



Public Procurement, Bid Rigging and (the Lack of) Actions for Damages

Giancarlo Spagnolo
SITE-SSE and EIEF
(and Tor Vergata)

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Damage claims from contracting authorities

- ❑ Damage Directive hopes to make Private Actions more common, for various reasons, including improving deterrence
- ❑ Not all of its provisions actually help (Buccirossi, Marvao, Spagnolo 2015)
- ❑ Bid Rigging cases in Public Procurement very common, and protected from leniency, needmother tools (Improved whistleblower protection and rewards, for example)
- ❑ Contracting Authorities represent tax-payers in bid rigging cases, have a duty to use well public money, should be in very good position to recover damages: no pass on, large stakes...

Some Confusing PP Features for Antitrust people

Objectives:

- ❑ Private Procurers: Supply Assurance + Value for Money
- ❑ Public Procurers: SA + VfM + Efficiency + Integrity and Accountability + Trade Rules + SMEs Access...
- ❑ EU Public Proc: + MKT Integration...
- ❑ Now: + Social Inclusion, Environment Protection, Stimulating Innovation...
- ❑ Suing suppliers for damages may not be a primary concern

Open Competition/Auctions

- ❑ Large gains in Value for Money (Q/P) from open competition are measured at the awarding stage

But **awarded contract is just a promise...** only kept if contracts complete, coordinated with the scoring rule, well managed, **and fully enforced...**

- ❑ Contractual remedies often not enforced in the private sector (Macaulay, Scaffolding, Toyota/German Automotive Sector)
- ❑ Limited formal contractual governance frame for dynamic relational-reputational forces
 - Relational
 - Reputational: Brand, Vendor ratings

Discretion limited in Public Procurement

Bureaucratic control:

...to reduce corruption, tie civil servants' hands...

- ▣ Issue strict procedural rules, and check that they are followed (e.g. open auctions, contracts)

STILL:

Lots of discretion whether to enforce contractual penalties...

little monitoring on contract implementation phase

Contractual penalties often not applied in PP, or absent

- PP contracts without credible remedies/sanctions are common (Bergman et al. 2016)

- Even where remedies exist, often not applied!

- HM Treasury 2006 regarding PFI

"There exists anecdotal evidence that the public sector can be reluctant to levy deductions for fear of spoiling the relationship with the private sector"

- Consip Inspections 2005-2008

- On 4095 inspections, 1455 infringements, remedies exercised in 64 cases only (<5%)

- Not correlated to type of buyer/'accountability rules'

- Ex ante 'contracted' quality may tell very little

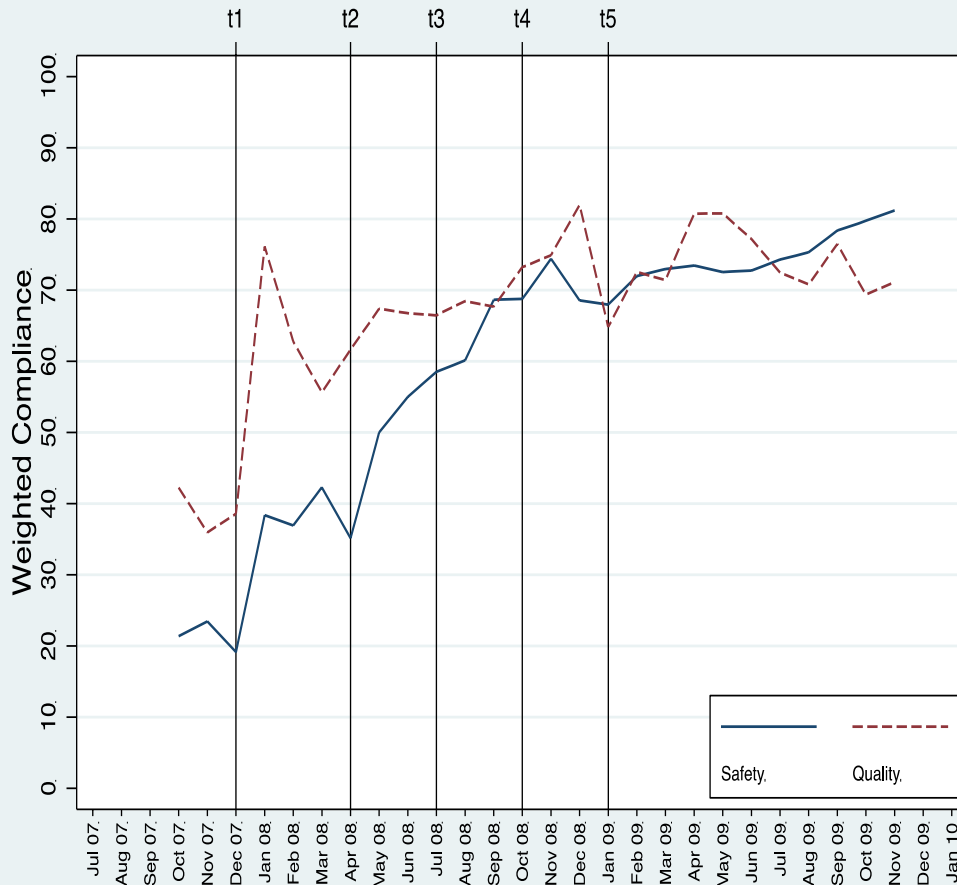
Many possible reasons...

