

Practical application of Defence Integrity Pacts

Experience in Colombia

Mark Pyman and Air Commodore (retired) Alan Waldron
Transparency International (UK)
And
Luis Avelia
Transparencia por Colombia

A paper presented to the seminar 'Public Procurement'
Organised by the Nottingham University School of Law. June, 2006



1. INTRODUCTION

The focus of this presentation is to outline the practical aspects and knowledge gained in a recent application of Integrity Pacts as a tool to deter, and ideally eradicate, corruption in the official arms trade. The observations and lessons learned were gained from our considerable experience during the procurement process in 2004 and 2005 of combat aircraft for the Government of Colombia, and more generally in a review of defence procurement processes there. In early 2004, Transparencia por Colombia (TPC), one of the worldwide Chapters of Transparency International (TI), requested specialist technical assistance from Transparency International (UK) (TI(UK)). TI(UK) agreed to review the contract and aircraft specification documents, provide appropriate comments, and supply in-Country advice prior to the formal contract launch.

2. TRANSPARENCY INTERNATIONAL (UNITED KINGDOM)

Where does TI(UK) sit in the process and why was our help sought? Transparency International, the overarching organisation, consists of some ninety National Chapters which are based world-wide. TI (UK) is one of these and currently has the lead internationally in attempting to reduce corruption in the official arms trade. In this work we are supported nationally by the UK Government's Department For International Development (DFID) which provides much of the funding together with support from the Swedish Ministry for Foreign Affairs. At the moment there are four main threads to our work:

1. *Trialling the use of Integrity Pacts in defence procurements*
2. *Working with defence companies to encourage the development of an industry consortium for joint working against corruption in international tenders*
3. *Intervening where practical to strengthen laws and international instruments against bribery in defence*
4. *Working to improve anti-corruption capability in defence ministries and in their procurement practices*

3. DEFENCE INTEGRITY PACTS

Integrity Pacts vary somewhat from country to country, and sector to sector, and are adapted to suit national needs. However, there are usually three main features:

- A ***contract***, in which all the bidders and the Government agree to no bribery pledges, and the bidders agree to enhanced disclosure rules. In addition, the bidders agree to sanctions, particularly withdrawal from the tender, in the event that they are found not to abide by the pledges.
- The use of an ***independent monitor(s)***, who scrutinizes the key documents and ensures that all the parties live up to their commitments under the pact.
- More ***public transparency*** of documents and process.

Defence Integrity Pacts are a tool to combat corruption at the tendering and contract stage of procurement. They bind all the bidders and the Government together in a contract to reduce the possibility of corruption occurring both during and after the tendering. Also, the Government may encourage the involvement of Civil Society groups such as Transparency International.

4. CURRENT COLOMBIAN DEFENCE ACQUISITION AND CONTRACT MECHANISMS AND THE REQUEST FOR ASSISTANCE

The requirement to replace an aging fleet of combat aircraft engaged in anti drug running operations has been ongoing in Colombia for a considerable time. TPC, the National TI Chapter, has been a world leader in anti-corruption activities for many years and in mid 2004 a representative from TI(UK) visited Colombia to discuss Integrity Pacts and offer assistance. As a result a request was made for specialist and technical support during the imminent aircraft acquisition programme. TPC is viewed internationally as being particularly strong and has worked for some years with the Colombian Ministry of Defense to increase transparency in defence related activities, especially procurement. This has included work to raise awareness among the Ministry Procurement Group. The Defence Ministry uses a form of the Integrity Pact, without an independent monitor, for all defence tenders.

Contract Mechanisms

In Colombia, military procurement is undertaken by the Ministry of Defense which has an average annual budget of some 600 billion pesos (equating to some US \$250 million), which in turn is part of the overall annual defence expenditure of circa US\$ 880M. Within the Ministry of Defense, purchasing is split between a Central Procurement Group, and procurement groups in the offices of each of the military services, Army, Navy, Air Force and Police.

