

Risks to integrity in public procurement: presentation of the project

Public procurement moves an immense volume of resources, and corruption, fraud and other irregularities produced in this area have extraordinary repercussions for the good governance of a country. This has led to the struggle to promote integrity in procurement becoming one of the European Union's top priorities. Over the last eight years, growing concern about corruption has raised the tone of the European discourse, which has evolved from recommending Member States to act decisively in this matter to laying down clear guidelines and obligations for them to transpose and implement. Spanish Law 9/2017 of 8 November on public sector contracts established new obligations for contracting authorities, which will now have to guard against the risks of corruption, fraud and other irregularities in the management of public procurement, and detect and respond to the practices that these risks can give rise to.

In this context, the Anti-Fraud Office is reaching out to the public servants who propose, manage or supervise the procurement of supplies, services and public works to present the project entitled "Risks to integrity in public procurement". This is the first in a series of Working Documents and initiates publication of the preliminary results of the diagnosis phase of this project. It sets out to discuss and enrich analysis made by the Anti-Fraud Office with input from the people who help give effect to the prevention obligation of the contracting authorities.

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The Anti-Fraud Office of Catalonia (AFO) is an independent institution attached to the Parliament of Catalonia, responsible for preventing and investigating corruption and preserving the transparency and integrity of Administrations and staff at the service of the public sector in Catalonia.

Its preventive arm provides support to public institutions in consolidating their integrity systems in various ways that include studying, promoting and sharing good practices that contribute to enhancing quality in public service provision.

These *Working Documents* form part of the preventive function of the AFO and are intended to facilitate participation in a process of joint reflection and teamwork, while at the same time promoting integrity in public procurement.

Anti-Fraud Office of Catalonia | Prevention Directorate

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In December 2016, the director of the Anti-Fraud Office (AFO) presented the working guidelines of his mandate to the Parliament of Catalonia. Among the priorities established at the time was that of drawing up a monographic report analysing risks in public procurement, one of the areas identified as most vulnerable to corruption in the public institutions.

That parliamentary commitment gave rise to the project entitled “Risks to integrity in public procurement”, launched by the Prevention Directorate in early 2017.

Since then, the AFO has conducted the detection and analysis actions necessary to produce the most accurate diagnosis possible of risks to integrity in public procurement in the Catalan public institutions. The preliminary results will be published through this series of *Working Documents*, which begins with this first issue, aimed at presenting the project.

This publication coincides with the entry into force of Spanish Law 9/2017, of 8 November, on public sector contracts. This legislation transposes two of the three European Union directives that represented a turning point in the fight against corruption in European public procurement.

Thus it is particularly timely to set presentation of the project within the process of change being concluded by that law: an evolution from recommendation to obligation

to prevent corruption, fraud and other irregularities in public sector procurement.

This first issue of the *Working Documents* begins by contextualising the project and explaining this change of paradigm; it then specifies some of the main initiatives introduced by Law 9/2017 in terms of preventing risks of corruption; and it ends with a presentation of the project scope: the phases, parties involved and results. The latter section will include various tools to help contracting authorities conduct a self assessment of their risks.

Preventing risks of corruption, a European priority

The European Union’s concern over corruption in public procurement is not recent. It was made known in the European Parliament in a Resolution of 6 May 2010, in which it noted that “the public procurement sector is the one most open to risks of mismanagement, fraud and corruption and that these unlawful activities distort the market, increase the prices and fees paid by consumers for goods and services and spread mistrust toward the European Union”¹.

This concern would be reflected in 2014 in a [monographic report from the Commission to the Council and the European Parliament on the fight against corruption in the European Union](#) which, in addition to confirming public procurement as one of the sectors

the costs added to the contract can even reach 20% or 25%, but in some cases can climb as high as 50% of the total cost of the contract (Evenett and Hoekman, 2005).” Medina, 2008: p. 2.

¹ European Parliament, 2010: point 27 of the Resolution. With regard to how these distortions shape increases in prices and fees, Teresa Medina cites the following percentages: “According to Strombom (1998),

most vulnerable to corruption, concluded that the fight against corruption had to be a priority for Member States: “Given that the corruption risk level in the public procurement process is rather high, **anti-corruption and anti-fraud safeguards in public procurement are a matter of priority** for both EU Member States and EU institutions”².

