



PUBLIC PROCUREMENT AND COMPETITION LAW



PUBLIC PROCUREMENT

- Public procurement is purchase of goods and services by the public sector and is a key economic activity of governments, accounting for, on average, **15% of GDP worldwide.**
- **In India,** government procurement constitutes **about 30% of the GDP.**
- Procurement of goods and services is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both at the Centre and at the State level.



OBJECTIVES OF PROCUREMENT POLICY



- Promotion of efficiency.
- To avoid mismanagement and waste of public funds.
- Vigorous competition among suppliers helps governments realize these objectives.
- Conversely, when competition is curtailed - for example when suppliers engage in bid rigging -taxpayers' money is wasted as governments pay more than a fair price.



COMPETITION CONCERN IN PUBLIC PROCUREMENT



- The overarching concern with public procurement is that, because formal rules governing public procurement make communication among rivals easier, they can promote collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process.
- Sometimes, the procurement mechanism adopted in most government departments is itself not designed keeping in mind the importance of competition in ensuring efficient outcome. Moreover, in some cases the mechanism itself is facilitating anti-competitive practices.



WHY PUBLIC PROCUREMENT?



- Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector has limited options to respond dynamically to anti-competitive behaviour owing to strict regulatory/ legislative framework and detailed administrative regulations/ procedures at multiple levels.
- Public procurement is subject to transparency requirements (legislation/ administrative regulations /procedures *etc.*) to avoid abuse of discretion.



ROLE OF COMPETITION AGENCY IN PUBLIC PROCUREMENT



Reducing collusion in public procurement requires strict enforcement of competition laws and the education of public procurement agencies at all levels of government to help them design efficient procurement processes and detect collusion.

A. Enforcement

The most direct way for the competition authority to promote competition in the public procurement market is to identify and correct bid-riggings through strict law enforcement.

B. Advocacy

Many competition authorities are also involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders.



EXISTING LEGAL FRAMEWORK



- **Statutes**

- The Tamil Nadu Public Procurement Act.
- The Karnataka Public Procurement Act.
- The Rajasthan Transparency in Public procurement Act, 2012.
- The Public Procurement Bill, 2012.

- **GFR/ DFP**

- **Manuals**

- **Guidelines**

- **Instructions *etc.***



COMPETITION ISSUES IN PUBLIC PROCUREMENT



- Cartelization/collusive bidding/bid-rigging.
- Restricting entry through entry barriers.
- Abuse of dominance.
- Competitive neutrality.



BID RIGGING UNDER COMPETITION LAW



- ❑ "Bid rigging" means:
 - any agreement.
 - between enterprises or persons engaged in identical or similar production or trading of goods or provision of services.
 - which has the effect of *eliminating* or *reducing* competition for bids or *adversely affecting* or *manipulating* the process for bidding.

Explanation to section 3 (3) of the Competition Act, 2002.



COMMON FORMS OF BID RIGGING



- Cover bidding**
- Bid suppression**
- Bid rotation**
- Market allocation**



INDICATORS OF BID RIGGING



- **Small number of companies**
- **Little or no entry**
- **Market conditions**
- **Industry associations**
- **Repetitive bidding**
- **Identical or simple products or services**
- **Few if any substitutes**
- **Little or no technological change**



RED FLAGS FOR PROCUREMENT OFFICERS



M A P S

M=Market

Who is in the market for this award?

A=Applications

Are there similarities between vendor applications or proposals?

P=Patterns

Have patterns developed among competing vendors?

S=Suspicious Behaviour

Have vendors demonstrated behaviour that suggests that they worked together on the award?



WARNING SIGNALS OF BID RIGGING



(i) In Bids

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly sub-contracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a sub-contractor.
- Competitors regularly socialize or hold meetings shortly before the tender deadline.



WARNING SIGNALS OF BID RIGGING CONTD.



(ii) In Documents

- Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.
- Identical mistakes/corrections in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail that would be necessary or expected, or give other indications of not being genuine.



WARNING SIGNALS OF BID RIGGING CONTD.



(iii) In Bid Pricing

Bid prices can be used to help uncover collusion. When other bids are much higher than the winner's bid, bidders may be using a cover bidding scheme. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion.

The following may be considered suspicious:

- Sudden and identical increases in price or price ranges by bidders.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier *e.g.* the new supplier may have disrupted an existing bidding cartel.



WARNING SIGNALS OF BID RIGGING CONTD.



- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

(iv) In the Statements of Bidders

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.



WARNING SIGNALS OF BID RIGGING CONTD.



(v) In the Behavior of Bidders

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behavior that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behavior could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialize together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.



ADDITIONAL CHECK-LIST FOR DETECTING BID-RIGGING



Be alert for:

- Opportunities that bidders have to communicate with each other
- Relationships among bidders (*e.g.* JVs and sub-contracting)
- Suspicious bidding patterns and pricing patterns (*e.g.* unexpectedly high prices or unexpectedly low discounts)
- Unusual behavior (*e.g.* unjustified withdrawal from tender, submitting the bid without required info).