Interestingly, the Colombian political process has a significant impact on defence acquisition. The President is elected for a period of four years (although this is under review). The first year of any new administration is limited by the fact that the budget for that year had been set by the previous administration, and the last year is normally constrained by preparation for the next election. Therefore, there are only two 'standard' years, which leads to heavy pressure on the procurement process in order to fulfil any Presidential agenda. This, in turn, leads to pressure to award contracts quickly, which can detract from transparency measures due to the lack of time for adequate public scrutiny.

A Statement of Requirement is developed into a Technical Specification. Once the bids from potential contractors are received, they are evaluated by three groups: legal, technical, and economic. Interestingly, the Colombian Freedom of Information law prescribes that much procurement data, except the most sensitive, be made available to the public, although potential bidders are required to sign a confidentiality agreement, which accords with most defence procurement processes. Additionally, potential contractors are required to sign two anti-corruption documents; an Integrity Pact (IP) and an Anti-Corruption Commitment (ACC). The Anti Corruption Commitment is considered as a unilateral statement by each bidder, and has within it a requirement to disclose at the time of submission of the bids all Commission payments made to date, and those which are expected to be paid if they are awarded the contract; whereas the IP is a bilateral Pact between the contractor and the Government.

Corruption prevention remains the main driver for the introduction of transparency measures and there was a strong desire to attract a wider range of potential contractors as many companies believed that corruption and human rights issues detracted from Colombia as an appropriate marketplace.

5. THE APPLICATION OF INTEGRITY PACTS TO THE ACQUISITION OF COMBAT AIRCRAFT

The requirement for modern combat aircraft to replace the existing aging operational fleet had been under consideration for several years by the Colombian Government. In 2004, some \$237 million was earmarked to purchase about 22 airframes. Interestingly, an earlier attempt at acquisition stalled due to the lack of clarity over aircraft type and associated capability, turbo prop (jet engine driving a propeller to provide thrust) versus turbo fan (jet engine providing thrust directly).

TPC's early involvement throughout the tendering process was considerable and influenced the agreement to the inclusion of an Integrity Pact, to the use of Independent Monitors, and approval to review tender documentation prior to release to bidders. With considerable local knowledge but without specialist technical expertise TPC formally sought assistance from TI (UK).

Initially, the TI(UK) defence team comprised of a Team Leader (Mark Pyman) with extensive experience in large scale contracts and anti-corruption methodology, a recently retired Admiral (Hugh Edleston) with considerable knowledge of senior defence administration and developing country corruption, and a full time research assistant. Following the TPC request for assistance, we decided that air and contracting advice was necessary and the team was enhanced by Air Commodore Alan Waldron (an ex Director of Air Operations in the Ministry of Defence also with contracting experience) and Commander Patrick Brown (with knowledge of contracting and contractor support in the international defence arena). Additionally, TI (UK) had already funded one TI Colombia representative (Luis Avelia) to provide local advice and a regular interface with Government and Military authorities.

Initial TI(UK) Evaluation

The entire range of bid documents, pre contractor release, was made available by the Colombian Government and passed to TI(UK) by TPC. The contents and breadth was considerable ranging from technical specifications through to contractual support post award. Their review was undertaken immediately against an exceptionally challenging deadline; and the initial report was forwarded to Colombia some 14 days later. A detailed analysis was not possible within the required timeframe but it was considered by the team that the major areas had been identified and addressed. Observations, passed via TPC to the Colombian Bid Team, were separated into Operational, Commercial and Management aspects.

Immediate, but very subjective, in-house reflections centred on a range of issues. Firstly, team composition: the team needed to have military, contract, procurement and anti-corruption experience. The expanded team fulfilled these requirements, worked well together and were able to prepare a most comprehensive report against daunting deadlines. Secondly, the volume and complexity of material; the bid document pack was substantial and very technically detailed. The provision of a definitive report would have required considerable staffing and legal advice which would have been costly both in terms of manpower and time. Thirdly, the quality of some elements of the specifications gave rise to serious concerns on some of the technical aspects regarding corruption potential.

