

Transparency and corruption in public contracting in Colombia

Alan Gilbert

The views expressed in this paper are those of the author and the sources cited and are not necessarily the views of the CoST International Secretariat.

Colombia, like many other countries in the world, has long suffered from both corruption and inefficiency in public works contracts. In 1993 Congress tried to address this issue by passing Law 80 which set up the General Statute for Public Contracting, a law that was reformed in 2007. In 1998 Decree 2405 established the Presidential Programme to Fight against Corruption. In 2006 the state also set up a national electronic public contract system (SECOP) which operates through the Portal Único de Contratación administered by the Ministry of Finance. In Bogota the district government's own electronic system, Contratación a la Vista, was set up even earlier, in 2003.

Unfortunately, the evidence suggests that corruption has proved difficult to eliminate. The Probity Survey of 2006 (admittedly conducted well before the Portal Único was fully operative) reported that:

- 84.4 percent of companies consulted did not compete for public contracts because they did not consider that the competition was conducted fairly.
- 31.7 percent said that in public contracting, officials asked for bribes.
- 16.7 percent thought that the companies that did put in bids, offered incentives.
- 28.4 percent of companies had been victims of some kind of request for money, favours, or gifts from a public official in return for some service and only 8.5 percent had denounced the official.

Equally worrying are the results of Transparency International's 2010 Corruption Perception Index, which ranked Colombia 78th out of 178 countries in the world—well ahead of many other Latin American countries but a long way behind much more honest Chile (21st) and Uruguay (34th) (http://en.wikipedia.org/wiki/Corruption_Perceptions_Index).

If current media coverage in Colombia is to be believed, the country will soon drop further down the ranking. In 2011, a flood of news articles and radio programmes has revealed a whole series of scandals in public contracting and many experts are arguing that corruption in the country has become systemic.

Among the many current scandals are:

- Local authorities in areas where mines are located are accused of widely misusing royalties from resource extraction.
- The whole system of public contracting for road works and for almost any major contract has been corrupted.

- The national drug agency, charged with expropriating the ill-gotten gains of the drug cartels, is accused of misusing the proceeds of its raids.
- Colombia's President has accused the land distribution agency of giving large areas of land (150,000 hectares) to drug gangs and paramilitary groups and has claimed that if 'we put the finger on any of the registry offices pus will come out.'
- A carrousel of contractors is accused of bribing its way to obtaining contracts in the country at large and in Bogotá in particular.

A recent news report claimed that: 'Corruption has always existed. But never before has the country been so terrified by the nature of the scandals and the size of the bribes associated with the distribution of public resources.' In 2010, the anti-corruption tsar claimed that in the previous year bribes had been paid totalling almost 4 million million pesos, a sum greater than all foreign direct investment in the country! [One US dollar currently buys around 1,800 Colombian pesos.]

With respect to public contracts, several recent reports have identified major scandals in road contracting in the country at large and in Bogotá. Until the recent scandals exploded in the city, principally through a report produced by a councillor from the mayor's own political party, public contracting in Bogotá was thought to be largely free of corruption. Certainly, none of the six previous, democratically elected, mayors were questioned about the misappropriation of funds or of the problematic allocation of public contracts. As such, the recent revelations about bribery in the allocation of public contracts in Bogotá came as a bombshell. Currently, the brother of the mayor in Bogotá is accused of organising a 'contract carrousel' which has caused havoc with the building of the new trunk routes of the Transmilenio system (Bogotá's internationally renowned Bus Rapid Transit system). He was arrested at his parents' home in Bogotá on 28 April, 2011. Bogotá's Comptroller has been removed from office because of his suspected receipt of bribes associated with the carrousel, and the former head of IDU (Bogotá's Institute for Urban Development which manages most public works contracts in the city) has also been arrested. The mayor himself, Samuel Moreno, is in deep trouble: some argue that he was part of the conspiracy, others that he must have known about his brother's activity, and—the most positive interpretation—that even if he did not know about the carrousel then he ought to have known. On 3 May 2011 the Attorney General decided to suspend him for three months, not on grounds of corruption but because he failed to take steps to stop the delays in major public works. The Colombian President immediately named the Minister of Education, María Fernanda Campo, as the temporary replacement.