In order to avoid bid-rigging, a check-list can be devised for designing tenders, which can be used by PSUs and State agencies. Such a check-list can be on following lines:

- Learn about the market and suppliers
- Maximize participation of potential bidders
- Define requirements clearly and avoid predictability
- Reduce communication among bidders



ADDITIONAL CHECK-LIST FOR DETECTING BID-RIGGING CONTD.



Use Certificates of Independent Bid Determination (CIBD) on an affidavit. CIBD typically require each bidder to sign a statement under oath that:

- it has not agreed with its competitors about bids,
- it has not disclosed bid prices to any of its competitors,
- it has not agreed to join or collude with others in any form from which could lead to bid rigging in any form or manner whatsoever, and
- it has not attempted to convince a competitor to rig bids.



METHODOLOGY TO REDUCE THE RISK OF BID RIGGING



(i) Gather all Relevant Information of the Product/ Services

- Be aware of the characteristics of the market from which one will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which one will purchase has characteristics that make collusion more likely.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B procurement.
- Collect information about recent price changes. Inform oneself about prices in neighboring
- geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.
- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If one uses external consultants to help estimate prices or costs ensure that they have signed confidentiality agreements.



METHODOLOGY TO REDUCE THE RISK OF BID RIGGING CONTD.



(ii) Encourage Participation of Maximum Potential Bidders

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as control on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms regarding the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.



METHODOLOGY TO REDUCE THE RISK OF BID RIGGING CONTD.



- Reduce the preparation cost of the bid.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.
- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.



METHODOLOGY TO REDUCE THE RISK OF BID RIGGING CONTD.



(iii) Train Staff Members

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.

(iv) Adopt a policy to review selected tenders periodically

- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.



METHODOLOGY TO REDUCE THE RISK OF BID RIGGING CONTD.



- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Whistleblower Protection: Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish cooperative relationships with the competition authority.

(v) Define Requirements of Procurement clearly (so as not to leave any room for the suppliers to define key terms to its own advantage).

(vi) Criteria for evaluating tender should be such that facilitates participation by maximum number of bidders in the bidding process, especially the small and medium level bidders.



STEPS PROCUREMENT OFFICIALS SHOULD TAKE IN CASE OF SUSPECTED BID-RIGGING

- Have a working understanding of the Competition Act, 2002 and other related laws/ rules dealing with public procurement.
- Do not discuss one's concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, *etc.*
- Keep a detailed record of all suspicious behavior/ events/ statements.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.
- File a formal reference with the Competition Commission of India.



OTHER FACTORS CAUSING COMPETITION DISTORTIONS



There are competition distortions caused by government policies and laws which require periodical reviews. Some such factors causing distortions to fair competition in bid riggings are:

Limiting number of suppliers

The number of suppliers in the procurement process may be limited when procurement rules lay down technical specification in terms of a proprietary product and do not lay down generic specifications.

Barriers to entry

There is a tendency among public procurers to restrict participation to select big and reputed firms. Often this is done to reduce the cost of evaluating bids or to ensure the stability and quality of supply. However, this tendency could raise high entry barriers for new entrants leading to inefficient outcomes.



OTHER FACTORS CAUSING COMPETITION DISTORTIONS CONTD.



Competitive Neutrality

Competitive neutrality aims to provide a level playing field to public as well as private entities in the markets. The markets tend to be distorted as a result of structural advantages enjoyed by public entities which may cause distortionary effects on competition.

Information Asymmetry

It has been observed that there is no information available in the public domain suggesting goods or services and their quantum to be procured by the public authorities and sudden decision to procure any good or service strains the existing capacity of supply which creates a price pull factor often leading to inefficient procurement.



CASE STUDIES



In re: LPG cylinder manufacturers, Suo Moto Case No. 03 of 2011

- The Commission initiated *suo moto* proceedings against LPG cylinder manufactures who were found to be involved in bid rigging in supplying LPG cylinders to M/s Indian Oil Corporation Ltd. pursuant to a tender floated by it. It was noted by the Commission that the identical price quotations submitted by the opposite parties therein pursuant to the impugned tender were actuated by mutual understanding/ arrangements.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 7% of the average turnover of the company.



CASE STUDIES CONTD.



A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. & Ors., Case No. 43 of 2010

- The Commission examined *inter alia* allegations of bid rigging by the bidders in the tender floated by Hospitals Services Consultancy Corporation for supply, installation, testing and commissioning of Modular Operation Theatre and Medical Gases Manifold System to Sports Injury Centre, Safdarjung Hospital, New Delhi.
- The Commission found commonality of mistakes in the tender forms by the bidders as indicative of collusion amongst them to manipulate the process of bidding.
- The Commission imposed a penalty upon each of the contravening party @ 5% of the average turnover of the company.
- However, COMPAT vide its order dated 25.02.2013 passed in Appeal No. 93 of 2012 after considering the aggravating and mitigating factors reduced the penalty to 3% of the average turnover.



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CASE STUDIES CONTD.