The report also warned that the contracting authorities are asked to adopt integrity plans and assess corruption risks in only few Member States³.

It ended with the following specific conclusions on the prevention of corruption in public procurement:

1. **Need for systematic use of corruption risk assessments** within public procurement.
2. Application of high transparency standards for the entire procurement cycle as well as during contract implementation.
3. Strengthening of internal and external control mechanisms for the entire procurement cycle as well as during contract implementation.
4. Ensuring coherent overview and raising awareness regarding the need for and know-how about prevention and detection of corrupt practices at all levels of public procurement.
5. Strengthening sanctioning regimes.

Spain did not figure among those “few States” that were already asking their contracting authorities to adopt integrity plans and assess corruption risks. It was, therefore, one of the recipients of the five recommendations the European Commission

made about systematically using risk assessment within public procurement⁴, which are listed below:

1. Develop risk assessments at the level of public procurement oversight, with the support of law enforcement or anti-corruption/integrity agencies.
2. Ensure centralisation of data on detected corrupt practices and patterns, including conflicts of interests and revolving door practices. Base risk assessments on these centralised data.
3. Develop, based on risk assessments, tailor-made measures for particularly vulnerable sectors and the most frequent types of irregularities encountered during or after the procurement cycle.
4. Implement targeted anti-corruption policies for regional and local administrations.
5. Develop and disseminate common guidelines for use of red-flagging indicator systems. **Help contracting authorities and oversight bodies detect corrupt behaviour, favouritism and conflicts of interest.**

From recommendation to obligation to prevent corruption risks in procurement

Regulations were approved between 2014 and 2017 that articulate this move from recommendation to obligation to prevent risks to integrity in public procurement: cor-

² European Commission, 2014: p. 23.

³ European Commission, 2014: p. 32.

⁴ European Commission, 2014: p. 38.

ruption, fraud or any irregularity which, despite not occurring with the intention of obtaining unlawful private gain, causes prejudice to public institutions or the general interest.

In 2014, the same year as the European Commission published the previously mentioned monographic report on corruption, a new generation of directives on public procurement and concessions were passed, in line with this priority of preventing and fighting against corruption. In particular, [Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement](#) established several **obligations on Member States with regard to prevention**. Going beyond demands for transparency, it compelled them to take the following action:

- Ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators; (Art. 24), [this is] a type of corruption risk that calls into question the impartiality and independence of those who issue technical judgements or take decisions on behalf of contracting authorities, and is of particular concern to the EU legislator in relation to two guiding principles of procurement: fair competition and equal treatment of the economic operators.

- Apply a definition of conflict of interest in public procurement at least as broad as that specified in Art. 24 of the Directive.
- Specify “by law, regulation or administrative provision” the conditions of application of grounds for exclusion that explicitly include not only conviction by final judgment for corruption and fraud, but also, for example, situations where the contracting authority has sufficiently plausible indications of collusion; conflicts of interest that cannot be effectively remedied by other less intrusive measures, or an attempt to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award (Art. 57).
- Submit to the Commission, no later than 18 April 2017⁵ and, subsequently, every three years, a monitoring report covering, where applicable, information on the most frequent sources of irregularities in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities (Art. 83.3).

⁵ On 21 November 2017, the Spanish Official State Gazette (BOE) published the Resolution of the Under-Secretariat of the Ministry of the

Treasury and Public Administration approving the computer app and e-questionnaire necessary to draft this report.

Pending transposition of the previously mentioned Directives, in March 2017 the Catalan Parliament approved [Law 5/2017, of 28 March, on fiscal, administrative, financial measures and the public sector](#), Article 159 of which provided a series of **measures to prevent risks to integrity** in public procurement throughout the institutional system that makes up the Government of Catalonia:

- Measures to prevent **risks to fair competition** based on new obligations of active transparency:
 - To prevent the abuse or misuse of procedures that limit fair competition (urgency procedure, contract renewals or modifications), it established the obligation to publish on the Public Procurement Services Platform and the Transparency Portal of the Government of Catalonia the reports supporting “the suitability of the proposed measure in relation to the purpose of the contract”.
 - To prevent contract splitting, it established the obligation to publish on the Public Procurement Services Platform and the Transparency Portal of the Government of Catalonia the report substantiating the conclusion of (i) more than two low-value, minor contracts with identical subjects and successful bidders in a period of time inferior to one year, or (ii) low-value minor contracts with identical subjects and successful bidders during three consecutive years, in the case of services and supplies exceeding €5,000 and works contracts exceeding €12,000, excluding VAT.

