



INTEGRITY PACTS IN PUBLIC
PROCUREMENT
AN IMPLEMENTATION GUIDE

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, we raise awareness of the damaging effects of corruption and work with partners in government, business and civil society to develop and implement effective measures to tackle it.



This manual is based on a previous publication jointly produced by Transparency International and the Water Integrity Network to guide government officials in the implementation of Integrity Pacts in the Water Sector. It has benefitted from updates from Transparency International's National Chapters and has been edited by John Warnes to provide a sector-neutral document.

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Finally, our sincere appreciation and admiration to all the people and the TI chapters around the world for their valuable work in this field and for the lessons recorded in this manual.

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INTEGRITY PACTS IN PUBLIC PROCUREMENT

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“This manual is a hands-on, practical guide to familiarise government officials in charge of public procurement processes with the Integrity Pact and to provide them with tools and ideas for its application.”

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ACRONYMS

ADR	Alternative Dispute Resolution
CFE	Comisión Federal de Electricidad: Federal Electricity Commission in Mexico
FBS	Flughafen Berlin-Schönefeld GmbH: Berlin Airport Authority
DIP	Defence Integrity Pact
IP	Integrity Pact
ICC	International Criminal Court
IEM	Independent External Monitor
KWSB	Karachi Water and Sewerage Board
MDG	Millennium Development Goals
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
SFP	Secretaría de la Función Pública: Public Administration Authority in Mexico
SW	Social Witness
TI	Transparency International
TI-D	Transparency International Germany: Transparency International's National Chapter in Germany
TM	Transparencia Mexicana: Transparency International's National Chapter in Mexico.
UDI	Unilateral Declaration of Integrity
UNCAC	United Nations Convention against Corruption

EXECUTIVE SUMMARY

“Integrity Pacts are an invaluable tool for ensuring the public good, building public trust, helping guarantee project success and saving money. This manual puts this tool into the hands of any official seeking the best possible outcome for a particular public contract.”

INTEGRITY PACTS IN PUBLIC PROCUREMENT – AN IMPLEMENTATION GUIDE

The Integrity Pact (IP) is a powerful tool developed by Transparency International (TI) to help governments, businesses and civil society fight corruption in public contracting. It consists of a process that includes an agreement between a government or government agency ('the authority') and all bidders for a public sector contract, setting out rights and obligations to the effect that neither side will pay, offer, demand or accept bribes; nor will bidders collude with competitors to obtain the contract, or bribe representatives of the authority while carrying it out. An independent monitor who oversees IP implementation and ensures all parties uphold their commitments under the IP brings transparency and invaluable oversight to all stakeholders in a contracting process, from the authority to the public.

The IP clarifies the rules of the game for bidders, establishing a level playing field by enabling companies to abstain from bribery through providing assurances to them that their competitors will also refrain from bribery, and that government procurement, privatisation or licensing agencies will commit to preventing corruption (including extortion) by their officials, and to following transparent procedures. IPs are legally-binding contracts, breaches of which trigger an array of appropriate sanctions, including loss of contract, financial compensation and debarment from future tenders. These act as powerful disincentives to corrupt behaviour, ensuring IPs are never simply goodwill gestures. Rather, they enable governments to reduce the high cost and the distorting impact of corruption on public procurement, privatisation or licensing, and to deliver better services to citizens.

With this IP implementation manual, TI aims to help leaders and champions within their own governments across the world who are determined to overcome corruption in public contracting. This manual is a hands-on, practical guide to familiarise government officials in charge of public procurement processes with the Integrity Pact and to provide them with tools and ideas for its application.

INTEGRITY PACTS CONTRIBUTING TO SUCCESS IN PUBLIC CONTRACTING

A successfully implemented IP means that a contracting process was undertaken in a transparent and accountable manner, free from corruption and from delays caused by trouble, confusion and a lack of transparency. The social, economic and development goals of the project are achieved – or at least not impaired by corruption. As a side effect, trust in government and government officials is increased, and the reputation of all participants improved. If corruption does occur, it is detected and eliminated from the process: when tools such as IPs that are designed to identify corruption find it, they perform their job effectively.

In addition, the IP helps governments to mobilise public support for their own procurement, privatisation and licensing programmes and to avoid the high cost in trust and reputation caused by corruption in highly sensitive projects. Beyond the individual impact on the contracting process in question, the IP is also intended to build confidence and trust in public decision-making; to support a more hospitable investment climate; to empower public officials to restrain corruption and to protect their good work in complicated projects; and to empower civil society to contribute to the integrity of public procurement processes. IPs help to increase the impact and effectiveness of resources when federal or national funds are involved in local projects or when aid resources are used.

IPs enable the implementation of desirable law-abiding standards without additional legal reform, reduce conflict and distrust and provide a channel for managing dissent. Through the use of an independent monitor, they help to ensure the credibility and legitimacy of the contracting process, and offer all stakeholders oversight that would otherwise be denied to them. They reassure the authority and all participants of the integrity of the process, and help to isolate it from political pressures.

As well as the commitment not to partake in bribery or extortion, an IP can include other obligations such as the requirement that bidders disclose all commissions and similar expenses paid by them to anybody in connection with the contract, or that government officials involved in the process adopt codes of ethics consistent with the IP. The IP establishes a monitoring mechanism and a process for determining the presence of violations, which carry sanctions as a consequence. The sanctions for bidders range from loss or denial of the contract, forfeiture of the bid or performance bond and liability for damages, to debarment from future contracts. Criminal, civil or disciplinary action should proceed against government employees.

The IP process has shown itself to be adaptable to many legal settings and is flexible in its application. Since its conception, the IP has been used in more than 15 countries worldwide. Being essentially a collaborative tool, it is built on trust and support and is therefore constructive. It also emphasises prevention, and so does not have the side effects of other corruption control tools, which often generate fear and distrust. IPs help to make projects viable. They are not an end in themselves, but are a means of supporting the appropriate completion of projects crucial for development and the satisfaction of basic needs in society.

INTEGRITY PACT DESIGN AND IMPLEMENTATION

DESIGN

The manual helps users to select the project and the contracting processes to which the IP should be applied, using criteria such as project impact and the stage that the contracting processes have reached. An IP may be suitable during some or all stages of the project; ideally, it should be applied to the full range of project activities and should cover all the phases of each contracting process. At the absolute minimum, the IP should start during the pre-bidding stage of a contracting process and continue until contract signature.

A key advantage of an IP is that it is a tool that can be implemented within the ordinary authority of contracting officials and bodies, with the support of civil society (one or several NGOs). The experience of TI chapters implementing IPs is very diverse and is in constant evolution. The distribution of responsibilities between the authority and the implementing NGO is arranged between them for each IP. Therefore it is not possible or desirable to offer a fixed formula for IP implementation. The process is always a learning experience in itself and there is no one-size-fits-all recipe that can be copied from one context to another. For this reason, this manual contains everything users need to know to tailor-make an IP for a particular project. What form should that IP take? Should signature be mandatory or voluntary? Should its content be mandatory or voluntary? The manual provides a step-by-step guide for before, during and after the bidding process.

Consistent with its practical approach, the manual makes reference to two main case studies: that of the IPs implemented in the El Cajón and La Yesca hydroelectric projects in Mexico, and the IP used in the enlargement of the Schönefeld Airport in Berlin, Germany (hereinafter referred to as the Berlin Airport Project).

The manual takes users through the conditions crucial to the successful design, set-up and implementation of an IP. Key among these are:

- The political will of the authority to use this tool to its full extent to reduce corruption and to reinforce honesty and integrity in government contracting
- Getting the basics right: maximum transparency at every step leading up to the contract and throughout its implementation, and an adequate, well-designed contracting process
- The use of an external independent monitoring system which verifies that the obligations in the IP are fulfilled and exercises the functions agreed to in the IP with regard to the tender process and contract execution
- Multi-stakeholder involvement: civil society has a very important role to play in supporting governments implementing IPs. Although the dynamics in every context are different, civil society organisations are a source of expertise, legitimacy, credibility and independence. A sensible distribution of responsibilities between the authority and the civil society organisation (or NGO) with whom it is working is critical.

It is important to secure general support for an IP from all stakeholders – and to understand the reasons why they may be sceptical about it. The basis of gaining support lies in addressing these two dimensions. Objections may need to be overcome, such as fears of delay or added complication to the project. Most objections will be adequately addressed with timely information about the IP and its implications. The manual shows how to gain support for an IP, with emphasis on the importance of good communications about both a project and the IP itself, throughout the process.

IMPLEMENTATION

Implementation must be supported by a comprehensive communications strategy: bidders and potential bidders, contractors and sub-contractors need to understand their rights and responsibilities under the IP; regulators, government control agencies and other government departments also need to understand the IP and how it works so that they can provide support and participate accordingly; and citizens (the public) in general and communities with a stake in the project need to know an IP is in place, how it operates, what participation mechanisms it offers and how they can be used. Civil society organisations can play various roles in the implementation of the IP: as initiators, facilitators, lead implementers or as monitors themselves. At the very least, they are essential in providing channels of accountability from the monitor to the public.

Implementation also requires capacity, resources, leadership, commitment and credibility – as well as the ability to convene different audiences. A range of actors can support IP implementation, promotion and communication, such as other government agencies, industry associations, civil society organisations, donors and multilateral organisations.

In implementing an IP, the authority (with the support of a civil society organisation) assures that all activities foreseen in the IP process are actually carried out: the selection of the project and the contracting processes where it will be applied; the design of the IP process according to goals and circumstances; the choice of implementation arrangements; monitor selection, and – once all is ready – putting the IP to work throughout all contracting stages. TI's experience indicates that the pre- and post-bidding stages bear high corruption risks which are often overlooked, hence the utmost importance of considering these stages under the IP implementation process, and of having in place from early on measures to ensure the transparency and accountability of the contracting process.

THE INDEPENDENT MONITOR

The monitoring system and the role the monitor plays are crucial for IP success. Without the monitoring system, the advantages of the IP may not be realised. The main task of the independent monitor is to ensure the IP is implemented and the obligations for bidders and the authority included in it are fulfilled (i.e. there is no violation of the IP). The monitor is therefore the source of credibility and reassurance for both the authority and the bidders that the process will go as agreed. He/she is also a source of information for the general public, and builds trust among citizens in governmental procurement processes.

The manual explains how to select and support the independent monitor and ensure that he/she remains accountable. A number of different monitoring systems can be used: institutional/organisational or individual; collective or individual; private, governmental or non-governmental; and national or international. The monitor has access to all relevant information on the process and carries out a wide range of activities, including:

- The review and assessment of documents: the bidding documents, the bidders' proposals, the evaluation report, and contractor and audit reports, among others
- Participation in meetings, including public hearings
- Site visits to the project
- Communication with the authority, the NGO and the public according to the terms established in the monitoring agreement
- Reporting his/her findings (including suspected corruption) to the parties in the IP, the authority, the NGO and the public.

THE COST OF INTEGRITY PACTS

The cost of implementing an IP may vary depending on the implementation arrangements, the activities included in the process and the complexity of bidding procedures. Whatever the case, experience has shown that they remain a very small percentage of the project costs and can be covered by different sources: the authority's own resources; contributions from donors or project financiers; bidders' fees, or a combination of these. There is no set figure, but on average, IPs cost between US\$50,000 and US\$200,000. The IP for Mexico's La Yesca hydroelectric dam, for example, cost an estimated US\$68,000 – less than 0.01 per cent of the total project cost of US\$760 million.

THE VALUE OF 'WHAT DIDN'T HAPPEN'

The IP is not a perfect tool: it is never possible to rule out corruption 100 per cent, and other complementary approaches should be implemented to strengthen an IP's impact, such as the effective intervention of control agencies and the timely prosecution of criminal offences. If not managed carefully, like any mechanism, the IP can be subject to abuse and be used for window dressing. Less than optimal IP implementation can still look 'good' but will not deliver the same results, thus undermining the impact of the tool.

The results and impact of IP implementation are difficult to measure, often because it is difficult to establish a causal relationship between 'what was done' and 'what didn't happen'. It is nevertheless possible to observe impact, through indicators including:

- The project ran as planned: bidding documents were observed; contractual agreements were upheld and enforced; and the project was successfully concluded
- The project was visible, transparent and accountable. Information was shared with the public, and the participation of stakeholders was possible and effective
- Conflict and complaints related to the bidding process and contract execution were minimised or adequately managed
- There was an observable reduction in costs or prices compared to the original budget
- The strategy facilitated the improvement of processes or the undertaking of reforms that benefited future projects at organisational and institutional (legal) levels
- Corruption was detected and addressed, and savings were made as a result, or damage was prevented.

IPs are an invaluable tool for ensuring the public good, building public trust, helping guarantee project success and saving money. This manual puts this tool into the hands of any official seeking the best possible outcome for a particular public contract.

INTRODUCTION AND BACKGROUND

“The Integrity Pact 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.”

1. INTRODUCTION

The Integrity Pact (IP) is a tool developed by Transparency International (TI) to help governments, businesses and civil society committed to fighting corruption in the field of public contracting. It has been improved and implemented on the ground by many of TI's chapters across the globe, in more than 300 contracting processes with independent monitors in a wide range of sectors.

The IP consists of a process that includes an agreement between a government or contracting 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, other obligations can be included, such as the requirement that bidders disclose all commissions and similar expenses paid by them to anybody in connection with the contract, or that government officials involved in the process subscribe to ethical commitments consistent with the IP. The IP further establishes a monitoring system and a process for determining the presence of violations, which carry sanctions as a consequence. The sanctions for bidders range from loss or denial of the contract, forfeiture of the bid or performance bond and liability for damages, to debarment from future contracts. For government employees, criminal or disciplinary action should proceed.

The purpose of this manual is to familiarise officials in charge of public contracting (procurement) processes with the Integrity Pact and to provide them with tools and ideas for its application. With this manual, Transparency International wants to help those leaders and champions within their own governments across the world who are determined to fight corruption in public contracting.

2. ABOUT THIS MANUAL

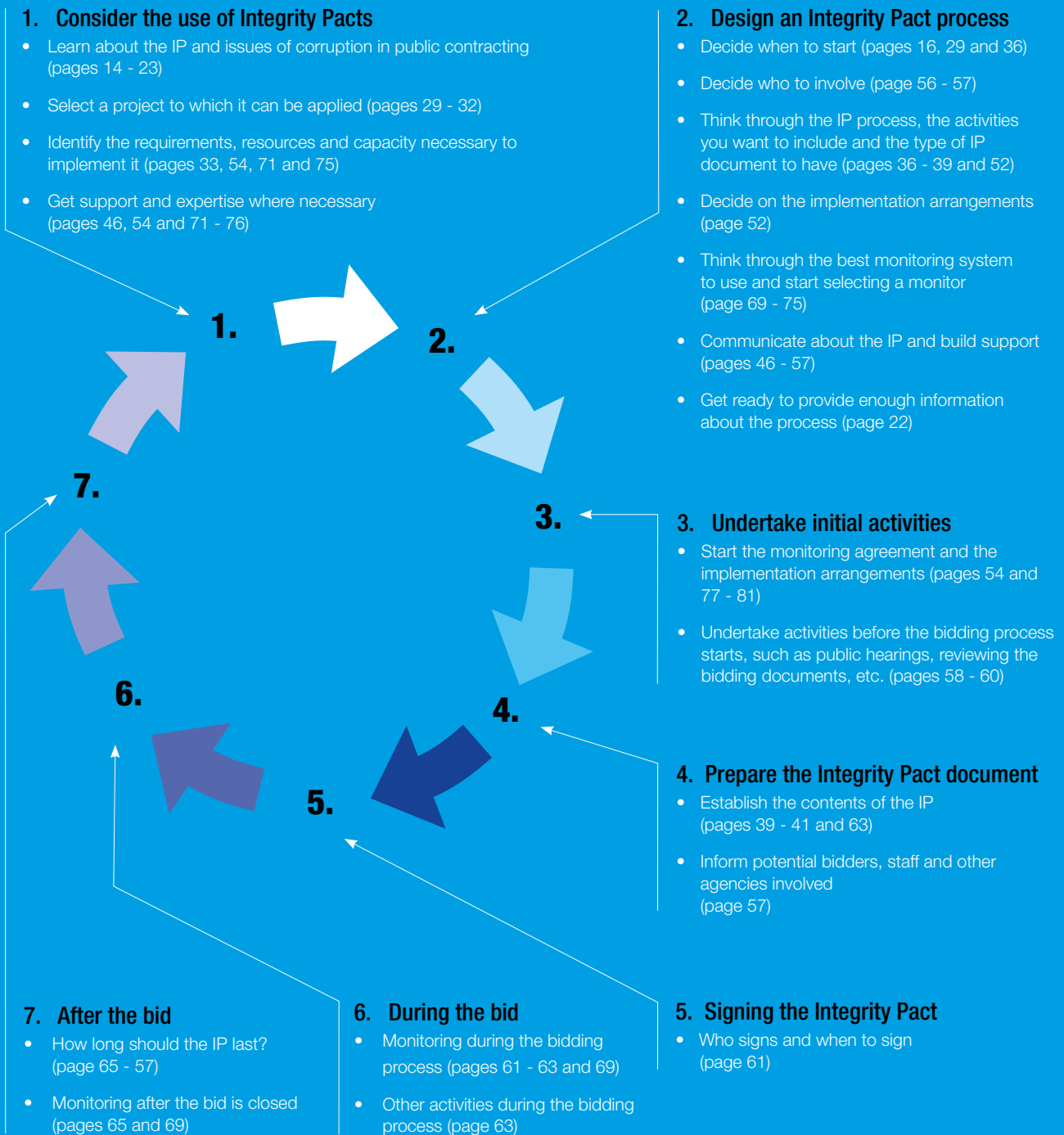
This is a hands-on, practical guide that addresses the basic questions which could arise from the perspective of government officials who would like to implement an IP, such as: What is an IP? Who can implement one? What is required to implement it? How to select an optimal monitoring system? How much do IPs cost?

The experience of TI chapters in implementing IPs is very diverse and in constant evolution. It is therefore not possible or desirable to offer a fixed recipe for implementing IPs. The reader should bear in mind that IP implementation is a learning experience in itself and that there is no one-size-fits-all recipe that can be copied identically from one context to another. For this reason, this guide aims to offer elements for judgment when considering IP implementation in particular situations and specific contexts.

Consistent with its practical approach, this manual makes ample reference to two main case studies: the Integrity Pacts implemented in El Cajón and La Yesca hydroelectric projects in Mexico, and the pact implemented in the Berlin Airport Project, Germany.

ROAD MAP TO INTEGRITY PACT IMPLEMENTATION AND THIS MANUAL

Most effort should go into getting the basics right, preparing the process and making the necessary implementation arrangements



3. OVERVIEW OF CORRUPTION IN PUBLIC CONTRACTING

3.1 WHAT IS THE PROBLEM AND WHAT ARE THE COSTS?

TI defines corruption as ‘abuse of entrusted power for private gain’. Private gain must be interpreted widely, including gains accruing to an actor’s close family members, political party or in some cases to an independent organisation or charitable institution in which the actor has a financial or social interest.

Public contracting activities, meaning procurement, privatisations, licensing, concessions and other forms of contract, have a double function. On one hand they are vehicles by which large sums of public funds are spent: procurement of goods, works and other services by public bodies alone amounts to on average between 15 and 30 per cent of Gross Domestic Product, and in some countries even more.¹ Few activities create greater temptation or offer more opportunities for corruption than public sector procurement. On the other hand, such contracts are vehicles for implementing policies, and therefore have a high impact on their outcomes. A good contracting procedure will ensure that the best quality works, goods or services will be acquired at the best value and in transparent and accountable ways.

Public contracting can go wrong for many reasons: corruption, lack of transparency and lack of accountability are a few among many but all are very important. Damage from corruption comes in the form of bad decisions, poorly performing contractors, poor quality goods and services, necessary projects delayed or made unfeasible, additional costs, and resources gone to waste. In this context, tackling corruption and increasing transparency and accountability means helping to ensure that public policy is effective and that government goals are fulfilled.

Public contracting procedures are often complex; transparency is limited, and corrupt manipulation is hard to detect. Few people who become aware of corruption complain publicly, as it is not their own but government money which is being wasted (not acknowledging that government money is actually taxpayers’ money, i.e. their own).

The IP is a tool used in public contracting processes to increase transparency and accountability and restrain corruption, thus enabling projects to be successfully completed. IPs are not only suitable for construction and infrastructure projects. They can be used for a variety of means such as bespoke goods, specialised services, selection of the beneficiary of a state permit, license, or concession (such as extractive industry exploration, or government regulated services such as telecommunications).

There can be contracts at each phase of the project cycle, with different purposes. For example, during the project or programme planning phase, there may be a need to contract out consultants, advisors and experts who help delineate policy, or carry out feasibility studies or similar programme design analysis. During the project design phase, there may be a need to hire an investment banker to structure the project, or consultants and engineers to define it. At the project implementation phase in sub-sectors where infrastructure construction is called for, equipment and construction must be contracted, external companies appointed to supervise the contract execution, or an operator chosen. The implementation of these contracts actually means the final completion of the ‘project’, although in some cases further contracts are needed, for example, to maintain infrastructure. In summary, there are contracts in all phases of a project, for different purposes.

Contracts in turn are entered into and executed through a process which also follows several stages (see Table 1). The process begins with the identification of the need to contract, followed by the process design and decisions on the contracting process and modalities (open tender, direct contracting, etc.), the drafting of the relevant documents, the selection process, the award of the contract and contract execution. This process is repeated every time there is a contract at each phase of the project cycle.

Case Box 1: How the Integrity Pacts came about in El Cajón and La Yesca

Transparencia Mexicana (TM) has extensive experience monitoring contracting processes, including more than 150 contracting procedures, involving contracts with an approximate total value of more than US\$30 billion. TM sees IPs as a tool that adds value by providing assurance to society and to the participants in a tender process (both the authority and bidders) in the way contracting procedures take place, making public relevant information about the conditions under which the contracting procedure has occurred. In turn this helps others understand the reasons underlying government decisions. TM does not question policy decisions but focuses on introducing transparency and accountability to their implementation. Key to TM's approach is the social witness (SW), which is the name given to the person (individual or legal) who acts as the independent external monitor (IEM) of the process. This is an expert who together with TM monitors and oversees the transparency and integrity of contracting processes.

In 2002 the Comisión Federal de Electricidad (CFE) approached Transparencia Mexicana to implement an Integrity Pact in the contracting process for the construction and equipment of the 750MW El Cajón hydroelectric project in northwestern Mexico. TM joined the process before the bidding documents were in the drafting stage and was immediately involved in providing comments on them. The IP process took place, and included the designation of a SW and the signature by bidders and government officials of declarations to partake in the process with integrity. The contract was assigned to the winning bidder, and the construction of the project took place as scheduled. El Cajón began operating in March 2007.

Four years later in 2006, when the construction of the La Yesca dam was being planned, the CFE again wanted a social witness. By then, and in part due to the success of the SWs implemented by Transparencia Mexicana, the government had issued a regulation establishing a mandatory SW in certain processes (at that time above a threshold of approximately US\$40 million² for public works), and in 2009 enacted further legislation that regulates their work. The assignment of a SW to a project is the responsibility of the Public Administration Authority (Secretaría de la Función Pública or SFP). The CFE filed a request for an SW to the SFP and appealed for the same SW who had worked with them in El Cajón, due to his experience, credibility and high-quality work. In particular, the technical requirements of the project were very similar to El Cajón. The SFP accepted the request and designated TM as SW, who in turn designated the same expert to perform as monitor for La Yesca.

The decision to use the SW in El Cajón was taken by the highest authorities in the Mexican Federal Government, which instructed the CFE to do so. At that time, the system was unknown to CFE officials in charge of procurement. It is possible that concerns over the technical, social and political complexity of the project prompted such instruction. By the time preparations for La Yesca had started, the CFE already had the previous experience with El Cajón; in addition, this being a Federal Government project, the Decree of 2004 was applicable, and due to the contracting amount, a SW was mandatory.

Corruption risks are present at each of these phases and at each stage of the contracting process. It is therefore very important to bear this in mind and to try and ensure that preventative mechanisms, including for transparency and accountability, are present at all phases, from decision-making to project implementation. It is often in the very early phases of project decision-making that corruption starts to creep in, as it can go unnoticed more easily here. In turn, preventive mechanisms also need to be in place early in the contracting process, from the moment the need to contract is identified up to contract execution.

THE COSTS OF CORRUPTION

Corruption affects people directly and also hurts governments who would rather do the right thing. Among the most palpable costs of corruption in public procurement are:

1. Waste of financial resources: corruption diminishes the total amount of resources available for necessary public purposes. In turn, this money goes into the pockets of a few, leaving more expensive and inefficient projects completed and necessary projects not carried out
2. Corruption distorts allocation by causing decisions to be weighed in terms of money, not human need. Infrastructure projects can also be motivated by their potential to attract votes, or to be profitable business for companies seeking a market, rather than on the basis of priority or availability of financial resources
3. Failure to lead by example. If elite politicians and senior civil servants are widely believed to be corrupt, the public will see little reason why they, too, should not indulge in corrupt behaviour. Corruption in government lowers respect for constituted authority and leads to diminished government legitimacy
4. Loss of natural resources.

Preventing corruption means instilling decisions and processes with transparency, accountability and an appropriate 'field of play' to enable participants to behave with integrity. The IP is one such tool for preventing corruption, which works specifically in cases of procurement.

3.2 CORRUPTION RISKS IN LARGE- AND SMALL-SCALE PROJECTS

Corruption manifests equally in large- and small-scale projects. By large-scale, we mean large in magnitude and value: projects requiring international competitive bidding and usually taking place at the national or federal level. Small-scale projects are more common at the local level, and while they may also involve international bidding, they are smaller in magnitude and volume.

Practitioners and public officials with contracting responsibilities know that smaller-scale projects are often more complex than large-scale ones. Smaller-scale projects may involve less human and technical capacity but because of their proximity to communities, there are likely to be more stakeholders directly or closely involved. At the local government level, consultants and external advisors may often be required and will probably be difficult to find; also, control mechanisms at this level tend to be less effective. Because of their magnitude, large-scale projects are often more organised, already containing the technical resources for their implementation. They are also often implemented in contexts where implementing and control institutions are relatively strong.

These differences do not alter the manifestations of corruption, but they do change its dynamics (who is involved, for what reasons, how feasible it is to detect or deter them, etc.) and thus may require different levels of effort in tackling it.

It is also possible to encounter different levels of state capture and political influence over stakeholders in large- and small-scale projects.

‘State capture’ is a term used to describe situations where ‘the actions of individuals, groups or firms both in the public and private sectors influence the formation of laws, regulations, decrees and other government policies to their own advantage, as a result of the illicit and non-transparent provision of private benefits to public officials’.³ The state is captured to the extent that it is not the public interest that drives its decisions.

Large projects are likely to involve bigger multinational firms or powerful national economic interests, while smaller-scale projects are most likely to involve locally established firms. In both cases, equal care should be taken to keep the project and its contracting processes away from undue influence.

Case Box 2: Large- and small-scale projects in the Mexican experience

In the Mexican experience, because the problem of corruption appears the same in large- and small-scale projects, the methodology used by *Transparencia Mexicana* (TM) in implementing IPs is the same in both cases and across sectors. What may differ is the applicable regulatory framework: large-scale projects are more likely to be funded (at least partially) through federal government funds, thus determining the application of federal procurement law, while local projects with different sources of funding will have a specific and different regulatory framework. In particular, the regulations requiring the use of social witnesses are currently not applicable at the local level across all federal states. Another difference lies in the level of effort and capacity required to monitor the projects. Smaller projects are more exposed to local political dynamics and pressures, and monitors often need to interact with a greater number of people, as well as directly with communities, which often requires more time and effort. Lower capacity levels in local government also need to be taken into account.

Table 1: Contracting process and corruption risks at each stage, a few examples⁴



1. Things can go wrong from the very beginning. For example, when specifications are exaggerated to secure a more expensive solution when a more economical one would be appropriate; or when a type of solution is pushed for over another which is more suitable; or when significant technical elements are purposely overlooked. All this can result from corruption, to enable government officials or contractors to benefit from such decisions at the expense of the public interest. However, some such mistakes could be due to non-corrupt reasons (e.g. mistakes in judgement or differences in philosophy), therefore transparency, openness and consultation are invaluable for building confidence that corruption is not involved. Among the most common risks at this stage are:

- Decision makers are biased (bribes, kickbacks or conflicts of interest are involved).
- The investment or purchase is unnecessary. Demand is induced for a specific project so that a particular company can make a deal, but the project is of little or no value to society.
- Instead of systematic leak detection or grid loss-reduction (both of which offer little reward), new capacity is installed (which offers bribe potential).
- The investment is economically or socially unjustified or environmentally damaging.
- Goods or services that are needed are over- or under-estimated, to favour a particular provider.

2. Sometimes corrupt actions hide within the details, such as a very precise design for infrastructure that only one company produces; the dimensions of a system being artificially and unnecessarily enlarged so that only a big company could deliver; or a very specific and unnecessary service is required, so that a consultancy company is hired. For a host of reasons, many actors in a project (development partners, contractors, suppliers, the owner) may try to influence this decision in a biased way, which is why enabling public scrutiny and debate at this stage is very important - just as it is vital to choose an unbiased, competent consulting company. Among the most common risks at this stage are:

- Bidding documents or terms of reference are designed to favour a particular provider, so true competition is not possible (or is restricted).
- Unnecessary complexity of bidding documents or terms of reference creates confusion, hiding corrupt behaviour and making monitoring difficult.
- Design consultants prepare a design that favours a particular bidder.

3. In the bluntest ways, decisions clearly favour one or another bidder. For example, if a service delivery provider is chosen not for its merits or how well it can deliver, but for how much it paid in bribes. Among the most common risks at this stage include:

- Selection criteria are subject to abuse or are applied so as to allow biases to play a role and remain undetected, or decision-makers are not made accountable.
- Advantage is granted to a particular bidder through the exchange of confidential information before bid submission or during the clarification period. Clarifications are not shared with all bidders.
- Confidentiality is abused and extended beyond legally-protected information, making monitoring and control difficult.
- The grounds for selection of the winner are not made public (lack of transparency of bid evaluation).
- Contracting conditions change substantially during contract negotiation and signature, departing from the bidding terms.

4. Even if things have gone well so far, the execution phase presents a number of corruption risks. For example, if a supplier won a bid by offering an extremely low price, but once the contract is signed he/she charges higher fees, withholds delivery without explanation or performs poorly to compensate for his/her low income. Or that a project is carried out with substandard materials, or with equipment that is outdated, in order to offset costs. Some of the most common risks during this stage are:

- Winning bidders/contractors offsetting bribes and other payments with work that is of poor quality, defective or with different specifications than those contracted. Faulty or sub-specification work may require early repairs or expensive correction.
- Contract renegotiation or 'change orders' introduce substantial changes to the contract specifications or costs, often in small increments that can be decided by a site engineer. These may be facilitated by collusion between the contractor and the site engineer.
- Officials demand bribes to process payments for the contractor.

5. Auditors and accountants doing final accounts are biased or 'bought', and are therefore willing to support false certificates.

