

Prevention of Corruption in Public Procurement in German Local Communities

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บทคัดย่อ

การจัดซื้อจัดจ้างภาครัฐเป็นภาคส่วนหนึ่งของการบริหารงานภาครัฐที่มีความเสี่ยงต่อการเกิดการทุจริตมากที่สุดของหน่วยงานภาครัฐในประเทศเยอรมนี บทความนี้ศึกษามาตรการของเจ้าหน้าที่รัฐเพื่อต่อต้านการทุจริตในการจัดซื้อจัดจ้าง โดยมุ่งเน้นองค์กรปกครองส่วนท้องถิ่น (ชุมชนและมณฑล) ซึ่งใช้เงินงบประมาณในการจัดซื้อจัดจ้างมากที่สุดของประเทศ และมีความเสี่ยงเกิดทุจริตรุนแรงที่สุด

บทความนี้ เน้นเครื่องมือต่อต้านการทุจริตต่าง ๆ ได้แก่ การวิเคราะห์ความเสี่ยง การแบ่งหน้าที่โดยเฉพาะการรวมศูนย์กระบวนการบางส่วนของ การจัดซื้อจัดจ้าง การเข้าไปมีส่วนร่วมของเจ้าหน้าที่รัฐฝ่ายต่าง ๆ ในกระบวนการจัดซื้อจัดจ้าง (ภายใต้หลักการร่วมสอดส่อง) การหมุนเวียนเจ้าหน้าที่รัฐ (ที่เกี่ยวข้องในกระบวนการจัดซื้อจัดจ้าง) การใช้ระบบจัดซื้อจัดจ้างอิเล็กทรอนิกส์ การตรวจสอบทางบัญชี การจัดให้มีคณะกรรมการต่อต้านการทุจริตโดยเฉพาะการทำหน้าที่ผู้รับสัญญาณจากผู้แจ้งเบาะแส

คำสำคัญ: การป้องกันการทุจริต การให้สินบน การจัดซื้อจัดจ้างภาครัฐ องค์กรปกครองส่วนท้องถิ่น

Abstract

Public procurement is the most corruption-prone field of public administration in Germany. The paper explores the standard measures taken by public authorities in Germany to counter the threat of corruption in this field. It has a special focus on the local level (local communities and counties), which holds the biggest part of the national procurement budget and where the corruption danger is most acute.

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The paper specifically deals with the following anti-corruption tools: risk analysis, division of functions, especially by centralizing parts of the procurement process, involvement of several civil servants in the procurement process (multiple eyes principle), the rotation of civil servants, use of e-procurement systems, auditing, anti-corruption commissioner and here especially its function to act as a contact person for whistle-blowers

Keywords: prevention, corruption, bribery, public procurement, local communities

1. Introduction

Corruption is usually defined as misuse of public office for private gain (e.g. by Transparency International¹). This wide definition also comprises nonspecific types of behaviour like fraud or embezzlement. This paper will only deal with prevention measures against types of corruption that are typical to the field of public procurement: bid rigging, kickbacks and conflict of interests where the public official has personal interests in the winning company (see also PwC study, 2013).

Procurement is the field of German public administration which is the most corruption-prone. Overall, public administration in Germany is not riddled by rampant corruption. Petty corruption based on a casual encounter (e.g. police officer in traffic control) is very rare (European Commission, Eurobarometer on Corruption, 2013). Substantial corruption risks arise where civil servants develop closer

relationships with people outside of the administration in the context of their professional tasks. Public procurement is the most important area in which these relationships can more or less automatically develop. This is especially true for the procurement of construction works by local communities. Civil servants who work in the building departments of contracting authorities are usually architects or construction engineers. They very often have work experience in the private sector. Their interlocutors on the supplier side have a similar professional background and socialization. They usually work for or own medium-sized construction companies with deep roots and connections within the community. This can lead to structural corruption in which the same protagonists develop corruptive behavioural patterns over a longer period of time (Dölling, 2007).