- Measures to prevent situations that could **compromise the impartiality and independence of staff members of the contracting authorities** (or of a procurement service provider acting on behalf of the contracting authority) based on a new circuit of conflict of interest management and a new active transparency obligation:
 - To improve the institutional management of conflicts of interest, the obligation was established for any contracting authority that detects a potential conflict to notify the Ethics Committee on Public Procurement of the Government of Catalunya. Following a report from the competent body of the Catalan Government in matters of procurement, this Committee determines whether a conflict of interest exists or not.
 - To prevent bias in the assessment of tenders, transparency measures were increased: the obligation was established to publish evaluation reports of the proposals in full on the Public Procurement Services Platform.

Finally, with the recent enactment of [Law 9/2017, of 8 November, on public sector contracts \(LCSP\)](#), transposing the European Parliament and Council Directives 2014/23/EU and 2014/24/EU of 26 February 2014, **new obligations were imposed in terms of the prevention of and fight against** corruption, fraud and other irregularities in contracting authorities.

The text of this new LCSP reveals greater awareness of the need to forge ahead with the prevention of risks to integrity in public procurement. Evidence of this is that the legislator:

1. Introduced integrity among the principles that should govern the actions of public servants and ensure the efficient use of funds allocated to the execution of works, acquisition of goods and procurement of services (Art. 1).
2. Increased obligations for active transparency throughout the entire life-cycle of contracts (Art. 63) as a cross-cutting preventive measure against risks to integrity in public procurement.
3. Established the obligation for contracting authorities to **adopt** “the appropriate **measures to fight** against fraud, favouritism and corruption, and **prevent**, detect and effectively remedy conflicts of interest that may arise in public procurement procedures to avoid any distortion of competition and to ensure transparency in the procedure and equal treatment of all candidates and tenderers” (Art. 64.1).
4. Laid down a definition broad enough to include any type of conflict of interest (real, potential or apparent) in which

public servants may find themselves. (Art. 64.2)⁶.

5. Established the obligation of any person or organisation that has knowledge of a possible conflict of interest to make it known to the contracting authorities (Art. 64.2), a preventive measure that facilitates detection of private interests that could introduce bias into public decision-making throughout the entire procurement process⁷.
6. Extended the prohibitions against contracting to explicitly include offences that relate to acts of corruption, such as corruption in business (not only in international transactions), prevarication, misappropriation, negotiations forbidden to officials and money laundering, to name but a few examples (Art. 71).
7. Regulated, for the first time, the practice of preliminary market consultations prior to opening the tender dossier (Art. 115), with minimum requirements of transparency and documentation of these practices (final report of the actions undertaken, substantiated, and forming part of the tender dossier with the same obligations of active publicity as the procurement documents).

⁶ Though very similar to that of Art. 24 of Directive 2014/24/EU, this definition differs from the latter as regards its subjective scope of application: “Paradoxically, said definition excludes procurement service providers acting on behalf of the contracting authority, explicitly included in Article 24 of Directive 2014/24/EU, who are far from immune to conflicts of interest and merit, at least, a specific article in the light of the weaknesses identified in this type of outsourcing.” Folguera, 2017: p. 100.

⁷ In this regard, the Opinion of the European Economic and Social Committee (2016/CO13/11), which this body set out to contribute to the Commission’s report on fighting corruption, recommended in 2016 (1.4.1) “The European Commission should ensure that there are appropriate channels for reporting corruption in public procurement procedures at national and local level [...]».

8. Created, as a preventive measure to ensure good governance, a state institution called the Independent Office for the Regulation and Monitoring of Procurement with:

- the aim of “verifying the broadest possible application of transparency obligations and good practices, particularly those relating to conflicts of interest, and detecting irregularities that occur in public procurement” (Art. 332.5.e);
- the obligation to publish each year a public procurement monitoring report which includes “information on the prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities in public procurement” (Art. 332.8.c).