3.3 CORRUPTION RISKS AND MANIFESTATIONS ACROSS THE CONTRACTING PROCESS

Corruption and corruption risks can occur throughout the entire public contracting process, from needs assessment, project design and bid preparation, to bid implementation, award and contract signature, and finally contract execution. Risks and manifestations of corruption may be different in each phase. A wise strategy to prevent or control corruption in this field will recognise the differences in these stages and will be attentive to ‘red flags’ as triggers for corrective action (or due diligence). Table 1 illustrates some of the most common risks and manifestations of corruption during each stage of the contracting process.

In TI’s experience, the early and late stages of the procurement process are the most exposed to corruption. Among the key areas of increased risk are:

- Limited or restricted access to information
- Deficiencies and lack of transparency during the budget phase
- Lack of information and participation at the planning stage
- Abuse of exceptions to open public bidding
- Limited or ineffective control and monitoring within the contracting process, particularly during the contract execution phase.

A significant aspect to consider when analysing corruption risks is to differentiate problems related to inefficiency, incompetence or basic lack of capacity (error) to corruption issues. While a ‘bad’ outcome may originate from any of these three, the approach taken to resolve it needs to consider more precisely the reasons why it happened – in particular whether criminal actions were involved. Not all efficiency problems are related to corruption, and vice versa; what can seem corrupt may simply be error. This distinction is also important as some efficiency-driven reforms may undermine transparency-building efforts. For example, if the goal of a particular reform is to speed up procurement processes, and due attention is not given to transparency issues, a recommendation to reduce publication and evaluation time may backfire. It also works the other way round. Implementing transparency measures that will render the process inefficient will not achieve its purpose either.

Further Reading: For more about corruption in public contracting in general, see:

- Michael Wiehen and Juanita Olaya, *How to Reduce Corruption in Public Procurement: The Fundamentals (2006)*. *Handbook For Curbing Corruption in Public Procurement, Part I*, Berlin: Transparency International, 2006, pp. 13-105
- Craig Fagan, *Working Paper: Reducing Corruption in Public Procurement (2010)* Berlin: Transparency International, 2010
- U4 Anti-Corruption Resource Centre, *Public Financial Management and Procurement*: <http://www.u4.no/themes/public-financial-management-and-procurement/>
- OECD, *Integrity in Public Procurement – Good Practice from A to Z*, May 2007.

4. ACCESS TO INFORMATION REQUIREMENTS: IDEAL INFRASTRUCTURE FOR ENSURING TRANSPARENCY

Transparency plays an essential role in mitigating, preventing and controlling corruption risk in public contracting. It is also an important component of IPs and a necessary element of the contributions they make to the contracting process. This section examines the components of transparency to do with access to information, and its requirements within the contracting process and for IP implementation.

An essential element of transparency is access to and the availability of information. Availability and access refer here both to the proactive disclosure of relevant information by the authorities, and to the availability of information ‘on request’ by any interested party. Access to information in the procurement process involves three elements: the kind of information available; how it is made available; and the mechanisms that provide for stakeholder participation.

Table 2 indicates those aspects of the different contracting stages that require transparency and some level of disclosure. It indicates when certain information must be provided to a specific stakeholder: the public, potential or actual bidders or the monitor. The availability of information requires that some information be publicly available, and adequate levels of transparency require that all information is available to the monitor. Fairness and transparency also call for the equal treatment of all bidders and that all information be available to them on equal terms. However, information disclosure must safeguard the confidentiality of legitimately protected information, such as technological innovations offered by a bidder. Disclosure practices must allow for this. However, it must be clear which information is legitimately protected (by law) and such exceptions must be minimised.

As Table 2 also illustrates, the availability of information necessary for public contracting processes does not only include the process itself, but also the authority in charge, the rules and applicable legislation and the operational units in charge of the process.

It is normally up to each country’s constitution and legislation to establish information disclosure policies and standards, and this may vary from country to country. In countries where there is still inadequate access to information legislation, or this is not adequately applied, IPs can introduce disclosure practices across the contracting process (for more, see Integrity Pact Design, 3. What do IPs consist of? What elements should be included? on page 39). The only exception would be in countries where information disclosure by the government is forbidden, which is rare under today’s circumstances.

Further Reading:

For more on government information disclosure standards, see the guidelines produced by Article 19, *The Public’s right to know: the Principles on Freedom of Information Legislation*, available at <http://www.article19.org/data/files/medialibrary/1797/public-right-to-know.pdf>

Table 2: Access to information in public contracting

	To the public	To all potential or actual bidders	To the monitor
ORGANISATIONAL (Contracting authority)			
Functions	x	x	x
Departments or units responsible for contracting process	x	x	x
Applicable laws and regulations	x	x	x
Funding sources and budget	x	x	x
PUBLIC CONTRACTING PROCESS			
Need assessment related studies and documents	x	x	x
Contract justification – investment and location decisions	x	x	x
Procurement/contracting plan	x	x	x
Drafts of bidding documents	x	x	x
Official bidding documents	x	x	x
Amendments to bidding documents	x	x	x
Clarifications on bidding documents (Q&A)		x	x
Bidders' prequalification documents		x ^(*)	x
Prequalification report	x	x	x
Official bid invitation	x	x	x
Bidders' proposals			x
Bid evaluation			x
Bid evaluation report – describing the way the evaluation criteria were applied to each bidder	x	x	x
Award decision (including reasons that substantiate it)	x	x	x
Text of the contract signed by the parties	x ^(*)	x ^(*)	x
Renegotiations for contract changes or amendments			x
Amendments to contract	x ^(*)	x ^(*)	x
Progress reports	x	x	x
Audit/supervision reports	x	x	x

x indicates access to information is required or is best practice, and should be specifically provided to that particular actor.

(*) Indicates documents where protection of proprietary information may apply and full disclosure does not automatically follow. Information provided to the public is assumed to be accessible both to bidders (actual or potential) and to the monitor.

THE INTEGRITY PACT

“A key advantage of the Integrity Pact is that it can be feasibly implemented within the regular scope of authority that contracting officials and bodies hold.”



1. WHAT IS AN INTEGRITY PACT? WHAT ARE THEY USEFUL FOR?

The IP is a tool developed during the 1990s by TI to help governments, businesses and civil society fight corruption in public contracting. It consists of an agreement between a government or government agency (hereafter referred to as ‘the authority’) and all bidders⁵ 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, and that bidders will not collude with competitors to obtain the contract, or bribe representatives of the authority while carrying it out. In addition, other obligations can be included, such as the requirement that bidders disclose all commissions and similar expenses paid by them to anybody in connection with the contract, or that government officials involved in the process subscribe to ethical commitments consistent with the IP. The IP further establishes a monitoring process and a process for determining the occurrence of violations, which carry sanctions as a consequence. The sanctions for bidders range from loss or denial of contract, forfeiture of the bid or performance bond and liability for damages, to debarment from future contracts. For government employees, criminal, civil or disciplinary action should proceed.

It is important to remember that an IP is both a document (a legal contract) and a process (a series of activities). This manual refers to both these aspects.

Since its conception, the IP has been used in more than 15 countries worldwide and has proven adaptable to many legal settings. Experience shows that four of the crucial elements for the successful design, setup and implementation of an IP are:

1. The political will of the authority to use this tool to its full extent to reduce corruption and to reinforce honesty and integrity in government contracting
2. Getting the basics right: maximum transparency at every step leading up to the contract and throughout its execution, and an adequate, well-designed contracting process, are essential. Such transparency calls for extensive and easy public access to all 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 execution and supervision. If these basics are right, the job of the monitor is easier
3. The use of an external independent monitoring system that verifies that the obligations in the IP are fulfilled, and exercises the functions agreed to in the IP with regard to the tender process and contract execution
4. Multi-stakeholder involvement: Along with public and private sector involvement, civil society has a very important role to play in supporting governments implementing IPs, although the dynamics are different in every context. Civil society organisations are a source of expertise, legitimacy, credibility and independence. In addition, the correct involvement of actual and potential bidders will ensure ownership and responsibility.

Case Box 3: How the Integrity Pact came to be integrated in the Berlin Airport Project

The Federal Republic of Germany and the states of Berlin and Brandenburg agreed in the early 1990s, soon after the re-unification of Germany, to build a major new international airport near Berlin. The three authorities began efforts to devise a project model that would garner political and financial support. The privatisation option that had been considered was dropped, and instead of moving the airport further out into the Brandenburg province (as had been considered earlier), it was decided to use the existing (former East-German) airport at Schönefeld, and to add runways as well as build a new terminal building and other infrastructure. Resistance from the immediate neighbours and nearby property owners delayed the final decision by several years, but by 2004 the authorities had determined to go ahead with the project, albeit on a more modest scale than originally envisaged, and to keep it within the public sector. For this purpose they formed a private sector company, the Flughafen Berlin-Schönefeld GmbH (FBS)⁶ – a limited company owned by the three public authorities, with the Mayor of Berlin as chairman of the Board of Supervisors.

As early as 1995 Transparency International Germany (TI-D) had offered the then-new tool of the Integrity Pact (IP) to the relevant authorities, but they declined the offer, arguing that applying the IP would be to admit publicly that there was a risk of corruption. Only weeks later, the first corruption allegations surfaced in the media and haunted practically every step of the process, forcing several modifications of the project's administrative and financial structures on the authorities until finally, in 2001, all project agreements were cancelled. Although formal charges were never filed, several participants in the process, including some interested investors and contractors, were suspected of having employed corrupt means to make headway in the competition.

In view of this experience, and under instructions from the Mayor of Berlin to various state authorities (including FBS managers) to seek new ways to avoid corruption risks in large investment projects, the FBS management approached TI-D in early 2004 and asked for suggestions on how to contain corruption in this major investment project. TI-D offered a number of suggestions and proposed applying an IP. Given the likelihood that contractors who had been involved in the previous process would again submit bids, TI-D emphasised the importance of appointing an independent external monitor, so as to shield FBS management from potential efforts to undermine or circumvent correct procedures.

Over the following weeks, TI-D and FBS managers and staff worked together to develop a model IP that contained all the essential elements, adapted to Germany's legal context. Both parties searched for a suitable person to act as the IP monitor. Several candidates surfaced, and in January 2005, two experts were appointed by FBS. The team leader was a retired procurement official from the City State of Berlin, with a spotless record and strong commitment to integrity in procurement, who became a member of TI-D before accepting the monitoring assignment.

The Berlin-Brandenburg International Airport at Schönefeld (Berlin Airport or BER) is one of the biggest and most complex transport infrastructure projects in Europe in the last years. The total cost of the project initially was estimated at €2.4 billion (US\$3.3 trillion). Due to numerous project design changes during implementation and other delays caused by technical problems, the final cost will be significantly higher. Except for one case of suspected collusion that the FBS could handle by redesigning and retendering the components, there has been no indication of corruption associated with any of the contracts managed by the FBS. Furthermore, there are no indications that any of the current cost overruns or the delays are caused by, or associated with, corruption. The opening date is still uncertain but expected to be in late 2014 or 2015.⁷

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

1. To clarify the rules of the game for bidders, establishing a level playing field by enabling companies to abstain from bribing by providing assurances to them that their competitors will also refrain from bribing, and that government procurement, privatisation or licensing agencies also commit to preventing corruption (including extortion) by their officials and to following transparent procedures
2. To enable governments to reduce the high cost and distorting effects of corruption in public procurement, privatisation or licensing and to deliver better services to citizens.

In addition, the IP helps to:

- Enable governments to gather and mobilise public support for the government's own procurement, privatisation and licensing programmes and to avoid the high cost in trust and reputation attached to occurrences of corruption in highly sensitive projects
- Create confidence and trust in public decision-making, beyond the individual impact on the contracting process in question, and foster a more hospitable investment climate
- Empower public officials determined to fight corruption and to protect their good work in complicated projects
- Empower civil society in its contribution to the integrity of public procurement processes
- Increase the impact and effectiveness of resources when federal or national funds are involved in local projects or when aid resources are used.

In summary, IPs help to make projects viable. They are not an end in themselves, but are a means of supporting the appropriate completion of projects crucial for development and the satisfaction of basic needs in society.

2. WHAT ARE THE ADVANTAGES AND LIMITATIONS OF IMPLEMENTING IPS?

A key advantage of the IP is that it can be implemented within the regular authority of contracting officials and bodies. Essentially a collaborative tool, the IP builds on trust and is therefore constructive. As IPs emphasise prevention they lack the side-effects of other corruption control tools, which can sometimes cause fear and distrust. Other advantages include:

- The implementation of desirable standards without additional legal reform
- The provision of a channel for managing dissent
- Increased credibility and legitimacy of the process through the monitor's independent and expert insights
- Reassurance to all stakeholders that this corruption-prevention aspect of the process runs well, without adverse political pressures
- Active civil society contribution to the integrity of the process.

The monitor's work focuses only on the prevention of corruption. An expanded monitor-function, e.g. overseeing contractor compliance with national labour laws, would require significant additional resources. Of the broad control-functions and –obligations of the management of an employer, only control of corruption prevention activities and compliance with the IP are duplicated by the IP.

IPs have some limitations. Among the most significant are:

- It cannot rule out corruption 100 per cent. Complementary approaches need to strengthen an IP's impact, such as effective intervention of control agencies and the timely prosecution of criminal offences
- If not managed carefully, like any mechanism, IPs can be subject to abuse and be used for 'window dressing'. Less than optimal IP implementation can superficially look 'good' but will not deliver the same results.

Case Box 4: The IP implementation strategy at the Berlin Airport

As project manager of the Berlin Airport Project, the Berlin airport authority, FBS, has implemented the IP as part of its project communications strategy. Communication plays a key role in the project's implementation. Part of this strategy, in FBS's view, is to establish partnerships with the contractors where interests are aligned. The IP is part of the way this alignment is formalised and comes in addition to a Partnership Agreement that the contractors sign, where they agree to general terms of behaviour towards FBS and their own employees, some risk management measures, information sharing, etc. The IP is therefore not seen as a 'threat', but as a project management tool that helps the company to complete its tasks successfully.

WILL I SCARE AWAY BIDDERS BY REQUIRING AN IP?

Since 1999, the OECD Anti-Bribery Convention makes bribing a foreign public official in a business context a criminal act in all Party States. The 2003 UN Convention against Corruption (UNCAC) confirmed a worldwide commitment to punish and prevent corruption. The UNCAC has so far been ratified by more than 160 countries. Corruption in many manifestations is illegal in most jurisdictions. Bidders across the world are thus facing a fundamentally different legal situation from the one in which they operated for years.

In light of this, companies may welcome the IP as a means of creating a level playing field and should be prepared to enter into agreements designed to provide a base line for all competitors, irrespective of where they operate. There are many reasons why bidders may feel reluctant to sign such commitments. If reluctance is connected to corruption, this is a sufficient reason for a bidder not to participate in a tender; here non-participation is a good outcome for the project. The government and the citizens of the country benefit when corrupt agents stay out of the contracting process. Experience shows that bidders are generally reluctant when IPs are first introduced, but the "good" companies quickly see the advantages and word of the benefits spreads fast.

WHY IS AN IP VALUABLE IF THERE ARE GOOD ANTI-CORRUPTION LAWS IN PLACE?

Despite the existence of laws that forbid corruption, its persistence in public contracting shows the need for mechanisms that increase compliance with the law. An IP does not duplicate the law, but enables compliance by levelling the playing field and assuring contenders that all are acting under the same conditions. As a collaborative tool, the IP also manages something that the law rarely can: a clearer view of how others are behaving, not only because the same agreement is signed by the other bidders and the authority, but because the monitor exists to ensure everybody keeps their IP commitments. IPs also incorporate sanctions contractually, in addition to those already foreseen by the law, thus, IPs do not replace the law, but complement it. IPs provide a mechanism to verify their implementation and enforcement (the monitor). Finally, IPs contribute to increased access to information and accountability, and ensure proper implementation of procedures, thus increasing trust in the law and government bodies.

3. WHAT CAN INTEGRITY PACTS NOT DO? WHEN ARE THEY NOT SUITABLE?

Much of what IPs can do depends on their design, the activities implemented in the process of their application and the extent and coverage given to them. But there are also things that IPs cannot do:

- They do not entirely rule out corruption and without proper monitoring and careful implementation they may not be as effective. When they incorporate sanctions, however, they can be applied for cases where corruption does appear
- IPs are not meant to change contracting rules, although their implementation can certainly facilitate discussions about necessary reform
- IPs do not change organisations themselves – but they can facilitate change
- IPs are aimed at changing behaviour during the contracting processes they are applied to, and may facilitate change beyond these processes, but more needs to be done to achieve such change
- They do not replace the role of control, oversight and regulatory agencies, but complement them
- The increased participation of different stakeholders, including civil society, in the IP process does not release the government from responsibility for decisions made during the contracting process
- Depending on how they are designed and at which stage of the contracting process they are implemented, IPs will work well for the actual tendering process and will have some impact on the previous stages, but are less effective if not fully in place by then. Specific transparency and accountability measures need to be in place during the budgeting and decision-making stages, to address corruption risks during those phases.

4. WHEN AND WHERE DO INTEGRITY PACTS WORK BEST?

WHEN SHOULD INTEGRITY PACTS BE IMPLEMENTED?

As illustrated on page 20, different contracting processes occur throughout the project cycle. Each of these processes therefore renders an opportunity to implement an IP. Within the project cycle, some contracting processes might take place during the project preparation phase (such as consultancies for the design, or the engagement of investment bankers to structure the project), while other contracting processes occur during the project implementation phase, such as the construction of infrastructure, or the privatisation of a state asset.

Ideally IPs should be implemented right from the beginning of a project, at the earliest phases of policy-making and project planning, where needs are assessed, key decisions are made and project feasibility is considered. IPs should continue throughout the whole project implementation phase.

Transparency, accountability and specific corruption prevention activities can be undertaken at the beginning, when decisions are being made on how the contracting process will be conducted, what method to use, etc. The IP document itself is normally signed the moment the bidding stage starts, but activities around IP implementation can, and ideally should, cover the stages prior to and after the bidding process. Depending on the type of contract, it may be more or less feasible to include the monitoring of contract execution within an IP. In general, contracts of immediate execution (such as purchases, construction, or maintenance services) may be more suitable to being overseen by a monitoring system like the one included in an IP. In contrast, contracts of deferred or sustained execution (such as utility operation contracts) may be too complicated to monitor through an IP during the execution stage. Monitoring the contract through its execution stage will in any case mean ensuring that the obligations set forth in the IP are honoured, and need not include monitoring service delivery, performance or quality, which is more appropriate for auditing, supervision and other forms of monitoring delivery, such as social accountability tools.

It is useful therefore to have both project cycle phases and stages of contracting processes in mind, and remember that:

1. The IP can and should be applied to the full range of activities concerning a particular investment, sale, licence or concession
2. Ideally, the IP should cover each contracting process, starting with the preparation of the earliest stages: the needs assessment, the consideration of alternative choices and the contract planning before the bidding starts. If not, a dishonest consultant can misdirect the entire preparation process for the benefit of some contractors or suppliers
3. Ideally, the IP should extend until contract execution, meaning it should cover the implementation of the main activity (the execution of the construction or supply contract, especially compliance with all contract specifications agreed and all change and variation orders)
4. At the absolute minimum and only as an exception, when the above is not possible, the IP should start during the pre-bidding stage and last until contract signature
5. Ideally, the entire project cycle should be subject to transparency and accountability measures that facilitate successful project completion. The IP may be suitable during some or all phases of the project, depending on the contracting processes involved and the types of contracts to be awarded.

TO WHAT TYPES OF CONTRACTS CAN INTEGRITY PACTS BE APPLIED?

The IP concept is suitable not just for construction and supply contracts; IPs can be implemented for any type of contract and any type of project. The most relevant elements are the willingness and the capacity (political will) of the authority to implement them.

For example, an IP could be implemented in the selection of:

- The buyer/recipient of state property as part of a government's state asset privatisation programme
- Engineering, architectural or other consultants
- The beneficiary of a state licence 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 sanitation, etc.)
- Complex and custom goods contracts (such as military or defence supplies)
- Management contracts
- Other service delivery contracts.

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 licences and concessions, as well as corresponding services such as consulting and similar technical, financial and administrative support.

Case Box 5: Contracting stages covered by the monitor in the Mexican experience and in at the Berlin Airport

In El Cajón, Transparencia Mexicana (TM) joined the process before the bidding started and remained until the contract was awarded, as did the social witness (SW) engaged as monitor. The implementation and monitoring contract termination dates were also tied to the date set for the award of the contract in the bidding documents. In La Yesca, the SW remained until contract signature, at his own special request.

At the Berlin Airport, the IP was implemented for all the project contracts, starting at the earlier phases of project design and implementation, including the contracting of design consultants. For each contracting process monitored, the monitor will remain until contract execution and his contract expires only once the airport is opened.

Example 1: The Greater Karachi Water Supply Scheme: it pays to start early in the project cycle

In February 2000, TI-Pakistan suggested to the managing director of the Karachi Water and Sewerage Board (KWSB) the implementation of an IP for KWSB's public procurement procedures. In April 2001, after ongoing lobbying by TI-Pakistan the managing director issued a formal letter accepting their assistance in IP implementation in KWSB's public procurement procedures, and particularly in IP application to the Greater Karachi Water Supply Scheme Phase-V, Stage-II, 2nd 100 MGD Project K-III (also known as K-III project).

In May 2001, to confirm the IP implementation, a workshop was organised by TI-Pakistan for KWSB, introducing the IP principle and its benefits in establishing transparency in procurement. Following this workshop, the IP was signed by all consultants bidding for the first phase of K-III: the tender process for the selection of consultants for the design and supervision of the project. Signing the IP was made mandatory for all bidders. TI-Pakistan closely monitored the application of the IP in K-III during this first phase, until the award of the contract, and also contributed with advice and expertise in designing the contracting process and drafting the related documents.

In July 2002, the KWSB awarded the consultancy contract to the best-evaluated bidder, for a contract value of 62 million Pakistani Rupees (approximately US\$1 million), in sharp contrast to the amount initially budgeted of 249 million Rupees (approximately US\$4 million).

By the second phase of the project, the construction phase, the Memorandum of Understanding signed by TI-Pakistan and KWSB had expired and the KWSB management had changed, hence an IP was not implemented. However, the new management supported and continued the process of transparent procurement suggested by TI-Pakistan during the first phase, and the managing director regularly sought TI-Pakistan's advice on transparency and procedural aspects of the award of tenders. The project was completed ahead of schedule at a total cost of 5.5 billion Rupees – well below the initial estimate of 6 billion Rupees.

Further Reading:

TI-Pakistan, TI's chapter in Pakistan, has undertaken activities to promote transparency and accountability in public contracting activities, including projects with the City Government of Karachi and with the Regional Government of Sindh. Find out more at: <http://www.transparency.org.pk>

WHICH PROCESSES TO COVER IN AN INTEGRITY PACT?

In selecting projects and contracting processes where IPs are most necessary, the following ideas are useful:

1. If there are many projects in the agency, one must consider:
 - Projects with more relevant social or economic impact – not just in terms of the contract value but the strategic importance of the project for the sector or the region, and where basic services to citizens are at stake
 - Projects that use combined funds (federal, national or international, combined with local funds, for example) and where different levels of transparency and accountability exist. The IP helps ensure the lowest standards are raised
 - Projects where the risks (real or perceived) of corruption may threaten viability or projects, which are necessary but have been questioned for corruption in the past
 - Complex projects (politically or technically) where a third party's involvement could facilitate decision-making and trust in the process along the way
 - Small-scale projects which deliver services to beneficiaries, who can be engaged in the monitoring process (these are ideal)
 - Very sensitive projects in terms of public opinion, or whose costs represent a big portion of the national or local budget.
2. In selecting the contracting processes within the project, start with the procurement plan/pipeline and pre-select the processes for which to implement IPs. Take into account these criteria:
 - An IP only makes sense in projects that feature bidding processes (competitive, open or restricted). It is of little use in direct contracting processes or single source contracts. Other transparency measures can be introduced in those processes. The point of the IP is the environment it creates for the relationship between the bidders and the authority, as well as among bidders. If there is only one contractor, there is little value added by this tool
 - In large-scale projects which have a relatively high number of separate contracts, IPs can be applied to every contract. If it is not possible to include them all, select the most vulnerable. If there is a single main contractor, provide for checks on sub-contractors by including a clause covering subcontractors in the main IP or by implementing IPs to those subcontracting processes. If this is too complicated, it may be better to use other tools⁹ to ensure transparency in subcontracting processes
 - Major international contractors may have been exposed to IPs in other locations (making it easier for them to understand and accept IPs).

Tip 1:

Start early, and if needs assessment and preparatory phases of the contractual process are already underway, get a third party (preferably the IP monitor) to examine existing documents and decisions and open up procedures through public hearings. Remember that the IP process must start, at the latest, when the bidding documents are being drafted.

5. HOW MUCH DO INTEGRITY PACTS COST? HOW CAN THEY BE FINANCED IN DEVELOPING COUNTRIES?

The cost of implementing an IP varies depending on the implementation arrangements, the activities included in the process and the complexity of the bidding procedures it applies to. Government agencies may be able to absorb some of these costs, particularly because human resources and fixed costs may already be accrued in the agency's budget or it may obtain inter-agency support to increase capacity. NGOs and other organisations require detailed costing of their infrastructure and coverage of their administrative costs. In some cases, monitors may be able to deliver their services as volunteers, on a pro bono basis or at a reduced fee (for example, if the monitor is a retired government official who already receives a pension), but this will most likely be the exception. Under any implementation model, the biggest portion of costs is normally allocated to the monitor's fees and expenses. Costs of an IP can usually be split into two parts. Firstly, the management of the Integrity Pact, often undertaken by a civil society organisation, and secondly the hourly wage and expenses of the independent external monitor. In the past, IEMs have received anything from US\$50 to US\$150 dollars an hour for their work. The time spent will vary with the various stages of the process, with highlights during the vetting of the invitation to bid, the tenders submitted, the evaluation and then again change orders during the execution.

In some cases, the monitor is more than one individual. In order for monitors to be effective in their duties sometimes two people are required. For instance, one being an engineer with the technical expertise necessary to monitor, and the second a lawyer familiar in the relevant legal basis of the project and procurement in general. This will drive up costs, but will help ensure the IP is effective.

Regardless of the funding method, attention should always be given to protecting the independence of the monitor, so his/her credibility and efficacy are never affected. There are different ways to finance IP implementation:

- The authorities' own resources. In this case, potential conflicts of interest need to be addressed and if the process is funded not through the public budget but from other resources, the source of the funds must be disclosed
- Contributions from donors and project financiers. This may enable government agencies and NGOs to acquire the necessary capacity to implement IPs and may promote and facilitate the dissemination of lessons learnt
- Through fees paid by the bidders. Under this scheme all bidders contribute the same amount (a fixed figure, normally reflecting a certain percentage of the estimated contract value) as the cost of participating in the tender. It is important that all bidders contribute and that the amount be the same for each in order not to create inequalities. The IP and monitoring costs during the contract execution period can be paid in part or fully by the winning bidder.

It is possible to combine some or all of these sources. A combination could help to reduce risks and concerns related to possible conflicts of interest in the funding of IPs.

Example 2: Experience with Integrity Pact costs

In the experience of TI chapters implementing IPs, the costs of implementation range from US\$50,000 to US\$200,000. A meaningful average figure cannot be established, as cases are different in magnitude and complexity and therefore not always comparable. Nonetheless, a general estimate for the implementation of an IP on an infrastructure bid, covering all aspects of the monitoring process, including management of the IP for a period of a whole year, could cost up to US\$100,000.

Case Box 6: The cost and funding of the Integrity Pacts in El Cajón and La Yesca

Social witnesses in Mexico are paid for their role. The public would view non-payment with suspicion ('Where are they getting their money from?') and so *Transparencia Mexicana* (TM) places great emphasis on ensuring that individuals performing the SW role are paid. The amount is less than a full commercial rate, but is nevertheless substantial (for the El Cajón and La Yesca about US\$95 per hour, with a cap depending on project type). In their experience and given the activities they undertake, an average IP will demand about 50 to 90 hours work, and could last over the course of a year. Currently, under the regulations issued by the SFP in Mexico (see Case Box 33: *Regulating the SW in Mexico: the Decrees of December 2004 and May 2009, page 79*), the entire cost is covered by the authority. Before the regulation was issued, TM used three different ways of funding the costs associated with implementing an IP and with the SW:

- 100 per cent of the cost was covered by the authority
- 50 per cent was paid by the authority and 50 per cent by the winning bidder (or different proportions) – the contributions by the bidders could be voluntary or mandatory
- 100 per cent of the cost was paid by the winning bidder.

In a few cases, TM paid the implementation costs from its own resources. Before the regulation was issued, about 70 per cent of the 60 IPs that TM had, at that time, implemented had been paid for by the authority, and about 25 per cent of cases had been funded by the winner. *Transparencia Mexicana* paid for the others with its own funds.

The amount received by *Transparencia Mexicana* includes the SW's fees, direct costs involved in the IP and an overhead. Of the full costs, about a third corresponds to the SWs fees, which are based on hourly rates up to a maximum amount pre-established in the contract. *Transparencia Mexicana* oversees that the declared hours worked correspond to reality. In El Cajón, the payment mechanism included a combination of funds from the CFE and voluntary (fixed) contributions by the bidders (only a few of whom actually paid). For La Yesca the costs were covered entirely by the CFE. TM's service delivery contract for La Yesca established minimum and maximum prices, determined by the final amount of hours taken, on the basis of an hourly service rate. The final cost of the IP (including the monitor fees) for La Yesca was 903,900 Mexican pesos (approximately US\$68,000).

Under the current legislation, the fees payable to the social witness are determined by the government considering the magnitude of the contracting process and the available budget.



INTEGRITY PACT DESIGN

“For all the activities that are planned, and to identify what is needed to be done, three guiding principles will be helpful for the design of the Integrity Pact process: transparency, stakeholder involvement and accountability.”

As part of the IP process a number of activities associated with the contracting process will be implemented. These can take place before and/or after the IP is signed. The authority will also have to work on the form and content of the IP document.

For all the activities that are planned, and to identify what is needed to be done, three guiding principles will be helpful for the design of the IP process: transparency, stakeholder involvement and accountability.

Thinking about these elements throughout all project stages will allow different features to be introduced into the process, depending on the particular characteristics and circumstances of the project:

Transparency

- What kind of information needs to be made public and when?
- What means should be used to disseminate or provide access to that information?

Stakeholder involvement

- Which other stakeholders (can) have a say in the terms of the project?
- Other government agencies? Communities?

Accountability

- Who is making decisions in this process, and how?
- Are those decisions and their basis being made public?
- Are the sources of funds used to finance this project being informed of its implementation?

1. GETTING READY AND DEFINING THE INTEGRITY PACT SCOPE

As part of the IP implementation process, it is possible to integrate additional activities to the signature of the IP document. These activities will be useful in establishing sufficient understanding of the tool and consensus for signing it. They will also be useful in establishing understanding of the process, building legitimacy and compliance, and introducing greater transparency and accountability. The activities required depend on the scope of the IP and the stage of the contracting process, therefore:

1. Determine the possible options available at this particular stage of the contracting process: Has the decision to undertake the project already been made? Has the contracting process already started? The IP document only makes sense if the bidding process has not already started. If it has, it is too late and other transparency and accountability measures must be implemented. If not, the IP process and contents can start being designed.
2. As the design process is underway, determine what needs to be achieved and how much authority is needed to make those decisions. Will someone else need to be involved?
3. Decide on implementing arrangements for the whole IP process – including the distribution of responsibilities between the authority and the NGO, and an appropriate monitoring system – and start involving possible stakeholders and participants by sharing information about the IP.