All this suggests that the Portal Único and its Bogotá equivalent cannot be working effectively. There are simply too many ways around the system to guarantee transparency. In Bogotá, the Mockus and Peñalosa administrations (1994-2003) attempted to make the whole process of contracting more transparent and the electronic contracting system was introduced in 2003. But many argue that their efforts have been watered down by clientelism under Lucho Garzón, 2004-07 and, even more so, by more rampant clientelism and even corruption under Moreno, the current mayor. An interview I conducted in March 2011 with a previous candidate for Mayor and a two-time city councillor produced the comment that clean individuals cannot make much difference in the country; corruption has been institutionalised.

Of course, Colombia is not without many honest brokers, including some politicians. However, the country faces a huge task given the prominence of drug trafficking and the associated business of money laundering, a long tradition of financing political campaigns through

supporters' contributions, a less than honest and competent bureaucracy, and a political system that rewards supporters with posts and contracts. What this suggests is that portals can help but the system is far too long established and the practitioners too experienced to end corruption.

The only positive signs are that President Juan Manuel Santos, who took office in August 2010, is anxious to reduce corruption in the country, and that after one month of discussions the lower house of Congress approved the Anti-corruption Statute on 4 May 2011. The Statute has yet to become law but is likely to be approved soon.

The provisions of the Anti-corruption Statute greatly strengthen the control of the state over corruption. Its main innovations are:

- Public officials may not join a private company with whom their institution has been working within two years of their departure.
- Companies that finance an election campaign are prohibited from obtaining public contracts.
- Penalties for corruption have been greatly increased.
- The Comptroller General's procedures have been simplified to speed up investigation.

The attachments to this note provide more detail about official attempts to stop corruption, about some of the scandals that have broken out in recent months, and about how corruption can take place despite the efforts to stop it.

Attachment 1 reports on usage of Bogotá's Internet portal for bids on construction projects.

Attachment 2 provides excerpts from one of the few Colombian studies that have attempted to evaluate how the portals and the anti-corruption system have been operating. The study was written by Transparency International's Colombia branch on the problems facing public contracting in the country.

Attachment 3 summarises some of the recent scandals that have been revealed across the country.

Attachment 4 is based on an interview with an insider well versed in obtaining contracts. The essential argument is that corruption begins with the electoral process and the way in which contracts finance candidates and buy votes.

Attachment 5 is part of an interview with Juan Martin Caicedo, a former mayor of Bogotá and now Director of the National Chamber of Infrastructure. He argues that the basic problem underpinning corruption is poor project design: specify the job and the cost clearly and the danger of corruption largely disappears.

Attachment 1: Open bidding - Bogotá's portal for transparency

The official site for bids to Bogotá has been operating since January 2003. It was set up by Mayor Antanas Mockus, whose probity is unquestioned and who, during his two terms as mayor of the city, tried hard to eliminate even the suspicion of misconduct within the city administration. Designed to maintain 'clarity' about the city administration and to strengthen democracy in the city, the portal compiles information on proposed contracts, current bidding for contracts, details of contractors, and approved contracts.

Between 3 February 2003 and 15 September 2010: the portal registered the following:

Assorted bids	23,321
Published contracts	185,162
Plans for registered bidding	147,930
Inscribed proposals	32,946
Completed draws	13,086
Demands/petitions	383,971
Invited by draws	130,393

Since August 2005, it has also received 16,120,004 visits from people wanting to consult the information registered and to participate in the bidding process.

Note: A history of the establishment of the electronic system for public contracting in Bogotá is available in Spanish at: <http://www.contratacionbogota.gov.co/cav2/html/normatividad.htm>

Attachment 2: 'Better laws are necessary but not sufficient'

This attachment presents conclusions from the work of the Transparency Corporation of Colombia on public contracting. It summarises the study 'Transparency in Public Contracting' which was discussed in May 2007 at a workshop attended by government officers, officials of the control organisations, lawyers, academics, members of Congress and business people. The main conclusion from the workshop was that better laws, however necessary, are not sufficient.

