



Notes on some legal aspects of the Integrity Pacts





Integrity Pacts in Colombia have been a successful tool to prevent bribery and to encourage private and public institutions to use new and more transparent rules of the game in goods and services procurement processes, as well as in the selection of consultants and the awarding of concessions and privatizations. The country has had significant experience upon applying this tool with which it has monitored over 60 important procurement processes, out of which 40 ended up with the signature of Integrity Pacts.

After 4 years of experience, the Colombian Chapter of Transparency International is willing to share, with those interested in pursuing increased transparency in public procurement, the perceptions and considerations that from a legal perspective we have developed, regarding the application of Integrity Pacts to a civil liabilities legal system as the one in force in Colombia. The legal nature of Integrity Pacts, the requisites necessary to establish them, the effects of signing them as well as of their non-compliance are some of the aspects this document presents.

We wish to profit from this opportunity to express our gratitude for and acknowledge the ongoing and very professional commitment of the entire external legal team of Transparencia por Colombia, as well as its assistance in understanding the legal scope of the Integrity Pacts when applied to the Colombian and Latin American context.

Rosa Ines Ospina Robledo

Executive Director Transparencia por Colombia

This document has been prepared by the Corporation Transparency for Colombia with the help of outside counsel composed by: Alejandro Linares Cantillo, Mauricio Acevedo Márquez, Santiago Jaramillo Caro and Cristina Aya Caro and y María Aparicio Cammaerd.



he coming into effect in February 1999 of the OECD Convention related with fighting against corruption of foreign public officials in international commercial transactions, has oriented member states to take measures to penalize international bribery. Taking into account Transparency International's ("TI") experience in these issues and in order to contribute with the OECD's initiative, TI continued with the active promotion amongst many countries for the use of the "Integrity Pact" tool designed by TI as an instrument to prevent bribery and to alert participants in public bids about the new rules in play for the procurement of goods and services.

In this way, the Integrity Pacts proposed by Transparency International have been taken in by different countries and have been adapted to the particular conditions of each country. In Colombia, the Corporation Transparency for Colombia, the Colombian chapter of TI, has developed its own methodology for the promotion of the Pacts. Also, it has molded the content of the Pacts with contributions of actors of different public and private entities, which have made them effectively useful in the prevention of corruption in large businesses between the State and national and international companies.

Since 1999, there have been 60 important government procurement processes in Colombia, where this tool has been used. About 40 Integrity Pacts have been subscribed. This instrument has been taken hold of by the last two governments, as one of the tools of their Programs in the Fight Against Corruption.

The purpose of this document is to make a description of some relevant legal aspects related with the application of the Integrity Pacts under a Civil Law system, as the Colombian one. In that sense, this document presents a description of the agreement by which the Integrity Pact is defined, with an emphasis on its legal aspects and without entering into details on the methodology applied by the Corporation for its promotion. The complete process normally includes: the public discussion about the bid documents, the identification of the possible risks of corruption, the adoption of ethical commitments by the public officials, the control on the presentation, and evaluation of offers and on the decisions made by the public officials during the bidding process.



The Integrity Pact was generically defined in Colombia as an agreement entered into by all the participants in public procurement in order to fortify the transparency and integrity of standing procurement procedures. In essence, it is based on the basic principle of contract law of the obligatory force of the agreement between the parties.

From a legal standpoint, the Integrity Pact is a contract or plurilateral agreement intended to produce a series of specific legal effects, based upon the theory of autonomy of will. It is subscribed by the bidders or by them and the contracting public entity under public procurement procedures. Integrity Pacts apply to processes where both the Government Contracting Statute (Law 80 of 1993) applies and does not apply.¹ The purpose of the Pact is to strengthen transparency, equality and integrity of the procurement process. Such Pacts may be subscribed by the bidders and the contracting party or only by the bidders as a unilateral commitment or declaration under a bidding process. In the first case, the contracting party, this is the public entity, will act as a third party beneficiary of the Pact.

The following are some of the main legal aspects related with the application of the Integrity Pacts :

1 | LEGAL NATURE OF THE PACT

Taking into account that those who subscribe the Pact are, in principle, individuals or legal persons or other forms of private collaboration, the Pact is a private contract, subject to private law. In this sense, the Pact is not a public contract, to which Law 80 and its regulatory decrees would apply.² The Pact is also characterized as a solemn, atypical, plurilateral,³ onerous contract and its execution is prolonged in time.