- ❑ Poor/lazy contract managers?
- ❑ Fear of expensive litigation? (Coviello et al. 2016)
- ❑ Gains (money) going somewhere else?
- ❑ Discretion recovered at contract execution stage
 - Remedies exchanged against non-contracted tasks?
 - Or exchanged against bribes/favor?
- ❑ Fear to spoil cooperative relationship with partners?

- ❑ As long as there is discretion to sue, all these reasons may also apply to the question why Contracting Authorities may not sue cartels for damages

Reputation Mechanisms - self enforced, accepted...

Decarolis, Pacini and Spagnolo (NBER wp 2016)



1. Past Performance /Vendor Rating indicator in scores, self-enforcing tool, led to a huge increase in quality and safety
2. Measures verifiable, contractible...
3. Buyer could not get formal contract enforced
4. Interdependent measurement made 'forgiveness' hard

Some issues common to bans from trade (debarment)

Should Government ban cartels from doing business for for some time? (Auriol and Soreide 2017)

Cartels often include the strongest suppliers, costly to ban them for contracting authority and the citizen, relative to tougher fines and damages

Claims for damages, as debarment and contractual penalties, may be problematic if pursued by one future partners against the other, in a discretionary way

But damages certainly more efficient than debarment, if feasible, so why debarment yes but damages not?

Relationships and Competition

- ❑ Private buyers also often refrain from damages if they are recurrent partner for cartel members (e.g. Toyota for car parts cartel - Calzolari and Spagnolo 2017)
- ❑ Some Consip's opposition to involve Competition Authority in cartel case (opposite of EC suing elevator cartel for damages)
- ❑ In Japanese Public Procurement it was customary for the procurement agency to arrange bidding rings among suppliers (*Kansei Dango*),
- ❑ often for bribes, but also for quality (as in Toyota's Lean procurement)

From reasons to possible solutions I

□ Poor/lazy contract managers?

Professionalization, better careers, reputation...

□ Fear of expensive litigation?

Not so relevant for damages: can be delegated more easily than for penalties, and much larger gains

□ Discretion recovered at contract execution stage?

Use administrative law that compels administrations to save taxpayer money, make them liable if they don't sue

From reasons to possible solutions II

□ Gains (money) going somewhere else?

Ensure suing authorities can retain and spend 'freely' recovered funds through damage actions

□ Fear to spoil cooperative relationship with partners?

Third party institutions with proper incentives to sue

• Special Courts/Institutions? (Audit agencies, Avvocatura...)

• Procurement oversight agencies? (ANAC...)

• Private agents? (Litigation funds plus law firms? Taxpayer associations?)