The bid team, with the Colombian Air Force (FAC) as the end user specifying the technical requirement, responded swiftly; agreeing with some TI (UK) comments, rejecting others and justifying the original specification for the rest. We decided that there were considerable unresolved technical and contractual issues and that an in-Country visit would be beneficial. Within one week of the initial report being passed to Colombia, Air Commodore Alan Waldron arrived at Bogota for a series of meetings.

In-Country Meetings

The initial, and probably most important, meeting included one of the Independent Anti-Corruption Assessors, the FAC Commander, several other Generals, the Acquisition Project Leader, specialist technical staffs, Ministry of Defense officials and specialist contract lawyers. The meeting was conducted in English, but with frequent forays into Spanish. Following an excellent FAC presentation, the bulk of the meeting concentrated on the technical specifications (additional more technically detailed discussion was conducted on the following day) and contract details.

It was clear during the meetings that there was considerable pressure from the Secretary General's office for complete openness and a desire for the technical specification to be as precise as possible thereby reducing the potential for corruption. There was also considerable support from the military, especially the project team, who realised that the comments being made by TI(UK) could have a considerable positive impact on the operational effectiveness of the aircraft. However, treading the line between providing a cheap consultancy service and ensuring that the errors or inconsistencies in the project were due to lack of expertise and not due to corruption was at times difficult. The relationship between TI(UK) and the team appeared very good and was enhanced due to the high level of technical dialogue and mutual respect during the meetings.

The major technical and contract observations, with corruption potential, were as follows:

- ***Core Purpose and Capability.*** The bid Terms of Reference documents were considered not sufficiently clear, especially on key items like core purpose and required aircraft capability.
- ***Future Capability Insufficiently Defined*** It was considered that the tender had not sufficiently addressed the long term operational capability required of the aircraft and systems
- ***Flight Simulation Not Considered*** Acquisition of a Flight Simulator to support the aircraft and crews has not been considered
- ***Inadequate Operational Evaluation*** The evaluation of the aircraft was based on simple criteria rather than phased approach based on operational capability.
- ***Prototypes*** Inclusion of prototypes within the competition was considered unwise.
- ***Tender Evaluation Matrix*** It was considered that the Tender Evaluation Matrix was insufficiently balanced, and too heavily weighted towards operational criteria rather than economic.
- ***Pre and Post Contract Award Controls*** It was considered that pre and post contract award controls outlined in the bid documentation required further detailed work.
- ***Offset Programme*** The proposed offset programme was considered to have corruption potential and required improvements to improve transparency

Positive Impressions Gained from Meetings

Despite the comments above, there was a clear willingness from all Government and Military officials interviewed to support transparency and anti-corruption measures. Indeed, it was pleasing to note that a great many of the TI comments had been supported, of which a great number were in the process of being implemented at the time of the visit to Colombia.

Tender Collapse

Following the visit to Colombia, we provided a full report and detailed analysis of our observations. This resulted in a considerable technical and bid document revision before they were made available to the potential contractors. However, soon after release, the Ministry received letters from one bidder and

then collectively from a group of four bidders announcing their intention to withdraw from the tender. The letters cited a number of reasons for the withdrawals, including: insufficient time for bid preparation; perceived favouritism of turboprop over turbofan; high cost of shipping airframes to Colombia for evaluation. In addition, the collective set of bidders believed that the tender specification favoured the Embraer Tucano. Subsequently, the Ministry of Defense considered the matter and came up with the following three options: address the concerns and re-issue the tender documents; continue with one bidder; or re-start the entire process. TPC and TI(UK) were included in the subsequent dialogue. However, ultimately the Ministry conclusion was to proceed with single source negotiation with Embraer, who market the Tucano (a turboprop). Whilst TPC and TI(UK) were requested to continue with oversight of the negotiation and project, we declined to do so because of the lack of competition.