9. Established, also as a tool for good governance, the *National Public Procurement Strategy*, with a time horizon of four years, responsible for:

- “the drafting of good practice manuals or guides that establish recommendations for applying procurement procedures that preventively avoid possible bad practices” (Art. 334.1.d);

- establishing measures to “combat corruption and irregularities in the application of legislation covering public procurement” (Art. 334.2.a).

Effectively and systematically complying with the new obligations of prevention of corruption and other risks to integrity in public procurement **requires public entities to conduct assessments** and periodically **design, introduce and review plans to prevent risks to integrity** in this area; a task that begins with thorough assessment of the risks for the public procurement of each entity in particular.

However, international experiences have shown this to be no easy exercise and that these plans are only effective if developed and adopted respecting minimum quality standards⁸. Thus among other results, the project initiated in 2017 by the Anti-Fraud Office of Catalonia with the aim of studying risks to integrity in public procurement and formulating proposals and recommendations provides for the publication of tools that facilitate these tasks.

⁸ The Italian National Anti-Corruption Authority published a report in 2015 evaluating the first Three-Year Anti-Corruption Plans (PTPC 2015-2017) designed by the Italian public administrations and, despite making a disappointing assessment of their quality, stating that: “The poor quality of the PTPCs should not lead to the simple conclusion that this tool to prevent corruption is almost

ineffective. On the contrary, the analysis results seem to suggest that by increasing efforts at all levels and holding different actors in the implementation accountable in terms of definition and, above all, application of preventive measures, these tools can be employed correctly and, over time, produce the anticipated results.” (P. 10)

Presentation of the project: phases, parties involved and results

The “Risks to integrity in public procurement” project is structured into two large phases. The first consists in studying the risks that contracting authorities should manage and ends with the publication of a report diagnosing risks in procurement in the Catalan public sector. The second phase begins with the analysis published with a view to laying on the table and discussing the best measures to deal with the internal and external factors that bring about the identified risks. This phase concludes with proposals to be made to the relevant public authorities and a range of tools to improve the way institutions manage these risks.

Phase 1. Study and diagnosis of the risks

The **aims** of this phase are:

1. To identify the major risks that public institutions may encounter in their procurement processes, based on detecting the irregular, fraudulent or corrupt practices through which these risks tend to or can materialise.
2. To analyse the internal factors in institutions that produce, strengthen or perpetuate the identified risks. The preventive measures the new LCSP recommends to contracting authorities should be based on these institutional risk factors.
3. To review other factors that do not depend on the contracting authorities (external factors) but which produce or

potentiate those risks. These external factors are multiple, and often systemic and complex. Therefore, only a few that have immediate and indisputable consequences for the main identified risks can be addressed within the scope of this project.

The **actions** undertaken up to now to achieve these aims have been:

- **Review of the reports** received by the Anti-Fraud Office with reference to public procurement.
- **Review of the bibliography specialised** in risks to integrity in public procurement; scientific literature; publications by other public institutions with guidance, supervision or control competencies directly or indirectly related to public procurement; publications by international bodies specialised in the prevention of and fight against corruption, such as the OECD, Transparency International and the European Commission, and articles published in blogs and websites by experts in procurement.
- **Risk analysis workshops with public administrators** who participate in procurement procedures. Some 11 workshops have been organised between November 2016 and February 2018, attended by 347 public employees from various Catalan public institutions who manage contracts, draft or supervise specifications, participate in contract awarding committees, conduct technical assessments for such committees, supervise performance of contracts and manage any incidents that may arise.
- **Risk analysis workshops with politicians exercising public office.** Two

workshops were organised attended by some 50 people who were exercising public office in 2017, a good number of them elected representatives in council plenary meetings.

- Meetings with experts in public procurement in specific markets.** In 2017, a total of 12 meetings were organised with eight people who are experts in procurement in markets with differentiated risk characteristics or factors: public works, ICT services and the supply of healthcare equipment.