Prevention of corruption in Germany in public procurement therefore focuses on preventing the

¹ Go to www.transparency.org/whoweare/organisation/faqs_on_corruption/2/. (accessed March 12, 2015).

development of these corruption-prone structures or at least manage them effectively. Two aspects are important here: The process of procurement itself (e.g. by procuring via public tender) and the organisation of the administrative entity which procures (e.g. by sensible centralization). While the former has received considerable attention by the legislator in form of a complex public procurement law, the latter is only little regulated. The responsibility to ensure organizational corruption safeguards largely lies with the administrative entity itself. The national government has taken extensive organisational measures for its administration to combat corruption (e.g. centralization of procurement activities). The same is true for the states² concerning their administration. The majority of public procurement activities however occurs on the local level (local communities, counties). Here, vast differences in taking up that responsibility can be observed. Some local communities take this issue seriously (typically those with high profile corruption scandals in the past, like the cities of Cologne and Wuppertal). Others have a negligent approach.

This article will explore standard organisational measures against corruption which are taken (or should be taken) by German local communities

in the field of public procurement. Because of the scarcity of regulation its role as a key element to prevent corruption is very often underestimated.

2. Risk Analysis

Prevention of corruption seeks to minimize corruption risks. Every prevention strategy must therefore begin with a risk analysis. No area of public procurement is immune against corruption but the risks are not evenly spread. The result of the analysis is a **risk map**. It is the basis for an efficient allocation of the resources available for prevention efforts. The development of a risk map is a legal obligation for local communities only in the federal state of North Rhine-Westphalia.³

The development of a risk map should follow a two-step procedure (Federal ministry of interior, implementation advice risk map, 2012). The first step consists of analyzing each post dealing with procurement with the help of **general criteria** (e.g. using job descriptions or the administrative distribution plan). The main criteria pointing to a heightened corruption risk are:

- Importance of the procurement budget
- Concentration of tasks within the procurement process

² Germany has a federal structure (comparable to the US) with 16 federal states with their own parliaments and governments.

³ Art. 19 (2) anticorruption statute NRW (Korruptionsbekämpfungsgesetz Nordrhein-Westfalen). North Rhine-Westphalia is the most populous federal state with 18 out of 82 million inhabitants.

- Freedom of discretion for the involved personnel

The second step is the closer analysis of those posts which have a heightened risk potential (e.g. with the help of interviews, spot-check file analysis or statistics). Again, the use of criteria is very useful, this time however more focused on **concrete facts**. The most important criteria here are:

- Cases of corruption or corruption suspicion in the past
- Number of procurement procedures without public tender
- Length of period of time a certain staff member is holding the post
- Expert knowledge on the managerial level as precondition for effective supervision
- Quality of documentation of procurement procedures

3. Division of Functions

The division of functions seeks to make the emerging of corruption-prone structures more difficult by assigning the responsibilities for the numerous decisions in the course of a procurement process to different posts. A key element of this approach is the creation of a **centralised procurement department** (Bekemann, 2007, Dimitri et al., 2006) which can be found in a majority of German local communities (Glock/

Broens, 2011, Leifeld, 2005). The procurement department is usually in charge of the formal procurement procedure while the technical department remains in charge of the technical issues and the implementation of the contract (e.g. school department for the planning prior to the tender procedure and for the construction of the school itself). However, the concrete task assignment for the procurement department varies greatly from one local community to the next. Some procurement departments have only the task to send the bidding documentation to potential bidders, to take in the bids and to open them after closure of the tender procedure. In such a case, the procurement department is little more than an auxiliary assistant to the technical department. The corruption prevention effect of such a “centralisation” is very limited. Centralisation can only become an effective anti-corruption tool if the procurement department gets enough resources (especially in form of personnel) and power to influence the procurement process in a meaningful way. Key decisions for which a procurement department will usually be suited are the choice of the bidding procedure⁴, the choice of potential bidders in procurement procedures

⁴ *Open procedure where every company can bid, restricted procedure where the buyer will select those companies allowed to bid, negotiated procedure where the buyer not only selects the company allowed to bid but also has the right to negotiate with the bidders in the course of the process. Negotiated procedures usually carry the highest corruption risk.*

other than the open procedure⁵ or determining the most economically favourable bid (the two latter decision usually in cooperation with the technical department). The procurement department can also be assigned tasks in the field of contract implementation. This should be especially considered for contract expansions in the course of the implementation of big construction projects.⁶ These expansions are very common and carry important corruption risks.⁷

Division of functions is possible in technical departments too. It could e.g. be fixed that the person in charge of setting up the performance description should not take part in the choice of bidders or in the selection of the most economically favourable bid.