¹ Some public entities are not subject to Law 80 of 1993 since they are not 100% public but rather they are mixed, this is they have private and public participation.

² In the event public entities are part of a public bid as bidders, the Integrity Pact will still be regulated by private law, as required by article 13 of Law 80 of 1993 and article 8 of Reglamentary Decree 679 of 1994.

³ Article 865 of the Colombian Commercial Code establishes that in plurilateral legal businesses, the non-compliance of one party or some of the parties will not free the other parties from complying with their obligations.

2 |

REQUIREMENTS FOR FORMATION

Because the Pact is a solemn contract, it has to be in writing and it also has to comply with the general requirements for formation included in article 1502 of the Colombian Civil Code, as follows: i) capacity of the parties, ii) consent with no defects, iii) licit object and iv) licit cause. Once validly formed, the contract has obligatory force as between the parties.

3 |

EFFECTS OF THE SUBSCRIPTION OF THE PACT⁴

The effect of the subscription of the Pact is that the bidders that subscribe it, assume a series of obligations to give, to do and not to do, based on the principles of autonomy of will and freedom of contract. These obligations consist of behaviors that have been established under ethical and moral parameters that should be adopted by those who are involved in processes to select contractors. In general, these obligations are related to the transparency of those selection processes. Some examples of these are: to abstain from offering or giving money inducements, rewards or any kind of benefits to public officers, counsel or contractors of the contracting entity, or to third persons that have influence over these, with the purpose of: i) targeting the award of the contract; or ii) obtaining any advantage or illicit or illegitimate gain during the bid or the execution of the contract.

4 |

EFFECTS OF THE NON-COMPLIANCE OF THE PACT

The breach by the bidders or the future contractor who subscribe the Pact, of their obligations under it, may have the following effects, according to what is agreed on the particular document⁵ and depending on the moment when the breach is verified:

- Termination of the government contract by mutual consent

The future contractor is obliged to accept the termination of the government contract by mutual consent at the moment when the Arbitration Tribunal declares his non-

⁴ Article 1602 of the Colombian Civil Code includes the principle of *pacta sunt servanda*, according to which: "All legally subscribed contracts are law for the contracting parties and they cannot be nullified but for their mutual consent or legal causes."

⁵ This means that the effects and consequences of the breach of the Pact are autonomous and independent from a possible breach and non-compliance of the law.



compliance with the commitments he assumed in the Pact, as seen herein. For those effects, the contracting entity, which in most of the cases is a party to the Pact, will previously include in the contract an express and unmodifiable clause, establishing as obligatory termination cause the mutual consent of the parties, motivated by the decision of the Tribunal of declaring the non-compliance by the contractor of any of the commitments included in the Pact. If the breach is verified before the subscription of the government contract, the contracting entity may dismiss the bid of the breaching offeror and may take hold of the seriousness of the bid bond, if this was included in the terms of reference made by the contracting entity. This shows that the Pact itself covers both the procurement procedure as well as the performance of the government contract.

■ Effectiveness of the liquidated damages in the Pact

The bidders or the future contractor commit (during a particular term counted starting on the moment in which the Tribunal declares the non-compliance) to pay to the bidders who did comply those commitments, liquidated damages equivalent to a percentage of the total value of the government contract. In case there is more than one offeror who did not comply with his obligations under the Pact, the mentioned penalty would be divided evenly amongst those bidders. In practice, in some cases, the penalty has been negotiated in favor of charities.

■ Effectiveness of a negative covenant (obligation to not do)

The bidders or the future contractor are obliged, under the principles of free will and freedom of contract, to abstain from celebrating any contract with public entities for five (5) years, in case the bidding process was opened by a public entity, or to abstain from participating in future processes with the contracting entity, in case the contracting entity was not public. In the first case, it is necessary to clarify that this negative covenant does not constitute a new lack of ability to contract, considering that elements that constitute a lack of ability to contract are listed in Law 80 and the Colombian legislation.⁶ This

⁶ Since the future contractor, by a free decision, obliges itself to abstain from celebrating any contract with public entities for five (5) years, in case the bidding process was opened by a public entity, if he breaches

obligation constitutes a contractual penalty that has been previously accepted and agreed. This sanction is declared by the Tribunal based on an attribution given ex ante by the subscribers to the Pact. In this sense, in the moment when the Tribunal declares the non-compliance of the obligations included in the Pact, the conditional obligation to not do is born.