1.1 SHOULD SIGNATURE BE MANDATORY OR VOLUNTARY?

Experience indicates that it is better that the signature of the IP be mandatory, i.e. only bidders who sign can participate in the bid. This guards the effectiveness of the IP and ensures a level playing field. An IP with voluntary signature can lead to a situation where not all participating bidders are subject to the same rules, thus rendering the IP ineffective.

However, to avoid excessive rigidity and to preserve the substance and relevance of the contracting process, it is advisable that the requirement of IP signing be essential but amendable. So if a bidder forgets to sign the IP or misplaces it, the bid should be valid if, on request by the authority, the bidder incorporates the document into other tender papers. What is important is the intention of the bidder to sign the IP, and that his/her commitment is clear and unequivocal. This is particularly valid for unilateral declarations or IPs filed as separate documents (see page 39, What forms can IPs take?).

It is always important to ensure that the bidders understand fully the extent of the commitment they undertake by signing the IP, even if it is mandatory. This is why sufficient effort should be invested in communicating and explaining the IP and its contents (see the guidance offered on communication, page 57).

1.2 SHOULD CONTENT BE MANDATORY OR VOLUNTARY?

When an IP has mandatory content, it works as a standard document with the content pre-determined by the contract giver and not subject to negotiation with the bidders. When the content is voluntary, bidders are given the opportunity to discuss the terms of the IP and to propose modifications under certain restrictions. The latter is problematic, as negotiating the document with multiple parties reduces the quality and the strength of the undertakings, as well as affecting the level playing field, as negotiating powers and capacities among bidders may be uneven. The best option is therefore to establish a standard mandatory document. Where concrete, context-specific conditions indicate otherwise the best choice is that which adapts best to the culture, context and characteristics of the project, preserves the essence of the IP and provides for the most clarity and ease of management.

Case Box 7: Mandatory or voluntary signature?

In the Berlin Airport case, bidders who do not sign the IP will not be considered in the bidding process. This is consistent with an FBS company principle and a rule in the contracting procedures on treating all bidders equally.

For La Yesca and El Cajón dams in Mexico, Transparencia Mexicana's (TM) experience has been varied. Initially the signature of unilateral declarations of integrity (UDIs) was mandatory, meaning that bidders who wouldn't sign were excluded from the bid for not fulfilling the technical requirements. TM changed this approach with time, realising that in the Mexican context and under its specific regulatory framework, it was more productive to leave signatures as voluntary. Not signing would still have a reputational consequence, as it would be recorded in the public report submitted by the SW at the end of his/her duties. To date, all bidders have signed unilateral declarations. In El Cajón, the UDIs were mandatory for all bidders; in La Yesca they were voluntary and all bidders signed the IP.

In general it is advisable that the IP signature be mandatory to ensure a level playing field for all bidders.

Case Box 8: Mandatory or voluntary content?

For the Berlin Airport, it was useful to have a standard mandatory document because the large volume of contracts makes it difficult to negotiate with all bidders. The mandatory IP has also made it easier for FBS to handle requests for changes made by some bidders, particularly at the beginning of the project, and also to be consistent with the guiding principle of equal and fair treatment of bidders, ensuring all are subject to the same obligations. The IP text has been moderately refined by FBS through time.

In the La Yesca and El Cajón dams in México, the content of the IP is mandatory, and bidders are not allowed to make or request changes to the contents of the IP.

In general, it is necessary that the IP content is the same for all bidders to ensure a level playing field for all. One good way to achieve that is to make content mandatory. Other options could include an open and public discussion of its contents with potential bidders, after which the content can be set to be mandatory for all participants.

Case Box 9: The form the Integrity Pact takes

In the Berlin Airport, the IP takes the form of a contract signed by the authority (the CEO as its representative) and each bidder separately, including its sub-contractors. The document must be submitted along with the bidding documents. The contract establishes mutual obligations from both parties and the acceptance of the role of the monitor (see Annex 1 for the full IP text).

With El Cajón and La Yesca, TM followed the same approach it uses in other sectors. Bidders and government officials all sign unilateral declarations of integrity (UDIs). Bidders are requested to present theirs along with their bidding documents on proposal submission. Government officials who must sign the UDIs include the head of the contracting agency, consultants and other advisors, even if they are not part of the agency staff, and the staff and other public officials involved in the bidding process. These are standard texts in both cases.

The declaration signed by the government officials contains (see Annex 2 for the original text):

- A general commitment to integrity
- An undertaking to abstain from any behaviour that directly or through third parties induces or changes the proposal presented and its evaluation, or the result of the procedures, or causes any other situation that would result in an advantage for any particular bidder
- A commitment to grant access to Transparencia Mexicana, as SW, to all information generated through the process.

The declaration signed by bidders contains the following:

- An undertaking to abstain from any behaviour that directly or through third parties seeks to induce public officials to distort or change the evaluation of the proposals or the result of the procedures, or causes any other situation that would result in an advantage for them as bidders
- Their consent for the monitor to access all relevant information regarding the bidding process and his/her participation in all meetings.

With La Yesca, for example, the UDI was signed by 26 officials involved in the bid, ranging from the CFE President to the Resident in Charge of the Preparatory Activities, including consultants and advisors.

2. WHAT FORMS CAN INTEGRITY PACTS TAKE?

While form makes no difference to the legal effect of an IP, it has different effects on 'the process' and the signature requirements.

THE INTEGRITY PACT AS A CLAUSE WITHIN THE TENDER DOCUMENTS

This is a form of mandatory IP, where the undertakings by the bidders are incorporated into the tender documents and are agreed to when the bidders submit a tender proposal or participate in the prequalification stage. This form should also include a similar undertaking by the government. It is similar to the unilateral declaration (see below) and must be signed by all bidders who submit proposals.

THE INTEGRITY PACT AS A SEPARATE CONTRACT

The IP is included as a separate contract from the bidding documents and its content can be determined as voluntary or mandatory by the authority (see previous section). It is the ideal form, as it makes very explicit that the undertakings include both contractual sides and all signatory parties: government authorities and all bidders. In this sense, the contract is multilateral as it establishes obligations among all participants and with regard to each other. This allows for some further 'legal engineering', such as creating entitlements for losing bidders in cases where corruption exists, which is not possible under unilateral declarations.

THE INTEGRITY PACT AS A UNILATERAL DECLARATION: AN INTEGRITY PLEDGE

The bidders' and the government officials' commitments can also be contained in separate unilateral pledges. In this case it is highly desirable to assure that the pledge text is standard and identical to the document signed by the other bidders and other officials.

For these unilateral pledges to be fully considered an IP, the corresponding authority's undertakings must be submitted at the same time and be known to the bidders. Otherwise, the IP process would not acknowledge the demand-side of bribery and would not give the bidders further assurances that they will not be asked to pay bribes. The IP as a set of unilateral declarations is therefore possible and valid, but not optimal. However, there are ways to inject further strength into unilateral declarations, particularly with ample scope for the monitor to oversee the process and provide assurances of compliance to all participants.

3. WHAT DO INTEGRITY PACTS CONSIST OF? WHAT ELEMENTS SHOULD BE INCLUDED?

The essential elements of an IP are:

SIGNATORY PARTIES

1. A government office (the authority) which is normally the entity inviting public tenders for contracts; in cases or countries where procurement decisions are made by a central procurement office, the IP may be signed by both the office in charge of procurement and the office that will administer the execution of the contract and operate the procured facilities.
2. All bidders participating in the tender.

MAIN OBLIGATIONS

- An undertaking by the authority that its officials will not demand or accept any bribes, kickbacks, gifts, facilitation payments, etc., with appropriate administrative, disciplinary, civil or criminal sanctions in case of violation
- An undertaking by each bidder that it has not paid, and will not offer or pay, any bribes, kickbacks, facilitation payments, gifts, etc. in order to obtain or retain the contract; along with the appropriate contractual, administrative, civil or criminal sanctions in case of violation
- An undertaking by each bidder that it has not colluded and will not collude with other bidders in order to rig or influence the tender process in any way
- An undertaking by each bidder to disclose to the authority and the monitor all payments made, or promised, in connection with the contract in question to anybody (including agents and other middlemen). This refers to payments made directly, as well as indirectly through 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
- The explicit acceptance by each bidder that it will have to provide the same IP undertakings from all its sub-contractors and joint-venture partners.

OTHER POSSIBLE OBLIGATIONS

Including further obligations in the IP brings other activities and behaviour under the umbrella of what the monitor should oversee, and makes the IP sanction system operational in these cases as well.

Other obligations for bidders:

- Bidders can be advised or requested 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 commitment by each bidder that the documents and information provided are truthful, and the acceptance of strict liability for misrepresentation, fraudulent representation or false declarations
- A statement by the bidder that it has not been involved in conduct forbidden by the IP or any other related corrupt behaviour in the period prior to the bid (this can be 3-5 years, for example). If it were involved, the bidder is required to disclose the case and to show what it has done to address the issue and to correct the problem and its causes
- A cap on payments to agents. Considering that agents and middlemen are often used (sometimes primarily) as instruments for paying bribes, the IP contains a stipulation that payments to agents must not exceed 'appropriate amounts for legitimate services actually performed'
- When an IP is implemented in a consultancy contract, consultants should commit themselves not only not to pay bribes in order to obtain the contract, but also to design the project or project components in a manner that is non-discriminatory, assures wide competition and will not offer advantages to a specific bidder
- The extension of the undertaking by bidders to other obligations, such as taxes and social security payments in connection with the bidding process.

Other obligations for authorities:

- Government officials of all ranks and hierarchy involved directly and indirectly with the contracting process can be requested to undertake an ethical commitment akin to the IP. This commitment can establish in further detail certain rules of interaction with the bidders during and after the tender process, including rules to manage potential conflicts of interest and put restrictions on future employment ('revolving doors'⁹)
- The authority commits to making public relevant contracting process information; this could include all information mandated by law and other additional aspects or elements considered relevant depending on the project. However, access to legitimately proprietary information should remain restricted; therefore this commitment must also include the undertaking by the authority not to disclose and to protect legally confidential information provided by the bidders
- The monitor should be granted the same access to all information by the authority and the bidders, subject to a confidentiality agreement. If necessary (see implementation arrangements on page 52), similar access could be granted to a representative from civil society
- Officials involved in the contracting process are required, on a regular basis, to disclose their own and their family assets, so as to offer perspective if such officials acquire wealth from a source that cannot be explained.

Other obligations for both bidders and authorities:

- The extension of the undertaking by the authority and the bidders to refrain from 'all other illegal acts'
- The commitment by the authority and the bidders to report to the monitor any attempted or fulfilled breaches of the IP.

SANCTIONS

Sanctions should be established as a consequence of violation of the IP clauses. The authority must have discretion in applying all or some of the sanctions, and in deciding on the severity of the individual sanctions, depending on the severity of the breach or violation.

These sanctions are contractual once they are included in the IP, which has two consequences:

1. They do not exclude, substitute or modify in any way the criminal, civil, disciplinary or administrative sanctions established by law, as these cannot normally be changed via a contractual arrangement.
2. They apply only to the signatory parties.

Further Reading:

For more on debarment, read TI's recommendations to the EU on setting an ideal debarment process at: www.transparency.org/content/download/5661/32802/file/TI_EU_Debarment_Recommendations_06-03-28.pdf.

See also the Multilateral Development Bank's mutual debarment policy at: http://siteresources.worldbank.org/INTDOI/Resources/Bank_paper_cross_debar.pdf

A brief overview is available here: http://siteresources.worldbank.org/INTDOI/Resources/Cross_Debarment_Brief.pdf

Some of the sanctions that should be included in an IP in case of breach by any of the bidders include:

- Denial or loss of contract, if the infringer is also the winning bidder. Exclusion from tender processes can be included for all bidders before the award has taken place
- Forfeiture of the bid security and performance bond, where these have been requested as part of the tender
- Liability for damages to the authority and the competing bidders. One way to establish this is by including a 'liquidated damages clause', which determines in advance the amount of money that a breach of contract would cost the infringer. The advantage of liquidated damages is that they save the often time-consuming procedures for establishing the appropriate amount and, if set at an appropriate level, they can act as a strong disincentive. This also shifts the burden of proof from the party claiming damages to the party who infringed the IP. An option can be included for either party to claim higher or lower damages if it can prove the actual damage exceeds (or falls short of) the level set in the liquidated damages clause
- Debarment of the violator by the authority from contracting with the government (or just the authority) for an appropriate period of time. Debarment mechanisms can be set by law or regulation or on a contractual basis. If the country in question does not have a formal mechanism of debarment, it is enough to establish in the tender documents that a requirement for participation is not to have been excluded or debarred from other contracting processes, or not to have had a contract terminated because of corrupt conduct or breach of an IP. However, a formal, transparent and accountable debarment process is ideal and if it is possible to establish, a database of debarred companies can allow other government agencies to utilise important debarment information across other agencies.

It is highly recommended that the sanctions and the process of imposing them are proportional to any breach, so as not to introduce unfairness to the IP. For example, the breach of secondary obligations may be a cause for exclusion from the tender or may give rise to a loss of 'evaluation points' within the tender, while breach of a primary obligation should give rise to the full application of sanctions.

IP breach by government officials is usually subject to disciplinary, administrative, civil and criminal sanctions that cannot be added to or modified contractually. The IP should therefore include a swift mechanism for the monitor to report wrongdoing to the appropriate control and prosecution authorities.

Suspicion alone cannot be enough for imposing sanctions. 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 valid. Recently, evidence of a violation has been considered adequate 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 need to be avoided.

Suspicions, 'red flags' (i.e. any piece of information that indicates a possible problem or risk of corruption) and other indicators should be enough to trigger investigations and other clarification efforts by the monitor and/or the authority. In the absence of a satisfactory explanation or clarification, or when it becomes clear that wrongdoing has occurred, this should be reported to the appropriate prosecution authorities and the IP's mechanism for imposing sanctions should be set in motion.

A MONITORING SYSTEM

The inclusion and implementation of an independent, accountable and credible monitoring system is essential to the IP document. The monitoring system performs various essential functions within the IP:

1. It ensures that the IP obligations are fulfilled by all parties, therefore making the IP credible.
2. It performs crucial monitoring and oversight duties for the contracting process itself, and preferably for contract execution as well. These duties can be described in the IP or in a separate monitoring agreement.

A more detailed description of how a monitoring system can be implemented is on page 69.

STAKEHOLDER PARTICIPATION

The IP can provide means of stakeholder participation that ensure all relevant parties can contribute. This includes the communities affected by (or benefiting from) a project, potential bidders, other government agencies and authorities in charge of formulating policies relevant to the project, or development agencies, in addition to civil society organisations and the media and, through them, the public. This can be achieved by several means:

- Specially targeted public hearings or town-hall meetings. These can have different purposes, for example:
 - facilitate discussion with all potential, interested bidders and communities on the bidding documents and project specifications
 - open question and answer sessions with all participating bidders on clarifications to the bidding documents
- facilitate discussion with the community about the environmental and social impact and characteristics of the project; in many countries, this is beginning to be a requirement.

Case Box 10: Sanctions

In the IP implemented in the Berlin Airport project, the amount indicated in the liquidated damages clause is three per cent of the contract value, up to an amount of €50,000 (US\$68,000). In addition, the authority is entitled to exclude the bidder from the bidding process (and in case of serious violations, also from future bidding processes). This amount is increased to the equivalent of five per cent of the contract value (without a ceiling) if the contractor violates any of the provisions of the IP after the award of contract. In this case, in addition, the authority may cancel the contract and, in case of serious violations, exclude the contractor from future bidding processes. In addition, the monitor will notify the prosecutor in case of IP violations. This is relevant as FBS (The Berlin airport authority) employees are not government officials, as the company is structured as a private company although it is publicly owned. It is perceived by FBS that the sanctions included in the IP produce a relevant deterrent effect.

The La Yesca and El Cajón IPs do not contain additional sanctions to those established by the law in case of corruption. However, a swift process of reporting increases the deterrent effect: Transparencia Mexicana (TM) informs authority officials at the highest level, withdraws from the process and reports directly to the public and the relevant authorities the failure to comply with the agreement. This did not actually occur in either El Cajón or La Yesca.

In June 2012, the Mexican government issued a “Federal Anti-Corruption Law in Public Contracting” introducing criminal and administrative sanctions for individuals and also for legal persons; the law is applicable to contracting processes at the federal level. The Mexican government also reports the amounts saved in public contracting or recovered through control and sanction mechanisms. See www.funcionpublica.gob.mx/index.php/transparencia/transparencia-focalizada/control-de-la-gestion.html.

Example 3: Creative sanctions in Integrity Pacts in Colombia

TI-Colombia introduced into some IPs the possibility of donating the money resulting from the imposition of sanctions to a charity, or of redistributing the amount among the compliant bidders. These are creative ways of introducing good incentives for reporting wrongdoing.

Tip 2:

In the dispute resolution mechanism (see page 44) it is important to include a process to determine whether a breach of the IP has taken place. It can be initiated by the monitor, for example, or directly by any bidder or government official. The process can indicate what standard of evidence can be used, the time in which it must be processed and different options for different types of breach.

Case Box 11: Dispute resolution mechanisms and the process for imposing sanctions

In the Berlin Airport Project, special conflict resolution mechanisms exist under German law which are applicable to FBS; it was therefore considered unnecessary to establish an additional mechanism in the IP. This also applies generally to the imposition of sanctions, although some can be imposed directly by FBS. For example, in cases where it has been established that an IP violation has taken place, FBS has the following options: i) it can exclude the bidder from the bidding process; ii) it can cancel the awarded contract if the winner was responsible; and iii) it can debar the non-compliant bidder/contractor from future participation in contracts with FBS. The monitor doesn't impose sanctions; both the IP and the monitoring agreement establish that on suspicion of violation, the monitor should notify FBS top management, who should endeavour to clarify or correct the situation. If such a response is not forthcoming within a reasonable time or if there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities.

The La Yesca IP does not contain additional sanctions to those included in the law and therefore does not include a special application process. Only the relevant prosecution authorities and the courts can impose sanctions, and the process is therefore not described in the IP, but left to legally established procedure. The IP only establishes that Transparencia Mexicana would inform the authorities and report to the public and the prosecutors in case of violation, and would also have the right to withdraw from the process.

Example 4: Dispute resolution mechanisms in other cases

In IPs implemented in Ecuador, Colombia, Indonesia and Pakistan, with TI chapters leading the implementation, national arbitration has been included as the dispute resolution mechanism. In Ecuador, this took the form of an arbitration council, while in Indonesia, the national arbitrator would first submit the dispute to the ombudsman (national or regional) and then consider it only in the second instance, with the possibility of judicial revision thereafter. In a few cases in Colombia, international arbitration was also included.

In the general experience of TI chapters worldwide, the IP dispute resolution mechanism has been activated only in a handful of cases. Reasons for not using it have been diverse, but in most cases it is because the IP has created better conditions for integrity in procurement processes, so claims of IP breach have rarely occurred. Where there have been claims, one bidder thought it would be too expensive and not worthwhile to go through arbitration; other bidders have claimed to be afraid of being harassed by public officials working for the authority in future bidding processes if they went to arbitration. This is an area where IPs still need to further develop, but even if only symbolically, the resolution mechanism is an element that plays an important deterrent role simply by its inclusion.

- Proactive access to information on the relevant stages of the process, the grounds for decisions, etc. As part of IP implementation, a particular information mechanism can be devised for this, for example, using the internet, radio or written media, depending on the most popular means of communication in a specific location
- Civil society can also play an active role in enabling participation in the process by channelling information, representing citizenry and providing expertise and support in organising public hearings. It can also act as monitor and IP lead implementer (see Implementing arrangements, page 52).

DISPUTE RESOLUTION

Parties to an IP may have differences arising from its interpretation or implementation; to address these differences with due process, a dispute resolution mechanism can be included. In addition, it is not normally the monitor who is able to impose sanctions. These powers remain within the authority and with the corresponding dispute resolution body, should this be needed. In some countries, where special tribunals or judicial authorities have a mandate to deal with these or related issues, such mechanisms may not be necessary. Within these frameworks, the IP dispute resolution mechanism can play two fundamental roles:

- Resolve disputes about the IP execution
- Impart the sanctions set forth in the IP.

Not all IPs need to include both functions in the dispute resolution mechanism.

Many IPs use arbitration (national or international) as a dispute resolution mechanism. Why arbitration rather than a national jurisdiction court?

- When international companies are involved:
 - Relying on the jurisdiction of a northern country is likely to be unacceptable to authorities 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 and commands the confidence of international companies, submitting a dispute to it will save time and costs.
- Even if only national companies are involved:
 - Arbitration and other 'alternative dispute resolution mechanisms' can often provide faster conflict resolution mechanisms than courts, and may be able to clarify conflicts at an earlier stage
 - Where such an accepted national arbitration system does not exist, the parties can 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).

However, in some cases, the cost of arbitration may be substantial and this should always be explored before agreement on arbitration is secured.

A crucial aspect of the dispute resolution mechanism, whatever form it takes, is that it should be independent, transparent and accountable. For these reasons, the following are important considerations when agreeing the rules of arbitration:

- The selection process for the arbitrator(s) should be undertaken with objectivity; most often, selection by a third party is the optimal solution. The option most preferred is that each party nominates one arbitrator and those two designate a third
- With regard to transparency, at the very minimum, the notification of initiation of procedures should be made public, as should the arbitration award or final decision
- Consistent with the IP's nature and goals, the arbitration agreement should ideally enable third party contributions (i.e. *amicus curiae*)¹⁰
- The agreement should also establish clearly the applicable law and the place of session; ideally the applicable law should relate to the place of contract execution.

Tip 3:

Mediation and other Alternative Dispute Resolution mechanisms (ADR) can also be useful as part of a resolution mechanism for the IP, and at times may be less expensive and quicker than arbitration.

OTHER FEATURES

1. Whistleblower protection

The IP can also contain measures to protect whistleblowers. Among these are:

- The requirement that internal regulations and commitments to protect employees and officials who report wrongdoing from being fired or sanctioned in any way, be established by both the authority and the bidders
- The implementation of anonymous communication mechanisms for the monitor to receive reports of wrongdoing, such as a hotline.

2. Information disclosure

The IP can also determine special information disclosure mechanisms, such as the internet and public hearings. In addition, the IP can be very useful in establishing the disclosure of documents and special information, even in cases where the law does not require it (but has also not forbidden such disclosure). For example, the publication of draft bidding documents, questions and answers, grounds for the award, actual awarded contracts, change orders and renegotiated agreements is not required by law, but can be agreed in the IP if the law does not forbid it.

The IP can also determine special mechanisms for making information public, such as a dedicated internet site, a local newspaper or the use of radio or TV for certain procedures.

4. HOW TO GET BUY-IN?

4.1 GAINING SUPPORT FOR INTEGRITY PACTS FROM GOVERNMENT AUTHORITIES, STAFF AND OTHER STAKEHOLDERS

It is important for others to understand the added value IPs can produce. It is also important to understand why others may be sceptical about this. The basis of gaining support lies in addressing these two dimensions, therefore:

- Be sure to explain what the IP is about and what it aims to do. If expertise is lacked, there are many out there who possess it (a TI chapter, an expert or other government agency who has implemented an IP, a monitor in some other process, etc.). It is important to reach out and bring them on board
- Those in charge of decision-making over whether to introduce an IP are among the first who need to understand it. However, ensure that other people indirectly or directly involved are also well informed
- Understanding promotes compliance, therefore ensure that bidders, the government officials working for the contracting department or agency, and all others involved are accurately informed about how the IP works.

Understanding reasons why others may be sceptical about IPs is key to being able to address them. A basic rule of communication is: 'know your audience'. This applies here, therefore:

- Make sure there are mechanisms of dialogue and participation that enable the initiators and the implementers to understand what any objection may be about
- Take concerns and objections seriously: they may be right and addressing them in a constructive way may improve the IP's impact
- Public hearings or roundtables with various participants are a good way to find out what different people think about an IP.

4.2 COMMON OBJECTIONS AND HOW TO ADDRESS THEM

To bring other stakeholders on board when this is not the normal process is always difficult, because it means sharing power. This is why IPs often face objections from both government officials and bidders, which need to be managed.

Common objections include:

‘This will cause delays to the project’:

Authorities involved in projects with IPs experience the contrary. The IP process actually saves time because it helps to manage and avoid conflicts that otherwise could have arisen through reduced transparency and accountability. Needless to say, if corruption occurs, this will affect the viability of the project and may even stop it all together. With these considerations in mind, the time required for discussions and revisions embedded in the IP process is an investment and not a cost.

‘I am not corrupt; I don’t need to sign this’ or ‘If I sign this it will look as if I’m corrupt!’:

It is important that everyone involved in the IP understands the way it operates. This should help reduce defensive reactions and enable reluctant parties to join. Parties who are not corrupt should feel confident about signing, and if they plan not to do anything corrupt there is nothing to lose by signing an IP. In practice, those who do not sign are perceived with suspicion by those who do.

‘This complicates the project’:

What complicates the project is corruption, and the risks are too high to be ignored.

‘We don’t need an intruder’:

Monitors are mechanisms of accountability. In principle, government officials can rarely speak of ‘intrusion’ legitimately, as public office is public business. However, it is normal that public officials new to the IP concept and the workings of the monitor feel sceptical; the monitor’s capacities and personal qualities will affect how his/her role is perceived and actually performed. The monitor is not designed to be an intruder, but a relevant tool to make the process legitimate, credible and viable.

Case Box 12: Initial concerns

The management at the Berlin Airport expressed concern over the delays that implementing an IP would cause. This concern was later addressed when the monitor’s first reports came in and managers realised that the time the monitor took to revise bidding documents, to provide clarity and to explain the rules to bidders was later saved by minimising conflict and misunderstanding with bidders, and by enabling the introduction of corrections and improvements to the process early on. It is not believed that the IP has caused any delays in the project.

In El Cajón, the CFE managers in charge of the contracting process received instructions from the highest level to implement an IP. Initially they did not know how it worked, as this was their first experience. Time was among their major concerns. By the time La Yesca began, El Cajón was already operational and had been built on time. Although the law enacted in 2004 by the Public Administration Authority required an IP in such processes, CFE officials in charge of the project say they would have requested an IP again anyway.

Tip 4:

Some concerns can be addressed by better understanding the IP; some may be addressed by improving or adapting its application and others may only be overcome once those concerned see the IP in practice. Don’t expect all opposition to clear before the start of the process!

Table 3: Integrity Pact implementation budget items

Item	Notes	Example		
		unitary costs	Units	Total
Implementation costs				
Human resources (including time invested by staff & supervisors)	Estimate the number of staff, professionals and managers you will need to involve in the process, and how much time they need to invest. This will all depend on the IP duration, the project complexity and the number of contracting processes to cover. Note that the duration of the IP in turn depends on the type of project and the coverage of the monitoring. Include the time necessary to prepare and implement the IP, to communicate about it and to make all necessary reports. A detailed calculation of these costs is particularly important if the lead implementer role will be played by an NGO, or by a government institution in which additional staff need to be assigned.			
Outsourced technical expertise (external consultants other than the monitor)	These are specialised experts to complement the monitor. In many sectors, projects are usually highly technical and complex, so it is likely an array of expertise will be needed that a single person is unlikely to have. For example, if the main monitor is a civil engineer and your project deals with the construction and operation of a utility by private operators, you may need to add expertise in public-private partnerships and in legal and investment banking. Someone with expertise in utilities may also come in useful. These costs can be included as hourly fees or as part-time involvement from the required professionals.			
Logistical costs of activities & events (public hearings, training sessions, etc.)	Cover costs associated with implementing workshops, events and public hearings - including the location; any costs associated with event management; participants' travel costs, if necessary; translators if different languages are spoken, etc.			
Printing & publication of reports, brochures, communications etc.	In this and the next item, consider all costs associated with communicating about the IP process, how it works and its results before, during and after its implementation. Include all expenses related to the increased access to information that implementing the IP entails; for example, if you set up a special Internet platform to publish bidding documents or if you issue regular newsletters on how the project is advancing. These costs can be reduced by using existing infrastructure (e-procurement sites, the agency's or NGO's websites, a public radio programme or simply office information boards, etc.).			
Administrative & fixed costs	These may be absorbed differently depending on whether more implementing responsibilities are taken by the authority or by the NGO. They include all administrative and operational costs not included above (office rent, office supplies, electricity, etc.)			
Monitoring costs				
Monitor fees	Hourly fees can change depending on location and whether local or international fees apply. Usually the level of effort required is estimated in number of hours and an hourly fee is paid. To keep costs predictable and under control, a cap of a maximum amount can be established. It is important to include follow-up mechanisms to determine the actual number of hours worked.			
Monitor's expenses (travel, fixed costs, etc.)	This is particularly important if on-site visits are foreseen or if the project location is elsewhere than the agency headquarters.			
Total Estimated IP Costs				

5. HOW TO BUDGET FOR AN INTEGRITY PACT?

Budgeting for an IP varies depending on numerous factors such as the scale of the project; the type and amount of independent monitors used and the complexity of the project management involved. Table 3 (above, page 48) outlines some of the key costs involved with IP implementation, from monitors' fees, to logistics and human resources. One can gather from the amount of days and list items the scale of the IP and should allow easy calculation of IP implementation costs and budgeting.

Table 3 outlines a potential break-down of costs for a contracting authority, including the most core elements required for IP implementation.

6. KEY LEGAL ASPECTS OF THE INTEGRITY PACT DOCUMENT

The IP, as described previously, is a legally binding document containing rights and obligations. Whatever form it may take in the specific circumstances of a specific country, it must be a legally enforceable document. Part of its strength is derived from the possibility of its enforcement.

IPs were conceived as, and have for the most part been implemented as, contracts. Therefore they are subject to the applicable contract law and, depending on the extent of the authority's involvement and the national legislation they may also be subject to administrative law. A similar framework governs other contractual forms related to IP implementation, i.e. the Memorandum of Understanding that defines the implementation arrangements (see the section on Implementation, page 54) and the monitoring agreement that establishes the monitor's capacities and duties. These contracts can all be subject to contract law, administrative law and procurement law, depending on the signatory parties.

Different legal systems (civil law, common law, religious law, etc.) may have different requirements in the design and implementation of IPs. What is most important is that the essential elements are maintained; that the principles of transparency and accountability are given due treatment and the enforcement of the IP as a legal document is guarded.

Variation between civil law and common law systems are actually less prominent than usually expected, as legal solutions will appear mostly the same even if resulting from different sources. Differences may be relevant to IP design, concerning different notions of unilateral and bilateral contracts and declarations; the relevance that common law systems give to 'consideration', and different common law approaches to performance and damages.

For example, the description here of unilateral declarations refers to unilateral formation and performance of the undertaking. Under common law, unilateral contracts mostly refer to the unilateral character of their formation and rarely to their performance.

Related to this, the requirement of 'consideration' under common law in order for contracts to exist may make IPs as unilateral declarations less applicable, as contracts derive their essence from a notion of exchange, absent in principle from unilateral declarations. In addition, under common law and generally speaking, a party that commits itself to fulfilling an existing legal obligation lacks 'consideration'. It is therefore relevant to underscore in the text that the IP contains other features than the mere reiteration that the parties will respect the law (no bribes, no kickbacks, etc.), as parties also agree to a monitoring system, to particular disclosure requirements, and to follow certain procedures that may also entail other obligations from them.