Smartly designed and implemented division of function does not only contribute to the prevention of corruption. It also contributes to specialisation of personnel and thus to more effective work. Division of function comes with unavoidable friction loss due to a higher number in interfaces in the process, thus generating costs. On the other hand,

it can reduce the necessity of other prevention measures (especially the many eyes principle) and thus save costs.

4. Many Eyes Principle

The many eyes principle is a classical instrument of prevention of corruption. Its application is nearly ubiquitous in procurement of German local communities although an obligation for it only exists in North Rhine-Westphalia.⁸

The efficiency of the many eyes principle essentially relies on the **technical competence** and the **time resources** of the staff member having to approve the transaction (usually a superior). This co-signing person must at least be able to perform spot check controls. If that is not the case, the many eyes principle only gives a wrong feeling of security. There are no studies about the practical implementation of the many eyes principle in public procurement in Germany. In any case, the many eyes principle does not make the necessity of a system of unforeseen external controls obsolete.

⁵ See prior footnote.

⁶ Example: The city awards a contract to refurbish a building for 200.000 Euro. In the course of the refurbishment, the contractor claims an additional fee of 50.000 Euro for additional work which is allegedly necessary because of the unforeseen poor state of some parts of the building.

⁷ The city of Cologne has a very effective procurement department, which handles this task very successfully.

⁸ According to Art. 20 anticorruption statute NRW (see footnote 3) for any procurement transaction above a volume of 500 Euro.

5. Rotation of Personnel

Corruption in public procurement is nearly always structural corruption (see introduction) which requires the involved personnel being on the relevant posts over a longer time. The most effective prevention instrument here is the rotation of personnel. Local communities with more than 25.000 inhabitants in North Rhine-Westphalia are obliged to rotate all staff members on “particularly corruption-prone posts” after a period of five years.⁹ An exemption is only possible for “compelling” reasons and this has to be reported to the supervising authority.¹⁰

The rotation of personnel is a very controversial instrument, which usually meets a considerable amount of resistance within public administration, not least amongst the directly concerned staff. The organisation loses precious knowhow, two staff members must familiarize with their new task. If the rotation takes place against the will of the concerned staff members, their work satisfaction and subsequently the quality of their work can suffer. There are no known studies on this subject

but the impression of the author is that this instrument is only fairly rarely used. Even local communities in North Rhine-Westphalia seem to ignore their legal obligation in that respect more often than not.

6. Use of e-procurement systems

E-procurement is the use of information technology to carry out the procurement procedure. E-procurement has two elements: The first element is the communication between the buyer and the bidders. There is an EU-wide obligation to ensure that this communication is carried out electronically by 2018¹¹ if the estimated contract volume exceeds a certain threshold.¹² The second element is the internal processing of the procurement act within the organisation of the buyer. Both elements can help prevent corruption because they substantially increase the transparency of the process and thus make manipulations more difficult (e.g. by manually altering one of the offers after the closure of the bid). As things stand now, the number of local communities introducing e-procurement solutions for their communication with potential bidders

⁹ Art. 21 (1) anticorruptions statute NRW (see footnote 3).

¹⁰ Art. 21 (1) anticorruption statute NRW (see footnote 3).

¹¹ For contracting authorities who act as centralized procurers for other public entities, this obligation comes into effect two years earlier.