The study discusses the problems associated with Colombia's General Statute of Contracting; the risks inherent in direct contracting; the large number of exceptions to the application of Law 80; and the advances and failings of Law 1150 of 2007. It makes recommendations to help prevent corruption and makes a call to the State, private entities involved in public contracts, and society in general about their duty in guarding the use of public resources and their responsibility to follow the rules that have been laid down on public contracts.

One of the main problems with the old law (the Contract Statute – Law 80 of 1993) was the number of exceptions it permitted. According to data from the study *Construcción del universo de referencia de la contratación*, 17.3 percent of public institutions had their own special contract rules. Such a multitude of special contract rules goes against the concept of transparency that ought to characterise public purchases. The need to understand so many different regimes complicates public scrutiny, especially since these rules are not required to be published.

Law 1150 of 2007, which reformed Law 80 of 1993, represents an advance but leaves some issues still to be resolved. Although it covers some institutions and activities previously excluded (e.g. FONADE and the Autonomous Regional Corporations), it does not include all (e.g. ESAP). Some institutions that are covered have not complied with the new law; they have employed special contract rules, using subcontracts to avoid the general rules. Elimination of this prerogative was recommended by the national policy publication CONPES 3249 and by the World Bank.

Law 80 allowed state institutions to draw up contracts between themselves. If one of these institutions had its own special rules, the contract was not required to follow the general rules. For example, some public universities have used their special rules procedures in ways that have had nothing to do with education. CONPES 3249 recommended that these kinds of practices should be prohibited. Law 1150 bans contracts between cooperatives and local state agencies, and non-academic deals through public universities.

Is direct contracting the exception or the rule? Law 80 laid down bidding as the norm but in practice this is still an exceptional procedure. The special rules, the lack of standard documents, and the lack of competent professionals helped make it so. According to *Construcción del universo de referencia de la contratación*, only one third of all public resources were allocated through open bidding. CONPES 3249 stated that the minimum budget sum permitted for direct contracts should be reduced. It also recommended that, above a certain sum, pre-contract and post-contract details should be published. Law 1150 brought some improvement by requiring that some direct contracts, e.g. contracting health services and goods and services for defence purposes, be subjected to an abbreviated selection procedure. However, this requirement changed little in practice.

Law 1150 also introduced a requirement that contracting be visible and that all contract documents be published. The use of electronic communication was recommended to speed up contracting, to reduce costs, and to generate more transparency and confidence in the process.

Various studies have praised efforts like SICE (Sistema de Información para la Vigilancia de la Contratación Estatal) but they do not mention the need to integrate this system with the Portal Único de Contratación or to publicise SICE's operation among potential suppliers. It is also clear that the information in SICE is not consistent with the information provided directly by state institutions. In addition, the latter are not obliged to put information on the system—which limits public accountability.

The Portal Único de Contratación is regarded more highly but it will be necessary to evaluate the effect of Decree 2434 of 2006 which requires all institutions subject to the General Statute to put all contract information on the portal.

Law 1150 of 2007 created the Electronic System for Public Contracting (SECOP), which will integrate the Single Register of Companies of the Chambers of Commerce, the Single Newsheet for State Contracting (el Diario Único de Contratación Estatal), the Portal Único de Contratación, and SICE. It will be important to monitor future practice to ensure compliance with this measure. Important too is to monitor the implementation of the electronic system of purchasing referred to in the current national development plan.

What needs to be done?

Objective rules of the game are required and this can be achieved easily. Several studies consulted show that one of the common tricks is to set up the terms of the contract or to modify the rules during the bidding so as to favour one party. Perfectly legal contracts can be manipulated in favour of the beneficiaries.

To remove these problems, the rules of contracting for state institutions ought to emphasise the 'untouchability' of the rules of the game. To guarantee that the rules are not changed, except under unforeseen circumstances, it is necessary to respect the pre-eminence of the principle of planning in the contracting process. Presidential directives in this respect and adequate vigilance by the control agencies ought to solve this problem.

