



INTEGRITY PACTS IN PUBLIC  
PROCUREMENT  
AN IMPLEMENTATION GUIDE

**Transparency International is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide and an international secretariat in Berlin, we raise awareness of the damaging effects of corruption and work with partners in government, business and civil society to develop and implement effective measures to tackle it.**



This manual is based on a previous publication jointly produced by Transparency International and the Water Integrity Network to guide government officials in the implementation of Integrity Pacts in the Water Sector. It has benefitted from updates from Transparency International's National Chapters and has been edited by John Warnes to provide a sector-neutral document.

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## CASE STUDY: THE IMPLEMENTATION OF AN INTEGRITY PACT IN THE BERLIN-BRANDENBURG INTERNATIONAL AIRPORT PROJECT

This account describes how an Integrity Pact was implemented in the Berlin Airport Project, in order to enable other government agencies, NGOs and project implementers to learn from the experience. It has been produced for knowledge-sharing and capacity-building purposes, and is not meant as an evaluation or an assessment of the case.

We are grateful to Michael Wiehen from Transparency International Germany (TI-D), the monitor Prof. Peter Oettel, Gottfried Eggers and Manfred Körtgen from FBS for their help and input.

### CONTEXT

#### **How the IP was integrated into the Berlin Airport Project**

The Federal Republic of Germany and the States of Berlin and Brandenburg agreed in the early 1990s, soon after the re-unification of Germany, to build a major new international airport near Berlin. The three authorities began efforts to devise a project model that would be able to obtain political and financial support. The privatisation option that had been considered was dropped, and instead of moving the airport further out into the Brandenburg province (as had been considered earlier), it was decided to use the existing (former East-German) airport at Schönefeld, and to add runways as well as build a totally new terminal building and other infrastructure. Resistance from the immediate neighbours and nearby property owners delayed the final decision by several years, but by 2004 the authorities had determined to go ahead with the project, albeit on a more modest scale than originally envisaged, and keeping it within the public sector. For that purpose they formed a private sector company, the Flughafen Berlin-Schönefeld GmbH (FBS)<sup>1</sup> – a limited company owned by the three public authorities, with the Mayor of Berlin as Chairman of the Board of Supervisors. The total cost of the project was then estimated at €2,400 million (€2.4 billion) and the planned completion date set for October 2011.

In late 1995 TI-Germany (TI-D) had offered the then-new tool of the Integrity Pact (IP) to the relevant authorities, but they declined summarily, arguing that applying the IP would be to admit publicly that there was a risk of corruption. Only weeks later, the first corruption allegations surfaced in the media and haunted practically every step of the process, forcing on the authorities several modifications of the project's administrative and financial structures and finally, in 2001, a cancellation of all project agreements reached by that time. Although formal charges were never filed, several participants in the process, including some interested investors and contractors, were suspected of having employed corrupt means to make headway in the competition.

In view of this experience, and under instructions from the Mayor of Berlin to various state authorities (including FBS managers) to seek new ways to avoid corruption risks in large investment projects, the FBS management approached TI-D in early 2004 and asked for suggestions on how to contain corruption in this major investment project. TI-D offered a number of suggestions and proposed applying an IP. Given the likelihood that contractors who had been involved in the previous process would again submit bids, TI-D emphasised the importance of appointing an independent external monitor, so as to shield FBS management effectively against potential efforts to undermine or circumvent correct procedures.

Over the following weeks, TI-D and FBS managers and staff worked together to develop a model IP that contained all the essential elements of an IP, adapted to Germany's legal context. Both parties concurrently searched for a suitable person to act as the IP monitor. Several candidates surfaced, and in January 2005, two experts were appointed by FBS. The team leader was a retired procurement official from the City State of Berlin, with a spotless record and strong commitment to integrity in procurement, who became a member of TI-D before accepting the monitoring assignment.