Gulshan Verma v. Union of Indian & Ors., Case No. 40 of 2010

- In this case, the Commission found the opposite parties named therein to be involved in bid rigging and cartelization in supply, installation, testing and commissioning of Modular Operation Theatre (MOT) at Jai Prakash Narain Apex Trauma Centre, All India Institute of Medical Sciences, New Delhi.
- The parties were found guilty of contravention of section 3(3)(d) of the Competition Act, 2002. Though the parties were found guilty, the Commission did not impose any penalty as the parties had suffered similar penalties for similar contraventions in Case No.43 of 2010. It was observed that contravention in this case followed within two months of the contravention in Case No.43 of 2010.
- It was also observed that both the cases had proceeded simultaneously and the project cost involved in Case No.43 was much higher than in the present case. It was further observed that in view of the fact that the three appellants were imposed a penalty of 5% of their three years of average turnover, the Commission did not deem it fit to impose penalty again on the appellants in this case.
- However, COMPAT vide its order dated 14.03.2013 passed in Appeal No. 98 of 2012 set aside the order of the Commission.



CASE STUDIES CONTD.



In re: Aluminium Phosphide Tablets Manufacturers, Suo Motu Case No. 02 of 2011

- The Commission examined the allegation of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets required for preservation of central pool food grains by Food Corporation of India. In this case, the Commission *inter alia* noted that the identical bid price is not possible unless there is some sort of prior understanding.
- The Commission found the collective action of identical bids, common entry in the premises of FCI before submission of bids as indicative of ‘plus’ factors is support of existence of an understanding among the parties.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 9% of the average turnover of the company.



CASE STUDIES CONTD.



Coal India Limited v. GOCL Hyderabad & Ors., Case No. 06 of 2010

- An information was filed by M/s Coal India Ltd. against explosive manufacturers/ suppliers in India along with their associations, for their alleged anti-competitive acts.
- In this case, the Commission found the acts and conduct by the opposite parties therein of boycott of e-reverse auction together with their past conduct of quoting identical rates and controlling the supply of explosives as sufficient to establish that the same was done with a view to manipulate the process of bidding in violation of section 3(3)(d) of the Act.
- The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 3% of the average turnover of the company.
- However, COMPAT *vide* its common order dated 18.04.2013 passed in Appeal No. 82 of 2012 and other connected appeals after considering the aggravating and mitigating factors reduced the penalty to the extent of total of 10% penalty imposed by the Commission.



CASE STUDIES CONTD.



Ref. Case filed by by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v. M/s Orissa Concrete and Allied Industries Ltd. & Ors., Ref. Case No. 05 of 2011

- In this case, the reference was filed under section 19(1)(b) of the Competition Act, 2002 by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata against the vendors alleging *inter alia* contravention of the provisions of section 3 of the Act in the matter of procurement of Anti-Theft Elastic Rail Clips with Circlips from RDSO approved firms.
- The Commission held that in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.



CASE STUDIES CONTD.



- From a number of coincidences and indicia (identical rates, division of quantity, similar handwriting, format of covering letter, tender fee payment, past conduct *etc.*), the Commission held that the opposite party bidders entered into an agreement to directly or indirectly determine the prices as also to rig the bid in question.
- The Commission issued a cease and desist order against the contravening parties.
- As regards penalty under section 27 of the Act, the Commission noted that there were circumstances in this case which required the issue of penalty to be looked into somewhat differently. The facts as projected in the present reference revealed a complete lack of awareness on the part of the opposite parties which also happened to be small and micro enterprises. Resultantly, no penalty was imposed upon them.



CASE STUDIES CONTD.



Reference Case No. 01 of 2012 filed by Director General (Supplies & Disposals), Directorate General of Supplies & Disposals, Department of Commerce, Ministry of Commerce & Industry, Government of India

- This case was initiated on a reference made by DG S&D in respect of a tender enquiry dated 14.06.2011 for conclusion of new rate contracts for polyester blended duck ankle boots rubber sole. The reference alleged bid rigging and market allocation by the suppliers while bidding against the above tender enquiry.



CASE STUDIES CONTD.



- After a detailed inquiry, CCI held that the bidder-suppliers by quoting identical/ near identical rates had, indirectly determined prices/ rates in the Rate Contracts finalized by DG S&D and indulged in bid rigging/ collusive bidding in contravention of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act. Further, CCI noted that the parties had also controlled/ limited the supply of the product in question and shared the market of the product amongst themselves under an agreement/ arrangement in contravention of the provisions of section 3(1) read with sections 3(3)(b), 3(3)(c) and 3(3)(d) of the Act.
- Accordingly, CCI directed the contravening parties to cease and desist from indulging in such anti-competitive conduct in future apart from imposing a penalty of Rs. 625.43 Lakhs on eleven companies.



WAY FORWARD



- **Policy planners, public procurement officials and CCI should work in tandem to detect and deter bid rigging.**
- **Competition Audit/ Impact Assessment by Governments/ Departments/ PSUs of procurement processes for better designed public procurement programmes, for which CCI could assist.**
- **Reference to CCI for violations of Competition Law.**
- **Periodic awareness and training of procurement officials through Government/ PSUs initiatives, assisted by CCI.**
- **Close coordination between CCI and Governments/ Departments/ PSUs.**



THANK YOU