Furthermore, the reluctance often found in common law systems to provide for specific performance on contracts' enforcement (performance as agreed, of what was agreed, and no other) does not actually have much effect, as it is often the case that IPs contain liquidated damages clauses that provide for alternative enforcement. However, it may be the case that common law courts are reluctant to enforce liquidated damages clauses if their purpose is punishment and not compensation of damages. The IP therefore would need to be specific in this regard, and if pecuniary punishment is to be included, this should be separate from the liquidated damages clause.

In general, the best option, independent of the governing legal system, is to use explicit written agreements to establish rights and obligations and to use legal tools that make the interpretation and enforcement of the IP as simple and straightforward as possible.

Example 5: Integrity Pacts before the courts

In the experience of TI chapters, only a few IPs have been brought before a justice system for enforcement (in Italy and Colombia). In Italy, the debarment imposed on companies under the IP was approved by the courts without questioning the validity of the IP. In Colombia, the case was dismissed by the bidder before it reached the national arbitration tribunal. There is therefore no experience so far of how an IP document would be acknowledged in court.

INTEGRITY PACT IMPLEMENTATION

“Integrity Pacts should be implemented right from the beginning of a project, at the earliest phases of its design, during the policy-making and needs assessment phases, where key decisions are made and project feasibility is considered.”

1. WHAT NEEDS TO BE DONE TO IMPLEMENT INTEGRITY PACTS?

1.1 IMPLEMENTATION ARRANGEMENTS

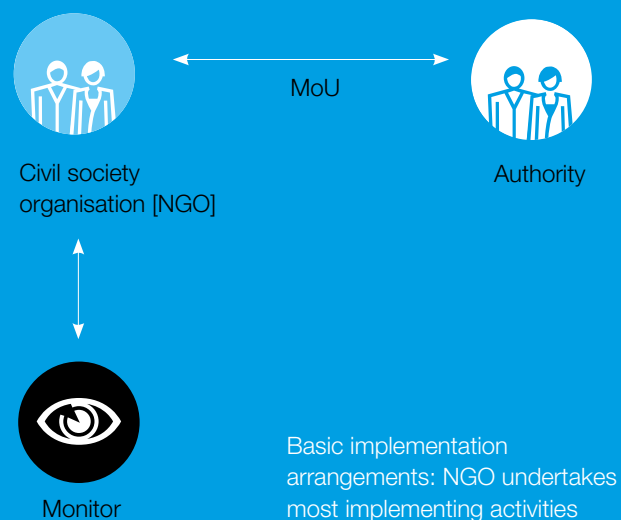
In implementing IPs, the authority with the support of a civil society organisation (a non-governmental organisation (NGO) or a group thereof) assures that all activities foreseen in the IP process are actually carried out. This means the responsibilities, among others, of:

- Facilitating the preparation of the 'IP plan': convening all agencies and stakeholders involved in IP implementation for planning and designing the IP process and including the input of all agencies and stakeholders involved in its implementation
- Gathering support and authority for the activities foreseen in the IP plan
- Ensuring an appropriate infrastructure to make the necessary information available to the bidders, the public and the monitor
- Preparing and facilitating the logistics of all activities (public hearings, workshops, information sessions, etc.) related to the implementation of the IP process, or coordinating with whoever has been defined as responsible
- Coordinating, following up and being responsible for the implementation of the communications strategy related to the IP
- Selecting and supporting the monitor and ensuring he/she remains accountable
- Drafting and signing the monitoring agreement
- Drafting the IP text with the input of all relevant stakeholders
- Implementing the procedure for signature of the IP document by bidders and the authority
- Finding and channelling the necessary resources for IP implementation
- Overseeing compliance with the monitoring agreement
- Being credible in convening different stakeholders around the table
- Explaining the IP fully: how it works and its effects
- Persuading potential participants and other government agencies of its benefits
- Managing IP implementation with credibility and independence; this includes taking the tough decisions it may imply.

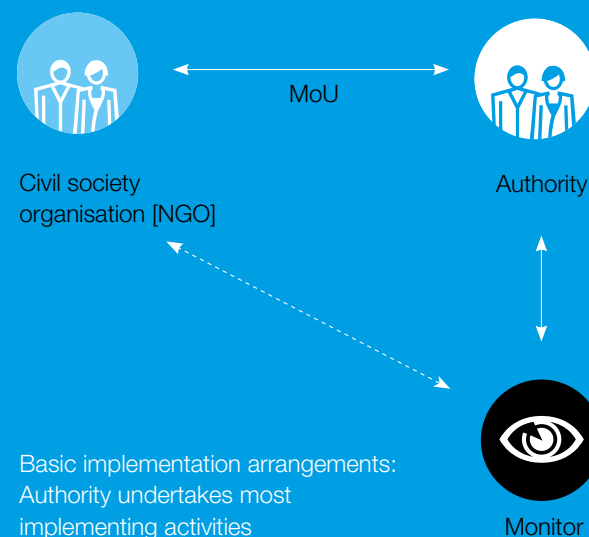
As Graphs 1 and 2 illustrate, different implementing arrangements distribute the responsibilities for these activities differently between the authority and the NGO. Graph 1 shows the case where the NGO takes on most implementing responsibilities and performs as 'lead implementer'. The IP does not take away from the authority its usual responsibility and decision-making power, which remains unchanged in all forms of implementation arrangements. What changes with different forms of implementation is how many activities within the IP process are implemented by the NGO and how much involvement it will have in the process. Whatever the implementation arrangement, it is of the utmost importance that these activities and responsibilities are established clearly; one way to do this is through a Memorandum of Understanding (MoU – see next page). Consistent with the principles of transparency and accountability, it is convenient that such an agreement or its terms of reference be known to others, particularly if additional duties are foreseen.

Graph 2 illustrates a different form of implementation arrangement, where the authority implements more activities within the IP process. In this case, because the NGO plays a different role and to provide credibility and legitimacy to the monitor, a line of accountability with the NGO (illustrated in Graph 2 with the dotted line) should be established. This can also be used for the monitor to report to the public through the NGO. With regard to our case studies, Graph 1 illustrates the Mexican experience and Graph 2 illustrates the Berlin Airport Project.

Graph 1: Implementation arrangements with more activities implemented by the NGO



Graph 2: Implementation arrangements with more activities implemented by the Authority



THE MEMORANDUM OF UNDERSTANDING

Memorandums of Understanding (MoU) can include the following:

- The activities to be undertaken by the NGO and the authority, their rights and duties, among them the possibility for the NGO to withdraw from the process under specific circumstances (see page 81)
- The procedure to be used for the selection of the monitor (see page 75)
- The commitment by the authority to disclose all necessary information, granting the NGO and the monitor (depending on the implementation arrangement) timely access to all such information; and the duty of the NGO to maintain confidentiality over legally protected information
- The processes and procedures to follow if corruption occurs or has been detected
- The extent of the collaboration: whether it includes all contracting processes of the authority or only a few; whether it includes support and collaboration in other activities, such as facilitating public hearings, etc.
- The fees and payment method, should this be the case.

Annex 6 gives examples of existing MoUs that illustrate different arrangements and their contents.

1.2 IMPLEMENTATION REQUIREMENTS

The following should be considered when implementing IPs:

Resources: The activities related to IP implementation require time, human and financial resources. The exact amounts vary depending on the actual monitoring system, the coverage and the activities foreseen. The IP plan should consider the necessary investment and funding sources accordingly. (See page 33: How much do IPs cost? How can they be financed in developing countries?)

Capacity: The activities involved in an IP process require time and knowledge. In making the implementation arrangements, it is vital to establish whether the authority and the NGO have sufficient knowledge, technical expertise and human resources. Is it possible for them to attend to the workload? What needs to be outsourced? Are there enough financial resources for this?

Leadership: Implementing an IP successfully requires vision, persuading and motivating others, and possibly making difficult decisions. It is important that those involved in implementation not only have the technical expertise, but also the capacity to mobilise others to come on board, and the determination to bring the process to completion.

Commitment and credibility: These are closely linked. A real or perceived lack of commitment will affect the credibility of the process and the impact of the IP. Credibility is also associated with capacity and the extent to which those involved in IP implementation can perform their duties neutrally, in the absence of conflicts of interest. These factors also need to be assessed with regard to how the implementing arrangement splits functions between the authority and the NGO; for example, if the NGO will be the main accountability channel for the monitor, its neutrality and own accountability must be certain.

Convening different audiences: An IP must involve a multi-stakeholder effort between government, the private sector and civil society. It is therefore expected that those involved in its implementation have the capacity to convene and interact with different audiences.

Case Box 13: Who's who in El Cajón and La Yesca

Transparencia Mexicana (TM) acts as lead implementer and monitor. Its monitoring role is mainly performed through a social witness (SW) – a knowledgeable, credible and independent individual with highly specialised technical expertise. The SW is engaged in the process through TM, and represents TM at all times. TM supports the SW in various ways, by:

- Providing additional experts (lawyers, accountants, etc.) as needed
- Providing institutional backup and support
- Supervising and guarding the SW's accountability, the SW reports back to Transparencia Mexicana during the course of his/her duties and discusses the appropriate course of action
- Establishing standards which the SW must uphold in performing his/her duties
- Contributing to the review of the draft bidding documents and other contracting process documents.

In certain circumstances it is possible that the SW would like to withdraw from the Integrity Pact i.e. if they feel they are unable to fulfil their duties. The decision to withdraw from monitoring, and others related to the course of action, are taken by TM on the basis of the assessments provided by the SW. The SW only produces a report at the end of the process, on termination of his/her duties. The report is published on TM's website and TM encourages the authority also to publish it in the media.

Current Mexican Procurement Law requires the reports to be published in the website of the corresponding authority, and can also be found in Compranet (e-procurement system) and at the website of the SFP. See <http://www.funcionpublica.gob.mx/unaopspf/tsocial/tsocial.htm>.

In both El Cajón and La Yesca the initiative to implement the IP came from the authorities, based on TM's reputation and experience. After 2004, procurement law requires the use of social witnesses in public works contracting above a certain threshold (approximately US\$51 million for 2013) and at the discretion of the contracting authority under criteria of relevance, risk and impact, among others.

Case Box 14: Who's who in the implementation of the Berlin Airport Integrity Pact

The Berlin IP implementation roles have been spread across different actors. The FBS (Berlin airport authority) legal department has been mandated with the main logistical aspects of implementation and IP integration into the company's operations. Within the company, the construction department is in charge of operations and procurement. When considering who to designate as lead implementer, FBS considered several options: an association of retired experts, TI-Germany (TI-D) or itself. Because the first two had capacity and resource restrictions and the association of retired experts also lacked technical expertise in IP implementation, it was decided that FBS itself would lead, with support from TI-D. In addition, internally, there was also the concern that with the monitoring system, there were already too many outsiders involved in operations; leading the implementation itself was also a way to address this concern.

The possible disadvantages of this model have been addressed by i) distributing the functions and enabling contributions from third parties; ii) strictly enforcing and guaranteeing the independence of the monitor; and iii) facilitating and sharing information on the experience with others. The effectiveness and impact of the IP demonstrates the effort made by FBS in making this work. The monitoring contract is signed by FBS and the monitor; the FBS Legal Department is the main contact point for the monitor and ensures he has access to the information and resources as agreed. In defining the terms of the IP, the contract with the monitor and the selection of the monitor, FBS and its legal department were supported by TI-D, which input directly and helped draft all documents.

Tip 5:

Ensuring the MoU is publicly available increases the transparency of the process and enhances its legitimacy. It also protects the independence of the NGO and the credibility of the authority.

Example 6: Initiative and commitment in Integrity Pacts

In TI's worldwide experience, the initiative to undertake an IP comes from different actors. In some cases it is driven by TI chapters, as in Colombia and Indonesia; in others it comes from governments and other organisations, as in Argentina and Mexico, or from a combination of different actors, as in Germany, India and Pakistan. However, where the initiative does not come from the government, it still requires the support of government officials determined to control corruption. Indeed, the political will and determination of the authorities is crucial. For example, in 1999 TI-Colombia (Transparencia por Colombia) launched IPs as a strategy for strengthening the integrity of contracting processes in the country. The initiative was supported by the Vice-President of the Republic and the Presidential Anti-Corruption Programme (an agency based in the executive branch and reporting directly to the Vice-President), who jointly with TI-Colombia promoted IP implementation across other government authorities, control agencies, donors and multilateral financial institutions, civil society organisations and the private sector. TI-Colombia went on to lead the implementation of 62 IPs in a wide variety of sectors.

Case Box 15: The federal government as financier: the social witness in the use of federal funds in Mexico

The Mexican Federal Government requires a social witness (SW) in local projects funded with federal funds, to reassure it that funds will be spent properly at the local level. Such was the case in the Acueducto II project, designed to deliver 50 million cubic metres of water per year to the city of Queretaro, with an approximate cost of three billion Mexican Pesos (approximately US\$250 million). In 2006, Transparencia Mexicana was selected to implement an IP in the selection process of the contractor. The project was inaugurated on February 2011.

Further Reading:

For further references on collective action strategies applied to anti-corruption you can see the Global Compact's overview see www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/CollectiveAction2010.pdf and for guidance and references see http://www.unglobalcompact.org/Issues/transparency_anticorruption/collective_action.html

1.3 WHAT IS (OR COULD BE) THE ROLE OF DIFFERENT ACTORS

Contracting agencies: These can be the best initiators, can perform as lead implementers and are necessary parties to the IP. It is not ideal that they implement IPs on their own; rather it is encouraged that they do so in coalition with others, particularly civil society organisations. By working with others, they overcome problems associated with the absence of independence and credibility, and can address conflicts of interest that could emerge by being party to an IP and sole implementer at the same time.

Other government agencies: These can be excellent initiators and can also serve as facilitators or lead implementers.

Regulators: Regulators have an important responsibility in safeguarding the transparency, integrity and accountability of a project. This makes them excellent initiators and supporters of IPs.

Other control, oversight or accountability agencies: Other government agencies may have formal duties as supervisors or organisations with political or technical control. They also gain through the IP, as it raises the accountability of the process to another level, and the IP monitoring system complements their tasks, especially during the early stages of the process where control agencies do not normally have a mandate. Other control agencies can support the independent monitoring system or can be part of it, depending on the mechanism chosen. They can also remain outside the agreement and continue their functions as usual. The monitor is not meant to replace or displace any of the control agencies.

Civil society: Civil society in general is an important ally and stakeholder. Many TI chapters around the world have played a powerful role as initiators, facilitators and lead implementers of IPs, supporting government authorities in their efforts; some have also performed as monitors or have served as an 'umbrella' to the monitoring function, to ensure independence by selecting monitors and serving as their reporting channel.

Private sector: Private companies and industry associations can be great initiators and facilitators. Strategies for transparency and accountability are in private sector interests. Private companies can act as initiators individually or through collective action (see Further Reading above, page 56). Industry associations can help disseminate the idea of the IP.

International financial institutions and donors: These have a dual role as initiators of Integrity Pacts and supporters of their implementation. They can also be active in helping fund activities related to an IP and can benefit from the accountability derived from its implementation. Performing as lead implementers may be beyond their mandate or inconsistent with the aid effectiveness principle, as established in the Paris Declaration of 2005¹¹, but they can be witnesses to the IP and can be clients of its accountability. Agencies have expressed their interest in IPs by disseminating information, instigating dialogue and exchange of experiences at national and international levels, and providing funds for their implementation.

The donor/project financier is also in a good position to initiate an IP, as well as to support it. The resources needed to implement an IP also require funding and the likely savings from increased transparency and accountability can pay off the investment of supporting them. Donors and financial institutions, for example, can require IP implementation as part of the transparency and integrity drive attached to the use of their funds.

Donors and financiers also require accountability from governments in projects that use their funds. The IP can be a vehicle for this accountability, and to guarantee that the projects are accountable to citizens at large. This applies not only to bilateral donors and multilateral institutions, but also to federal governments providing funds for projects at local government level.

1.4 COMMUNICATION AND INFORMATION IN SUCCESSFUL INTEGRITY PACT IMPLEMENTATION

The role of communications and the importance of information in the implementation of IPs cannot be overstated. Together with the communications strategy of the project, the implementation of the IP needs to be supported by a comprehensive communications strategy with various purposes:

- Bidders and potential bidders, contractors and sub-contractors need to understand their rights and responsibilities under the IP regardless of the form it takes (mandatory, voluntary, unilateral, contractual, etc.)
- Regulators, government control agencies and other government departments also need to understand the IP and how it works, to provide support and participate accordingly
- Citizens (the public) in general need to know an IP is in place, how it operates, what participation mechanisms it offers and how they can be used
- Communities benefiting from or affected by the project also need to know an IP is in place, how it operates, what participation mechanisms it offers and how they can be used.

Access to information is also an important component of communication. Access to information that is fluid and yet respectful of proprietary (protected) information is crucial to IP implementation and a necessary condition for the monitor's work.

Even a well-designed IP can have less impact than desired if the communication effort and the information availability it should promote do not actually take place.

Case Box 16: How Transparencia Mexicana makes information public

Transparencia Mexicana (TM) has an important role in IP implementation and supports the social witness (SW) in performing his/her monitoring role. Within its activities, it makes various information public:

1. At the end of the monitoring, TM delivers a report signed by the expert SW, which is published on its website and often also in the media.
2. TM's involvement as monitor is made public through its website and through the media.
3. TM presents its experience at different conferences and forums.
4. A special section of TM's website is dedicated to this topic. See TM's homepage section on IPs www.tm.org.mx, where SW reports and other documents can be found.

During monitoring, TM has a strict communications policy of not making public declarations through the media while the contracting process is ongoing. This protects the monitor and discourages the use of its work for political purposes. Only in exceptional circumstances would TM and not the SW address the press. Once the report has been issued publicly at the end of the process, interaction of the monitor and Transparencia Mexicana with the media is possible. The government and companies are, however, free to report to the media throughout the process. This policy, which has worked well so far for TM, is derived from the specific Mexican context and results from TM's experience.

Transparencia Mexicana's practices opened the way for improved openness. Current procurement and access to information regulations require the publication of the social witness reports and the social witness registry, which includes the names of all individuals and legal persons admitted to perform as social witness. See www.funcionpublica.gob.mx/unaopspf/tsocial/tsocial.htm.

Case Box 17: How FBS communicates the Berlin Airport Integrity Pacts

FBS invested much time and effort in communicating the Berlin Airport IP at the beginning. It was included in presentations about the project made regularly at the local Chamber of Commerce and other forums, including industry associations. With time, and as bidders and other government officials became familiar with the IP, there was less demand for such information sessions. In addition, the monitor himself is involved in explaining the IP to potential bidders.

2. ACTIVITIES TO UNDERTAKE BEFORE THE BIDDING PROCESS

Transparency International's experience indicates that the pre-bidding and post-bidding stages bear high corruption risks that are often overlooked. In some cases, most instances of corruption actually occur during these stages – hence the utmost importance of having measures in place early in the process to ensure transparency and accountability. These stages need specific consideration in the IP implementation process.

2.1 DURING THE NEEDS ASSESSMENT STAGE (POLICY-MAKING/PROJECT PLANNING)

Few governments are equipped to make decisions about needs assessment and magnitude or quantities of investment on major investment projects through their own staff. Most employ consultant engineers or investment bankers to assist in the process. The issue here is to make sure that the consultants selected are truly independent and, for example, not (formally or informally) associated with one or more suppliers or contractors, and therefore tempted to recommend solutions which would benefit their associates. Only consultants who can confirm their independence and who are willing to commit themselves to select and design an investment which is not biased in favour of a particular supplier or contractor should be allowed to participate in the selection process. In addition, a special prohibition can be introduced, by which the consultants who participate at this stage cannot participate during the bidding process.¹²

This stage should involve thorough transparency, to allow all stakeholders to contribute to the investment selection, location and design process, and to focus public attention on any economic, financial, environmental, social, civil or human rights concerns.

- Before the preparation and design of the contracting process, the results of the needs assessment should be made public; for high-impact investments, the results should be publicly debated and discussed
- In many cases, consultants are hired for this contracting stage and the next. Key issues include the transparency of the process by which they are contracted and the independence with which they operate (possible conflicts of interest). An IP can be introduced in the consultant-hiring process to address these issues
- Enable public (civil society) participation at this stage of the decision-making process to ensure that public concerns are fully reflected. This could take place through public hearings (see next section) or other means of open consultation, such as use of the internet, the publication of documentation, etc. This generates accountability, allowing stakeholders to assess the need for the project, and to identify necessary and unnecessary elements of the goods, services or investment to be acquired.

Tip 6:

It is important to bear in mind that at the very latest, an IP can begin when the bidding documents are being drafted. By definition, an IP cannot be introduced after this time, because the contract award is already underway.

2.2 DURING THE PREPARATION AND CONTRACTING PROCESS PREPARATION STAGE

Several activities to increase transparency and accountability can take place before the actual bidding and can be implemented simultaneously as part of the IP process (they do not exclude or substitute one another).

PUBLIC HEARINGS

Public hearings are good instruments for enabling stakeholder participation, providing necessary information on the process and contributing to the legitimacy, credibility and transparency of the bidding.

Public hearings can be open, semi-public or targeted:

- Open hearings: anyone interested can participate
- Semi-open: certain participants are invited, but the hearing is still open to people not invited but interested
- Targeted: only invited participants are allowed, but the results are either made public or shared with other non-attendees who could be interested.

Private or confidential meetings are not an option here, as they do not entail a participatory or information-sharing component.

During the stages prior to the bidding process, public hearings can be used:

- As mentioned in the previous section, to facilitate citizen and stakeholder input into the decision-making process as a whole. Open public hearings that enable the participation of all are the best option and are particularly useful for facilitating project communication and participation, and ensuring input from various stakeholders (including bidders, communities and possible project beneficiaries)
- To facilitate expert and stakeholder input into the contracting process preparation stage. For this purpose either open public hearings or more targeted, semi-open meetings can be used, with the same goals as open hearings, and the invitations ensuring that specific target groups participate

- During the drafting of the bidding documents, to ensure their accuracy and fairness. All three options can be useful: open, semi-open or targeted hearings. They help detect and prevent corruption in the early stages of the project cycle and the contractual process, where particular project designs or specifications could be made to favour a particular bidder. The participation of as many potential bidders as possible could help bring this to light
- To explain and discuss the IP, the monitoring system and its implementation with potential bidders and stakeholders. This helps the communication process for the IP itself, creates buy-in and helps clarify concerns. Any type of public hearing can be used. These sessions can be repeated throughout the project if more contracting processes are due to contain an IP.

Public hearings require preparation and enough time to allow possible participants to attend. Be clear to the participants about their purpose, so as not to generate false expectations. If organisers claim project documents will be changed according to attendees' input, they must be consistent in implementing this; otherwise they lose legitimacy and effectiveness.

Further Reading:

For more on public hearings, visit TI-Argentina's website which has detail on its wide experience in implementing them at: www.poderciudadano.org.ar.

Tip 7:

Some people are wary of public hearings, as discussions may be difficult to moderate and managing them can be tricky. Include an expert moderator or someone skilled in managing discussions to address this.

INDEPENDENT VETTING OF TENDER DOCUMENTS

Having the opinion of a third party on the tender documents (in particular, on the technical specifications) is a good idea even where investment banks and several experts have been involved in drafting the contract's detail ('special conditions' or 'terms of reference' depending on the type of contract). As many corruption risks occur during the project design and planning phases, having independent opinions on the tender document increases its legitimacy, the transparency of the process and the confidence of the contracting agency that things are going in the right direction.

This vetting can be part of the responsibilities assigned to the monitor, or if he/she is still not in place by the time the terms are drafted, the authority can involve an independent party or a civil society organisation with expertise in the subject area of the contract.

It is crucial that the vetting process is independent, transparent, objective and accountable.

The vetting process can also be undertaken partly through a public hearing or by posting drafts on the internet and organising a process for receiving and responding to comments and suggestions.

COMMUNICATING THE PROCESS TO BIDDERS, THE PUBLIC AND OTHER STAKEHOLDERS

Practitioners involved in implementing complex government projects know the importance of communication. Where an IP is involved, the way it operates and what it is meant to achieve should be explained – in addition to an explanation of what the project is about and its expected impact (benefits and costs). Such communication needs to start early in the contracting process, including making available information on the project that enables others to understand it and allows full accountability of the decision-making process see page 46: How to get buy-in?).

Example 7: Other ways of facilitating participation, accountability and involvement

In many European countries, it is a requirement that plans are publicly discussed ahead of a major project. The project design and plans are made accessible in a public office and may also be available online. Affected and non-affected people are invited to scrutinise them and submit comments and concerns. If necessary later in the process, such discussions could be complemented by public hearings.

Example 8: The role of TI-Pakistan in reviewing bidding documents

In the Greater Karachi Water Supply Project (see page 31), TI-Pakistan as monitor performed a number of crucial functions in the process in addition to observing the compliance of the parties to their IP undertakings. Among them were:

- Preparing the evaluation criteria for the selection of consultants who would be short-listed for the design and supervision of the K-III project
- After short-listing, providing assistance on developing transparent and discretion-free evaluation criteria for the Letter of Invitation sent to those short-listed
- Advising on the implementation of a selection procedure based on the 'two-envelope' system (separately sealed envelopes for the technical and financial proposals). Only those proposals which scored 75 per cent or above in the technical evaluation were considered for financial evaluation, and the best of these proposals was selected for award of the contract.

Case Box 18: Other mechanisms used in El Cajón to gather information about corruption risks

Transparencia Mexicana (TM) requested that bidders elaborate a risk map, identifying aspects of the process where they expected to encounter irregularities, so that special attention could be given to those. In TM's experience, this mechanism is particularly useful at the beginning of the process, when implementers and authorities want to build their capacity for tackling these problems.

Case Box 19: Reluctance to sign the Integrity Pacts

At the beginning of the project, very few bidders refused to sign the Berlin Airport IP. The bidding documents are clear in requiring signature as a condition of participation. Those few bidders who refused were not allowed to participate. After seven years of implementation, there have been no new cases of reluctance to sign.

3. ACTIVITIES DURING THE BIDDING PROCESS

3.1 SIGNING THE INTEGRITY PACT

IP signatories should have the authority to sign and commit the organisations, agencies and companies they represent, as well as to represent themselves personally. It is also important that signatories include both high-level officials and managers of government agencies and companies, and staff and employees involved in the day-to-day operations of the project and the contracting process.

WHAT IF SOME BIDDERS DON'T SIGN?

Normally, all bidders should sign the IP and those unwilling to do so should not be allowed to participate in the bid. This prevents an uneven situation where certain bidders are bound by some rules while others are not, creating imbalance and unfairness that weaken the process and could also jeopardise its implementation, as shown in the example below.

WHEN SHOULD INTEGRITY PACTS BE SIGNED?

At the latest, an IP should be signed at the moment each bidder presents a proposal in the tendering process. While the IP process would have had effect beforehand (see page 58), the document needs to be signed by actual bidders, who only become so the moment they submit their proposals or bids.

In two-stage contracting processes where there is a prequalification phase, the IP should be signed at the moment of applying for prequalification.

Example 9: Lack of commitment: Peru's water supply and sewage project in Huancavelica

Proética, TI's chapter in Peru, and the Huancavelica Water and Sewerage Company signed an agreement in 2005 that TI would support the company in the implementation of an IP in the water supply project to the city of Huancavelica. The project included two phases, one involving networks of potable water and drainage, and the second involving a new treatment plant and reservoir extension. The agreement between the two organisations aimed at the promotion of practices of public accountability and the prevention of corruption, through fostering areas of interaction between the agency, the private sector and the public. This agreement was implemented through several activities to promote public accountability, citizen participation and the fight against corruption.

With the support of international development aid and the funds provided by the central government, Proética developed a number of steps to promote transparency in the international public tender for the selection of contractors responsible for project implementation for Part 2 (the tender for Part 1 was never called).

Under the terms stated in the agreement, Proética:

1. Organised a workshop on 'The Commitment and Ethics of Public Officials' aimed at engaging participants with transparency, integrity and functional responsibility, as effective tools for combating corruption in the bidding process
2. Promoted the signature of an ethical commitment by officials involved in the process. This statement was the result of the agreement reached by workshop participants and was aimed at consolidating the commitment of project officials and public servants to taking action against any practices that were corrupt or inconsistent with ethics and public accountability
3. Organised a workshop with potential bidders on the draft IP. Participants exchanged views about ethical conduct and practices, and the transparency of the contractor selection process and in other areas of government, expressing their concerns and suggestions
4. Performed the role of facilitator between the community and the state agency.

After this process, most of the bidders were ready to sign an IP for the project. The document contained the ideas and suggestions developed at the workshop. However, there was not enough commitment for all of the participants to sign the IP and therefore it could not be implemented. This shows the additional challenges of implementing an IP when signing is voluntary.

Case Box 20: Equal treatment of bidders in the Berlin Airport Project

In Berlin Airport, FBS implements the principle of 'equal treatment of all bidders', undertaking to meet with bidders to address clarification questions, and enabling all questions and answers to be shared by all. The questions and answers are typed into a computer system in real time during the meetings and shown on screen. At the end of the meeting, participants can take away the printout of those questions, and non-attendees can access them online. This guarantees all information is timely and shared.

Case Box 21: Additional measures to protect the award process

In the Berlin Airport Project, FBS physically keeps the bidding documents and proposals in a single room, and restricts access to them. People who enter and leave the room must be registered.

Case Box 22: The contracting process in El Cajón and La Yesca

During the El Cajón bidding process, as reported by the social witness (SW), 31 companies acquired terms of reference but only three consortia (10 companies in total) presented bids. The flexibility shown by the authority (CFE) in clarifying and explaining the terms of reference, listening to doubts and concerns, and adjusting the terms of reference accordingly, gave additional assurances of technical accuracy and avoided unnecessary conflict. Transparency and the equal treatment of the bidders are important principles of the process and of the SW's work. The SW leaves a clear message in its recommendations on the importance of the monitoring and control that will be undertaken during the execution of the contract (the construction phase). The technical specifications were designed transparently, ruling out corrupt pre-bidding arrangements.

The bidding process for La Yesca began in 2006, but had to be reissued as the proposals presented did not fulfil all technical requirements. The second bid took place in 2007 with some changes to the technical specifications. In general, the La Yesca process built on lessons learnt during El Cajón and the bidding terms were improved accordingly. It also used the same approach and principles. Seventeen companies acquired the terms of reference and three consortia presented proposals. The procedure also took place through the Compranet (e-procurement system), although no proposals were presented through this mechanism.

PREPARING THE INTEGRITY PACT FOR SIGNATURE

Irrespective of the IP format chosen, it is important to ensure that all bidders and government officials involved understand the IP well, including its operations and the consequences of breaching it. Preparing the IP for signature therefore not only means having set a text for the agreement but also having communicated it to current and potential participants. This can be done, for example, through joint or individual meetings, making information available on a website, etc.

3.2 OTHER ACTIVITIES DURING THE BIDDING PROCESS

DISCUSSION OF BIDDING DOCUMENTS

Enabling participation in and discussion of the bidding documents by potential bidders, communities, experts and civil society organisations can help increase transparency, improve the quality of the documents and discourage corruption in the pre-bidding stages.

As previously mentioned the discussion can take the form of public hearings (see page 59), meetings with potential bidders or internet-based debates. These can take place before the bid invitation is issued, in parallel with the independent vetting of the bidding documents (see page 60), or once the invitation to bid has been issued, during the questions and answers procedure. The results and relevant information should be shared with actual and potential stakeholders.

