

THE INTEGRITY PACT

A powerful tool for clean bidding



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Transparency International is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it.

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THE INTEGRITY PACT

A. WHAT IS AN INTEGRITY PACT?

The Integrity Pact (IP) is a tool developed during the 1990s by Transparency International (TI) to help governments, businesses and civil society intent on fighting corruption in the field of public contracting. It consists of a process that includes an agreement between a government or government department (hereafter referred to as the Authority) and all bidders for a public sector contract.

The IP sets out rights and obligations to the effect that neither side will pay, offer, demand or accept bribes, or collude with competitors to obtain the contract, or while carrying it out. In addition, bidders are required to disclose all commissions and similar expenses paid by them to anybody in connection with the contract. If violations occur then sanctions will apply. These sanctions range from loss or denial of contract, forfeiture of the bid or performance bond and liability for damages, to blacklisting for future contracts on the side of the bidders, and criminal or disciplinary action against employees of the government.

Companies and governments alike stand to benefit from IPs. Companies can refrain from bribing in the knowledge that their competitors are bound by the same rules, while governments can reduce the high cost of corruption on procurement, privatisation and licensing.

The IP has shown itself to be adaptable to many legal settings and flexible in its application. Since its conception, the IP has been used in more than 15 countries worldwide and has benefited from feedback from a variety of individuals and organisations.

B. HOW DO THE INTEGRITY PACTS OPERATE?

In a specific contracting process, the IP is intended to accomplish two primary objectives:

- (a) To enable companies to abstain from bribing by providing assurances to them that
 - (i) (i) their competitors will also refrain from bribing, and
 - (ii) (ii) government procurement, privatisation or licensing agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures;
- (b) To enable governments to reduce the high cost and the distorting impact of corruption on public procurement, privatisation or licensing.

Beyond the individual impact on the contracting process in question, the IP is also intended to create confidence and trust in the public decision-making, a more hospitable investment climate and public support for the government's own procurement, privatisation and licensing programmes.

2. To what types of contracts can they be applied?

The IP concept is suitable not just for construction and supply contracts, but equally for the selection of:

- o the buyer/recipient of state property as part of a government's state asset privatisation programme,
- o (engineering, architectural or other) consultants,

- the beneficiary of a state license or concession (such as for oil or gas exploration or production, mining, fishing, logging or other extraction rights), or for government-regulated services (such as telecommunications, water supply or rubbish collection services).

The contract and the IP may cover the planning, design, construction, installation or operation of assets by the Authority, the privatisation sale of assets, the issuing by the Authority of licenses and concessions, as well as the corresponding services such as consulting services and similar technical, financial and administrative support. Whenever possible, the IP should cover all the activities related to the contract from the pre-selection of bidders, the bidding and contracting proper, through the implementation, to its completion and operation.

3. When are they useful?

The IP can and should be applied to the full range of activities concerning a particular investment, sale, license or concession:

- beginning with the feasibility and preparatory stage: Even the preparation of the earliest alternative choice and design documents should be covered – if not, a dishonest consultant can misdirect the entire preparation process for the benefit of some contractors or suppliers;
- continuing with the selection of the main contractors/suppliers/licensees;
- and extending to the implementation of the main activity (execution of the construction or supply contract, especially the compliance with all the contract specifications agreed and all change and variation orders); indeed, for projects such as big dams or toxic plants (such as nuclear power plants), the protection by the IP should continue until the decommissioning and disposal of the project assets.

C. WHAT MAKES AN INTEGRITY PACT AN INTEGRITY PACT?

The essential elements of the Integrity Pact are:

- a **pact** (contract) among a government office (the principal) inviting public tenders for any type of contracts related to goods and services and the bidders;
- an **undertaking by the principal** that its officials will not demand or accept any bribes, gifts etc., with appropriate disciplinary or criminal sanctions in case of violation;
- a **statement** by each bidder that it has not paid, and will not pay, any bribes in order to obtain or retain the contract;
- an **undertaking by each bidder** to disclose all payments made in connection with the contract in question to anybody (including agents and other middlemen as well as family members etc.);
- the explicit acceptance by each bidder that the no-bribery commitment and the disclosure obligation, as well as the corresponding sanctions, **remain in force** for the winning bidder until the contract has been fully executed;
- bidders are advised to have a company **Code of Conduct** (clearly rejecting the use of bribes and other unethical behaviour) and a compliance programme for the implementation of a Code of Conduct throughout the company;
- the use of **arbitration** as a conflict resolution mechanism and the instance to impose sanctions;

- a pre-announced set of **sanctions** for any violation by a bidder of its commitments or undertakings, including (some or all):
 - denial or loss of contract,
 - forfeiture of the bid security and performance bond,
 - liability for damages to the principal and the competing bidders, and
 - debarment of the violator by the principal for an appropriate period of time.
- an **independent monitoring system**, which can be performed with active civil society participation or any other structure with independence, accountability and credibility.