Shortly after the collapse of the tender, TPC was able to interview three of the companies: Those interviewed indicated that corruption was not a factor in their withdrawal: indeed two of them positively commented that they thought that the process had been clean.

6. LESSONS LEARNED

During our work with the Colombian project, the lessons learned fell into 4 main areas. Firstly, the human factor, especially expertise and commitment (both in the immediate contract environment and also remotely). Secondly, the assessment of contracts, mechanisms and tender documents, particularly their volume and the complexity when viewed against required response timescales. Thirdly, the structure of TI support to third parties together with channels for advice. Finally, action following contract bid collapse, especially when there is a single source procurement option. Additionally, there were other factors such as whether we should be querying the requirement for the contract in the first place within the IP work.

The Human Factor

Looking at these areas in a little more detail, the first, the Human factor, was particularly important. The local TI Chapter provided the essential background material and immediate interface with both Government and Military staffs, together with providing the crucial dialogue with potential bidders. However, TPC was not unusual in not having technical expertise to undertake a complex aerospace evaluation. TI (UK) was able to rapidly expand its existing structure with highly qualified personnel experienced in both aviation and contracts. The resultant team formed good working relationships with TPC, the Colombian Government and Colombian Military staffs, which were essential to making the process work. Importantly, we noted that the commitment from most of the Government representatives to introduce anti-corruption and openness measures was impressive and that clearly resulted from support at the highest level. Also, the selection of well-respected, independent Colombian assessors was further evidence of good intent.

Turning to value for money, as with most projects, success often depends on appropriate funding. Our funding of a dedicated TPC member of staff in Bogotá proved crucial to the programme to facilitate integration and dialogue at the local level. The speed and expertise of project staffing and responses were out of all proportion to the costs. It is estimated that had external non-TI (UK) consultants been employed, manpower costs would have effectively increased by a factor of around 10. Considering the volume and complexity of the documents to be analysed, both turned out to be substantial and complex, and especially so when set against challenging deadlines. Subsequently, the team considered that specialist TI involvement at the earliest opportunity would have eased the workload and possibly

resolved some of the more operational/corruption potential concerns that were raised, such as definition of capability and the balance between turboprop and turbofan.

This technical evaluation required broad knowledge of a range of operational, engineering and contractual issues. Striking the balance between value for money, operational effectiveness, and corruption potential was at times very difficult bearing in mind the lack of cutting edge combat equipment procurement expertise in the Colombian bid team - was, for example, a stated requirement based on inadequate knowledge or on corruption potential? A balanced view was necessary, and ideally the operational/technical TI expert should also have considerable contracting experience. Furthermore, there needed to be an awareness of any bias towards a particular piece of equipment, service or supporting facility. A specification, for example, of self sealing fuel tanks was a most valid operational need, but if only one candidate airframe offered the modification, was this bias or combat imperative? Also, we noted that flying evaluations were to be undertaken by relatively junior aircrew, who could have been subject to pressures from senior officers. Protracted 'independent expert' supervision during the in country evaluation would have reduced both flying and evaluation ground risks

Contract Assessment

Moving on to the second area - contracts, with Spanish as the document's formal language, it is possible that nuances were lost in any translation to English, thus our inputs, without the benefit of specialist legal analysis were broad rather than definitive. Many issues were raised concerning the contract, its implementation, both pre and post award, as well as concerns regarding the required offset programme.

Structure of TI Support

The third aspect, structure raised two major threads. Firstly, the relationships between the in-country government, the local TI chapter and the team providing external TI support. The preferred format was for an agreement between the responsible government Ministry and the local TI Chapter, with (in the Colombia case) TI(UK) as the technical experts providing assistance to the local TI chapter. For the directly engaged TI organisation, a formal 'participation agreement' is necessary in order to outline precise boundaries and responsibilities between relevant parties. The current participation agreement template builds on this experience.

Secondly, there was uncertainty of precisely what any report to the Government on the tender documents and processes should contain. Content options ranged from: observations; recommendations; corruption risk only; operational issues; through to value for money comments. It was considered that many of these areas were completely and utterly intertwined as, for example, a value for money or operational issue could indeed have a covert corruption risk; therefore a balanced approach was necessary.