OPENING THE TENDER AND DISCLOSURE OF QUESTIONS AND ANSWERS

After the tender invitation has been issued it is usual practice to set a time period during which potential bidders may raise questions to the authority regarding the terms of reference or contract conditions. Because the information exchanged in this context may be relevant to all other bidders and because privileged information may be released or information that would affect the fairness of the bid, it is important that the questions and answers provided be shared with all potential bidders. (This is standard operating procedure in World Bank financed projects, for example). They should also be shared with the monitor. There are even examples where they have been made public through the authority's website.

CLOSING THE TENDER BY OPENING BIDS PUBLICLY

It is usually required that sealed envelopes containing the proposals be submitted by a certain deadline; occasionally it is required that the financial proposals and the technical proposals are in separate envelopes. Some authorities ask for duplicate proposals and secure one set in a safe place immediately after the bid opening session, so as to make it more difficult to manipulate bids after opening.

It is normal practice to close the bidding process publicly (meaning in the presence of at least the bidders) by opening all bids received and reading out and recording the total cost proposals. If the two-envelope procedure is followed, the technical proposals are usually opened and evaluated first, before the second, financial, envelopes are opened – but only those from bidders deemed to have met the technical requirements.

TRANSPARENCY OF BID EVALUATIONS AND THE AWARD DECISION

There are different mechanisms for bid evaluation and award decision-making. While not specific to the IP, there are some standard good practices to consider:

- Evaluation criteria must have been previously set in the tender documents and must be known to the bidders and the public. They can be quantitative and qualitative, and must be clearly spelled out. Criteria are 'weighted' (given different evaluation points) through a pre-announced process. Evaluators should remain accountable for both quantitative and qualitative decisions
- A standard practice is that award decisions on all but negligible contracts be made by committee, to ensure that the award decision does not depend on a single evaluator, but is made by a group of people with enough time, support and resources to make an informed decision
- The award decision, together with the main underlying quantitative and qualitative factors, must be justified and made public to all bidders and citizens.

REOPENING THE TENDER

Occasionally the tender process needs to be reopened, because not enough proposals were submitted, none of the proposals fulfilled the technical requirements or substantial mistakes were made by several bidders in procedural aspects. In these cases, the same steps, activities and characteristics as mentioned above should be undertaken when reopening the tender. The reopened bid should also be overseen by the monitor.

CONTRACT NEGOTIATION AND SIGNATURE

The stage between the tender award and the signature of the contract also faces a number of corruption risks. The tender process may have looked legal and according to the rules, but collusion strategies among bidders or corrupt agreements with award officials may have enabled bidders to submit unrealistic proposals, which are awarded. In such cases, the bidders count on being able to change the terms of the contract once awarded, or on making amendments that compensate for the features they 'failed' to incorporate in their proposals. Often the real costs only surface at this stage. To avoid this situation it is important to establish that the negotiation stage cannot allow for changes in the scope or conditions of the proposal, especially those elements that were the basis for the evaluation. It is also important to submit contract negotiations and the terms of the contract to public scrutiny, and particularly that of the monitor, and to include this stage under the obligations covered by the IP. It is also good for transparency to make signed contracts publicly available.

WHAT TO DO IF CORRUPTION OCCURS OR IS SUSPECTED?

The IP and the monitoring agreement should specify the steps for and the consequences of raising suspicions of corrupt behaviour during the bidding process. It may be that the evidence or indications of such behaviour only emerge during this stage, but that it actually occurred previously. It is therefore important that the IP contract and the monitor's powers enable intervention in these situations.

The appropriate reaction is the one pre-determined in the IP and the monitoring agreement, which can include any or all of the following:

- If suspicions arise but are not clear, the monitor can gather more information and try to clarify what occurred; he/she should raise the issue with the contact person designated by the authority, whether the suspicion has been clarified or not. The monitor requests a reaction from the authority to address the suspicion. If the suspicion is cleared up as unfounded, the process ends. If it is not cleared up, indications of corruption increase or the reaction of the authority is not consistent with the IP, the monitor should notify the prosecution authorities and possibly make a public report
- If initially there are strong indications of corruption, the monitor should raise the issue with the contact person designated by the authority. He/she should also inform the prosecution authorities and possibly make a public report.

Upon breach of the IP, the mechanism to impose sanctions should be set in motion, according to the process established in the IP. This will normally be the responsibility of the authority. To avoid situations where the authority itself has been involved in corruption and action is not taken, the monitor should have the capacity to set the resolution mechanism and sanctioning process in motion, and to inform the prosecution authorities and invite them to take part.

On serious indications of corruption, the authority should notify the corresponding prosecution authorities.

Case Box 23: Allegations of possible wrongdoing in El Cajón

During the El Cajón bidding process, TM received an email indicating that there had been irregularities and that privileged information had been given to one bidder before the process began. In response to a request for an explanation, CFE informed TM that it had posted information on its website about the project five months ahead of the tender, requesting feedback on the project from all interested stakeholders. TM and the social witness (SW) sought out the informant in order to obtain more details and identify the possible misconduct, but the informant did not respond and further allegations were not made. After the award, news was released through the press that the winning bidder had not fulfilled one of the bidding requirements. In addition, the bidder in second place requested a meeting with the SW and argued that it had lost unfairly, showing documents claiming it had offered better financial terms for the project. Once analysed by the SW, the documents proved to have no legal force and the allegations were unfounded, and the matter was dismissed. None of the bidders complained thereafter about the qualification criteria or about the legal framework for the contracting process. According to TM there were no unresolved complaints in relation to the project.

4. ACTIVITIES AFTER THE BIDDING PROCESS

Once the bidding process is over and the contract has been awarded and signed, the main activity of the monitor under the IP is to oversee that contract execution is in line with the obligations set in the IP. Most corruption risks during this stage refer to contract changes and under-performance enabled by corrupt arrangements. The activity of the monitor therefore remains highly relevant during this stage.

4.1 HOW LONG SHOULD INTEGRITY PACTS LAST AND WHICH PROJECT CYCLE STAGES SHOULD BE COVERED?

Ideally an IP should last until the end of the contract execution stage. If this is not possible, at a minimum the IP should be active from the drafting of the bid documents until the contract signature, i.e. until after the bidding stage has concluded. This does not mean that if corruption which occurs during the bidding process is discovered later, it will be beyond the IP. The IP can still be invoked and the sanctions and remedies it contains be enforced. It is advisable to indicate this clearly from the outset in the IP, as the costs of cancelling a contract may be higher than other forms of remedial action.

Depending on the nature of the project, the Integrity Pact could also cover elements after the project has been executed. For example, the terms of the contract could include sub-clauses stating that a certain degree of maintenance should be carried out when necessary over a certain amount of years. If corruption were to be found in these stages, it would be possible to impose sanctions if included under the IP.

The IP could also include a remit for the final audited financial accounts to be made public, demonstrating the overall cost of the procurement contract compared to what was settled upon in the award, allowing for further public scrutiny.

4.2 CHANGE ORDERS AND CONTRACT RENEGOTIATION

Some types of corruption can be observed only during contract execution. A tender process may have seemed entirely legitimate, but collusion strategies among bidders or corrupt agreements with award officials may have enabled bidders to submit artificial proposals. During contract execution, the winning bidder (now the contractor) counts on being able to use corrupt means to obtain favours from auditors and supervisors who can ignore the under-performance that will help save costs. This would enable contractors to compensate during contract execution for the features they deliberately failed to incorporate into their proposals. The risk of such corruption is significant.

To avoid this situation:

- Establish criteria for contract renegotiation that enable the authority, the monitor and others to identify changes arising from circumstances that emerged after the bidding, and to place special restrictions on changes in the scope or conditions of the proposal (especially those elements that were the basis for the evaluation)
- Submit contract negotiations and changes to public scrutiny, and particularly to that of the monitor
- Include these stages under the IP obligations granted
- Establish a ceiling for changes (usually a percentage of the value of the contract) above which such changes should require additional authorisation (e.g. by the evaluation committee) or cause the bid to be reopened, to allow the other bidders to submit bids.

4.3 WHAT IF CORRUPTION OCCURS, OR IS SUSPECTED, DURING OR AFTER EXECUTION?

If the IP covers the contract execution stage, the procedure should be similar to that during the bidding process (page 61). In either case, the authority should notify the corresponding prosecution authorities of serious indications of corruption.

In addition, the IP enforcement mechanism should remain active during all contract stages, so it can be invoked at any time by whoever identifies a case of corruption. This should be made explicit in the IP document.

Corruption post-execution can be very difficult to monitor and address. The IP has the ability to ensure a certain degree of transparency beyond the initial construction/supply of goods, for instance regarding maintenance and upkeep, sub-clauses or contracts. The contracting authority again should, in any case, notify the prosecution authority, but if sufficient sanctions are included in the IP, these could be taken up against the corrupt agent.

Case Box 24: Monitoring implementation in the Berlin Airport Project

The monitor in the Berlin Airport IP began work in 2005 and is engaged until six weeks after the end of the project (i.e. the opening of the airport). Until then, the monitor will oversee that the obligations acquired under the IP are not violated and that bidders and contractors behave within those terms. The IP itself governs the behaviour of the bidders during the contracting process and after the award. While the monitor is active during contract implementation, including a review of change orders, he/she does not oversee contract execution (quality, timeliness or fulfilment of the job), but oversees that during the execution phase contractors behave with integrity, avoid fraud and corruption, and continue to fulfil the behavioural requirements of the IP.

Further Reading:

The ceiling for contract changes in the current World Bank guidelines for the provision of goods is 10 per cent of the contract price see:
<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

Tip 8:

Transparency and accountability mechanisms, as well as standard anti-corruption measures, can be especially helpful during this stage. Among them, whistleblower protection mechanisms, communication channels for reporting corruption, regular publication of information and reporting on activities of the contractor, and civil society or project beneficiaries' oversight of implementation (i.e. local communities for local government projects) can help hinder corrupt acts and highlight them when they occur.

Example 10: Renegotiating contracts publicly: Poder Ciudadano's experience in Morón, Argentina

From December 2001, high inflation in Argentina affected the costs foreseen in previously signed contracts, among them the waste collection contract of the municipality of Morón. The company asked the Mayor to renegotiate the contract, who in turn asked for support from Poder Ciudadano, TI's chapter in Argentina, to make the renegotiation process more transparent and participatory. As a result, several activities took place:

1. A pre-public hearing, focused on the technical aspects of the contract and fundamentally about information sharing, in preparation for the public hearing where the renegotiation was to be discussed.
2. As a result of the pre-public hearing, the contractor was asked to make publicly available information on: ownership, accounting and financial balances, and its payroll. This information was in turn distributed by the municipality on the day of the public hearing. (The municipality was in charge of organising and inviting people to the public hearing.)
3. Following Poder Ciudadano's suggestion, the University of Morón reviewed the renegotiation proposal filed by the company and concluded that only 45-54 per cent of the proposed cost was reasonable.
4. The public hearing took place, with good levels of participation from affected citizens.
5. With all these elements, the municipality reviewed the proposal and accepted 40 per cent of the increment proposed by the company.

Among the lessons learnt from this experience, Poder Ciudadano acknowledges the importance of having sufficient and relevant information available in advance of public hearings; of using a participatory mechanism for the renegotiation process, which enables the involvement of citizens affected by the negotiation; and of involving an independent third party with additional technical expertise to support the negotiations. For more information on transparent contracting, visit Poder Ciudadano's website: www.poderciudadano.org.

THE MONITORING SYSTEM

“Independence means that the monitor is able to perform his/her job objectively, guided only by the purposes set out in the Integrity Pact and the monitoring agreement.”



The monitoring system and the role of the monitor him/herself are crucial for Integrity Pact success. Without the monitoring system, the advantages created by an IP may be unrealised. The monitor scrutinises the process closely and guards the implementation and enforcement of the IP. He/she is the source of credibility, reassuring both the authority and the bidders that the process will go ahead as agreed, and is a source of information for the general public, building trust in the contracting process.

1. WHAT ARE THE MONITOR'S FUNCTIONS?

The main task of the independent monitor is to ensure the IP is implemented and the obligations of bidders and the authority included in it are fulfilled (i.e. there is no violation of the IP). In order to perform this task, the monitor can undertake a number of activities:

- Examine documents, reports and all preparatory work by the authority during the bidding process, in order to detect corruption risks
- Examine and give his/her view on the tender documents before they are issued, including watching out for specifications that may be biased in favour of one or more bidders
- Facilitate, promote and take part in public hearings
- Participate in meetings held by the authority and potential bidders
- Review the questions and answers exchange, to verify the answers and that they are equally available to all bidders
- Organise, lead or facilitate meetings, training sessions, etc. where the IP is explained, and produce supporting materials
- Attend the closing of the tender to verify that the established procedure is rigorously followed
- Examine bidders' proposals to check and compare the evaluators' assessment and judge its accuracy
- In the case of a failed tender, fulfil all these functions again
- Review the award decision document to verify it is duly substantiated, and attend the award notification meeting if applicable
- Inspect construction sites, visit the contractor's offices and review contractor reports to identify signs of possible irregularities during contract execution
- Review content and procedure for contract changes during implementation
- Keep contact with local communities or the end users of the goods or services contracted, to collect information or complaints about contract execution that might flag corruption
- Communicate with the senior management of the authority and the NGO about his/her findings and where necessary, to the prosecution authorities
- Receive and deal with complaints related to the IP and offer clarification
- Report on the monitoring process to the parties in the IP, the authority, the NGO and the public, following the designated process
- Suggest avenues for improvement of the contracting process, based on his/her work.

The monitoring performed through the IP does not necessarily include service delivery monitoring or quality control: including these may make the monitor's task more difficult and may eventually lead to a conflict of interest, as in principle during the contract execution the monitor guards the integrity of the auditors and supervisors who are overseeing quality and delivery. During the contract execution stage, most corruption risks are associated with bribery and kickbacks to secure positive audit and oversight reports, so it is good to have a third party watching. It is therefore advisable to focus the functions of the monitor on ensuring that the duties set forth in the IP are fulfilled, and on protecting the transparency and integrity of the contracting process.

Tip 9:

Experience shows that when the monitor performs his/her job adequately, he/she can undertake even more activities that add value to the whole process. An empowered monitor has more ways of performing his/her task successfully.

Case Box 25: The monitor's activities in the Mexican experience

In the Mexican experience, the monitor (SW):

- Has access to all documents during the bidding process, including the evaluation documents, and is in direct contact with the evaluating committee
- Participates in all ordinary and extraordinary (formal and informal) meetings
- Participates actively in clarification meetings. The CFE holds clarification meetings to discuss and answer questions on the bidding documents, and in which amendments to the bidding documents are considered
- Makes site visits to potential bidders
- Attends meetings to present the project
- Channels within the agreed process concerns and allegations of corruption
- Reviews the terms of reference before they are pre-approved by the procurement committee
- Makes recommendations during those meetings and raises issues or concerns
- Reports findings back to Transparencia Mexicana.

Norms governing the mandatory social witnesses in Mexico determine their activities. In El Cajón according to the SW report, the monitor performed the following activities: two site visits; four clarification meetings; one meeting to present the project; and five informal meetings for information exchange on the bidding terms. In clarification meetings, 1124 questions were answered. As a result of the discussions during these meetings with bidders and the CFE, the terms of reference were modified to adopt some of their feedback. The deadlines initially established for the process were also modified equally for all bidders.

For La Yesca, the SW participated in one of two site visits. Six clarification meetings took place, where 738 questions were asked and then responded to in writing. The SW made random visits to the evaluation committee and also reviewed all documentation.

The monitor's report at the end of the project is published on TM's website and also often published in the local media. Current procurement and access to information regulations require their publication by the contracting authority and are also available at the SFP website. Reports for the El Cajón and La Yesca cases are available under www.tm.org.mx.

Case Box 26: Monitors adding value

In the Berlin Airport Project, the monitor has performed reviews in circumstances initially not foreseen, fulfilling an important preventive function in cases where there were questions raised against potential bidders or doubts over the participation of bidders who had been previously involved in corruption scandals, but had not been debarred. The monitor reviewed the cases and the reactions taken by the potential bidders, and concluded that they had addressed the problems encountered in cases of corruption, determining that there was in principle no cause for concern to prevent their participation in the process, provided all other requirements were also met.

In La Yesca, the monitor was involved when the bid was first opened in 2006. Public officials then faced a difficult decision, as the bids presented did not sufficiently fulfil the technical requirements. The monitor gave his own technical opinion, which supported the need to close the tender and reopen it for new bids under different terms. The new bid was reopened in 2007, the contract was awarded and construction began in January 2008. In general, monitors perform an important role that translates into better management of conflict and differences during the contracting process. They help seek clarification and identify points of uncertainty, and provide the contracting process with credibility and legitimacy.

Case Box 27: The monitor's independence

The Berlin Airport IP monitor was selected jointly by FBS (the authority) and Transparency International Germany (TI-D) from a list of proposed names. The selected monitor was a retired expert with years of experience in public office and procurement for complex projects. As he was a retired professional, problems of possible conflicts of interest and revolving doors were almost ruled out: the monitor did not derive his income from any business relation with bidders or potential bidders. As FBS performs not only as the authority, but also as lead implementer of the IP, the company pays the monitor from its budget. It ensures however that the monitor prepares his reports without its intervention, and is clear about this feature in its own reports on the IP. The greatest assurance of independence in this case has been the content of the reports submitted by the monitor, which have shown to bidders, FBS and other supervision authorities in Berlin that he performs his duties independently.

2. WHAT ARE THE MAIN REQUIREMENTS FOR A GOOD MONITOR?

INDEPENDENCE

Independence means that the monitor is able to perform his/her job objectively, guided only by the purposes set out in the IP and the monitoring agreement. Independence means the monitor will not have to prioritise his/her mandate against other interests, because his/her only interest is to defend the public good through contributing to the integrity of the process. There is neutrality in the monitor's independence: neutrality from the bidders and from the authority. His/her actions should give assurance that they do not aim to privilege or to sanction any party. In certain industries it may be difficult to find independent monitors, because the knowledge and expertise required are scarce and must be drawn from within the industry. This raises questions over the monitor's independence. The way the monitor is selected, engaged and paid can also affect his/her real and perceived independence. It is important to verify that he/she does not have current or potential conflicts of interest, and to ensure that the monitor is subject to scrutiny him/herself, so that situations where the position of the monitor can be abused are avoided. There is great risk to the effectiveness and integrity of the project if the monitor does not act independently, or if he/she is not perceived to be independent.

KNOWLEDGE

A monitor's expertise is essential if he/she is to perform his/her duties fully and add value to the project. He/she will need specialised knowledge of both the contractual process and the technical aspects of the project. However, it is often difficult to find one single person with the full set of required knowledge. To compensate for this, it is possible either to assemble a team of people who share the monitoring task, to establish a support team with combined expertise or to authorise the monitor to seek professional input for the specialised technical fields where he/she needs support, for example:

- In the case of a contract for the construction and equipment of an infrastructure project, the monitor would ideally have participated at least in one such project in the past
- For the selection of the supplier for custom built and researched goods, the monitor should have experience and knowledge in the detailed technical specifications and research required for their construction
- For the selection of the investment bank for a public-private partnership project, the monitor needs to be familiar with investment banking and programme design, and will also need relevant sectoral knowledge.

In general all professions are suitable for the monitor role: e.g. engineers, lawyers, administrators. What is more important is that the monitor has specialised knowledge in the required field or that the combined knowledge of the monitor and supporting experts provides for the necessary aggregated expertise, for example: an engineer with experience on a project together with a public contracting lawyer or a former government official with experience in similar projects.

If it is difficult to find an independent expert locally, nationally or internationally who would fit a particular expertise profile, it could be possible to assemble a team whose collective experience fits the monitoring needs. For example, experienced former managers from other sectors could be paired with experts from the sector in question. It is often not possible to guarantee the independence of a monitor coming from the same industry, in which case expertise should be brought in from other similar sectors, or independence can be assured through the use of a team. A downside to using a team is that it increases monitoring costs; a good alternative is to engage support from external advisers just for specific tasks.

Different types of knowledge may be required at different stages of the contracting process and the project cycle. This may mean engaging different people for different stages or, again, structuring a team.

REPUTATION

The monitor must have an excellent reputation not only in terms of his/her technical knowledge but also regarding ethical behaviour in his/her professional activity. The selection process should give particular attention to verifying candidates' backgrounds and references and making sure that they have not been involved in prior unmanaged conflicts of interest or questionable situations that will affect the credibility of the monitor's role in IP implementation.

CAPACITY

The monitoring role requires time, effort and resources, varying with the type of contracting process overseen. There is no standard capacity required of a monitor: a capacity assessment is important while defining the monitor's terms of reference, prior to his/her selection. The assessment may indicate whether an individual or an organisation will have the best capacity for the task, and it will help to determine the profile of the monitor. The institutional support that can be given to the monitor by the authority and the NGO involved in implementation also add to his/her capacity.

Example 11: Defence Integrity pacts in Colombia

Due to the complexity and scale of procurement projects in the defence and security sector, there is a strong focus on technical specifications, as corruption often takes place in the needs assessment phase where the technical specifications are constructed in such a way that the tender favours a particular contractor. In 2004 Transparencia por Colombia (TI Colombia) and TI-UK helped Colombia's Ministry of Defence (MoD) implement a Defence Integrity Pact (DIP) during an aircraft acquisition programme which had previously stalled due to lack of clarity over aircraft type and associated capability. The TI-UK Defence and Security team provided two technical experts with military and defence acquisitions backgrounds to support the DIP. They reviewed the bids and met with stakeholders including the MoD to ensure the technical specifications were suitable.¹⁴

Case Box 28: The profile of the monitor in El Cajón and La Yesca

Transparencia Mexicana (TM) designates the individual to perform as social witness SW following a rigorous selection process. The SW cannot be a member of TM's staff and is specifically appointed for each process. The individual should have experience in the sector to which the specific IP applies, so that he/she is capable of contributing not only to the process but also to the substance, inputting to the drafting of the bidding documents and during the contracting procedure. He/she represents TM and therefore should understand and share the organisation's spirit, values and philosophy. Transparencia Mexicana has developed a knowledge network of 40 experts, which continues to grow and specialise.

ACCOUNTABILITY

One of the monitor's main tasks is to introduce accountability to the contracting process through his/her oversight role. In turn, the monitor needs to be accountable, otherwise his/her effectiveness is jeopardised. The question is: Accountable to whom? This is a matter of degrees. The monitor is directly accountable to the entity (authority or NGO) with whom he/she signs the monitoring agreement or the terms of engagement. He/she is also accountable to the bidders and the authority for fulfilling the job adequately and fairly, and to the communities and citizens for whom he/she performs a public service of oversight and compliance. The monitor may often be the only one with access to information needed to hold authorities and bidders accountable. This accountability can be realised by the monitor providing fluid communication and information about his/her reports and activities to the public or to civil society organisations, which then serve as society's 'eyes and ears'.

COMMITMENT

The monitor's role is demanding, requiring difficult choices and particular abilities to establish a productive and engaging relationship with all parties, while at the same time retaining independence. It therefore calls for strength of character and impeccable behaviour. The monitor performs a preventative role, and in such a capacity he/she aims to facilitate the process and ensure that it runs smoothly.

3. WHAT TYPES OF MONITOR AND MONITORING SYSTEMS CAN BE USED?

Beyond the necessary qualities of a good monitor (independence, knowledge, capacity, accountability and commitment), there is no such thing as an ideal or standard monitoring mechanism. Each possible combination of options should be weighed for advantages and disadvantages, so that it is possible to choose the one most appropriate to a particular situation.

3.1 INSTITUTION/ORGANISATION OR INDIVIDUAL

The monitor can be one individual or organisation, or a group thereof (collective). The grounds for choosing one or the other relate to capacity, reputation, independence and knowledge. In certain contracting processes it may be difficult to find a single person with the necessary knowledge and capacity; a good way to overcome this is to assign the task to a group of individuals or organisations which, combined, have this capacity and knowledge. Depending on the nature of the organisation however, they may find it more difficult to manage possible conflicts of interest or to stay clear of them if they depend on clients for income, or if their sources of funding create conflicts of interest. A collective monitor may also be the way to address questions about the independence of one of its members, particularly if final decisions are also collective – although individuals retain the right and the capacity to speak up for themselves.

In some cases it may simply be most practical to have collective oversight, for example, when there is interest in a participatory oversight mechanism, a group of NGOs, control agencies and experts could be of great added value. Such a mechanism would also grant greater independence.

However, collective monitoring systems may involve more operational and governance difficulties (the need for more resources and to take decisions collectively), which may make the task more complex than when single entities perform it.

3.2 PRIVATE, GOVERNMENTAL OR NON-GOVERNMENTAL

The choice between these three options is determined by independence, knowledge and capacity.

NGOs are often best placed to perform IP monitoring roles, as in the experience of many TI chapters. One advantage of having NGOs perform as monitors is that their participation brings civil society involvement and therefore increases the accountability and legitimacy of the process. In many countries, NGOs are also most knowledgeable in implementing tools such as IPs. In some cases, however, NGO capacity and resources may be limited and may impose restrictions on their ability to perform the task. These restrictions can be overcome by reaching out for expert support for specific monitoring efforts. There are also great differences from country to country on how NGOs are perceived; in some, they are the best option for ensuring independence and neutrality. In others, circumstances may make it difficult to establish the real or apparent independence of NGOs.

Government agencies can also perform as IP monitors, easily fulfilling capacity and knowledge requirements but rarely seen as an independent mechanism and easily perceived by bidders as not neutral. One way to address this weakness is to ensure the agency remains accountable to the public and establishes communication and information mechanisms that assure bidders and citizens that its independence is guarded. Another option is to establish collective mechanisms where civil society organisations can perform the task together with governmental agencies (differentiating clearly the roles and responsibilities of each party in order to ensure the required independence).

Private sector organisations or companies may be the best placed in terms of capacity and knowledge to perform as monitors. However, they share the same disadvantage as government organisations, i.e. their independence and neutrality may be questionable or perceived as absent, particularly by bidders. Additional measures should be considered for preventing actual or potential conflicts of interest. The monitoring role is understood not as a for-profit activity but as a safeguard of the public interest, which collides with the *raison d'être* of private companies.

In the case of industry associations, for example, neutrality and independence need to be examined closely. Only if the bidders are not members of the association or do not benefit from its work would such an approach be feasible. The reputation of private sector companies is also an issue to consider, as it may affect their capacity to act independently and to be perceived as such.

Often, one of the outstanding benefits of introducing an IP to a project or contracting process is that it provides a mechanism for civil society involvement, which would not be the case if a sole government agency or a private sector company assumed the monitoring role.

3.3 NATIONAL OR INTERNATIONAL MONITORS

This is also a choice heavily determined by context. In some countries, foreigners and international organisations are regarded as independent and neutral, while in others they are not. Capacity, knowledge and particularly expertise are also relevant. Some projects or contracting processes may require technical knowledge and expertise that are not available nationally. In other cases, knowledge of local regulations might be a determining factor.

Case Box 29: Keys to success in the monitor's role

In El Cajón and La Yesca, and the Berlin Airport IP, the following are common elements of success in the monitor's role:

- The personal and professional qualities of the monitor ensure credibility and respect
- Good communication with the NGO (Transparencia Mexicana) in Mexico and with the authority (FBS) in Germany
- The ability to display both empathy and independence, i.e. the capacity to understand the role of the authority, provide constructive feedback, and empathise with it, while remaining firm and independent
- In Mexico, the support and backup the monitor receives from TM is also salient.

Case Box 30: Monitor selection

In the Berlin Airport Project, the monitor was chosen by FBS and TI-Germany (TI-D) from a shortlist proposed by both. The choice was announced by FBS in the media and reported by TI-D. The 2005 German press release can be found under: www.berlin-airport.de/presse. In a more recent IP Project in Germany (HOWOGE, the acronym in German for a housing development company in Berlin) the owner opted to search for suitable monitors through public competition. TI-D was involved in designing the terms of reference and the selection process and in evaluating the candidates. The monitors selected met the highest professional standards, at a somewhat higher cost to the owner.

Since the 2004 legal reform in Mexico, the SFP designates the social witness (SW) who will operate in each case from a list of previously registered SWs. SWs are included in the registry through an open process whereby interested candidates have to fulfill certain capacity and experience conditions. The same regulation stipulates that when those chosen are not individuals but legal entities (such as Transparencia Mexicana), they are in charge of designating an individual who will act as SW. Transparencia Mexicana was the first SW to register under the SFP registry in 2005.

4. HOW TO SELECT A GOOD MONITOR?

The monitor selection process is as relevant as the qualities of the monitor him/herself. If the selection process is not accountable and transparent, even the work of a very good monitor may be undermined. The selection process brings legitimacy to the monitor. There is no standard process for selection, but it is recommended that the following points are considered:

4.1 THE ACCOUNTABILITY AND TRANSPARENCY OF THE SELECTION PROCESS

Different factors influence the accountability and transparency of the monitor selection process:

- The existence of predetermined criteria or a profile
- The degree of openness of the selection process
- The person who is in charge of taking the decision
- The availability of information about the final choice and the grounds for the decision.

The selection process does not necessarily have to be an 'open call' (i.e. a public competitive selection process). The selection of the monitor is what lawyers call *intuitu personae*, i.e. the selection is closely tied to the individual capabilities and characteristics of the monitor and the trustworthiness he/she projects to the different stakeholders. The open call therefore may not be the best way to obtain the best monitor.

Case Box 31: Monitor accountability in the Mexican experience

As implementer and monitor, Transparencia Mexicana (TM) exercises close oversight of the work of the individual engaged as the social witness (SW); the SW represents TM and is directly accountable to it. TM also supports the SW, providing technical assistance from other experts and an institutional backbone for the role. Therefore the way in which the monitor is held accountable is more a notion of responsibility than one of control. The human and professional qualities of the monitors selected by TM also ensure that they feel their role as a personal responsibility and a duty in which they represent society. Although there is no formal arrangement, TM communicates to its SWs policies and guidelines to follow in their duties and explicitly requires that they abstain from entering situations that may entail conflicts of interest at least one year before and after performing their duties as SW, and that they abide by TM's communication policies, among others.

In addition, the usual systems of verifying actual hours of work apply. If TM is informed of misconduct in one of its SWs, it informs its Managing Board which decides on the appropriate response. To date, there have been no instances of sanctioning or removing an SW.

The selection process also depends on the type of monitoring system. For example, when the collective or mixed system is used, the selection process is no more than a consensus among the main stakeholders and participants.

Whatever the procedure, being able to explain and communicate why a monitor was chosen and the way the decision was taken is important for the accountability of the process.

4.2 ACCOUNTABILITY OF THE MONITOR

The monitor performs a role that directly affects not only all stakeholders involved in the contracting process, but also citizens and communities who should benefit from a public project free of corruption. The monitor is therefore not only accountable to those selecting him/her. Ensuring broader accountability is another guarantee of the monitor's independence.

The monitor performs his/her role differently from other service providers. Normally it is understood that accountability and the responsibilities for the fulfilment of a role are to the party with whom an agreement is signed. (see page 77, The monitoring agreement) But because an IP is a collaborative effort and the function of the monitor is of public interest (given their role in government projects), the monitor's accountability is to all participants, as well as to society at large. This is the case regardless of the monitoring system used.