Maximum transparency at every step leading to the contract and throughout its implementation is the basis for the successful design, setup and implementation of an IP. Such transparency, in turn, calls for extensive and easy public access to all the relevant information including design, justification of contracting, pre-selection and selection of consultants, bidding documents, pre-selection of contractors, bidding procedures, bid evaluation, contracting, contract implementation and supervision.

It is highly desirable that there be a forum in which representatives of civil society can discuss the official steps taken in the context of the contract. At the present time, the Internet provides a nearly ideal platform. Public hearings are also an effective tool. However, access to legitimately proprietary information should remain restricted. If necessary, a representative of civil society could be granted the same access as the Authority, but the right of this representative to refer publicly to the proprietary aspects should be strictly specified in close relation to the danger, the suspicion and the degree of substantiation of corrupt practices.

D. IS THERE A ROLE FOR CIVIL SOCIETY?

From the outset it has been expected that civil society in the respective country would play a key role in overseeing and monitoring the correct and full implementation of the IP. The legitimate confidentiality of proprietary information, to which civil society representatives would gain access, can be protected adequately through an appropriate contractual stipulation.

E. INTEGRITY PACTS AT WORK

1. Application

ABOUT THE SANCTIONS. One common question is: "What kind of evidence is required to be certain of a violation by a bidder so as to trigger sanctions?" Suspicion alone cannot be enough. Clearly, a criminal conviction for bribery is the most persuasive evidence, but a criminal conviction is rarely obtained, and in the event that one is, it usually comes much too late to be of any help in administering prompt sanctions. German practice, for example, is to treat a no-contest statement or an admission of guilt as equally persuasive. Recently the practice is emerging of considering it as adequate evidence of a violation if "on the basis of the facts available there are no material doubts". In any case, "sufficient evidence" is enough to trigger action, especially if non-reparable damages want to be avoided.

ARBITRATION. The venue for collecting damages should be arbitration under national or international auspices. Why arbitration rather than normal national jurisdiction?

- By relying on the jurisdiction of a Northern country it is likely to be unacceptable to principals in a Southern country; similarly, relying on the national jurisdiction of a Southern country is likely to give little comfort to bidders from Northern countries; thus the consensual choice of arbitration.
- Where a well functioning national system of arbitration exists, which commands the confidence of international companies, submitting a dispute to it will save time and costs.
- Where such an accepted national arbitration system does not exist, the parties should provide for "international arbitration by the ICC Arbitration Court under the rules of the International Chamber of Commerce" (or a similar internationally accepted arbitration institution).

Normally, the parties would stipulate from the outset the place of session, the applicable law and the number of arbitrators.

PAYMENT AND ASSET DISCLOSURE AND ITS LIMITS. Considering that "agents" and "middlemen" are often used (sometimes primarily) as instruments for paying bribes, the model contains a stipulation that payments to agents must not exceed "appropriate amounts for legitimate services". This language stems from the ICC Rules of Conduct ("Extortion and Bribery in International Business Transactions", 1996 Revision). In fact, many globally active companies have begun to refrain from using such agents or middlemen.

- "Officials" of the principal will be required, on a regular basis, to disclose their own and their family assets, so as to offer a handle if such officials acquire wealth from a source that cannot be explained.
- Consultants that commit themselves not only not to pay bribes in order to obtain a contract, but also to design the project or project components in a manner that is totally nondiscriminatory, assure wide competition and will not offer advantages to a specific bidder.

ABOUT MONITORING. A clear and unrestricted oversight and monitoring role for civil society is highly desirable in any country. This will increase trust in the process and highlight the monitors' independence. Nevertheless, it is understood that in some countries the government will not, at this time, be prepared to allow civil society to play such a role. In those cases the oversight and monitoring function could be performed in one of several ways:

- The government employs what in some US cases has been called an "Independent Private Sector Inspector General" (or IPSIG). The IPSIG, a private sector company or individual, would come with the necessary expertise. Such an arrangement can be acceptable provided the IPSIG is given not only full access but also the contractual right to seek correction of any procedural problems or improprieties and, if no correction takes place, to inform the public of the impropriety. In any case, the IPSIG should be accountable to civil society and, in a broader sense, to the public in general.

or:

- The government commits itself to provide full public disclosure of all relevant data regarding the evaluation of the competing bids. This would include a statement, that the evaluation criteria announced in the invitation to tender were fully applied, a list of the bidders and their prices, a list of the bids rejected, including the grounds for rejection, the major elements and aspects of the evaluation process and the specific reasons for selecting the winning bidder. The government should also at this time announce its own cost estimate for the project.