Action Post Contract Collapse

Finally, what happens when the bid collapses? The withdrawal of all bidders from the contract competition except one (Embraer) was unexpected and unforeseen. Although the Colombian Government was keen to retain TI engagement to scrutinise procurement, it had already been compromised given the withdrawal of the bidders and therefore lacked of any degree of competition. Regrettably, we felt obliged to decline to continue to support and scrutinise.

A Difference of Perspective – the Balance in Expertise Between Corruption and Technical Reviewers

During the document and procedure review, it was noticeable that those with considerable expertise in the corruption arena looked at some issues with a different perspective from those with a purely technical background. For example:

- A technical requirement might be clear and necessary, but deliverable by only one bidder: eg self sealing fuel tanks. Is this reasonable and appropriate or is it a subtle bias to one bidder?
- The operational test requirements are clear, sensible and have a large weight in the evaluation. However, they are to be flown by junior pilots who could be easily subject to influence from more senior officers unless the evaluation was better structured.
- Some military requirements are only capable of being fulfilled by some countries. The requirement might be reasonable, but the limited number of companies who can fulfil it may be a deliberate competition restriction.

Value for Money Versus the Corruption Risk

It was at times difficult to differentiate between value for money and a potential corruption risk. A functional expert would comment that a particular specification was not an efficient or effective way to satisfy the requirement. In most cases it was much more likely simply to be a different professional opinion. However, should value for money issues be raised at all and the exercise risk becoming simply a piece of cheap consultancy?

Our conclusion was that both perspectives are relevant and mostly complementary. In addition, the value for money aspect can be one way of ‘selling’ the significance of such reviews to Defence Ministry staff. In the case of Colombia, the value for money comments were extremely well received.

Whilst there is clearly a need for functional expertise to review a particular project it is also crucial that there is significant participation of experienced Transparency personnel who are steeped in anti-corruption knowledge and understanding.

The Equipment Requirement – Should it be part of the Anti Corruption Review

One of our early findings was that the operational imperative for the aircraft replacement lacked clarity. Therefore, was it part of our role to query the **requirement** as well as commenting on the documentation and mechanisms used in the acquisition process? The creation of unnecessary needs is one of the classic ways in which corruption in defence is manifested. Ideally, unless there is an open and agreed requirement, and in the case of Colombia the issue had been extensively debated in Parliament, then it would be important for TI involvement to be at the earliest opportunity.

7. CONCLUSIONS RELEVANT TO THE INTEGRITY PACT APPLICATION

It is not possible to know definitively the extent to which the Transparency International requirements brought other problems to the surface in this tender, considering that in the end there was no final oversight of the procurement. Nevertheless, the exercise was exceptionally worthwhile; both in order to work out building blocks for the future, but more importantly, to indicate to governments and

contractors worldwide that there **is** a process that **can** work as a basis for future contracts and that it has demonstrably set the deepest foundations for work in the future; of particular note:

- The TI work added to the transparency and credibility of the bid process. The cooperation between TI (UK), TI Colombia, the Defense Ministry and the Air Force was very good.
- The combination of local TI Chapter and Defence/ Contract expertise from TI(UK) was crucial to the credibility and authority of the TI intervention.
- We found that it was possible to make valuable and relevant comment on corruption risks in the tender documents, even in a short timescale. The scrutiny needed quite a combination of skills: military technical expertise, anti-corruption expertise and procurement/contracts expertise.
- A key issue in scrutiny of the tender documents was to distinguish between operational/ value-for-money observations and corruption risk observations. These often overlapped, but it was helpful to make the distinction.
- A single-source procurement, or the transition of the project from a competitive to a single source one, makes the application of an Integrity Pact problematic and probably not realistic.

A whole set of useful lessons have been learned which are now being taken into account in further defence work and Defence Integrity pacts elsewhere.