆ Professionalism of the buyer;
- ◆ Collective decisions...

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**b) Reporting the information to the PP authorities**

- ◆ In principle, by the hierarchic way;
- ◆ But it may be useful to set up *mechanisms of denunciations*

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## For example, in France

- ◆ *Art 40 CPP* impose to all the authorities (civil servants as well politics) to inform the Procureur de la République about illegal facts of which they were aware.
- ◆ But
  - 📁 No sanctions;
  - 📁 Fear of reprisals...

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## Other tools

- ◆ Free phone number
- ◆ Special unit

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## 2-4 Methods of investigations

- ◆ **Main difficulty:**

Corruption practices are hidden...

- ◆ So investigations should be **wide-ranging**:

- 📁 Multidisciplinary analysis;

- 📁 Not only legal analysis, but also account analysis, tax analysis, technical analysis...

=> *Two main ways to identify the frauds*

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### a) The frauds may be directly identified

- ◆ Sometimes, *some evidences* are available: documents, phone tapping, diaries...

- ◆ If not, *the supplier's accounts* must be analysed...

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## **The most interesting counts**

- ◆ Count about “gifts and public relation” (representation, travelling...)

For example: a gift given by a company without any compensation

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## **The limit of investigations by using accounts**

- ◆ False invoices;
- ◆ Umbrella companies;
- ◆ Offshore companies;
- ◆ Black money;
- ◆ Spilling off...

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**So, it may be necessary to go further into accounts**

- ◆ By establishing *ratings, trends...*
- ◆ By identifying the *beneficiaries of the gifts;*
- ◆ By using *specific software.*

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**b) The frauds may be identified in basis of “red flags”**

◆ **When ?**

- 📖 No direct proofs;
- 📖 Complex affairs;

◆ **How ?**

- 📖 Mapping the risks;
- 📖 Further searches

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## Further searches

- ◆ By using *statistic tools*;
- ◆ By *establishing correlations* between the buyer's choices and the bidder's attitude

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## For example:

- 📁 All the contracts are awarded to the same company;
- 📁 Long term contracts;
- 📁 Too numerous additional clauses;
- 📁 Contracts renewed with the same terms;
- 📁 All the proceedings are won by the supplier...

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**Finally, it may be necessary to go further into:**

- ◆ one *contract*;
  - ◆ or the activity of *one company*
- ... And to have *an exchange of information* between the authorities of control: tax administration, competition administration, Court of audit...

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