2. Other issues regarding its application

- It is important to note that the IP can function only if all bidders submit to it. It is therefore highly desirable to make the **signing** of the IP **mandatory**. Some countries have chosen to make the signing voluntary, and then begin a campaign to convince all bidders of the advantages of having an IP in place; however, bidders will only be prepared to sign the IP
- provided all the competitors also sign. If only one bidder refuses to sign, all the others will withdraw their commitment, since after all the objective is the creation of a level playing field – for all players.
- A fascinating and highly relevant recent development is the use in several countries of the Internet for total **transparency of procurement**. In Mexico, all public procurement activities countrywide are recorded and made available in great detail through a website that is accessible to all. In Colombia, a State Contracting Information System is meant to be widely accessible. Similar electronic information systems are being applied in Brazil, Chile, Ecuador, Pakistan and South Korea. The high degree of transparency achieved through this real-time access to public decision-making clearly reduces the opportunity for manipulation and should enhance the willingness of officials and bidders alike to commit to a corruption-free contracting procedure, such as through the IP.
- Finally, experience shows that **the political will** to reduce corruption and to revive honesty and integrity in government contracting is an indispensable condition for success. That's why TI recommends starting any IP process by establishing the existence of that political will – at the highest available political level. Experience to date shows that it may be easier to establish and nail down that political will at the municipal level than at national government level.
- In judging the **suitability of the IP** model one should take into account that since 1999, the OECD Anti-Bribery Convention makes bribing a foreign official a criminal act in all states that have ratified the Convention and in most of those countries the tax deductibility of bribes, which had been previously allowed, has been abolished. Bidders from many countries thus face a fundamentally different legal situation from the one they had operated in for years. They should therefore be prepared to enter into agreements designed to provide a "level playing field" for all competitors, irrespective of whether they come from countries bound by the OECD Convention rules or not.
- Why is an IP valuable if there are existing laws in place? Despite the existence of laws that forbid corruption, the persistence of corruption problems in public contracting show the need to develop mechanisms that increase compliance with the law and make it harder to ignore. In this sense, the IP does not duplicate the law, but enables its compliance by levelling the playing field, and assuring the contenders that all will behave under the same conditions.

There are an increasing number of cases where all the essential principles of the IP are being applied. While there is some variety in the approach, the documents and the process, TI greatly appreciates the many efforts by TI-members worldwide to introduce the IP concept as fully as possible and encourages further experimentation with modified applications rather than insisting on a "purist" approach.

However, in order to assure consistency, TI national chapters are requested to maintain close contact with TI International Secretariat while they discuss and develop "customised" versions of the IP. TI has a group of Resource Persons who can provide the necessary expertise in response to calls for help from individual national chapters when promoting the IPs.

3. Experiences

Integrity Pacts in a more complete form have been used and are currently being used in Argentina, Colombia, Ecuador, Germany, Mexico and Paraguay, as well as in Indonesia and Pakistan. They have been introduced as a general model in complete sectors (Construction in China), groups of public institutions (public enterprises in India) or local governments (Milan, Italy). Essential elements of the IP (e.g. monitoring) are being used to detect risk of corruption in public contracting elsewhere, among them Bulgaria, Rumania, Czech Republic, Serbia, Guatemala, and Peru.

In total, over 15 countries through the efforts of TI national chapters have implemented adapted versions of Integrity Pacts. Further information about them can be found in TI's website (www.transparency.org).

The global overview of experience indicates that the IP concept is sound and workable. One of the strengths of the concept seems to be that it is flexible enough to adapt to the many local legal structures and requirements as well as to the different degrees in which governments are willing to proceed along the lines set forth here. Nevertheless, TI's experience is that these lines contain the essentials that must appear in an IP in order to be designated as such and supported by TI.

4. Results

SAVINGS. For example, the tender process for the technological turnaround of the state-owned "Banco Agrario" in Colombia during the first semester of 2002, finished with an awarding price 30 percent below the budgeted price, in part, due to the introduction of an IP. Also, savings of 75 percent were achieved in 2002 in Pakistan, when the Karachi Water and Sewerage Board (KW&SB) included the application of the IP concept in the contracting process for consultants for its K-II Greater Karachi Water Supply Scheme.

TRUST. During case evaluation exercises, bidders who participated in processes where the IP had been used mentioned that they might be unhappy that they lost, but know they lost fairly. This element is also very important. It can save unnecessary judicial claims, and create trust in Government action.

SANCTIONS. In some countries, companies have been blacklisted for violating the Pact (e.g. Italy, Korea).

MORE INFORMATION

More information can be found in the "Integrity Pact: A Status Report" available electronically on TI's website: www.transparency.org/global_priorities/public_contracting.

Updated and new materials regarding Integrity Pacts, anti-corruption in public contracting and the Handbook: *Curbing Corruption in Public Contracting* are also available.

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