<sup>1</sup> In 2011 the company changed names to Flughafen Berlin Brandenburg GmbH (under the acronym in German FBB), which is the one currently used. Since the company was called FBS at the time the IP was introduced, we keep the reference here to FBS

## The Berlin Airport procurement process

The Berlin-Brandenburg International Airport (Berlin Airport) is one of the biggest and most complex transport infrastructure projects in Europe in the last years. The project covers approximately 1000ha and involves 3,000 workers. The terminal, once in operation, should be able to carry between 25 and 27 million passengers a year.

The contracting of the work was divided into five components: planning, construction of terminal and service buildings, civil engineering, technical infrastructure and rail. Each component was sub-divided for procurement purposes into smaller tenders for a total of 45 service packages awarded through individual bidding processes. The initial procurement plan involved fewer, bigger tendering packages, but this approach was later changed, together with the project management structure, to include more, smaller packages. The financial framework, along with the restrictive timeline and the desire to avoid disruptions to the construction process, discouraged the partitioning of the project into even smaller contracts. If the tenders were smaller, smaller firms without the capacity to manage the demands of such a big project would submit proposals, whereas this size of tender was appropriate for large and medium-sized firms. In addition, FBS together with the Industrial Chamber of Commerce established an agency to strengthen the capacity of medium-sized firms by providing advice and assistance in the tender process.

By November 2011, the project had entailed 567 individual bidding processes and 900 signed contracts (including design, construction and supplies) worth more than €2.1 billion. The total cost of the project initially was estimated at €2.4 billion. Due to numerous project design changes during implementation and other delays caused by technical problems, the final cost will be significantly higher. Except for one case of suspected collusion that the FBS could handle by redesigning and retendering the components, there has been no indication of corruption associated with any of the contracts managed by the FBS. Furthermore, there are no indications that any of the current cost overruns or the delays are caused by, or associated with, corruption. The opening date is still uncertain but expected to be in late 2014 or 2015.

The monitor has reviewed a good portion of these contracts. There have been no instances or reports of corruption and the project has not been subject to delays on this ground.

Although FBS is a private company, it is subject to German public contracting law and the applicable EU procurement regulations because of its mandate and the public nature of its owners. On the basis of their value, most tenders need to be submitted for European-wide competition and have not been subject to worldwide bidding. Some contracts have been awarded through direct contracting when such a procedure was appropriate according to the law.

## THE MAIN FEATURES OF THE BERLIN IP

FEATURE	CHARACTERISTICS
<b>Participants</b>	<ul style="list-style-type: none"><li>• TI-D and FBS as initiators</li><li>• FBS as lead implementer</li><li>• Independent monitor</li></ul>
<b>Form</b>	<ul style="list-style-type: none"><li>• Contractual (separate) agreement</li><li>• Mandatory</li><li>• Pro-forma agreement, i.e. the same text signed by all bidders in all contracting procedures.</li></ul>
<b>Signatures</b>	<ul style="list-style-type: none"><li>• Signed by all bidders and FBS. Bidders who do not agree to sign are not allowed to take part in the bid.</li></ul>
<b>Monitoring System</b>	<ul style="list-style-type: none"><li>• Independent third party (individual) engaged through a contract with FBS as lead implementing agency.</li></ul>
<b>Coverage</b>	<ul style="list-style-type: none"><li>• Includes all project phases. The IP was first introduced for the awarding of the design and consulting contracts. It is not a mandatory element in all contracting procedures at FBS.</li></ul>

## ASPECTS OF IMPLEMENTATION

### Initial concerns

FBS managers were initially sceptical about the IP and concerned its implementation would cause delays in the project. This turned into optimism once the monitor was in place and started producing reports to the Board and the Advisory Council. They realised his oversight brought value, protected the process and was not causing extra delays. In time, it was perceived that the involvement of the monitor helped prevent conflict and disputes with the bidders, which in turn also saved precious time for the project.