¹² 5.186 Mio. Euro (5.65 Mio. USD) for construction contracts, 207.000 € (225.500 USD) for most other contracts (USD figures on the base of Euro-USD exchange rate on April 4th 2015).

is increasing constantly. It can be expected that the deadline 2018 will be met and that most local communities will take advantage of the situation to introduce this element of e-procurement for procurement acts below the threshold mentioned below.

The second element of public e-procurement, the internal processing, is facing much more problems to impose itself. There are several products on the German market enabling a more or less completely digitalized internal workflow for the procurement procedure. However, the reception for these solutions has been mixed. As of today, only a minority of contracting authorities use one of them. The more the procurement process is decentralized, the more workplaces need to be equipped with the new software, thus increasing costs for licences, training etc. At the same time, decentralization facilitates corruption. As a consequence, contracting authorities with a highly decentralized procurement face a dilemma: Decentralization carries a higher corruption risk and at the same time higher costs for one of the tool to reduce the risk.

7. Auditing

German local communities are legally required to set up an audit department which has the task of controlling the whole municipal administration.¹³ The audit department has an independent place within the administration: It is not integrated in the administrative hierarchy; the mayor has no managerial authority. It is subject to the authority of the municipal council alone and thus its tool to control the administration. In this function, the auditing of procurement is one of its important tasks. It has the authority to look into any current or past procurement procedure as it sees fit. In practice however, it is rare that the audit department will uncover corruption in an audit unless it has been tipped off before (e.g. by a whistle blower, see also next paragraph). The reason for this is that you will not usually identify corruption when looking into a procurement procedure unless you more or less know what you are looking for. The audit department has also the task to advise the administration on matters of corruption prevention. However, this advice is not binding and in practice the role the audit department can play very much depends on the persons involved. Measures to prevent corruption are often seen as exaggerated and bureaucratic

¹³ E.g. for North Rhine-Westphalia art. 103 Local Community Act NRW.

complications. If leading staff members sharing this opinion have a strong position within the organization, they will tend to impose their views towards the municipal council and/or the mayor. The importance of an independent audit department as such should therefore not be overestimated. It can be an effective tool to prevent corruption if its head is strong and if other key players in the administration take prevention seriously. If these conditions are not met, its role will be limited.

8. Anti-Corruption Commissioner

An anti-corruption commissioner is a person within the administration which is entrusted with certain anti-corruption tasks. One possible duty can be the risk analysis (see above) as well as providing anti-corruption training for other staff members. However, its most important function is to be a **contact person** for people inside or outside the administration who want to **report on a possible case of corruption**. Giving this possibility to potential informants is a very effective way to prevent corruption. First, it sends a clear message to potential wrongdoers that there is a heightened risk of exposure. Second, it will encourage potential informants, who will often be reluctant to come forward. It is

therefore important to highlight the possibility to report in an appropriate way (e.g. by placing it in a prominent position on the municipality's website) and to give informants the possibility to remain anonymous. Another important success factor is the position of the commissioner: To be taken seriously, a certain degree of seniority is required. An ideal candidate for such a post is the head of the audit department.

Providing potential informants the possibility to report is an often underestimated anti-corruption tool. Its practical effectiveness and its psychological impact are considerable. At the same it does not use up many resources. Practical experience shows that the number of wilfully misleading tips is small.

The law doesn't proscribe to set up an anti-corruption commissioner. Nevertheless, many but by far not all local communities in Germany have an anti-corruption commissioner (Leifeld, 2005, Einmahl, 2011).¹⁴ The number of local communities who entrust their commissioner with the task of acting as a contact person in a very visible way is however small (Einmahl 2011). Anti-corruption commissioners are usually senior staff members (Leifeld, 2005).

¹⁴ In the study undertaken by Leifeld 10 out of 32, in the study undertaken by Einmahl 22 out of 29.

9. Conclusion

Overall, German local communities only face few legal obligations to take effective corruption prevention measures. Standard measures to prevent corruption are widespread in one form or another. Their effectiveness however very much depends on whether the local leadership perceive corruption as a subliminal and present threat, even if it is largely invisible, and if it has the political will to counter that threat.

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