The monitor is accountable to:

- The NGO involved in IP implementation
- The authority
- Bidders and contractors
- Society at large.

Such accountability may be exercised towards each of these stakeholders in different ways, by:

- Monitoring reports and their content
- Means of communication and information reported to the public
- The accurate, proportionate and fair use of powers and attributes
- Direct contact/reporting to civil society.

4.3 THE MONITOR'S ROLE WITH REGARD TO CITIZENS AND CIVIL SOCIETY

In principle the monitor derives his/her mandate and capacities from the monitoring contract and the IP. The monitor can be a civil society organisation or the monitoring contract may be signed with a civil society organisation when it performs as lead implementer. Both situations involve a direct interaction and a direct accountability line with civil society.

However, when this is not the case, it is important to establish ways of interaction or communication between the monitor and civil society. Among these are:

- Determining that the monitor's report can be shared with the public or with NGOs participating in the procedure, who in turn can broadcast the results
- Enabling civil society participation in public hearings or other meetings where the monitor will also be present
- Establishing appropriate and protected whistleblower channels that enable the monitor to receive information and complaints from citizens or civil society organisations regarding IP fulfilment.

All the access to information features of the contracting process and the monitor's work also support transparency and accountability and are conducive to civil society involvement.

5. THE MONITORING AGREEMENT

The monitoring agreement establishes the monitor's rights and duties, the terms of his/her engagement and the fees, when applicable. While some of the monitor's roles may be established or described within the IP, the monitoring contract establishes his/her general terms of engagement and should be understood to include what is additionally contained in the IP (ideally, state this explicitly).

5.1 PARTIES TO THE AGREEMENT

DIFFERENT MODALITIES

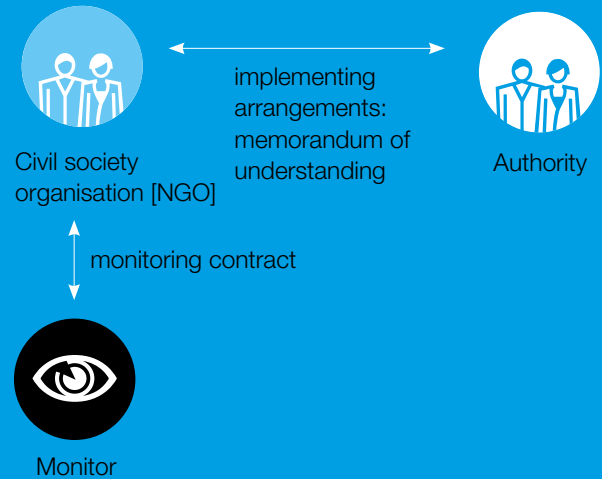
The monitoring agreement can be structured in several ways, reflecting choices about the monitoring system, accountability lines and the division of roles among different IP participants:

- In the situation illustrated in Graph 3, the NGO plays the leading role in implementing the IP and therefore the monitoring contract is signed with the NGO, which supervises the monitor and works together with him/her. Here, there is a direct accountability line with civil society (and thus the wider public).

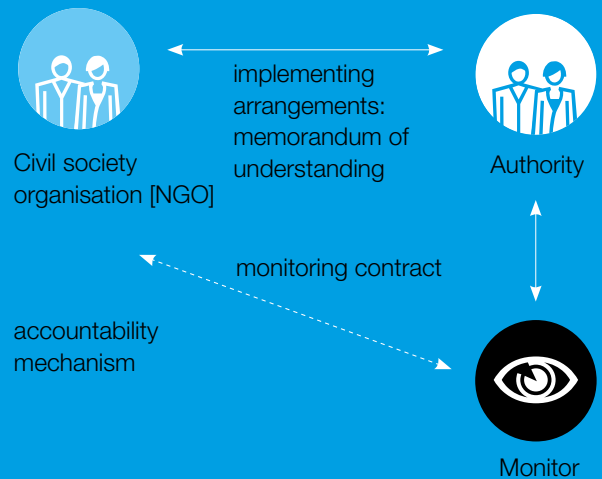
This system generally requires an implementation arrangement, usually in a contract or MoU, as described on page 54. The implementing agreement contains various features, among the most relevant of which are the authority's commitment to granting access to documents and information to the monitor. The government commits itself to full public disclosure of all relevant data regarding the process and the evaluation of competing bids. The arrangement can also include a confidentiality clause that binds the NGO and the monitor, protecting information that should legitimately and legally remain confidential (such as proprietary information).

- Where the authority is the lead implementer (see Graph 2, page 53) the monitoring agreement is signed between the monitor and the authority. In this case, there is a risk that the process will be perceived as non-neutral by bidders and third parties. It is therefore necessary to address and secure the legitimacy of the process, for example by establishing additional accountability mechanisms so that the monitor remains responsible to society at large. Such mechanisms can include, for example, the possibility of making the monitor's reports public directly or through a civil society organisation engaged as initiator or facilitator. In addition, the monitoring agreement should explicitly include the authority's commitment to granting access to documents and information in order for the monitor to be able to perform his/her duties. This commitment should also be part of the MoU signed with the NGO. Additional features that ensure independence include the possibility of withdrawal, the payment of the monitoring fees even in case of withdrawal, and limitations on the termination of the contract by the authority. The government also commits itself to providing full public disclosure of all relevant data regarding the process.

Graph 3: Monitoring agreement signed with the NGO



Graph 4: The monitoring agreement signed with the authority



Case Box 32: How is Transparencia Mexicana engaged as monitor and implementer?

Transparencia Mexicana (TM) was engaged as lead implementer and monitor, first through a frame agreement (Memorandum of Understanding) with the authority. This agreement contains the general conditions for being involved as monitor in the contracting process. It then subscribes to an individual additional service delivery agreement for each process it actually monitors, in which it specifies who will act as SW and establishes the fees. These service agreements with the authority are subject to public procurement legislation. Their contents will vary depending on the level of the authority (federal, state or local), as different types of procurement legislation apply. At federal level, the SW role is now regulated, therefore these contracts are subject to the law. For processes at regional or municipal level, where the federal law does not apply, implementation contracts are negotiated with each authority and contain clauses regarding withdrawal from the monitoring process, access to information and payment of the monitor, among others. In El Cajón, as the legislation was still not in place, TM subscribed to an implementation agreement with CFE, the contracting authority. For La Yesca, the contract followed the guidelines established in the newly enacted law.

Further reading:

For a review of the experience since the introduction of mandatory social witnesses in Mexican Law see the report produced by the NGO Contraloría Ciudadana para la Rendición de Cuentas, A.C in 2011 “El Testigo Social: experiencia de incidencia de la sociedad civil en la gestión pública”, <http://www.rendiciondecuentas.org.mx/pdf/ElTestigoSocial.pdf>

Case Box 33: Regulating the Social Witness in Mexico: the Administrative Decrees of December 2004 and May 2009

TM first introduced the SW instrument and the contract monitoring component of the IP to Mexico in 2000. After several IP experiences, there was increased demand for SWs. Additionally, the Federal Procurement Law and the Public Works Law (“the Laws”) required an SW in processes above a certain threshold. In 2004 Mexico’s Public Administration Authority (Secretaría de la Función Pública or SFP) issued a decree regulating the SW which was further enhanced by the decree of 2009 and then developed by regulations in 2010. The purpose of the decree is to establish guidelines to regulate SWs in the contracting processes undertaken by agencies and entities of the Federal Public Administration. The Decree aimed to ensure minimum quality standards, as new SWs were taking part in projects under criteria different from TM’s.

The regulations assign the SFP the responsibility for the SW mechanism and ensuring its effectiveness. They determine selection requirements, a selection and designation process, a public registry¹⁵ for persons eligible as SWs, and determine the SW’s functions and capacities. They establish minimum access to information obligations to which the authorities are subject when SWs are in place. It enables individuals and NGOs to perform as SW and requires that the request for a SW is made before the bidding documents or the contracting process have been approved or fulfilled. A “Social Witness Committee” composed of representatives of the SFP, business and professional associations oversees the registry, SW’s fees and make recommendations for the effectiveness of SW.

The May 2009 reforms to the laws require SWs on all contracting processes above a minimum of five million salary days for procurement processes and 10 million salary days for public works (for 2013 around US\$26 million and US\$51 million respectively). They also enable authorities to request their involvement in other projects, irrespective of the value, when the authorities consider the project of strategic relevance.

In general, the introduction of mandatory IPs has advantages and disadvantages. On the one hand, it secures the presence of social control mechanisms in key projects. However, it also raises demands on capacity to implement them for the government agencies without necessarily securing political will. Monitoring the monitors will therefore remain an important activity.

THE ROLE OF CIVIL SOCIETY

As previously mentioned (see page 56) civil society organisations (CSOs) can play various roles in IP implementation: as initiators, facilitators, lead implementers or as monitors themselves.

When civil society has the expertise to act as monitor, it is particularly well placed to play this role given its independence both from bidders and the authority, and its sole incentive to protect the public interest. Even if civil society does not have the required expertise ‘in-house’, it can reach out for expert support for a particular IP process, combining specific expertise with its own institutional capacity. In this situation, the expert monitor would sign the monitoring agreement with the NGO.

The role of civil society is fundamental for the credibility of the monitoring system. Even when a lack of capacity or other circumstances are non-conducive to civil society taking on the monitor’s role, at a minimum it is essential in providing channels of accountability for the monitor to the public. For this reason, when the monitoring agreement is signed with the authority, it should clearly specify an accountability line between the monitor and civil society and, through this channel, to society at large.

Further Reading:

For an example of a monitoring agreement, see Annex 3.

5.2 ELEMENTS OF THE MONITORING AGREEMENT

1. Scope and coverage: identify which phases of the contracting process and/or the project cycle will be covered by the monitor and governed by the agreement.
2. Duties and activities the monitor will perform, among them:
 - The length and depth of monitoring duties
 - The duty of confidentiality with legally protected proprietary information, whether it relates to the authority or the bidders
 - Reporting obligations and accountability mechanisms to different IP stakeholders and the general public (especially when the monitoring agreement is signed with the authority).
3. Powers and attributes of the monitor, among them:
 - Unrestricted access to all relevant information regarding the project/contracting process
 - The authority’s obligation to inform the monitor sufficiently and in good time of all relevant activities regarding the process, and the authorisation to participate in related meetings
 - Procedures to follow in case of suspicion or indications of corruption or any violation of the IP. (See page 83: The Monitoring System, 6. How should the monitor proceed if corruption occurs or is suspected?)
 - The possibility of unilaterally withdrawing from monitoring duties if it is not possible to fulfil them
 - An explicit duty to refrain from engaging in conflicts of interest with regard to the bidders and the authority, and the requirement that any such possible situation be declared.

4. The monitoring fees, should they apply, and the way these will be paid. To preserve the monitor's independence (particularly if the contract is signed with the authority itself), it is made explicit that the payment of the fees is not dependent on the content of the monitor's reports, and if the monitor decides to withdraw from the procedure, the costs incurred up to withdrawal will be covered.
 5. General contractual clauses:
 - The usual contractual stipulations regarding contract duration, amendments, partial or total nullification, jurisdiction and applicable law
 - The conditions under which the monitor's contract can be unilaterally terminated by the lead implementer. To guard the monitor from the possibility of abuse, this requires a clear procedure that includes a collective decision or more than one authorisation.
- By establishing a clear requirement to avoid and to properly manage conflicts of interest. Options to help achieve this include:
 - The prohibition to contract with any bidder participating the process or any of their sub-contractors during an extended period of time after the bidding process has concluded
 - The absolute prohibition to work for the contractor or any sub-contractor from the project overseen by the IP
 - The requirement to disclose family relations, memberships, associations and assets in cases where conflicts of interest could arise from such connections
 - The requirement to make an asset declaration prior to and after the conclusion of monitoring activities.

5.3 PROVIDING PROTECTION TO THE MONITOR

The monitor must protect his/her independence and neutrality. This is reflected in the monitoring agreement in various ways:

- By granting the monitor sufficient capacity, power and attributes to oversee the process(es)
- By attaching no conditions to his/her rights, for example: the capacity of the monitor to examine documents and to access information is not subject to conditions other than the protection of legally confidential information
- By enabling the monitor to pull out of the project under certain conditions
- By limiting the unilateral termination of the monitoring contract by the lead implementer to situations or by means that are less prone to abuse (such as requiring a collective decision or a court injunction)

5.4 WHEN WOULD THE MONITOR OR THE NGO ACTING AS LEAD IMPLEMENTER WITHDRAW FROM AN INTEGRITY PACT?

Withdrawal, premature termination of the monitoring agreement or pulling out from the monitoring of the contracting process is one of the most important rights of the monitor (and is also an option for the NGO participating as lead implementer). This right needs to be exercised with caution. It is one of the clear manifestations of both the monitor's and the NGO's independence, and the conditions under which it could be exercised need to be established in advance and be clear to all parties. Often, they need to be made explicit in the monitoring contract and in the agreements that set implementing arrangements (see pages 77 and 52 respectively). The monitor and the implementing NGO are also accountable for their own decision to withdraw (or not to withdraw) and should therefore provide public explanation of their reasons.

Among the most important grounds for withdrawal is if access to information has been restricted or denied, preventing the monitor from performing his/her role, or where the behaviour of the parties (particularly the contracting authority) does not guarantee the transparency and integrity of the process.

Case Box 34: Protecting monitor independence in the Mexican experience

There are various mechanisms under which *Transparencia Mexicana* (TM) protects the social witness (SW) and his/her independence. Among them, the policy by which the technical opinion of the SW cannot be revoked by any of TM's staff, management or Managing Board; and the restriction on the SW not to communicate his/her findings to the media until he/she issues the final report. The qualities of the individual selected as SW are also important: SWs should be individuals who are not in, and are not likely to enter, situations where there may be conflicts of interest.

Case Box 35: The Mexican experience with withdrawal

Transparencia Mexicana (TM) has included the possibility of withdrawal in all its IP implementation agreements with the authorities. However, the Decree of 2004 which regulated SW involvement eliminated this possibility at the federal level. The instrument of withdrawal is still included and used at municipal and regional levels, where other legislation applies. There is a risk of abuse of the discretionary use of withdrawal that may be bigger in the case of individuals than in the case of organisations acting as SW, as in the latter such a decision would be taken collectively. Perhaps for this reason, the federal SW regulation restricts the possibility of withdrawal, as both individuals and organisations can be registered as the SW. This is contrary to the case of TM, where such a decision is not taken by the SW on his/her own, but by the organisation as a whole. Such a decision would then have institutional backup.

An example of withdrawal clauses can be found in the agreement signed between TM and the authority in the Municipality of Queretaro, where TM implemented an IP for the construction and equipment of the water distribution system (Acueducto II). In that agreement, the withdrawal clause reads: 'In the case that '*Transparencia Mexicana*' through its 'social witness' considers that its involvement is not contributing to the transparency of the process, it will be entitled to withdraw publicly at any time'. However, the clause was not implemented, and withdrawal did not occur.

Despite the fact that withdrawal from monitoring is no longer possible at the federal level, the public report issued by the SW still has an important deterrent effect at both federal and local levels.

Case Box 36: Procedure if corruption is suspected or detected

In the Berlin Airport Project, on suspicions of IP violation the monitor should notify top FBS management, who should endeavour to clarify or correct the situation. If such a response does not occur within a reasonable time or if there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities.

In La Yesca and El Cajón, the monitor should inform *Transparencia Mexicana* (TM), who is acting as lead implementer. TM would report the incident to the top management of the authority, and the circumstances would also be included in the monitoring report submitted by TM and made public at the end of the monitoring process. In cases when corruption has been clearly established, TM would withdraw from the process and communicate this decision to the public.

Under the current regulations, the social witnesses would report any wrongdoing to the SFP or the internal control agency of the contracting authority or eventually to the parliamentary oversight commission. Prosecution and control authorities would afterwards conduct investigations if pertinent.

Tip 10:

Make sure the fees and expenses paid to the monitor do not obstruct his/her independence. There are many mechanisms to address this, among them: i) the monitor can be paid through a 'basket' of funds to which the authority and all bidders contribute; ii) the monitor can be funded by donor or project financier resources; and iii) always ensure the monitor has sufficient powers to act and react independently of the funding source.

It is therefore important to establish fully the grounds for withdrawal. One approach is to provide the opportunity for the authority to correct the problem or to eliminate the obstacles before withdrawal actually takes place. If it fails to do so adequately, withdrawal proceeds.

The grounds or the conditions for withdrawal are usually:

1. The authority denies the monitor timely access to necessary information to oversee the process (and usually in violation of the monitoring agreement or the implementation agreement)
2. The authority directly or indirectly impedes the fulfilment of the monitor's duties
3. The authority does not take corrective measures after corruption risks or occurrences have been identified or reported by the monitor
4. Any other circumstance that, if unaddressed, impedes the monitor in fulfilling his/her duties or creates unnecessary risk or danger (threat or extortion, for example).

In general, these circumstances indicate that the transparency of the process cannot be guaranteed.

6. HOW SHOULD THE MONITOR PROCEED IF CORRUPTION OCCURS OR IS SUSPECTED?

The monitoring agreement should clearly indicate the procedure to follow in case of indications or suspicions of corruption. Whatever the procedure chosen, it should guarantee that the monitor has the capacity to react independently provided the agreed process has taken place.

The reaction should also be proportionate. Vague indications (suspicions) of corruption are different from clear evidence that corruption has taken place. In the first case it is necessary to provide for further investigation and should doubts remain, notify the investigation authorities. In the second case, recourse to the investigating authorities should happen immediately.

ACTION WITH REGARD TO THE AUTHORITY

It can be helpful if the authority is informed about the suspicions or possible wrongdoing and has the opportunity to undertake early corrective measures or further preventative action. However, to sustain the independence of the monitor, it should be made clear that should the authority not react, or not react sufficiently or swiftly enough, the monitor will proceed to inform the investigation authorities.

ACTION WITH REGARD TO THE PROSECUTING AUTHORITIES

The monitor should always have the capacity and the duty to notify the investigating and prosecution authorities when there is a clear indication of corruption, and should also be entitled to refer to them when there are only suspicions which cannot be clarified through his/her own powers, or when the authority, having been given the opportunity, has not reacted effectively.

ACTION WITH REGARD TO THE PUBLIC (MEDIA)

The possibility of informing the public about a detected corruption case is a powerful tool that should be used with prudence. The monitor should have this capacity, but in cases where the investigating or prosecution authorities have been involved, information made available to the public must not jeopardise the investigation.

7. ACCESS TO INFORMATION AND CONFIDENTIALITY OF THE MONITOR

Just as it is important that the monitor be granted full and unrestricted access to information related to the contracting process by the authority and the bidders, it is necessary for the monitor to commit to preserving the confidentiality of legally protected information (proprietary information). Both elements must be described clearly as within the powers and duties of the monitor, in the monitoring agreement.

Such confidentiality requirements must also be extended to any experts supporting the monitor.

IMPACT AND TROUBLESHOOTING

“...as a side-effect of the strategy, trust in government and government officials increased and the reputation of all participants was improved.”

1. WHAT IS SUCCESS?

Success in IP implementation means that the contracting processes were carried out in a transparent and accountable manner, free from corruption. The project was effectively brought to completion and the contracting processes required were free from delays caused by trouble, confusion and a lack of transparency. Success is that the social, economic and development goals of the project were achieved (or at least not impaired by corruption). Success is that as a side-effect of the strategy, trust in government and government officials increased and the reputation of all participants was improved. Success is also when corruption is detected and eliminated from the process, i.e. the tools designed to prevent corruption find it and perform their job effectively.

1.1 THE IMPACT AN INTEGRITY PACT CAN HAVE

The results and impact of IP implementation are difficult to measure and identify, often because they mean that 'nothing bad happened'. It is also often difficult to establish a causal relationship between 'what was done' and 'what didn't happen'. Measuring and observing the impact is nevertheless possible. There may also be cases where the corruption prevention objectives are fully achieved and yet, management problems cause delays and cost overruns. The anti-corruption focus and the normally limited resources available to the monitor do not allow a broad "all will go well" assumption.

Nevertheless, based on the experience of TI chapters in implementing IPs, observable indicators of success exist. Only in rare cases can it be assumed that the sole cause is IP implementation, but they do show IP impact:

1. Things run as planned: the requirements of the bidding documents were observed by the bidders; contractual agreements were upheld and enforced; and the project was successfully concluded
2. The project was visible, transparent and accountable. Information was shared with the public, and the participation of stakeholders was not only possible, but effective
3. Conflict and complaints related to the contracting process and contract execution were minimised or adequately managed
4. There is an observable reduction in costs or prices compared to the original budget
5. The strategy facilitates the improvement of processes or the undertaking of reforms that benefit future projects at organisational and institutional (legal) levels
6. Corruption is detected and addressed, and savings are made as a result or damage is prevented.

1.2 COMMUNICATING SUCCESS

Success as here described is difficult to demonstrate. It is often the case that no news is good news. However, communicating success is an important element of having achieved it, because it enables reward and recognition from society, bidders and peers, regulators and other government agencies. Some of the impact of the strategy comes through having communicated its outcomes.

Tip 11:

Gather information on any of these indicators before the process begins and use it as a baseline. Make comparisons after the procedure and it will be possible to evaluate and sometimes measure the IP's impact. It is also good to document what was done and how. From here one can learn for future IP opportunities and explain to others how the IP was run.

2. RISKS AND POSSIBLE PROBLEMS

2.1 CONFLICTS OF INTEREST

Conflicts of interest hinder independence and neutrality, and affect the legitimacy and credibility of the parties involved in IP implementation and therefore they should be properly managed. There is a risk of conflicts of interest between and among all actors participating in an IP process: the monitor, the bidders, the authority and the NGO.

Among key measures to address conflicts of interest are:

- Request that NGOs and monitors must not have been involved in politics or have had any contractual or business relations with the parties involved in the contracting process for a reasonable period of time before and after their duties in IP implementation take place
- Include in the monitor's contract a statement of absence of conflicts of interest
- Establish clear criteria for selecting monitors and implementers that exclude those who could have conflicts of interest. It is usually advisable to engage professionals who do not derive their main income from business or contracts with potential bidders or authorities, or to rule out professionals interested in pursuing a political career.

2.2 MANAGING PUBLIC INFORMATION

Just as access to information is critical to the monitor's role and the impact of the IP, it is also important to protect proprietary information which, on the basis of the public interest and the principle of 'do no harm', has been protected by law.

In this sense it is possible that the NGO acting as lead implementer and the monitor sign confidentiality clauses that assure the authority and the bidders that legitimately confidential information will be appropriately protected. Although a communications strategy is necessary for successful IP implementation, such a strategy must be careful not to expose the IP process and the monitor's role to undue political pressure.

2.3 WINDOW-DRESSING

Like any strategy, the IP can be subject to abuse (or indifference). If wrongly implemented, it can give an appearance of credibility without this being backed by a serious implementation strategy. In particular, IPs implemented en masse, across many contracts (by virtue of the law), and without proper monitoring face this risk. To minimise it, it is important to have an empowered and independent monitor capable of flagging up this situation should it happen, and of withdrawing from the process. In the absence of such a monitor, a truly independent media can help by exposing inappropriate use of the IP.

2.4 ADDRESSING BIDDER RELUCTANCE

It is important to distinguish between reluctance originating from lack of information and understanding of the IP, and reluctance originating from fear of the IP. Ensure that information, training and clarification are given to bidders so they can make informed decisions about participating. If potential bidders have been properly informed of the IP and the way it works, the authority should accept their non-participation in the bid if they so chose. Bidders who refuse to sign to IPs send the wrong signal, and if the reason for their reluctance is because they are otherwise interested in corrupt deals, then the IP has had its intended impact.

ENDNOTES

1. Simon Evenett, Bernard Hoekman, International Cooperation and the Reform of Public Procurement Policies. World Bank Policy Research Working Paper 3720. Washington DC: World Bank, Trade Team, September 2005.
2. For 2013 the threshold lies approximately at US\$51 million, which is the equivalent of 10 million minimum legal salary days for the City of Mexico as stated in the Law.
3. World Bank. Anticorruption in Transition: A Contribution to the Policy Debate. Washington DC: World Bank, 2000.
4. Table 1 is based largely on a similar graph included in Michael Wiehen and Juanita Olaya, How to Reduce Corruption in Public Procurement: The Fundamentals (2006). Handbook for Curbing Corruption in Public Procurement, Part I. Berlin: Transparency International, 2006, pp. 13-105. It has been further adapted to suit the purposes of this manual.
5. Hereafter, "bidder" normally refers to the selected contractor as well, except where the context indicates otherwise.
6. In 2011 the company changed names to Flughafen Berlin Brandenburg GmbH (under the acronym in German FBB), which is the one currently used. Since the company was called FBS at the time the IP was introduced, we keep the reference here to FBS.
7. This account is taken from the case note written by Michael Wiehen, July 2008. Dr. Wiehen has expressly authorised the use of the contents of his report for the preparation of this manual.
8. This is the requirement that contractors and sub-contractors have (and enforce through a compliance system) a code of conduct, such as TI's Business Principles for Countering Bribery or similar tools.
9. The mechanism of "revolving doors" takes place when an individual moves between public office and private companies, exploiting his/her period of public office for the benefit of companies previously worked for, or which he/she would expect to work for in the future.
10. Third party contributions, or amicus curiae, refer to interventions by individuals or organisations that are not parties to the dispute. Because of their expertise, or their interest in the matter subject to discussion, their contribution to the process (in the form of a testimony or expert submission) would be admitted in some cases and under certain rules.
11. The Paris declaration, endorsed on 2 March 2005, is an international agreement to which over one hundred Ministers, Heads of Agencies and other Senior Officials adhered and committed their countries and organisations to continue to increase efforts in harmonisation, alignment and managing aid for results with a set of monitorable actions and indicators. For more information see: www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html
12. In some cases it is possible that the nature of the market or the investment make it difficult to select consultants who are independent from the potential bidders; for example, when a project requires very specific engineering capacities, or when only a few companies are active in this area of work (oligopolies). In this case, explicit measures to manage potential conflicts of interest should be put in place, e.g. setting clear rules in advance, making sure they are enforced and enabling sufficient public scrutiny and debate.
13. See http://archive.transparency.org/news_room/in_focus/2006/defence_sector/colombian_defence_integrity_pact
14. The 2009 Mexican Decree can be found here online at <http://www.funcionpublica.gob.mx/unaopspf/unaop1.Htm>
15. The public register in Mexico of individuals and entities eligible to act as social witness can be found online at SW registry at the SFP is available at: <http://www.funcionpublica.gob.mx/unaopspf/tsocial/tsocial.htm>

ANNEXES

INTEGRITY PACT USED IN THE CASE OF THE BERLIN AIRPORT

between

and

[Company details]

Flughafen Berlin-Schönefeld GmbH
Flughafen Schönefeld
12521 Berlin Schönefeld

hereafter called the Principal

hereafter called the Bidder/Contractor

PREAMBLE

The Principal intends to award, under the procedures prescribed by law, a number of contracts for developing the present Berlin-Schönefeld Airport into the Berlin-Brandenburg International Airport (BBI). This concerns in particular architectural, engineering and construction contracts. The Principal attaches great importance to full compliance with all relevant laws and regulations, and the principles of economical use of resources, and of fairness and transparency in its relations with its Contractors.

In order to achieve these goals, the Principal cooperates with the renowned international Non-Governmental Organisation, Transparency International (TI). Following TI's national and international experience, the Principal has appointed an external independent monitor who will, until the BBI is completed and put into service, accompany and monitor the tender processes and the execution of the contracts for compliance with the principles mentioned above.

§ 1 COMMITMENTS OF THE PRINCIPAL

- (1) The Principal commits itself to taking all measures necessary to prevent corruption and to observe the following principles:
 1. No employee of the Principal, personally or through family members, will in connection with the tender for, or the execution of, a contract demand, accept a promise for or accept, for him/herself or a third person, any material or immaterial benefit to which he/she is not legally entitled.
 2. The Principal will, during the tender process, treat all Bidders alike, in compliance with the relevant provisions of the GWB and the *Vergabeverordnung* [regulations on procurement awards]. The Principal will in particular, before and during the tender process, provide to all Bidders the same information and will not provide to any Bidder confidential information through which the Bidder could obtain an advantage in relation to the tender process or the contract execution.
 3. The Principal will exclude from the process any prejudiced persons, in accordance with the provisions of § 16 *Vergabeverordnung* (VgV).
- (2) If the Principal obtains information on the conduct of any of its employees which constitutes a criminal offence under the corruption sections, in particular the §§ 298, 299, 331-335 StGB, or if there should be a concrete suspicion in this regard, the Principal will inform the State Prosecutor's Office and in addition can initiate disciplinary or civil sanctions.

§ 2 COMMITMENTS OF THE BIDDER/CONTRACTOR

- (1) The Bidder/Contractor commits himself to take all measures necessary to prevent corruption. He commits himself to observing the following principles during his participation in the tender process and during the contract execution:
 1. The Bidder/Contractor will not offer, promise or give to the Principal, to any of the Principal's employees involved in the tender process or the execution of the contract, or to any third person any material or immaterial benefit to which he/she is not legally entitled, in order to obtain in exchange an advantage during the tender process or the execution of the contract.
 2. The Bidder/Contractor will not enter with other Bidders into any illegal agreement, which would constitute a violation of the relevant provisions of the Contract Award Regulations, § 16 VgV, the UWG, the GWB, the Anti-Corruption Law or the StGB. This applies in particular to agreements regarding prices, price components, prohibited price recommendations, the participation in recommendations or agreements concerning the submission or non-submission of bids, or similar conduct.
 3. The Bidder/Contractor will not commit any criminal offence against §§ 298, 299, 333, 334 StGB, or §§ 17, 18 UWG. Beyond § 18 UWG, the Bidder /Contractor will not use improperly, for purposes of competition or personal gain, or pass on to others, any information provided by the Principal as part of the business relationship, regarding plans, technical proposals and business details, including information contained on diskettes or other data carriers.
 4. The Bidder/Contractor will, when presenting his bid, disclose any payments he has made, is committed to making or intends to make to agents, brokers or any other intermediaries in connection with the award of the contract.
- (2) The Bidder/Contractor will not instigate third persons to commit offences according to paragraph 1, sentence 2, numbers 1-3, or be an accessory to such offences.

§ 3 DISQUALIFICATION FROM THE TENDER PROCESS AND EXCLUSION FROM FUTURE CONTRACTS

- (1) If the Bidder, before contract award, has committed a serious transgression through a violation of § 2 or in any other form such as to put his reliability as Bidder into question, the Principal is entitled to disqualify the Bidder from the tender process or to terminate the contract, if already signed, for a 'significant reason'.
- (2) If the Contractor, after the contract has been awarded to him, has committed a serious transgression through a violation of § 2 or in any other form such as to put his reliability as Bidder into question, the Principal is entitled to give notice of cancellation for a 'significant reason'.
- (3) If the Bidder/Contractor has committed a serious transgression through a violation of § 2 such as to put his reliability into question, the Principal is also entitled to exclude the Bidder/Contractor from future contract award processes. The imposition and duration of the exclusion will be determined by the severity of the transgression. The severity will be determined by the circumstances of the case, in particular the number of transgressions, the position of the transgressors within the company hierarchy of the Bidder and the amount of damage. The exclusion will be imposed for a minimum of six months and a maximum of three years.
- (4) If the Bidder/Contractor can prove that he has restored the damage caused by him and has installed a suitable corruption prevention system, the Principal may revoke the exclusion prematurely.
- (5) A transgression in terms of the Nr.1-3 above is considered to have occurred if, in light of all evidence, no reasonable doubt is possible.