In the Berlin Airport Project, the IP takes the form of a contract signed by the authority (the CEO as its representative) and each bidder separately, including its sub-contractors. The document must be submitted along with the bidding documents. The contract establishes mutual obligations from both parties and the acceptance of the role of the monitor

## **Who's who in the Berlin Airport IP**

The IP implementation roles have been spread across different actors. The legal department of FBS was mandated with the main logistical aspects of implementing the IP and its integration into the company's operations. Within the company, the Construction Department is in charge of operations and procurement. When considering who to designate as lead implementer, FBS considered several options: an association of retired experts, TI-D or itself. Because the first two had restrictions in capacity and resources, and the association of retired experts also lacked technical expertise in IP implementation, it was decided that FBS itself would lead implementation of the pact, with support from TI-D. Internally, there was also concern that with the monitoring system, there were already too many outsiders involved in operations; leading the implementation itself enabled FBS to address this.

The possible disadvantages of this model were addressed by:

- i) distributing functions and enabling contributions from third parties
- ii) strictly enforcing and guaranteeing the monitor's independence
- iii) facilitating and sharing with others information on the experience.

The effectiveness and impact of the IP demonstrates the effort made by FBS, who showed their commitment by rigorous implementation of the IP, in a manner that built credibility in the process. The monitoring contract was signed between the company (FBS) and the monitor, and the legal department is the main contact point for the monitor, ensuring that the monitor has access to information and resources as agreed. In the definition of the IP terms, the monitor's contract and the selection of the monitor, FBS and its legal department were supported by direct input from TI-D. To date, TI-D also relays synthesised monitoring reports to the public about the project.

FBS managers attribute the pact's success to:

- getting the basics right (procurement procedures, law and people involved)
- the monitoring system
- communicating about the IP.

Out of more than 1000 bidders, only 7 took a complaint to the courts. The FBS won four cases and lost one. In one case the complaint was withdrawn and in one other case the parties settled the case out of court. There were no complaints before the court or the award authority in 2011. To date, there have been no further complaints regarding the contracting processes.

## **Sanctions**

In case of breach of the Berlin Airport IP, the liquidated damages clause is set at three per cent of the contract value, up to an amount of €50,000 (US\$67000). In addition, the authority is entitled to exclude the bidder from the bidding process (and in case of serious violations, also from future bids). This amount is increased to the equivalent of five per cent of the contract value (without a monetary ceiling) if the contractor violates any of the provisions of the IP after the contract award. In this case, the authority may cancel the contract and, in the case of serious violation, may exclude the contractor from future bidding processes. The monitor will notify the prosecutor in case of IP violations. This is also relevant as FBS employees are not government officials: the company is structured as a private company although it is publicly owned. FBS perceives that the sanctions included in the pact produce a deterrent effect.

## **Dispute resolution mechanisms and sanctions imposition**

Under German law, special conflict resolution mechanisms exist that are applicable to the Berlin Airport Project and to FBS, therefore it was not considered necessary to establish a special additional process in the IP. This also applies generally to the imposition of sanctions, although some can also be imposed directly by FBS in cases where it has been established that a violation of the IP has taken place, in particular the exclusion of the bidder from the bidding process; the cancellation of the awarded contract if the winner was responsible for the violation, and debarment from future participation in contracts with FBS. The monitor doesn't impose sanctions: both the IP and the monitoring agreement establish that the monitor should notify FBS senior management on suspicion of violation, who will endeavour to clarify or correct the situation. If such a response is not given within a reasonable time, or in case there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities.

## **Communicating the IP**

FBS invested significant time and effort in communicating the Berlin Airport IP. It was included in presentations about the project made regularly at the local Chamber of Commerce and other industry associations. With time, and as bidders and other government officials became familiar with the IP, there has been less demand for such information sessions. In addition, the monitor himself is involved in explaining the IP to potential bidders.

### **Mandatory or voluntary?**

In Berlin, it has been useful that the IP is a standard mandatory document. Because of the large volume of contracts, it would be difficult to negotiate the IP content with all bidders. This has also made it easy to react to requests for changes made by some bidders, particularly at the beginning of the project. The IP text has been moderately refined by FBS through time.