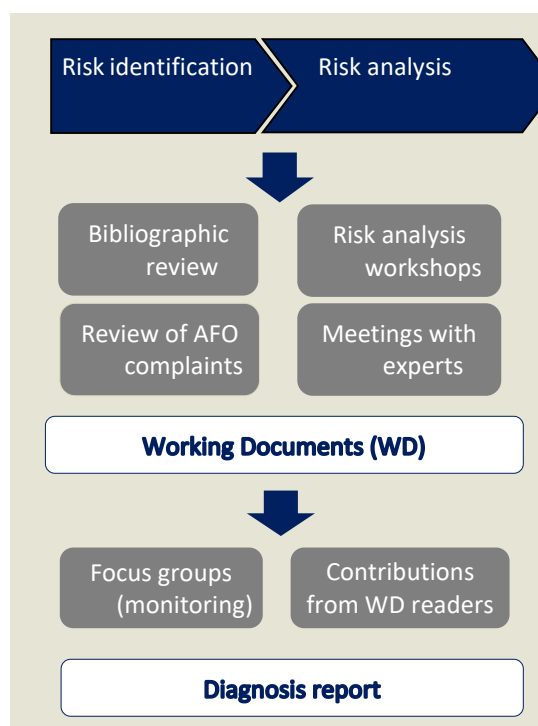
The **preliminary results** of this analysis will be complemented with other points of view, in particular from other public servants who have procurement oversight responsibilities, such as Catalan Government controllers, local authority secretaries and controllers, auditors with the Catalan Public Audit Office and specialists with the Catalan Competition Authority. Focus groups will be organised with these people to discuss the preliminary results **published through the Working Documents (WD)**.

Moreover, the comments and contributions arising out of the Working Documents and received by email through the Anti-Fraud Office Prevention Mailbox will also be collected.

The final analysis will be documented in the **diagnostic report of the main risks in public procurement in Catalonia**, which will be published and presented in a symposium addressed to the public sector as a whole.

This phase is summarised graphically in Diagram 1.

Diagram 1. Diagnosis phase



Phase 2. Proposals and tools

This diagnosis will be the basis from which the Anti-Fraud Office will carry out identification and assessment of possible measures to respond to defined risk factors. Subsequently, in exercise of its indicative powers, it will formulate:

- Proposals** to public authorities of regulatory and executive measures that facilitate the prevention of these risks.
- Recommendations** to contracting authorities that will improve the identification and management of risks of irregularities, fraud and corruption in their procurement.
- Support tools** to aid contracting authorities in the exercise of their preventive responsibilities:

- Guidelines for identifying the most common risks and assessing the likelihood and seriousness of these risks in each institution. The aim is to prioritise preventive action (given that the risks are generally multiple, while the resources of public institutions are limited).
- Causal factor charts for each risk that help the institution assess which of these factors is occurring in their organisation and more accurately identify the type of preventive measure that should be designed.
- Guidance in choosing, designing and adopting the preventive measures the organisation needs, and in conducting effective monitoring during their introduction.

This phase is summarised graphically in Diagram 2.

Diagram 2. Proposals and tools phase



Future Working Documents

Making effective and practicable proposals and recommendations requires rigorous, precise and complete risk diagnosis. Consequently, the Anti-Fraud Office consults public servants who are directly or indirectly involved in public procurement to share and discuss its preliminary conclusions. The comments and contributions they provide will help complete, clarify and improve that diagnosis.

These *Working Documents* will present the results obtained in the diagnosis phase with respect to:

- more precise detail about what the aim of prevention should be as a result of approval of Law 9/2017, of 8 November, on public sector contracts (*Working Documents N°2*);
- the inventory of the major risks identified, together with the lists of irregular, fraudulent or corrupt practices detected for each risk (*Working Document N°3*);
- the multifactorial nature of these risks, the type of risk factors developed during the analysis and the necessary correlation between these factors and the preventive measures that should be adopted by contracting authorities (*Working Documents N°4*);
- the analysis of personal, organisational and procedural institutional factors that produce the opportunities for risk within institutions (*Working Documents N°s 5,6 and 7*), and
- the analysis of institutional factors that strengthen those risks or contribute to

perpetuating them following the occurrence of irregular, fraudulent or corrupt practices in an institution (*Working Documents* N°8).

The systemic factors that create or increase these risks will be the subject of monographic analyses conducted by experts from other public institutions that have agreed to collaborate with the Anti-

Fraud Office of Catalonia on this project; a project which, ultimately, sets out to progress towards a public procurement which is more inclusive and efficient, which ensures freedom of access to public tenders, equal treatment of all tenderers and fair competition.

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