§ 4 COMPENSATION FOR DAMAGES

- (1) If the Principal has disqualified the Bidder from the tender process prior to the award according to § 3, the Principal is entitled to demand from the Bidder liquidated damages equivalent to three per cent of the value of the offer (without options), up to 50,000 EUR.

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- (2) If the Principal has terminated the contract according to § 3, or if the Principal is entitled to terminate the contract according to §3, the Principal is entitled to demand from the Contractor liquidated damages equivalent to five per cent of the contract value.
- (3) If the Bidder/Contractor can prove that the exclusion of the Bidder from the tender process or the termination of the contract after the contract award has caused no damage or less damage than the amount of the liquidated damages, the Bidder/Contractor must compensate for the damage only to the value of the amount proven. If the Principal can prove that the value of the damage caused by the disqualification of the Bidder before contract award or the termination of the contract after contract award is higher than the amount of the liquidated damages, it is entitled to claim compensation for the higher amount of damages.

§ 5 PREVIOUS TRANSGRESSIONS

- (1) The Bidder declares that no severe previous transgressions occurred in the last three years that could justify his exclusion from the tender process.
- (2) If the Bidder makes incorrect statements on this subject, he can be disqualified from the tender process, or the contract, if already awarded, can be terminated for a 'significant reason'.

§ 6 EQUAL TREATMENT OF ALL BIDDERS/CONTRACTORS/SUB-CONTRACTORS

- (1) The Bidder/Contractor undertakes to demand from all Sub-contractors a commitment consistent with this integrity pact and to submit it to the Principal before contract signing or, at the latest, before the Principal approves the sub-contracting.
- (2) The Principal will enter into an agreement with the same conditions as this one with all Bidders, Contractors and Sub-contractors.
- (3) The Principal will disqualify from the tender process all bidders who do not sign this agreement or who violate its provisions.

§ 7 CRIMINAL CHARGES AGAINST VIOLATING BIDDERS/CONTRACTORS/SUB-CONTRACTORS

If the Principal obtains knowledge of conduct by a Bidder, Contractor or Sub-contractor, or by an employee of a Bidder, Contractor or Sub-contractor, which constitutes a corruption-related crime, or if the Principal has a concrete suspicion in this regard, the Principal will inform the State Prosecutor's Office.

§ 8 EXTERNAL INDEPENDENT MONITOR

- (1) The Principal appoints a suitably qualified external independent Monitor for the period until completion of the BBI project. The task of the Monitor is to review, independently and objectively, whether and to what extent the parties comply with the obligations under this agreement.
- (2) The Monitor is not subject to instructions from the representatives of the parties and performs his functions neutrally and independently. He reports to the Principal's Management and the Chairperson of the Supervisory Board.

- (3) The Monitor has the right of access without restriction to all the Principal's project documentation. The Contractor will also grant the Monitor, upon his request and demonstration of a valid interest, unlimited access to his project documentation. The same is applicable to Sub-contractors. The Monitor is under contractual obligation to treat the information and documents of the Bidder/Contractor/Sub-contractor with confidentiality.
- (4) The Principal will provide the Monitor with sufficient information about all meetings among the parties related to the Project, provided such meetings could have an impact on the contractual relations between the Principal and the Contractor. The parties will offer the Monitor the option to participate in such meetings. With regard to meetings of the parties' decision-making bodies ('organs'), the right of the Monitor to participate will be determined by such organs.
- (5) As soon as the Monitor notices, or believes he notices, a violation of this agreement, he will inform the Management of the Principal and request the Management to discontinue or correct the violation, or to take other relevant action. In this regard, the Monitor can submit non-binding recommendations. Beyond this, the Monitor has no right to demand from the parties that they act in a specific manner, refrain from action or tolerate action.
- (6) The Monitor will regularly submit a written report to the Chairperson of the Supervisory Board of the Principal and, should the occasion arise, submit proposals for correcting problematic situations. The Chairperson of the Supervisory Board will transmit these reports in appropriate form to the members of the Supervisory Board.
- (7) If the Monitor has reported to the Chairperson of the Supervisory Board a substantiated suspicion of an offence against the corruption-related criminal laws, and the Chairperson has not, within reasonable time, taken visible action to proceed against such an offence or reported it to the State Prosecutor's Office, the Monitor may also transmit this information directly to the State Prosecutor's Office.

§ 9 CONTRACT DURATION

This agreement begins when both parties have legally signed it. It expires for the Contractor 12 months after the last payment under the respective contract, and for all other Bidders 12 months after the contract has been awarded.

§ 10 OTHER PROVISIONS

- (1) This agreement is subject to German substantive law. The place of performance and jurisdiction is the headquarters of the Principal.
- (2) Changes and supplements, as well as termination notices, must be made in writing. Side agreements have not been made.
- (3) If the Contractor is a partnership or a consortium, this agreement must be signed by all partners or consortium members.
- (4) Should one or several provisions of this agreement turn out to be invalid, the remainder of this agreement remains valid. In this case, the parties will strive to come to an agreement closest to their original intentions.

Schönefeld, on the [date]

(Signature of the Principal)

(Signatures of Bidders/Contractors)

ANNEX 2

TRANSLATION OF THE UNILATERAL DECLARATION OF INTEGRITY (UDI) USED IN THE CASE STUDY OF LA YESCA, MEXICO

(UDI to be signed by a government official)

I [Name and Last Name] acting as [Position] of [Government authority], declare under oath that in the present Public Bidding, I will behave with integrity and transparency. I manifest that I will refrain from any behaviour by me or through another person that distorts or affects the evaluation of the proposals or the results of the process, or creates any other situation that grants undue advantage to any of the bidders.

I also agree to grant unrestricted access to all information related to the contracting process to *Transparencia Mexicana* in its role as Social Witness.

(UDI to be signed by a company)

I [Name and Last Name] acting as [Position] of [Company], in fulfilment of Section [Detail] of the bidding document, declare under oath that in the Public Bidding for [Detailed identification of the bidding process], I will refrain from any behaviour by me or through another person to encourage government officials from [The Authority] to distort or alter the evaluation of the proposals or the results of the process, or to create any other situation that grants me undue advantage in regard to any of the other bidders.

For these reasons, I agree to give *Transparencia Mexicana* unrestricted access to all information related to the contracting process and accept its participation as Social Witness in all events and meetings, and during each of the stages of the process: in the design of the bidding documents; clarification meetings and site visits; the presentation and opening of the technical proposals; the review and evaluation of the technical proposals; the technical and economic review; the award, the contract signature and any other event before or after, linked with this bid.

ANNEX 3

EXAMPLE OF A MONITORING CONTRACT

This annex illustrates what a monitoring contract could entail, to help IP Manual users visualise one they might use. Actual content and language will need to be adapted to the project in question and to every specific legal context. In addition, necessary legal references would need to be included.

This example illustrates a situation where the monitoring contract is signed with the Contracting Authority and covers all phases of a project that has not started. It also assumes implementation arrangements have been established with an NGO through a separate Memorandum of Understanding (MoU).

I. PARTIES

This agreement is entered into by

_____ herein called 'the Principal'

And

_____ herein called 'the Monitor'

II. PREAMBLE AND PURPOSE

1. The Principal will initiate the implementation of an Integrity Pact process in Project X in order to (i) ensure the maximum transparency and accountability of the contracting processes that take place within the project and (ii) contain the occurrence of corruption before, during and after those processes take place.
2. An essential element of the Integrity Pact process is the involvement of an independent Monitor who will oversee that those contracting processes and the execution of the contracts awarded are implemented with the maximum transparency and accountability, and in fulfilment of the principles and obligations in the Integrity Pact that will be agreed by the Principal acting as contract awarder and the Bidders in each of those contracting processes.
3. The purpose of this agreement is to establish the rights, duties and capacities of the Monitor in performing his monitoring role in regard to Project X, and the rights and duties of the Principal in enabling the Monitor to perform his role adequately and independently.
4. The references herein to an NGO refer to NGO Y with whom the Principal has signed a Memorandum of Understanding (MoU) for the implementation of the Integrity Pact in Project X.

III. THE MONITOR'S ROLE

5. The Monitor will observe the contracting processes taking place within Project X and commits himself to checking and screening those contracting processes to ensure they have taken place with full transparency and accountability and in fulfilment of the obligations agreed by the Principal and the Bidders in the Integrity Pact signed in each contracting process.
6. The Monitor will review and comment on all bidding documents for the contracting processes he oversees and will make non-binding recommendations to improve them or the process undertaken.

ANNEX 3

7. The Monitor will observe and review the bid evaluation and the award decision and will be able to pose questions or request clarification when necessary.
8. The Monitor will promote and participate in public hearings related to the project, whether organised by the Principal or the NGO.
9. With the support of the Principal and the NGO, the Monitor will conduct workshops, training sessions and all necessary activities to inform potential bidders and officials working for the Principal and involved in the contracting processes about the Integrity Pact, how it operates and the need for transparency and accountability in those processes, and how these should be ensured.
10. The Monitor will receive complaints, whether anonymous or not, regarding the correct fulfilment of the obligations of the Integrity Pact by any of the Parties and will initiate further action when appropriate and according with the terms of this agreement. To enable this he could establish an anonymous mechanism for people to file complaints.
11. The Monitor will prepare a written report about his activities and his findings every Z months and will provide it to the contact point designated by the Principal and to the NGO. However, if in performing his duties the Monitor finds situations or circumstances that are time-sensitive, or need to be further examined or be put to the Principal promptly, he will report them outside these regular reporting times to both the NGO and the Principal. The NGO and the Principal will make these reports available to the public within the terms of this agreement and the terms of the MoU between the Principal and the NGO. Within three months of completion of the project, the Monitor will prepare a final report which will also be made publicly available.

IV. THE MONITOR'S POWERS

12. The Monitor will have unrestricted access to all documents and information and formal and informal meetings related to Project X. The Principal is committed to instructing all of its officials and employees of this and to ensuring full compliance with this requirement. The Principal will also in a timely fashion inform the Monitor whenever meetings related to Project X will take place and enable the participation of the Monitor.
13. The Monitor performs his tasks and duties independently. The Principal therefore cannot and will not in any way influence him in his duties or determine the contents of his reports. The Monitor is not subject to any instructions from the Principal, the Bidders or any of their management or employees.
14. Should the Monitor encounter restrictions to accessing relevant information, or should he find that there are not proper conditions in terms of sufficient transparency and accountability for him to perform his job adequately, he will be able to withdraw unilaterally from his role in the project. In this case he must report in detail to the Principal and the NGO the concrete reasons why he believes this is the case. In case of withdrawal the Principal will cover the costs incurred by the Monitor according to this agreement, up to the moment of withdrawal.
15. In case of indications of corruption at any stage of the contracting processes overseen by the Monitor, he will inform the Principal and the NGO. The Principal in this case should react to clarify, correct or investigate the matter further. If there is no reaction by the Principal or if its reaction was not satisfactory, the Monitor will inform the prosecution authorities when he considers appropriate. The Monitor's reports should include both the findings and the indications and the action undertaken by the Principal to clarify, correct or further investigate the matter. The publication of those reports will be made ensuring that should further investigation be needed, it is not compromised.
16. If occurrences of corruption have been identified by the Monitor, he is committed to report them to the control and prosecution authorities independently of whether the Principal reported those occurrences to those authorities or not.

V. THE MONITOR'S DUTIES

17. The Monitor commits to handling as confidential all legally protected proprietary information given to him by the Principal, any of its officials, the Bidders or any of their employees in any form. This also includes information the Monitor has obtained through his participation in meetings.
18. The Monitor explicitly states he is not currently in a situation of conflict of interest directly or through near relatives, and commits to disclose to the Principal and the NGO any possible situation which could be perceived as a conflict of interest that could arise in the future. The Monitor also commits not to engage in any contractual or business relation with any of the bidders participating in the contracting processes he has overseen, for a period of at least XX years after the termination of the project.

VI. CONTRACT DURATION AND TERMINATION

19. The Monitor will perform his role as established in this agreement until Project X is completed [this can be an inauguration date or the moment operations start, depending on the type of project].
20. Only if the Monitor has not fulfilled his confidentiality duties, as set forth in this agreement, can this contract be terminated unilaterally by the Principal. The contract can be unilaterally terminated by the Monitor only in the case of his withdrawal under the reasons set forth in this contract. The contract can be terminated earlier by mutual agreement of the parties but a report detailing the reasons and context of the termination should be made public by the parties and through the NGO.

VII. FEES AND PAYMENT

21. The tasks of the monitor are estimated to require X hours each month at an hourly fee of Z. This will be paid by the Principal upon presentation of an invoice every three months until completion of the project. The invoices should detail the number of hours worked under this contract and the main activities. The NGO will receive a copy of this invoice. [A cap can be established for the maximum amount that could be charged per year, for example.]

[location], on the [date]

Signature of the Principal

Signature of the Monitor

CASE STUDY: THE IMPLEMENTATION OF AN INTEGRITY PACT IN MEXICO'S EL CAJÓN AND LA YESCA PROJECTS

This annex describes how Integrity Pacts were implemented in Mexico's El Cajón and La Yesca Projects, in order to help other government agencies, NGOs and project implementers learn from the experience. It has been produced for knowledge-sharing and capacity-building purposes, and is not meant as an evaluation or an assessment of the case.

We are grateful to Transparencia Mexicana (Transparency International in Mexico) and particularly to Eduardo Bohórquez, Mónica Gabriela Ramírez, Michelle del Campo and Paula Sepúlveda for their help and input; and to all the experts and officials who contributed their time and insights through interviews which fed into this document.

CONTEXT

Transparencia Mexicana (TM) has extensive experience monitoring contracting processes, spanning almost more than 150 contracts with an approximate value of US\$30 billion. In TM's view, an Integrity Pact (IP) is a tool that adds value by providing assurance to society and to participants in a tender procedure (both the authority and bidders) about the way contracting procedures operate, making public relevant information about the conditions under which the contracting procedure has taken place. In turn, this helps others to understand the reasons underlying government decisions. TM doesn't question policy decisions; rather, it focuses on introducing transparency and accountability to their implementation. Characteristic of TM's approach is the social witness (SW), the name given to the person (individual or legal) who acts as monitor of the process.

THE LAW

As a result of the impact created by TM's initiative in monitoring contracting processes, the government's Public Administration Department (Secretaría de la Función Pública or SFP) issued a decree in December 2004 and another revision in 2009 establishing the mandatory use of SWs at the federal level in contracting procedures above a US\$51 million threshold for public works and US\$26 million for other procurement processes, and requested that entities acting as SWs be registered with them. TM registered as the first SW, in March 2005. To date there is a total of around 40 registered SWs, five of whom are organisations, TM being one of them. Under this regulation, the SFP selects the SW that will be involved in each project. Under this regulation, the SFP selects the SW that will be involved in each project.

THE PROJECTS

In 2002 the CFE (Comisión Federal de Electricidad or Federal Electricity Commission) began preparations for contracting the construction work and equipment supply for the 750MW El Cajón hydroelectric project (known as El Cajón) in the states of Santa Maria del Oro and Nayarit. In 2006 the CFE initiated procedures to contract the construction and equipment of a similar project, also foreseen in the national development plan and only 62km away from El Cajón, the La Yesca dam. The La Yesca project, located in the states of Nayarit and Jalisco, has an estimated cost of US\$760 million; its construction, which began in 2008, was expected to take four years. El Cajón began operating in March 2007. Both projects have interesting similarities (in magnitude and impact) and IPs were implemented in both by TM. Similarities in both projects' IP implementation justify examining them together. Both are also part of the hydrological system of the Santiago River, which includes a hydropower potential of 4,300 MW across 27 projects, of which six have already been built (<http://www.cfe.gob.mx/movil/Paginas/hidroelectrica-la-yesca.aspx> (Spanish)). This document will refer to both of these projects as the 'Mexican experience', or it will refer to them individually as El Cajón or La Yesca.

INITIATIVE

In 2002 the CFE approached TM to implement an IP in the contracting process for the construction and equipment of El Cajón. At that time, no regulation existed on SWs so TM established the terms of the pact's implementation through a

service agreement. Four years later in 2006, when the construction work for La Yesca was being planned, the CFE again wanted an SW, and as the legislation regulating SWs had been enacted in 2004, it requested that the Public Administration Department (SFP) assign the same SW as for El Cajón, due to its experience, credibility and high-quality work. In particular, the technical requirements of the project were very similar to El Cajón, so knowledge from the previous project would be useful. The SFP accepted the request and designated TM as SW, which in turn designated the Engineer José Manuel Covarrubias Solís as SW for La Yesca.

The decision to use the SW in El Cajón was taken by the highest authorities within the Mexican Federal Government, who instructed CFE. At that time, the system was unknown to CFE officials in charge of procurement. It is possible that concerns with the technical, social and political complexity of the project prompted such instruction. By the time preparations for La Yesca had started, the CFE already had experience with El Cajón; in addition, this being a Federal Government project, it was covered by the Decree of 2004: due to the value of the contract, the use of an SW was mandatory.

In both cases, the authorities' decision to implement the IP was encouraged by TM's reputation and experience.

MAIN CHARACTERISTICS

FEATURE	CHARACTERISTICS
Participants	TM, as implementer and monitor, designates the engineer José Manuel Covarrubias Solís as SW in both El Cajón and La Yesca.
Form	Unilateral declaration signed by the bidders is part of the bidding documents. Government officials related to the bidding process sign a similar unilateral declaration. In El Cajón, it was mandatory; in La Yesca it was voluntary. Pro-forma agreement, i.e. the same text signed by all bidders. The text signed by government officials is also the same.
Signatures	Declarations were signed by all bidders in both projects. Government declarations were signed by a number of CFE staff and management related to both projects.
Monitoring system	Called a 'Social Witness' (SW), this is an independent third party (individual) engaged through an implementing agency (in this case, TM). The SW represents TM in the exercise of his duties.
Coverage	From the preparation of the bidding documents (review of the tender documents for pre-approval) until the award, and in some cases the signature of the contract.

DESIGN

Who's who in El Cajón and La Yesca

TM acts as lead implementer and monitor. Its monitoring role is performed mainly through a Social Witness (SW), a knowledgeable, credible and independent individual with highly specialised technical expertise. The SW is engaged in the process through TM, and represents TM at all times. TM supports the SW in various ways, by:

- providing additional experts (lawyers, accountants, etc.) as needed
- providing institutional backup and support
- supervising and guarding the accountability of the SW. The SW reports back to TM during the course of his duties and discusses appropriate courses of action
- establishing standards which the SW must uphold in performing his duties
- contributing to the review of the draft bidding documents and other contracting documents.

The decision to withdraw from monitoring, and other decisions related to the course of action, are taken by TM on the basis of assessments provided by the SW. The SW produces only one single report at the end of the process, on termination of his duties. The report is published on TM's webpage and TM encourages the authority to publish it in the media.

The implementation arrangements

TM was engaged as lead implementer and monitor, firstly through a frame agreement (Memorandum of Understanding) with the authority. This agreement contains the general conditions for being involved as monitor in the contracting process. It then subscribes to an individual additional service delivery agreement for each process it actually monitors, in which it specifies who will act as SW and establishes the fees. These service agreements with the authority are subject to

public procurement legislation. Their contents will vary depending on the level of the authority (federal, state or local), as different types of procurement legislation apply. At federal level, the SW role is now regulated, therefore these contracts are subject to law. For processes at regional or municipal level, where the federal law doesn't apply, implementation contracts are negotiated with each authority and contain clauses regarding withdrawal from the monitoring process, access to information and payment of the monitor, among others. In El Cajón, as the legislation was still not in place, TM subscribed to an implementation agreement with CFE, the contracting authority. For La Yesca, the contract followed the guidelines established in the newly enacted law.

The form of the Mexican IP

Bidders and government officials all sign Unilateral Declarations of Integrity (UDIs). Bidders are requested to present their UDI along with their bidding documents, on proposal submission. Government officials who must sign the UDIs include the head of the contracting agency, consultants and other advisors (even if they are not part of the agency staff), and the staff and other public officials who will be involved in the bidding process. These are standard texts in both cases.

The declaration signed by government officials contains:

- A general commitment to integrity
- An undertaking to abstain from any behaviour that directly or through third parties distorts or changes the Proposals presented and their evaluation or the result of the procedures, or causes any other situation that would result in an advantage for any particular bidder
- The commitment to grant access to TM as social witness to all information generated through the process.

The declaration signed by bidders contains:

- An undertaking to abstain from any behaviour that directly or through third parties seeks to influence public officials or change the evaluation of the proposals or the result of the procedures, or causes any other situation that would result in an advantage for them as bidders
- Their consent for the monitor to access all relevant information regarding the bidding process, and his participation in all meetings.

Voluntary or mandatory?

TM initially made the signature of UDIs mandatory, meaning that bidders who wouldn't sign were excluded from the bid for not fulfilling the technical requirements. In time, TM changed this approach, realising that in the Mexican context and regulatory framework, it was more productive to leave it as voluntary. Not signing would still have a consequence, as it would be recorded in the public report submitted by the SW at the end of his duties. To date, all bidders have signed unilateral declarations. In El Cajón, the signature of UDIs was mandatory; in La Yesca, it was voluntary.

IMPLEMENTATION PROCEDURES

Initial concerns

In El Cajón, the CFE managers in charge of the contracting process received instructions from the highest level to implement an IP. Initially they didn't know how it worked: this was their first such experience. Timing was one of their major concerns. By the time the construction of La Yesca was about to start, El Cajón was already in operation and had been built on time. The 2004 law requiring an IP in such processes had by then been enacted, but CFE officials interviewed say they would have requested the implementation of an IP again anyway.

Duration of the monitoring

In El Cajón, TM joined the process before the bidding started and remained until the contract was awarded, as did the SW engaged as monitor. The implementation contract and the monitoring contract termination dates were also tied to the date set for the award in the bidding documents. For La Yesca, the SW remained in place until contract signature, at his own request.

Process and results; keys to success

During the bidding process, as reported by the SW, 31 companies acquired terms of reference but only three consortia (10 companies in total) presented bids. The flexibility shown by the Authority (CFE) in clarifying and explaining the terms of reference, listening to doubts and concerns, and adjusting the terms of reference accordingly, gave additional assurances

of technical accuracy and avoided unnecessary conflict. Transparency and the equal treatment of the bidders are important principles of the process and of the SW's work. The SW leaves a clear message in his recommendations on the importance of the monitoring and control that will be undertaken during the execution of the contract (the construction phase). The technical specifications were designed transparently, ruling out corrupt pre-bidding arrangements.

The bidding process for La Yesca began in 2006 but had to be reissued as the proposals presented didn't fulfil all technical requirements. The second bid took place in 2007 with some changes to the technical specifications. In general, the La Yesca process built on lessons learnt during El Cajón and the bidding terms were improved accordingly. It also used the same approach and principles. Seventeen companies acquired the terms of reference and three consortia presented proposals. The procedure also took place through the Compranet (e-procurement system), although no proposals were presented through this mechanism.

In La Yesca, the UDI was signed by 26 officials involved in the bid, ranging from the CFE President to the Resident in Charge of the Preparatory Activities, and including consultants and advisors.

Communications

TM has an important role in IP implementation of supporting the SW in performing his monitoring role. It makes certain information public:

- At the end of the monitoring process, TM delivers a report signed by the expert SW, which is published on its website and often in the media as well
- TM's involvement as monitor is made public through its website and often in the media
- TM presents its experience at different conferences and forums
- A special section of TM's website is dedicated to this topic (see TM's homepage on IPs, <http://www.tm.org.mx/programa-de-integridad-en-contrataciones/>, where the SW reports and other documents can be found).

While the contracting process is ongoing, TM has a strict communications policy of not making public declarations through the media. This protects the monitor and discourages the use of his work for political purposes. Only in exceptional circumstances would TM address the press in place of the SW. (One such circumstance would be in case of withdrawal from monitoring.) Once the report has been issued publicly, interaction by the monitor and TM with the media is possible again. However, the government and bidding companies are free to report to the media throughout the process. This policy has worked well so far, and is the result of TM's longstanding monitoring experience. TM's practices opened the way for improved openness. Current procurement and access to information regulations require the publication of the social witness reports and the social witness registry, which includes the names of all individuals and legal persons admitted to perform as social witness (see <http://www.funcionpublica.gob.mx/unaopspf/tsocial/tsocial.htm>).

Sanctions

The La Yesca and El Cajón IPs don't contain additional sanctions to those established by the law in cases of corruption. However, procedures for the swift reporting of wrongdoing increase the deterrent effect: TM informs authority officials at the highest level, is able to withdraw from the process, and reports directly to the public and the relevant authorities any failure to comply with the agreement.

Under the current regulations, the social witness would report to the SFP or the internal control agency of the contracting authority or eventually to the parliamentary oversight commission of any wrongdoing. Prosecution and control authorities would afterwards conduct investigations if pertinent.

On June 2012, the Mexican government issued a "Federal Anti-Corruption Law in Public Contracting" introducing criminal and administrative sanctions for individuals and also for legal persons; the law is applicable to contracting processes at the federal level. The Mexican government also reports the amounts saved in public contracting or recovered through control and sanction mechanisms (see www.funcionpublica.gob.mx/index.php/transparencia/transparencia-focalizada/control-de-la-gestion.html)

Dispute resolution mechanisms and the imposition of sanctions

The IP doesn't contain additional sanctions to those included already in the law, and therefore doesn't include a special process for their application. In this case, only the relevant prosecuting authorities and the courts can impose sanctions, and the process for doing so is left to established legal procedures. The IP only establishes that TM would inform the authorities and report to the public and the prosecutors cases of violation, and is able to withdraw from the process. This didn't occur in either El Cajón or La Yesca.

Withdrawal

TM has included the possibility of withdrawal in all its IP implementation agreements with the authorities. However, the Decree of 2004 which regulated SW involvement eliminated this possibility at federal level. The instrument of withdrawal is still included and used at municipal and regional levels, where other legislation applies. There is a risk of abuse of the discretionary use of withdrawal that may be bigger in the case of individuals than in the case of organisations acting as SW, as in the latter such a decision would be taken collectively. Perhaps for this reason, the federal SW regulation restricts the possibility of withdrawal, as both individuals and organisations can be registered as the SW. This is contrary to the case of TM, where such a decision is not taken by the SW on his own, but by the organisation as a whole. Such a decision would then have institutional backup.

An example of withdrawal clauses can be found in the agreement signed between TM and the authority in the Municipality of Querétaro, where TM implemented an IP for the construction and equipment of the water distribution system (Acueducto II). In that agreement, the withdrawal clause reads: "In case that 'TRANSPARENCIA MEXICANA' through its 'Social Witness' considers that its involvement is not contributing to the transparency of the process, it will be entitled to withdraw publicly at any time." However, the clause was not implemented, as withdrawal did not occur.

At both federal and local levels, the public report issued by the SW also has an important deterrent effect.

The monitor adding value

In La Yesca, the monitor was involved when the bid was first opened in 2006. Public officials then faced a difficult decision, as the bids presented did not sufficiently fulfil the technical requirements. The monitor gave his own technical opinion, which supported the need to close the tender and reopen it for new bids under different terms. The new bid was reopened in 2007, the contract was awarded and construction began in January 2008. In general, monitors perform an important role that translates into better management of conflict and differences during the contracting process. They help seek clarification and identify points of uncertainty, and provide the contracting process with credibility and legitimacy.

THE MONITORING SYSTEM

Regulating the SW in Mexico: the Administrative Decrees of December 2004 and May 2009

TM first introduced the SW instrument and the contract monitoring component of the IP to Mexico in around the year 2000. After several IP experiences, there was increased demand for SWs in contracting processes. Additionally, the Federal Procurement Law and the Public Works Law required an SW in processes above a certain threshold. In 2004 Mexico's Public Administration Authority (Secretaría de la Función Pública or SFP) issued a decree regulating the SW this was further enhanced and strengthened in the decree of 2009 and the regulations of 2010 that developed them. The purpose of the decree is to 'establish general guidelines that regulate the participation of social witnesses in the contracting processes undertaken by agencies and entities of the Federal Public Administration'. The Decree was issued to ensure minimum quality standards, as new social witnesses were taking part in projects under different criteria from those followed by TM.

The regulation assigns the SFP the responsibility of implementing the social witness mechanism and ensuring its effectiveness. The law determines selection requirements, a selection and designation process, and a public registry for persons who can be designated as social witnesses, and determines the SW's requirements, functions and capacities. It also establishes minimum obligations regarding access to information to which the authorities are subject when SWs are in place. It enables both individuals and organisations (NGOs) to perform as social witnesses and requires that the request to have one be made before the bidding documents have been approved or the contracting process already fulfilled. A "Social Witness Committee" composed of representatives of the SFP, business and professional associations oversees aspects of inclusion and exclusion of individuals and entities into the registry, their fees and make recommendations for the effectiveness of SW. The most recent reforms to the Mexican Procurement Law and to the Public Works Law issued in May 2009 require the use of SWs on contracting processes above a minimum of five million salary days for procurement processes and 10 million salary days for public works (for 2013 approximately equivalent to US\$26 million and US\$51 million respectively). It also enables authorities to request their involvement in other projects, irrespective of the value, when the authorities consider the project of strategic relevance.

The monitor's functions

The monitor:

- Has access to all documents during the bidding process, including the evaluation documents, and is in direct contact with the evaluating committee
- Participates in all ordinary and extraordinary (formal and informal) meetings
- Participates actively in clarification meetings. The CFE holds clarification meetings to discuss and answer questions on the bidding documents, and in which amendments to the bidding documents are considered
- Makes site visits to potential bidders
- Attends meetings to present the project
- Channels within the agreed process concerns and allegations of corruption
- Reviews the terms of reference before they are pre-approved by the procurement committee
- Makes recommendations during those meetings and raises issues or concerns
- Reports findings back to TM.

In El Cajón according to the SW report, the monitor performed the following activities: two site visits; four clarification meetings; one meeting to present the project and five informal meetings for information exchange on the bidding terms. In clarification meetings, 1,124 questions were answered. As a result of the discussions during these meetings with bidders and the CFE, the terms of reference were modified to adopt some of their feedback. The deadlines initially established for the process were also modified equally for all bidders.

For La Yesca, the SW participated in one of two site visits. Six clarification meetings took place, where 738 questions were asked and then responded to in writing. The SW made random visits to the evaluation committee and also reviewed all documentation.

The monitor's report at the end of the project was published on TM's website and also often published in the local media.

The profile of the El Cajón and La Yesca monitor

The expert who acted as social witness (SW) in El Cajón and La Yesca is a well-known and highly regarded civil engineer, with ample experience in the private sector, particularly in hydroelectric projects. He was the Treasurer of the Universidad Nacional de México, where he also teaches various graduate and undergraduate courses. In his duties as SW, he was supported by TM's team of professionals, in particular the leader of the Public Contracting group, whose expertise derives from having implemented almost 60 IPs in different sectors. In addition, other public sector and legal experts were engaged by TM to contribute to the monitoring of the projects and to the work of the SW.