■ Impulse of proceedings before competent authorities

The bidders who have complied with the obligations under this Pact must inform the corresponding authorities (criminal, fiscal, disciplinary, etc) in case of non-compliance, aside of initiating the Arbitration process bidders.

■ Execution of the bid and performance bonds

Depending on the moment in which the breach to the obligations in the Pact is verified, the contracting entity, as third party beneficiary to the Pact, may execute the bid bond or the performance bond, as long as the breaches were included expressly in the terms of reference or in the contracts, as causes to execute the mentioned bonds.

■ Payment of the stamp tax

The bidders or the future contractor that have been declared to breach their obligations under the Pact, by the Tribunal, are obliged to pay the stamp tax generated by the subscription of the Pact, in the terms included in the tax laws.

5 |
ARBITRATION,
DECLARATION OF
NON-COMPLIANCE
AND REQUIREMENT
TO EXECUTE THE
OBLIGATIONS
CONTAINED
IN THE PACT

The Pact establishes that in the event the bidders seriously and reasonably think that one or more of the bidders have not complied with their obligations under the Pact, the former can jointly or individually require the formation of an Arbitration Tribunal. This is based on article 116 of the Colombian Constitution and its legal

the Pact, the condition precedent to apply the penalty previously accepted and agreed by the contractor will become effective and therefore, the Tribunal will be able to impose such penalty. In that sense, as explained in the document above, the sanction is declared by the Tribunal based on an attribution given ex ante by the subscribers to the Pact.



and reglamentary development,⁷ according to which private persons may temporarily hold the public function of administration of justice when acting as arbitrators, with competence given by the parties to decide either in law or in equity. The Tribunal will follow the rules of the Center of Arbitration and Conciliation of the Chamber of Commerce of the city in Colombia where the contracting entity resides and the arbitration will be held in Spanish. The Tribunal will be formed by one (1) or three (3) arbitrators, depending on the agreement between the parties. The arbitrator will be called “Defendant for the Transparency of the Bid”, he must be Colombian and he will be chosen by the Center of Arbitration and Conciliation of the Chamber of Commerce from their list of arbitrators by public lot, unless the parties to the Pact agree on a different selection proceeding.

The decision of the Tribunal or arbitral award (that may be based either on law or equity, according to the parties’ decision), will be valid and will have the same effect as a judicial decision, in relation to the parties to the Pact. In consequence, when the Tribunal declares the breach of the Pact, it can impose the abovementioned penalties, which were previously and expressly agreed upon by the parties. In the same sense, the parties may use the mechanisms included in the law to enforce the arbitral award. However, the Pact and the decision adopted by the Arbitration Tribunal in case of a possible non-compliance, will not involve decisions related to the criminal, fiscal, administrative, patrimonial and disciplinary responsibility of those that are subject to arbitration.

It is also necessary to note that the arbitration clause, created to solve the conflicts generated through the execution of the Pact, to declare the presence of a breach of its obligations and to enforce its effects, is a stage that is autonomous, independent, additional or complementary to the institutional stages included in the Colombian legislation. The processes that are legally required to be decided by judicial and administrative authorities,⁸ are

⁷ Decree 2279 of 1.989, Law 23 of 1.991, Decree 2651 of 1.991, Law 270 of 1.996, Law 446 of 1.998 and Decree 1818 of 1.998.

⁸ In development of criminal and administrative processes and those related to pecuniary, fiscal and disciplinary responsibilities.

characterized in the same fashion and cannot be decided by the Arbitration Tribunal agreed upon by the Pact.