Strengthening of controls over contracting. Opinion polls have shown that the work of the control agencies is seen as peripheral to the prevention of fraud and more interested in form than substance. The honesty of some of the officials responsible for control over contracting has also been questioned. There is overlap in the controls over contracting exercised by the organs of fiscal control and the Attorney General.

Initiatives like the agreement to cooperate and help in the fight against inflation, signed by the National Prosecutor's office, the Attorney General, and the Comptroller General, show that these agencies have a will to coordinate their actions and have been receptive to public complaints about the need for a major campaign against corruption.

To develop a culture of legal compliance. The maxim 'the end justifies the means' has become inculcated among large groups in society. This has been encouraged by the fact that discovery and punishment are so rare. A subculture of illegality has developed which legitimises corrupt practices under the rule 'rob, but get something done'. A document

produced by the Vice President's office recognises that society gives a low value to the public interest and that there is little sign of an ethic of public service. Strong public measures are required to combat the culture of illegality.

Break the link between contracting and the financing of political campaigns. A great help in this regard would be to stop campaign donations by state contractors. Then successful politicians would not award contracts to the donors. Similarly, it is necessary to stop public authorities making decisions that help finance electoral campaigns. This is especially important when politicians have established alliances with illegal armed groups to subsequently control budgets and territory.

The task of everyone: to stop corruption in contracting. Public contracts are a significant feature of Colombian life but unfortunately they offer ample opportunity and temptation to corruption. The new law helps discourage corruption but is not itself sufficient. To confront corruption requires combined action by the state, the private sector, and the general public.

Attachment 3: Extracts from 'The country is being robbed'

'Today it is almost impossible to win a public contract honestly. The carousels of contractors have taken over Colombia.'

'Corruption has always existed in Colombia but never before has the country been so terrified as now by the nature of the scandals and the size of the 'bite' (mordida) being taken out of public resources.'

'Columnists are perplexed. Even Alfonso Gómez Méndes, who has been the National Prosecutor, General Attorney, and head of one of the principal law chambers in the country, has noted the change: "Today, alarmingly, two kinds of impunity have emerged ... those implicated not only carry on calmly and shamelessly, but they set themselves up as leaders of opinion and moral censors."'

'What is happening today that is different from what happened in the past? Perhaps the great difference is that whereas in the past one discussed individual people or officials who were corrupt, today corruption is no longer a matter of individual behaviour, it looks as though it is becoming an endemic national practice. Some have discovered how to ransack the state in a systematic way and it seems as if the formula for stopping the bleeding is yet to be found.'

'The fact that a contracting scandal has touched the family of the mayor of Bogotá has put corruption on the front pages. But in reality what that scandal has done is to bring to the surface certain practices that have become common place throughout the country.'

'On the one hand are the contractors, for example the Nule cousins [who are at the centre of the Bogotá carousel], who have become the public faces of the current disaster. The country has been amazed to discover that three young men have been able to obtain 160 public contracts across the country, worth more than two million millions of pesos, in a business that was in reality little more than a fragile pyramid.'

'On the other hand are the authorities, who are expected to exercise control, but who in practice, as was demonstrated by actions of the recently dismissed District Comptroller, Miguel Ángel Moralesrussi, not only failed to safeguard public funds but even pressured contractors to pay them bribes.'

'For that reason it is not surprising in Bogotá to discover a paradox that has left a certain smell of mafia practices. The only two members of the cabinet with an international technical reputation were, until recently, the only ones to have been harassed by the city council and threatened by legal action by the city's Solicitor and by the Comptroller.'

'Never before has a national government discovered so many scandals at the beginning of its administration. Every day the figures look more terrible. Some 37,000 public officials are under investigation by the General Attorney, 70 percent for corruption. He says that 32 governors are currently being investigated and several have already been removed from office. It is estimated that some 42 million million pesos have been lost and only one percent are likely to be recovered.'

