



Preventing collusion in government procurement: why “minimizing transparency” is not an adequate solution and what else can be done

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NB: These remarks are made purely in the author’s personal capacity, and in the context of an academic conference. The views expressed should not be attributed to the WTO or its Secretariat.



Points to be addressed

- **Inherent risks of transparency measures and importance of limiting them.**
- **Necessity/importance of some transparency measures notwithstanding the above.**
- **Other tools for preventing collusion: the roles of competition advocacy and trade liberalization.**
- **“Buy local” measures as a potential facilitating factor.**
- **International perspective: right recipes for the US not necessarily right everywhere.**



Inherent risks of transparency measures and importance of limits

- **Potential usefulness of transparency measures as an enabling device for bidders:**
 - **Facilitating the reaching of agreements**
 - **Monitoring compliance/detecting deviations by individual members of a conspiracy**
- **Consequent (agreed) need to limit transparency measures.**

But transparency requirements also serve legitimate functions (!): we won't (shouldn't) do away with them entirely!



- **Necessity of some transparency measures in light of:**
 - **Public accountability and good governance (anti-corruption) concerns;**
 - **Sheer need to generate responsive tenders and good results (customer satisfaction) -- only possible if we share (some) information on desired characteristics of the goods/services being sought.**
- **Also, some transparency measures (e.g. basic requirement to advertise; availability of information on how to be listed, etc.) are fundamentally pro-competitive: they facilitate participation by suppliers from “outside the club”.**
- **Minimally, we need to distinguish good transparency measures from bad ones.**

Other tools for deterring collusive tendering



The obvious:

- **Effective antitrust enforcement, reinforced by tools such as leniency measures for cartel breakers.**
- **Education of the supplier community: certificates of independent bid preparation/similar measures.**

And the perhaps not-so-obvious:

- **Pro-active measures to expand the pool of potential competitors and introduce enhanced supplier diversity, e.g. through competition advocacy and trade liberalization (Anderson and Kovacic 2009; Anderson, Kovacic and Müller 2011).**



The potential role of “buy local” requirements as a facilitating factor

- **US: *Erie County v. Morton Salt* (6th Circuit; 2012).**
- **Canada: Quebec infrastructure markets.**
- **The Swiss experience.**
- **OECD Global Forum on Competition (late February): relevance of buy local requirements AND confluence of collusion and corruption concerns in specific cases.**

The WTO Agreement on Government Procurement (GPA) as a competition enabler



- Agreement spans 42 WTO Member jurisdictions: ensures non-discriminatory conditions of competition in procurements “covered by the Agreement”.
- Procedural and institutional requirements to reinforce competition on the merits (e.g. technical standards to be based on objective and (where possible) international standards; independent bid challenge procedures).
- Main limitation as a competition enabler: gaps in the Agreement’s coverage.
- But: prospects for deepening/broadening of coverage over time.

Concluding comments



- Agreement on the inherent risks of transparency measures and the importance of limiting them.
- **Necessity/usefulness of residual transparency measures, nonetheless.**
- **Addressing unnecessary/harmful barriers to participation: the roles of competition advocacy and trade liberalization.**
- **“Buy local” policies as a potential facilitating factor.**
- **Need for deepening of international dialogue: right recipes for the US not necessarily right everywhere.**

For related info/analysis:



- 1) Anderson, Robert D. and William E. Kovacic, "Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement Markets," *Public Procurement Law Review*, 2009, issue 2, pp. 67-101.
- 2) Anderson, Robert D., William E. Kovacic and Anna Caroline Müller (2011). "Ensuring integrity and competition in public procurement markets: a dual challenge for good governance," in Sue Arrowsmith and Robert D. Anderson, *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press), chapter 22, pp. 3-58.
- 3) Anderson, Robert D. (2012). "The conclusion of the renegotiation of the WTO Agreement on Government Procurement: what it means for the Agreement and for the world economy," 21 *Public Procurement Law Review* 3, pp. 83-94.