In this sense, the Tribunal's jurisdiction awarded by the Pact, will not interfere, hinder, replace or take hold of the legal competence of the judicial and administrative authorities related to control, investigation, judgment and penalization of conducts related to selection of contractors in bidding processes. The Tribunal's competence will not breach the non bis in idem principle, according to which no one can be judged twice for the same cause, because the Tribunal and the courts constitute two (2) independent, complementary and completely differentiable stages. In this sense, the Pact promotes the duty of all bidders that have complied with their obligations to carry out all the proceedings before the competent authorities regarding the criminal, fiscal, patrimonial and disciplinary responsibility processes, against the public officials, their counsel and contractors and against the bidders that have breached the commitments included in the Pact.

Finally, it is important to point out that the Integrity Pact is on the one hand, a private agreement which seeks to maintain the integrity of the public procurement procedure by combining rules and activities in order to generate trust and credibility in the procedure; and, on the other, a preventive tool and not a warranty, by itself, of the absence of corruption. In the adaptation process to the Colombian conditions, the intention has been that its voluntary character and its use as a tool to discuss openly the risks of corruption in the negotiation processes between the public and private sector, would effectively contribute to voluntary cultural changes that would lead to the construction of integrity in a country where, according to information to all known, there is always a need for these type of initiatives.





Since 1999 Transparencia por Colombia has been developing an important experience in the implementation of The Integrity Pacts Tool in 60 important government procurement processes, that have involved U\$ 2.215 million.

Those processes have included 24 Colombian State Institutions of ten sectors: communications, public works, transportation, information technology, banking and financial services, agriculture, food and beverage, supply services, power utilities and supervisory services.

40 Integrity Pacts have been subscribed by 254 national companies and 48 international companies. Additionally almost 600 public officials have developed corruption risk maps and signed ethical commitments to mitigate such risks.

INTEGRITY PACTS
STATISTICS 1999 - 2002

▲Sector Public Entities	Number of Processes		SignedColomb. Companies	SignedMultinat. I Companies	Public officials signing ethical declarations	Public Contacts Value US\$ (000)
	Signed Pacts					
▲Communications						
Ministerio de Comunicaciones / FONADE	7	4			91	\$355.798
TELECOM	11	6			77	\$41.274
Ministerio de Comunicaciones	1	5			45	\$56.000
▲Public works / Constructions						
Departamento de Risaralda y Gtz alemana	4	4			28	\$1.570
Departamento del Atlántico y Cámara de Comercio de Barranquilla	1	0			12	\$13.500
INVÍAS	1	1			24	\$268.000
Aguas de Cartagena	10	0			18	\$24.000
Departamento del Meta	1	1			19	\$ 4.191
▲Transportation						
Instituto de Desarrollo Urbano de la Alcaldía Mayor de Bogotá	1	0			Without signed	\$1.500
▲Information Technology						
Ministerio de Educación y Secretaria Ejecutiva Convenio Andrés Bello	1	0			18	\$27.600
DIAN	2	2			25	\$52.000
ECOPETROL	2	2			65	\$42.800
Banco Agrario	1	1			57	\$ 30.000
▲Banking and Finance						
Ministerio de Salud	1	1	8	0	30	\$600.000
▲Agriculture						
Instituto Nacional de Adecuación de Tierras-INAT / BID	1	0			Without signed	\$20.000
▲Foods and Beverages						
Instituto Colombiano de Bienestar Familiar, ICBF y CapitalCorp	1	1			17	\$144.967
Fábrica de Licores y Alcoholes de Antioquia	1	1			15	\$8.540
▲Services						
Empresa de Acueducto y Alcantarillado de Bogotá	1	1	4	0	20	\$4.000
▲Power utilities						
Ministerio de Minas y Energía / Empresa distribuidora de energía ISAGEN / INVERLINK	1	0			Without signed	\$500.000
▲Supervisión Services						
Ministerio de Comunicaciones / FONADE	4	4			30	\$4.165
Departamento de Risaralda y Gtz alemana	4	4			Included in Public Works	\$158
Comisión Nacional de Regalías / PNUD	1	1			10	\$5.511
Instituto Colombiano de Bienestar Familiar, ICBF y CapitalCorp	1	1			Included in Foods	\$1.028
Empresa Colombiana de Vías Férreas	1	0			Without signed	\$7.900
Total	60	40	254	48	601	\$2.214.502

Note (*): Out of 60 bidding processes undertaken by Transparencia por Colombia, only 35 were awarded, with average savings of 19% from original budgets.