

Bidding for business

Balancing participation and risk management is key to successfully navigate the complexities of tenders

1 MINUTE READ

Public tenders are a common procurement mechanism and potentially very lucrative for companies with global operations.

However, given the significant corruption risks that can arise – and the spate of enforcement actions that have involved the same – companies are advised to implement robust internal processes to ensure that their participation in tenders does not run afoul of relevant laws. The authors outline the risks that can arise in the tender context and offer several best practices for risk management.

Governments around the world often conduct business through tenders – a procurement vehicle similar to a request for proposal (RFP), whereby bidders submit competing offers to supply goods or services in accordance with announced specifications. Indeed, many governments require agencies to issue public tenders if the value of the procurement exceeds a particular threshold.

Estimates suggest that public procurement is as high as \$9.5 trillion globally, a whopping 15% of the global GDP. In many respects, tenders represent the free-market economy ideal – sellers with equal access to relevant information submit competing offers, and the buyer chooses a winner based on price, quality, and overall value.

However, because public tenders involve the awarding of large government contracts often at the discretion of government officials, they can present significant corruption risks under the US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act (UKBA) and similar local laws, as well as risks under antitrust and competition laws. The most obvious (and egregious) risk is bribing procurement authorities to select the bribe payer as the winner or to give the bribe payer inside information. Other risks include price-fixing with other bidders, making false statements in bid submissions, or ultimately failing to supply products or services in accordance with specifications.

The commercial impact of any of these missteps can be significant: in addition to costly litigation or investigations and resulting reputational damage, misconduct can also result in debarment (that is, exclusion) from participation in future business with the tendering entity and other entities participating in a cross-debarment agreement.

The corruption risk is particularly acute in developing markets that require engagement with the local economy as a condition of the tender. For example, in 2017, US-based Halliburton paid over \$29 million to the Securities and Exchange Commission (SEC) to resolve FCPA violations arising from its use of a third party intermediary to win contracts in Angola. Under the guise of satisfying applicable local content regulations, Haliburton outsourced more than \$13 million worth of business to a local Angolan company, whose owner was a friend and neighbor of the government official who ultimately

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approved the award of public oil contracts to Halliburton.

Below are a few tips for navigating the complexities of tenders including:

- 1) adopting a written policy governing the bidder's tender participation;
- (2) avoiding the misappropriation of confidential information; and
- (3) carefully managing any third parties assisting the bidder in the tendering process.

Prepare a written policy

Tender submissions often require significant coordination among multiple functions in a company. This level of coordination is particularly complicated for companies with tender business in jurisdictions around the world. For example, a typical tender submission may require input from sales, finance, government/regulatory, supply chain and legal/compliance. It can be helpful to have written policies delineating each department's role and setting out key company requirements. For example, legal/compliance could be responsible for reviewing any local procurement requirements and ensuring that the company's participation does not run afoul of other applicable laws (for example, participation does not require impermissible boycotts).

An effective tender policy should require documentation of the various processes the company undertook when submitting a bid, including evidence of arms-length negotiations with the procuring entity and accurate recording of the transaction in the company's books and records. Finally, requiring appropriate levels of approval for any bid submission is crucial – it reduces the likelihood of a rogue employee manipulating the process and generating liability for the company. In the case of Halliburton, employees failed to comply with an internal control that required contracts over \$10,000 in countries with a high risk of corruption (for example, Angola) to be reviewed and

approved by its tender review committee.

Tender specifications and confidential information

Perhaps the most common corruption risk is a bidder offering a benefit to a procurement authority in exchange for tender specifications tailored to the bidder's submission, effectively excluding others from submitting a qualifying bid. For example, in 2013, Netherlands-based Philips paid \$4 million to resolve FCPA violations that stemmed from improper arrangements with officials at various Polish healthcare facilities. The SEC alleged that Philips submitted technical specifications to officials drafting the tenders that provided for a significant advantage when competing for public contracts.

Relatedly, parties should avoid early or exclusive access to tender specifications or other confidential information (for example, the procuring entity's budget), even if the procuring authority is offering such access. Another red flag is the absence of written guidelines outlining procurement requirements or the bidding process—a lack of transparency can be the result of (or lead to) manipulation.

Managing third parties

Companies often use a third party intermediary to submit a bid, particularly in markets where the company does not have a physical presence. While third parties can be a strong on-the-ground resource, they are a significant source of potential liability – enforcement authorities often hold companies liable for the acts of third parties. Indeed, the vast majority of recent corruption cases in the US and UK stem from third-party conduct that a company failed to address.

As a threshold matter, it is important to conduct appropriate due diligence on any third parties assisting with tenders. In vetting

these third parties, it helps to identify any connections between the third party and government employees, including whether the intermediary himself is a former (or current) government official.

Companies should also document their relationships with any third parties via contracts containing appropriate anti-corruption representations and covenants, including audit rights granting the company access to the third party's books and records when appropriate. Additionally, companies should be wary of vague, unsubstantiated fees incurred by any third party and require supporting documentation for all expenses incurred. Finally, parties, should watch out for any requests to make payments to offshore bank accounts or to different entities.

Perhaps the most compelling example of third party risk is UK-based Rolls-Royce's \$800 million settlement with multiple enforcement authorities in 2017. In addition to loosely enforced internal policies and improper payments for rigged tender specifications, Rolls-Royce was found to have mismanaged numerous third parties that paid millions in bribes to procurement entities in several countries.

In sum, while tenders present great opportunity, they can also present significant exposure. Parties that participate in tenders at arms' length, with a trusted third party—and with the benefit of robust internal processes and appropriate documentation—are best positioned to succeed.



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