### **Reluctance to sign the IP**

Very few bidders refused to sign the IP at the beginning of the project. The terms of reference are clear in requiring the signature as a condition for participating. The few bidders who refused were not allowed to participate. After seven years of implementation, there have been no new cases of reluctance to sign the IP.

### **Equal treatment of bidders**

FBS has implemented a principle throughout the process that refers to the 'equal treatment of all bidders'. Within this, it holds meetings with the bidders to address clarification questions, enabling all questions and answers to be shared by all parties. Questions and answers are typed into a computer system in real time during the meeting and shown on a screen. At the end of the meeting, participants can take a printout of these questions, and those not present have internet access to them. This guarantees all information is timely and shared.

### **Additional measures to protect the award process**

FBS keeps the physical bidding documents and proposals in a single room, and restricts access to them. People who enter and leave the room must be registered.

### **Implementation strategy**

As project manager of the Berlin Airport Project, FBS has implemented the IP as part of its project communications strategy. Communication plays a key role in the project's implementation. Part of this strategy, in FBS's view, is to establish partnerships with the contractors where their interests are aligned. The IP is part of the way this alignment is formalised and comes in addition to a Partnership Agreement that the contractors sign, where they agree with FBS to general terms of behaviour towards FBS and their own employees, some risk management measures, information sharing, etc. The IP is therefore not taken as a 'threat' but as a project management tool that helps the company to complete its tasks successfully.

## THE MONITORING SYSTEM

### **Selection of the monitor**

The Berlin Airport IP monitor was chosen by FBS (the authority) and TI-D from a shortlist proposed by both. The selected monitor was a retired expert with years of experience in public office and procurement for complex projects. The designation of the monitor was announced by FBS in the media and also reported by TI-D. The 2005 press release can be found under: [www.berlin-airport.de/DE/Presse](http://www.berlin-airport.de/DE/Presse)

### **The monitor's independence**

As the Berlin Airport IP monitor was a retired professional, problems of possible conflicts of interest and 'revolving doors' (when someone who moves between public and private roles exploits his public post to the benefit of companies previously worked for) were almost ruled out: the monitor did not derive his income from any business relation with bidders or potential bidders. As FBS performs not only as the authority, but also as lead implementer of the IP, the company pays the monitor from its budget. It ensures however that the monitor prepares his reports without its intervention, and is clear about this feature in its own reports on the IP. The greatest assurance of independence in this case has been the content of the reports submitted by the monitor, which have shown to bidders, FBS and other supervision authorities in Berlin that he does perform his duties independently.

### **The value added by the monitor**

The monitor has performed reviews in circumstances initially not foreseen, fulfilling an important preventive function in cases where there were questions raised against potential bidders or doubts over the participation of bidders who had been previously involved in corruption scandals but had not been debarred. The monitor reviewed the cases and the reactions given by the potential bidders, and concluded that they had addressed the problems encountered in the cases of corruption, determining that there was in principle no cause for concern to prevent their participation in the process, provided all other requirements were also met.

## **Monitoring IP implementation**

The Berlin Airport IP monitor began work in 2005 and is engaged until the end of the project (i.e. the opening of the airport) and for six weeks afterwards. Until then, the monitor will oversee that bidders and contractors do not violate their obligations under the IP. The IP itself governs bidders' behaviour during the contracting process and after the award. While the monitor is active during project implementation, including a review of change orders, he does not oversee contract execution (i.e. the quality, timeliness or fulfilment of a contractor's work), but ensures that during the execution of the contract, contractors behave with integrity and continue to fulfil the IP requirements.

## **Procedure if corruption is suspected or detected**

On suspicion of IP violation, the monitor should notify top FBS management, who should endeavour to clarify or correct the situation. If such a reaction is not given within a reasonable time, or if there are clear indications that corruption has occurred, the monitor will report the issue directly to the prosecuting authorities. This procedure has been established but has never been used, as there have been no claims of breach of the IP.

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