'How did we get to this point? How did the contractors manage to capture the state? Some say that it was the introduction of decentralisation, the popular election of mayors, and the manner in which the system of resource rights was changed. But the election of mayors is not

the problem. The detonator of corruption was the manner in which the political campaigns operate.’

‘Of course, in Colombia there are aggravating factors like the drug trade and the presence of armed groups like the guerrillas and the paramilitaries whose practices have helped spread a culture of illegality and corruption. Two terrible examples developed during the last administration (2006-10). First, the reform in 2007 of the law on contracting, Law 80, gave unusual tax concessions to contractors—it permits, in certain cases, direct contracting and allows an extension of up to 60 percent of the contract to concessions. Thanks to this reform, for example, concessions have been given to private individuals to construct roads worth six million million pesos and then allowed additions of 6.5 million millions to those contracts. The government ended up handing out an astronomical sum of money. Second, the Uribe government made delayed payments acceptable. This left a bad taste of excess in the delivery of contracts: Uribe left 26.4 million million pesos tied to future payments, and the departments and municipalities have future payments worth 14.5 million million pesos.’

Attachment 4: Extracts from 'In the entrails of the monster'

'Semana talked with a man who understands like few others the underground world of contracting. He reveals the tricks and traps that have permitted the sacking of the state.

"I am going to tell you what I have seen and lived through during twenty years in the world of contracting. The first thing that I want to make clear is that there are two types of contractors: the good corrupt contractors and the bad corrupt contractors. The latter are those that put in bids in order to launder money and they get the job done. The good corrupt contractors are those that try to be honest but need an advance payment in order to get the work. In the end they spend the advance but do not finish the work. That is to say, the bad ones, those that move drug monies are the good ones in the end.

"If an honest company wins a contract it is because it is unprofitable. The other contractors are not interested in getting the work.

"The origin of all the corruption lies in the electoral campaign. Some contractors give money to the candidates and others that give money and provide votes. The elected candidate ends up with an obligation to the contractor. It is simple.

"Corruption has become so sophisticated that there are contractors than can mobilise more votes than congressmen. A really dedicated contractor, one who knows the business and cultivates his client base, might control 150,000 votes. Or to put it another way, there are cities in Colombia today where if three mayoral candidates attend an event together and a contractor arrives, the candidates' assistants gather round the contractor.

"Virtually no contractor tries to get a senator or representative elected because these people do not control resources directly. Contractors only finance the few who can place their supporters in the administration and can influence the contracts. I am not going to deny that it may be useful to have a congressman in your pocket. One of the best known road constructors in this country has four senators. They come cheap. It's like paying a parking valet for a contractor who can make 300 billion pesos from a single contract for a really big project. In parenthesis I might add that there are some businessmen that try to become congressmen in order to set up a profitable business. For example, one representative introduced a bill to Congress that required that all vehicles be tested annually and then set up dozens of testing centres. He became rich.

"The real business lies in the election of mayors and departmental governors. Every contractor controls one or two governors. We contractors decide who will be mayor and they kneel before us. The best pollster is the richest contractor. He understands the voting market. At the end of the day every campaign spends 300-500 percent more than the total sum permitted by law.

"The contractor gives in order to benefit in turn. If I give 100 million pesos to a candidate, as mayor he awards me a contract worth 1,000 million pesos. From that I can keep up to 40 percent, perhaps more.

"How much is a mayor worth? That depends on the budget of the municipality. One does one's sums. If the budget is 100 billion pesos, 30-40 billion are spent on administration. That

leaves around 60 billion for investment. The contractor will bet on 40-50 percent of that, no more, because the mayor will find other ways of spending the rest.

“There are no contractors in poor towns” or in municipalities that are heavily in debt.

“Once the candidate has been elected, the contractor is guaranteed to get the contracts. To win them is easy. The mayor puts a confidant at the service of the contractor. Often the terms for the bid are written at the contractor’s home. He designs it so that he can beat even the most respectable multinational company. It is enough to demand that contestants need to be locally founded businesses—that provision will disqualify the best company in the world.