Costs

Social witnesses in Mexico are paid for their role. The public would view non-payment with suspicion ("Where are they getting their money from?") and so TM places great emphasis on ensuring that individuals performing as SWs be paid. The amount is less than a full commercial rate, but is nevertheless substantial (For El Cajón and La Yesca about US\$95 per hour, with a cap depending on project type). An average IP will demand about 50 to 90 hours work, and could last over the course of a year. Currently, under the regulations issued by the SFP in Mexico, the entire cost is covered by the authority. Before the regulation was issued, TM used three different ways of funding the costs associated with implementing an IP and with the SW:

- 100 per cent of the cost was covered by the authority
- 50 per cent was paid by the authority and 50 per cent by the winning bidder (or different proportions).
The contributions by the bidders could be voluntary or mandatory
- 100 per cent of the cost was paid by the winning bidder.

In a few cases, TM paid the implementation costs from its own resources. Before the regulation was issued, about 70 per cent of the 60 IPs that TM implemented had been paid for by the authority, and about 25 per cent of cases had been funded by the winner. TM paid for the others with its own funds.

The amount received by TM includes the SW's fees, direct costs involved in the IP and an overhead. Of the full costs, about a third corresponds to the SWs fees, which are based on hourly rates up to a maximum amount pre-established in the contract. TM oversees that the declared hours worked correspond to reality. In El Cajón, the payment mechanism included a combination of funds from the CFE and voluntary (fixed) contributions by the bidders (only a few of whom actually paid). For La Yesca the costs were covered entirely by the CFE. TM's service delivery contract for La Yesca established minimum and maximum prices, determined by the final amount of hours taken, on the basis of an hourly service rate. The final cost of the IP (including the monitor fees) for La Yesca was 903,900 Mexican pesos (approximately US\$68,000).

Under the current legislation, the fees payable to the social witness are determined by the government considering the magnitude of the contracting process and the available budget.

Following up suspected corruption

During the El Cajón bidding process, TM received an email indicating that there had been irregularities and that privileged information had been given to one bidder before the process was begun. In response to a request for an explanation, CFE informed TM that it had posted information on its website about the project five months ahead of the tender, requesting feedback on the project from all interested stakeholders. TM and the social witness sought the informant in order to obtain more details and identify the possible misconduct, but the informant never responded and further allegations were not made. After the award, news was released through the press that the winning bidder did not fulfil one of the bidding requirements. In addition, the bidder in second place requested a meeting with the SW and argued that it had lost unfairly, showing documents claiming it had offered better financial terms for the project. Once analysed by the SW, the documents proved to have no legal force and the allegations were considered unfounded, so the matter was dismissed. None of the bidders complained thereafter about the qualification criteria or about the legal framework for the contracting process. According to TM there were no unresolved complaints in relation to the project.

Selecting the monitor

TM designates the SW following a rigorous selection process. The SW cannot be a member of TM's staff and is specifically appointed for each process. The individual should have experience in the sector to which the specific IP applies, so that they are capable of contributing not only to the process but also to the substance, inputting to the drafting of the bidding documents and during the contracting procedure. They represent TM and therefore should understand and share the organisation's spirit, values and philosophy. TM has developed a knowledge network currently of 40 experts, which continues to grow and specialise.

Since the legal reform of 2004, the SFP designates the SW who will operate in each individual case from a list of previously registered SWs. Social witnesses are included in the registry through an open process whereby interested candidates have to fulfill certain capacity and experience conditions. The same regulation stipulates that when those chosen are not individuals but legal entities, they are in charge of designating an actual individual who will act as SW. TM was the first SW to register under the SFP registry in 2005.

The monitor's accountability

As implementer and monitor, TM exercises close oversight of the work of the individual engaged as SW; the SW represents TM and is directly accountable to it. TM also supports the SW, providing technical assistance from other experts and an institutional backbone for the role. Therefore the way in which the monitor is held accountable is more a notion of responsibility than one of control. The human and professional qualities of the monitors selected by TM also ensure that they feel their role as a personal responsibility and a duty in which they represent society. Although there is no formal arrangement, TM communicates to its SWs policies and guidelines to follow in their duties and explicitly requires that they abstain from entering situations of conflict of interest at least one year before and one year after performing their duties as SW, and that they abide by TM's communication policies, among others.

In addition, the usual systems of verifying actual hours of work apply. If TM is informed of misconduct in one of its SWs, it informs its Managing Board which decides on the appropriate response. To date, there have been no instances of sanctioning or removing an SW.

Protecting SW independence

There are various mechanisms under which TM protects the SW and his independence, including the policy by which the technical opinion of the SW can't be revoked by any of TM's staff, management or Managing Board, and the restriction on the SW not to communicate his findings with the media until he issues his final report. The qualities of the individual selected as SW are also relevant: TM seeks individuals who are not in, and are not likely to enter into, situations of conflict of interest.

Additional tools

For El Cajón, TM requested that bidders elaborate a risk map, identifying aspects of the process where they expect to encounter irregularities, so that special attention could be given to them. In TM's experience, this tool is most useful at the beginning of the process, when implementers and authorities want to build capacity and knowledge in tackling these problems.

Impact and application

In TM's experience, although it is not entirely possible to rule out corruption, the role of the SW in the process reduces the risk of corruption.

An important outcome in the Mexican case is that it was possible to complete two projects of strategic, economic and social importance while protecting their credibility and legitimacy. The absence of scandal is crucial in projects that span long lengths of time.

While price reductions are desirable, they are not unequivocal indicators of success. In El Cajón the winning bid was 8.5 per cent less (approximately US\$64 million) than the expected price, based on previous bidding trends.

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CASE STUDY: THE IMPLEMENTATION OF AN INTEGRITY PACT IN THE BERLIN-BRANDENBURG INTERNATIONAL AIRPORT PROJECT

This account describes how an Integrity Pact was implemented in the Berlin Airport Project, in order to enable other government agencies, NGOs and project implementers to learn from the experience. It has been produced for knowledge-sharing and capacity-building purposes, and is not meant as an evaluation or an assessment of the case.

We are grateful to Michael Wiehen from Transparency International Germany (TI-D), the monitor Prof. Peter Oettel, Gottfried Eggers and Manfred Körtgen from FBS for their help and input.

CONTEXT

How the IP was integrated into the Berlin Airport Project

The Federal Republic of Germany and the States of Berlin and Brandenburg agreed in the early 1990s, soon after the re-unification of Germany, to build a major new international airport near Berlin. The three authorities began efforts to devise a project model that would be able to obtain political and financial support. The privatisation option that had been considered was dropped, and instead of moving the airport further out into the Brandenburg province (as had been considered earlier), it was decided to use the existing (former East-German) airport at Schönefeld, and to add runways as well as build a totally new terminal building and other infrastructure. Resistance from the immediate neighbours and nearby property owners delayed the final decision by several years, but by 2004 the authorities had determined to go ahead with the project, albeit on a more modest scale than originally envisaged, and keeping it within the public sector. For that purpose they formed a private sector company, the Flughafen Berlin-Schönefeld GmbH (FBS)¹ – a limited company owned by the three public authorities, with the Mayor of Berlin as Chairman of the Board of Supervisors. The total cost of the project was then estimated at €2,400 million (€2.4 billion) and the planned completion date set for October 2011.

In late 1995 TI-Germany (TI-D) had offered the then-new tool of the Integrity Pact (IP) to the relevant authorities, but they declined summarily, arguing that applying the IP would be to admit publicly that there was a risk of corruption. Only weeks later, the first corruption allegations surfaced in the media and haunted practically every step of the process, forcing on the authorities several modifications of the project's administrative and financial structures and finally, in 2001, a cancellation of all project agreements reached by that time. Although formal charges were never filed, several participants in the process, including some interested investors and contractors, were suspected of having employed corrupt means to make headway in the competition.

In view of this experience, and under instructions from the Mayor of Berlin to various state authorities (including FBS managers) to seek new ways to avoid corruption risks in large investment projects, the FBS management approached TI-D in early 2004 and asked for suggestions on how to contain corruption in this major investment project. TI-D offered a number of suggestions and proposed applying an IP. Given the likelihood that contractors who had been involved in the previous process would again submit bids, TI-D emphasised the importance of appointing an independent external monitor, so as to shield FBS management effectively against potential efforts to undermine or circumvent correct procedures.

Over the following weeks, TI-D and FBS managers and staff worked together to develop a model IP that contained all the essential elements of an IP, adapted to Germany's legal context. Both parties concurrently searched for a suitable person to act as the IP monitor. Several candidates surfaced, and in January 2005, two experts were appointed by FBS. The team leader was a retired procurement official from the City State of Berlin, with a spotless record and strong commitment to integrity in procurement, who became a member of TI-D before accepting the monitoring assignment.

¹ In 2011 the company changed names to Flughafen Berlin Brandenburg GmbH (under the acronym in German FBB), which is the one currently used. Since the company was called FBS at the time the IP was introduced, we keep the reference here to FBS

The Berlin Airport procurement process

The Berlin-Brandenburg International Airport (Berlin Airport) is one of the biggest and most complex transport infrastructure projects in Europe in the last years. The project covers approximately 1000ha and involves 3,000 workers. The terminal, once in operation, should be able to carry between 25 and 27 million passengers a year.

The contracting of the work was divided into five components: planning, construction of terminal and service buildings, civil engineering, technical infrastructure and rail. Each component was sub-divided for procurement purposes into smaller tenders for a total of 45 service packages awarded through individual bidding processes. The initial procurement plan involved fewer, bigger tendering packages, but this approach was later changed, together with the project management structure, to include more, smaller packages. The financial framework, along with the restrictive timeline and the desire to avoid disruptions to the construction process, discouraged the partitioning of the project into even smaller contracts. If the tenders were smaller, smaller firms without the capacity to manage the demands of such a big project would submit proposals, whereas this size of tender was appropriate for large and medium-sized firms. In addition, FBS together with the Industrial Chamber of Commerce established an agency to strengthen the capacity of medium-sized firms by providing advice and assistance in the tender process.

By November 2011, the project had entailed 567 individual bidding processes and 900 signed contracts (including design, construction and supplies) worth more than €2.1 billion. The total cost of the project initially was estimated at €2.4 billion. Due to numerous project design changes during implementation and other delays caused by technical problems, the final cost will be significantly higher. Except for one case of suspected collusion that the FBS could handle by redesigning and retendering the components, there has been no indication of corruption associated with any of the contracts managed by the FBS. Furthermore, there are no indications that any of the current cost overruns or the delays are caused by, or associated with, corruption. The opening date is still uncertain but expected to be in late 2014 or 2015.

The monitor has reviewed a good portion of these contracts. There have been no instances or reports of corruption and the project has not been subject to delays on this ground.

Although FBS is a private company, it is subject to German public contracting law and the applicable EU procurement regulations because of its mandate and the public nature of its owners. On the basis of their value, most tenders need to be submitted for European-wide competition and have not been subject to worldwide bidding. Some contracts have been awarded through direct contracting when such a procedure was appropriate according to the law.

THE MAIN FEATURES OF THE BERLIN IP

FEATURE	CHARACTERISTICS
Participants	<ul style="list-style-type: none">• TI-D and FBS as initiators• FBS as lead implementer• Independent monitor
Form	<ul style="list-style-type: none">• Contractual (separate) agreement• Mandatory• Pro-forma agreement, i.e. the same text signed by all bidders in all contracting procedures.
Signatures	<ul style="list-style-type: none">• Signed by all bidders and FBS. Bidders who do not agree to sign are not allowed to take part in the bid.
Monitoring System	<ul style="list-style-type: none">• Independent third party (individual) engaged through a contract with FBS as lead implementing agency.
Coverage	<ul style="list-style-type: none">• Includes all project phases. The IP was first introduced for the awarding of the design and consulting contracts. It is not a mandatory element in all contracting procedures at FBS.

ASPECTS OF IMPLEMENTATION

Initial concerns

FBS managers were initially sceptical about the IP and concerned its implementation would cause delays in the project. This turned into optimism once the monitor was in place and started producing reports to the Board and the Advisory Council. They realised his oversight brought value, protected the process and was not causing extra delays. In time, it was perceived that the involvement of the monitor helped prevent conflict and disputes with the bidders, which in turn also saved precious time for the project.

In the Berlin Airport Project, the IP takes the form of a contract signed by the authority (the CEO as its representative) and each bidder separately, including its sub-contractors. The document must be submitted along with the bidding documents. The contract establishes mutual obligations from both parties and the acceptance of the role of the monitor

Who's who in the Berlin Airport IP

The IP implementation roles have been spread across different actors. The legal department of FBS was mandated with the main logistical aspects of implementing the IP and its integration into the company's operations. Within the company, the Construction Department is in charge of operations and procurement. When considering who to designate as lead implementer, FBS considered several options: an association of retired experts, TI-D or itself. Because the first two had restrictions in capacity and resources, and the association of retired experts also lacked technical expertise in IP implementation, it was decided that FBS itself would lead implementation of the pact, with support from TI-D. Internally, there was also concern that with the monitoring system, there were already too many outsiders involved in operations; leading the implementation itself enabled FBS to address this.

The possible disadvantages of this model were addressed by:

- i) distributing functions and enabling contributions from third parties
- ii) strictly enforcing and guaranteeing the monitor's independence
- iii) facilitating and sharing with others information on the experience.

The effectiveness and impact of the IP demonstrates the effort made by FBS, who showed their commitment by rigorous implementation of the IP, in a manner that built credibility in the process. The monitoring contract was signed between the company (FBS) and the monitor, and the legal department is the main contact point for the monitor, ensuring that the monitor has access to information and resources as agreed. In the definition of the IP terms, the monitor's contract and the selection of the monitor, FBS and its legal department were supported by direct input from TI-D. To date, TI-D also relays synthesised monitoring reports to the public about the project.

FBS managers attribute the pact's success to:

- getting the basics right (procurement procedures, law and people involved)
- the monitoring system
- communicating about the IP.

Out of more than 1000 bidders, only 7 took a complaint to the courts. The FBS won four cases and lost one. In one case the complaint was withdrawn and in one other case the parties settled the case out of court. There were no complaints before the court or the award authority in 2011. To date, there have been no further complaints regarding the contracting processes.

Sanctions

In case of breach of the Berlin Airport IP, the liquidated damages clause is set at three per cent of the contract value, up to an amount of €50,000 (US\$67000). In addition, the authority is entitled to exclude the bidder from the bidding process (and in case of serious violations, also from future bids). This amount is increased to the equivalent of five per cent of the contract value (without a monetary ceiling) if the contractor violates any of the provisions of the IP after the contract award. In this case, the authority may cancel the contract and, in the case of serious violation, may exclude the contractor from future bidding processes. The monitor will notify the prosecutor in case of IP violations. This is also relevant as FBS employees are not government officials: the company is structured as a private company although it is publicly owned. FBS perceives that the sanctions included in the pact produce a deterrent effect.

Dispute resolution mechanisms and sanctions imposition

Under German law, special conflict resolution mechanisms exist that are applicable to the Berlin Airport Project and to FBS, therefore it was not considered necessary to establish a special additional process in the IP. This also applies generally to the imposition of sanctions, although some can also be imposed directly by FBS in cases where it has been established that a violation of the IP has taken place, in particular the exclusion of the bidder from the bidding process; the cancellation of the awarded contract if the winner was responsible for the violation, and debarment from future participation in contracts with FBS. The monitor doesn't impose sanctions: both the IP and the monitoring agreement establish that the monitor should notify FBS senior management on suspicion of violation, who will endeavour to clarify or correct the situation. If such a response is not given within a reasonable time, or in case there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities.

Communicating the IP

FBS invested significant time and effort in communicating the Berlin Airport IP. It was included in presentations about the project made regularly at the local Chamber of Commerce and other industry associations. With time, and as bidders and other government officials became familiar with the IP, there has been less demand for such information sessions. In addition, the monitor himself is involved in explaining the IP to potential bidders.

Mandatory or voluntary?

In Berlin, it has been useful that the IP is a standard mandatory document. Because of the large volume of contracts, it would be difficult to negotiate the IP content with all bidders. This has also made it easy to react to requests for changes made by some bidders, particularly at the beginning of the project. The IP text has been moderately refined by FBS through time.

Reluctance to sign the IP

Very few bidders refused to sign the IP at the beginning of the project. The terms of reference are clear in requiring the signature as a condition for participating. The few bidders who refused were not allowed to participate. After seven years of implementation, there have been no new cases of reluctance to sign the IP.

Equal treatment of bidders

FBS has implemented a principle throughout the process that refers to the 'equal treatment of all bidders'. Within this, it holds meetings with the bidders to address clarification questions, enabling all questions and answers to be shared by all parties. Questions and answers are typed into a computer system in real time during the meeting and shown on a screen. At the end of the meeting, participants can take a printout of these questions, and those not present have internet access to them. This guarantees all information is timely and shared.

Additional measures to protect the award process

FBS keeps the physical bidding documents and proposals in a single room, and restricts access to them. People who enter and leave the room must be registered.

Implementation strategy

As project manager of the Berlin Airport Project, FBS has implemented the IP as part of its project communications strategy. Communication plays a key role in the project's implementation. Part of this strategy, in FBS's view, is to establish partnerships with the contractors where their interests are aligned. The IP is part of the way this alignment is formalised and comes in addition to a Partnership Agreement that the contractors sign, where they agree with FBS to general terms of behaviour towards FBS and their own employees, some risk management measures, information sharing, etc. The IP is therefore not taken as a 'threat' but as a project management tool that helps the company to complete its tasks successfully.

THE MONITORING SYSTEM

Selection of the monitor

The Berlin Airport IP monitor was chosen by FBS (the authority) and TI-D from a shortlist proposed by both. The selected monitor was a retired expert with years of experience in public office and procurement for complex projects. The designation of the monitor was announced by FBS in the media and also reported by TI-D. The 2005 press release can be found under: www.berlin-airport.de/DE/Presse

The monitor's independence

As the Berlin Airport IP monitor was a retired professional, problems of possible conflicts of interest and 'revolving doors' (when someone who moves between public and private roles exploits his public post to the benefit of companies previously worked for) were almost ruled out: the monitor did not derive his income from any business relation with bidders or potential bidders. As FBS performs not only as the authority, but also as lead implementer of the IP, the company pays the monitor from its budget. It ensures however that the monitor prepares his reports without its intervention, and is clear about this feature in its own reports on the IP. The greatest assurance of independence in this case has been the content of the reports submitted by the monitor, which have shown to bidders, FBS and other supervision authorities in Berlin that he does perform his duties independently.

The value added by the monitor

The monitor has performed reviews in circumstances initially not foreseen, fulfilling an important preventive function in cases where there were questions raised against potential bidders or doubts over the participation of bidders who had been previously involved in corruption scandals but had not been debarred. The monitor reviewed the cases and the reactions given by the potential bidders, and concluded that they had addressed the problems encountered in the cases of corruption, determining that there was in principle no cause for concern to prevent their participation in the process, provided all other requirements were also met.

Monitoring IP implementation

The Berlin Airport IP monitor began work in 2005 and is engaged until the end of the project (i.e. the opening of the airport) and for six weeks afterwards. Until then, the monitor will oversee that bidders and contractors do not violate their obligations under the IP. The IP itself governs bidders' behaviour during the contracting process and after the award. While the monitor is active during project implementation, including a review of change orders, he does not oversee contract execution (i.e. the quality, timeliness or fulfilment of a contractor's work), but ensures that during the execution of the contract, contractors behave with integrity and continue to fulfil the IP requirements.

Procedure if corruption is suspected or detected

On suspicion of IP violation, the monitor should notify top FBS management, who should endeavour to clarify or correct the situation. If such a reaction is not given within a reasonable time, or if there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities. This procedure has been established but has never been used, as there have been no claims of breach of the IP.

Sources

- Michael Wiehen, *The Berlin Schönefeld International Airport and the Integrity Pact*, July 2008
- FBS Jahresbericht 2008
- Interviews with:
 - Gottfried Egger – Director, Legal Department at FBS, July 2009
 - Manfred Körtgen – Technical Director, FBS, July 2009
- Review of existing materials (some confidential)
- Presentation by Manfred Körtgen, Technical Director, FBS
- Integrity Pact Model by FBS, Version 25/08/2009
- FBS Monitoring Agreement
- Transparency International IP Internal Evaluation 2008.

ANNEX 6.1

EXAMPLES OF MEMORANDA OF UNDERSTANDING (MoUs)

AGREEMENT BETWEEN TI GERMANY AND BREMEN HOSPITAL

AGREEMENT

between

Transparency International – Deutschland e.V. (hereinafter: TI-Deutschland),
represented by the Executive Board,
Alte Schönhauser Str. 44, 10119 Berlin

and

Gesundheit Nord – Klinikverbund Bremen, a gGmbH (not-for-profit association)
wholly owned by the city of Bremen (hereinafter: Gesundheit Nord),
represented by its Managing Director for Hospital Management,
Osterholzer Landstraße 51 G, 28325 Bremen.

PREAMBLE

Gesundheit Nord is aiming to achieve the highest standards of integrity and transparency with regard to the construction of a (partial replacement) building at Bremen Central Hospital (KBM). For this purpose, it will use the concept developed by Transparency International of an integrity pact for all applicants, bidders and contractors when awarding and executing all supply, construction and other service agreements associated with the hospital project. It will work in close cooperation with TI-Deutschland on this issue. An important element of the concept is the appointment of an external independent Monitor with specialist knowledge who will supervise compliance with the integrity pact by all partners.

§1 INTEGRITY PACTS

TI-Deutschland and Gesundheit Nord will jointly develop and approve drafts for the integrity pacts and the monitoring agreements. If there are any subsequent changes made to these agreements by Gesundheit Nord, TI-Deutschland will be informed in advance and Gesundheit Nord will take any suggestions TI-Deutschland may have into consideration.

§2 MONITOR

- (1) The Monitor will be appointed by Gesundheit Nord as agreed between TI-Deutschland and Gesundheit Nord. Candidates for the position of Monitor will be either proposed by TI-Deutschland or reviewed by TI-Deutschland for suitability.
- (2) The Monitor will act in his own name and assume full responsibility for his actions.
- (3) TI-Deutschland will support the Monitor in his work without infringing his independence.

§3 TI-DEUTSCHLAND REPRESENTATIVES

TI-Deutschland will be represented in all contacts with Gesundheit Nord by Dr. Michael Wiehen and the members of TI-Deutschland's regional group for Bremen, Prof. Rainer Dombos and Joachim Larisch.

ANNEX 6.1

§4 REIMBURSEMENT OF COSTS FOR TI-DEUTSCHLAND REPRESENTATIVES

- (1) TI-Deutschland will not receive a fee for its advisory and assistance services.
- (2) Expenses incurred by TI-Deutschland representatives residing in the Bremen area will not be eligible for reimbursement.
- (3) For trips occasionally made by other TI-Deutschland representatives (especially Dr. Wiehen) in connection with the implementation of this agreement, Gesundheit Nord will reimburse reasonable expenditure incurred for travel and accommodation. Travel that is eligible for reimbursement should be agreed in advance between the parties whenever possible.

§5 CONFIDENTIALITY

- (1) During the joint preparation work, as well as during the monitoring of the execution of the integrity pacts, Gesundheit Nord will grant the representatives of TI-Deutschland access to selected confidential information and data. TI-Deutschland pledges to treat in confidence all information and data that can be assumed to be confidential, even within the confines of TI-Deutschland, and to make such information and data available only to persons responsible for this matter and known to Gesundheit Nord. These persons, and especially the representatives named in the agreement, will sign appropriate confidentiality undertakings with TI-Deutschland.
- (2) This also applies to confidential information and data that TI-Deutschland receives from the Monitor while providing the Monitor with support.

§6 CONTACT WITH THE MEDIA

Gesundheit Nord and TI-Deutschland will only provide specific information to the media regarding the content and implementation of the integrity pact for 'Bremen Central Hospital' in joint releases or after prior agreement with the other party. Spontaneous enquiries from the media, the answering of which does not permit prior consultation with the other party, may be answered subject to the principles of confidentiality agreed between the parties and while ensuring that the confidential nature of internal information is observed. In all cases, the other party should be informed immediately of such provision of information.

§7 TERMINATION

This agreement may be terminated by either of the parties at any time, without having to provide reasons or a period of notice. Information for public release regarding termination of the agreement may be provided by either contractual party only after coordination with the other party.

ANNEX 6.2

MEMORANDUM OF UNDERSTANDING BETWEEN PAKISTAN STEEL MILLS, KARACHI, AND TRANSPARENCY INTERNATIONAL PAKISTAN (I)

Considering that bribery is a widespread phenomenon which raises serious moral and political concerns, undermines good governance and economic development, and distorts national and international competitive conditions;

Considering that all companies and Major organizations within Pakistan share a responsibility to combat bribery in all its forms and manifestations;

Having regard to the present policies of the Pakistan Government on Combating Bribery through various measures taken by it including the National Accountability Bureau Ordinance 1999 which, inter alia, calls for effective measures to deter, prevent and combat bribery in all its manifestations in particular the prompt criminalization of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in its articles and within the jurisdictional and other basic legal principles of the Anti Corruption Laws presently in force in Pakistan.

Welcoming the recent developments within Pakistan such as the Securities and Exchange Commission of Pakistan's Code of Corporate Governance and the Companies Ordinance of 1984, and the recently announced UN Convention against corruption,

Welcoming the efforts of Transparency International Pakistan and other like-minded companies, business organizations as well as other non-governmental organizations in combating corruption.

Recognizing the role of the Pakistan government and the recommendations of the National Anti Corruption Strategy approved by the Cabinet and signed by the President in 2002,

Recognizing that achieving progress in this field requires sustained efforts not only on a company level but on a National level in terms of implementation and monitoring of its reforms,

Have agreed to Support and implement to the best of our ability, both in letter and in spirit the recommendations of TI-Pakistan in affording Transparency within PSM.

Have agreed that the PSM shall take such measures as may be necessary to prevent that any person from our company intentionally offers, promises or gives any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Have agreed to take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a Public official shall be a criminal offence. Where a "public official" means any person holding a legislative, administrative or judicial office in Pakistan, whether appointed or elected; any person exercising a public function, including for a public agency or private enterprise; and any official or agent of a public / private organization;

Have agreed to take such measures as may be necessary, within the framework of existing laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

ANNEX 6.2

Have agreed that in case the PSM fails to carry out the above agreed-upon recommendations Transparency International Pakistan has the right to withdraw from this Memorandum of Understanding and declare the same through a public announcement. Such withdrawal shall be effective 30-days after the date of the receipt of a notification given by TI-Pakistan to the PSM to this effect.

Have agreed to this Memorandum of Understanding between Transparency International Pakistan (TI-Pakistan) and the Pakistan Steel Mills (PSM) – Karachi for the Implementation of the “Integrity Pact” and Transparency in its Procurement Systems. Where the “Integrity Pact” is an Integral Part of the National Anti Corruption Strategy approved by the Cabinet on 20th September 2002 & 5th October 2002 and its Implementation mechanism approved by the President 24th October 2002.

The Integrity Pact is a tool developed by Transparency International, which ensures that all activities and decisions of public offices are transparent and that the projects/works are implemented, services are provided or taken, and goods/materials are supplied without giving taking or allowing for any kind of benefit, financial or otherwise. Justification of the decisions taken is provided without discrimination to all parties concerned or to any individual or institution/organization.

It is agreed that the Pakistan Steel Mills – Karachi along with TI-Pakistan will work jointly for the implementation of the appropriate SBD's herein being the Pakistan Engineering Council's Guidelines and Standard Bid Documents for Procurement of Engineering Services, Works and Plant and Equipment. The implementation of the PEC Procurement SBD's are a recommendation of the NACS including those recommendations in the NACS involving Transparency in procurement. In case the PEC Guidelines and Standard Bid Documents do not respond to the requirements of the PSM, other SBD's such as the World Bank guidelines and SBD's will be used..

It is also agreed that the Pakistan Steel Mills – Karachi will establish accountability in all its dealings and will to all intents and purpose try to provide the necessary Checks and Balances in its effort towards an all encompassing Transparent Procurement System in its effort to reduce corruption in procurement. The process will comprise the formation of a Coordination Committee and other relevant committees to implement the Integrity Pact and transparency in Procurement.

THE COORDINATING COMMITTEE.

This basic committee to be set up by the Pakistan Steel Mills shall consist of three members comprising Officials of the Pakistan Steel Mills with responsibilities related to the Administrative (Legal Expert), Financial and Technical (Procurement & Contracts) Departments. and two Representative of TI-Pakistan. The General Manager (Development and contracts) shall act as its Chairman. The Coordinating Committee will:

1. Identify and list all issues of transparency and evaluation of tenders criteria in the procurement bidding documents, including the discretionary conditions presently existing in the contract documents and make the necessary changes where necessary..
2. Prepare ways and means to be included in the Contract Documents to eliminate/reduce delays to a bare minimum (Time base decisions with predictable milestones) and in approvals by providing mandatory time frames for submittals by consultants/ contractors / suppliers and approvals by client/consultants.
3. Introduce approval systems to process and award contracts, as well as to complete the Projects at the most economical cost and within the scheduled time.
4. Incorporate the Directives of the NACS with regards to Procurement and Contracting.

Herein after it is agreed that;

- All important decisions be made public
- The PSM will develop a comprehensive website for publication of all information especially with regards to tenders and procurement
- Information on all important activities including auditor's report should be made easily accessible to all
- The Pakistan Steel Mills will periodically make public their sources of income and revenues
- For this purpose, Transparency International Pakistan will provide the services of experts to the Pakistan Steel Mills – Karachi without any cost to the PSM
- The Pakistan Steel Mills has the responsibility to inform the local public and all interested individuals / institutions / organizations / Vendors and others about the activities carried out under this Agreement and to make public this agreement through a Press Conference organized by the Pakistan Steel Mills
- In accordance with the proposed Pact, Transparency International Pakistan will provide experts' services for 3-months beginning from June 16, 2004 and may be renewed on mutual understanding
- The PSM will continue the Integrity System even after the completion of this project and will provide information and details when Transparency International Pakistan requires such information for the purpose of implementation of this agreement. TI-Pakistan may continue the monitoring of the Integrity Pact and Transparency in Procurement, if found necessary for a further 9-months and shall be deemed to be accepted by the PSM in case TI-Pakistan requests for the same
- That all information relevant to providing Transparency Procurement procedures shall be provided to the Coordination Committee by the Management of the PSM and all its related departments. It shall include documents which are in addition to those that are allowed under the Freedom of Information. Ordinance 2002
- It is also agreed that the SAMPLE Integrity Pact attached along with will be implemented as part of all Contracts / Tenders to be implemented by the PSM with modifications by the coordination committee where and when necessary and preferably at the pre-qualification stage.

Pakistan Steel Mills Ltd. and Transparency International Pakistan have agreed to sign this MOU on this day of Wednesday, June 16, 2004 at Karachi

Signed by:

Lt. Gen. Abdul Qayyum H.I. (M)
Chairman
Pakistan Steel Mills, Karachi

Shaukat Omar
Executive Director
Transparency International Pakistan
Karachi

Mr Khurshid Anwar
Director Finance
Pakistan Steel Mills, Karachi

Syed Adil Gilan
Procurement Specialist
Transparency International Pakistan
Karachi

Witness

Witness

Mr Saleem Ahmed
General Manager – Finance
Pakistan Steel Mills

Lt. Gen. (Retd) Moinuddin Haider
Former Governor Sindh.
Advisor TI Pakistan

(i) Taken from <http://www.transparency.org.pk/documents/PSM-MOU.pdf>