“From the contract that one receives, the rule is that ten percent goes to the mayor. There was a time when contractors were subjected to extortion by public officials. So the contractors raised the cost of each vote they delivered and made it clear to the candidates that if they were to win they had to submit to the contractor’s rules....They may also set up a network of contacts. There are mafias inside the organs of control that are controlled by contractors. Then one might call the mayor and say: ‘You have seven law suits against you pending in the public attorney’s office and it will cost you so much to stop them’. It all adds up.

“Today it is more profitable to be corrupt than to be a drug trafficker. There are around 50 groups of contractors. Some of them are richer than the drug dealers. There are some that have contracts across the country but they don’t get involved with very large contracts because they want to remain invisible. Today the politicians have to kneel in front of the contractors.”

Attachment 5: Extracts from an interview with Juan Martín Caicedo (ex-Mayor of Bogotá and now head of the Chamber of Infrastructure)

'The notorious cases of the Bogota-Girardot road and Phase III of Transmilenio were due to failings in the contract and on the part of the contractor. If the project is not well structured all is lost. In Phase III the District produced some poor designs. This devilish cocktail of bad designs and irresponsible contractors has been a constant in the contracting agencies— in this case IDU. The Comptroller says that Law 80 must be changed because of the problems in Bogotá. But Caicedo does not think that necessary—the problem is one of poor management not a weakness in the law. The latest law, 1150, made some changes to Law 80 and obliged managers of public agencies issuing a bid to reveal the legal, technical, and financial studies that underpinned the project. But how many officials have actually done that? For example, INCO, an agency created by President Uribe to run the roads, had twelve directors in six and a half years. The truth is that public administration is influenced by political interests and therefore is open to corruption. Alvaro Uribe (President from 2002-10) did well in achieving a consensus about the importance of investing in infrastructure. Where he failed was not to do things well!'

Attachment 6: Other reports on the supposed corruption

In Bogotá

\$4.500 millones habrían recibido funcionarios del IDU en carrusel (Officials of the Urban Development Institute may have received US\$ 2.7 million in bribes: the former director of IDU might go to prison) *El Espectador*, 24 March 2011.

En 10 contratos de los Nule se perderían más de \$37 mil millones (In 10 contracts the Nule brothers may have robbed the state of US\$18 million). The Nule brothers are the current major villains of corruption in Colombia and at the centre of the corruption scandal in Bogotá. *El Espectador* 24 March, 2011

Denuncian contrataciones irregulares del ex gerente del Acueducto de Bogotá (Irregular contracting denounced by the former director of the Bogotá water company), *El Espectador*, 23 November, 2010

IDU y Acueducto, las más cuestionadas en informe de Petro (IDU and the wáter company, the most questioned institutions in Petro's report – Petro is the leader of the mayor of Bogotá's own political party and a representative of that party in the Council!), *El Espectador*, 20 October, 2010

In Colombia at large:

¿Este es un país de pícaros? (Is this a country of thieves?), *El Tiempo*, 7 March, 2011

Los cinco casos más emblemáticos de rediseño del Estado por corrupción (The five best examples of the redesign of the state through corruption) *El Tiempo*, 5 March, 2011

Por corrupción, Pastrana pide renuncia del Directorio Conservador (Pastrana, the head of the Conservative party, asks the Conservative party directorate to resign for reasons of corruption), *El Tiempo*, 14 March, 2011

La otra tragedia nacional: contubernio corrupción-ineptitud (The other national tragedy: a combination of corruption and ineptitude) *El Tiempo*, 7 March, 2011

El mamut burocrático y las mafias de la corrupción (The bureaucratic mammoth and the mafias of corruption), by Juan Carlos Flórez, *Especial para El Espectador* 19 February 2011

Carruseles por todo el país (Carrousels across the country). Bogotá no es la única. La contratación en Antioquia, Cali y Cartagena es igual de escandalosa. Dinero presenta las pruebas (Bogota is not alone. Contracting in Antioquia, Cali and Cartagena is equally scandalous. Dinero presents the proof.) 4 March 2011