

Public Procurement and Competition Law (Role of CCI in curbing fiscal deficit)



A presentation by
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Agenda

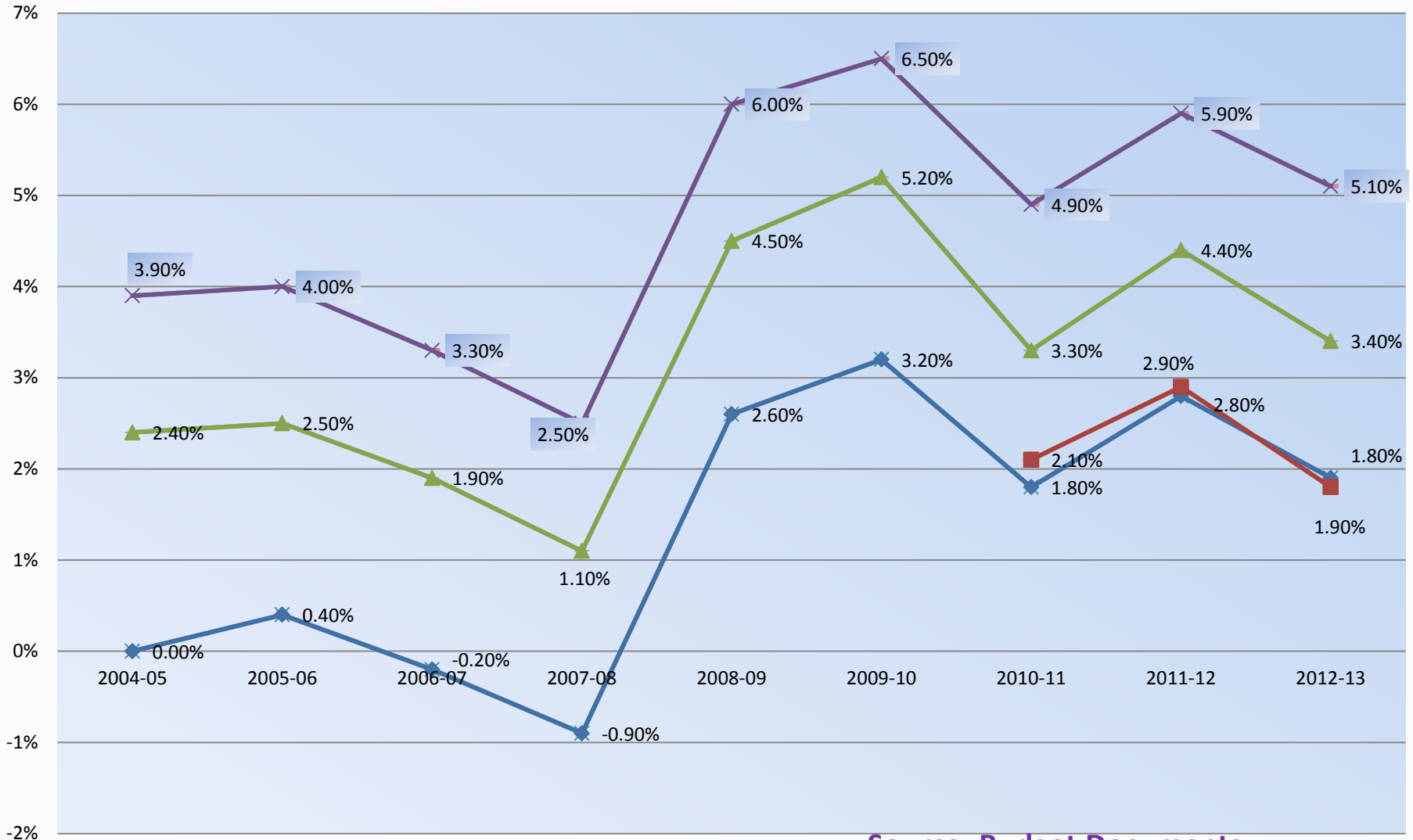
1. **Fiscal Deficit – Current Scenario and Role of Competition Commission of India in containing Fiscal deficit.**
1. **Legal Framework of Competition Law in India.**
3. **Public Procurement and CCI as change agent**
4. **Prevention and Detection of Bid rigging**
5. **Some International Experiences**
6. **What to do in cases of suspected bid-rigging ?**
7. **Conclusions**

Fiscal deficit and Role of CCI in Curbing it



As Percentage Of GDP

- Primary Deficit
- Effective Revenue Deficit
- Revenue Deficit
- Fiscal Deficit

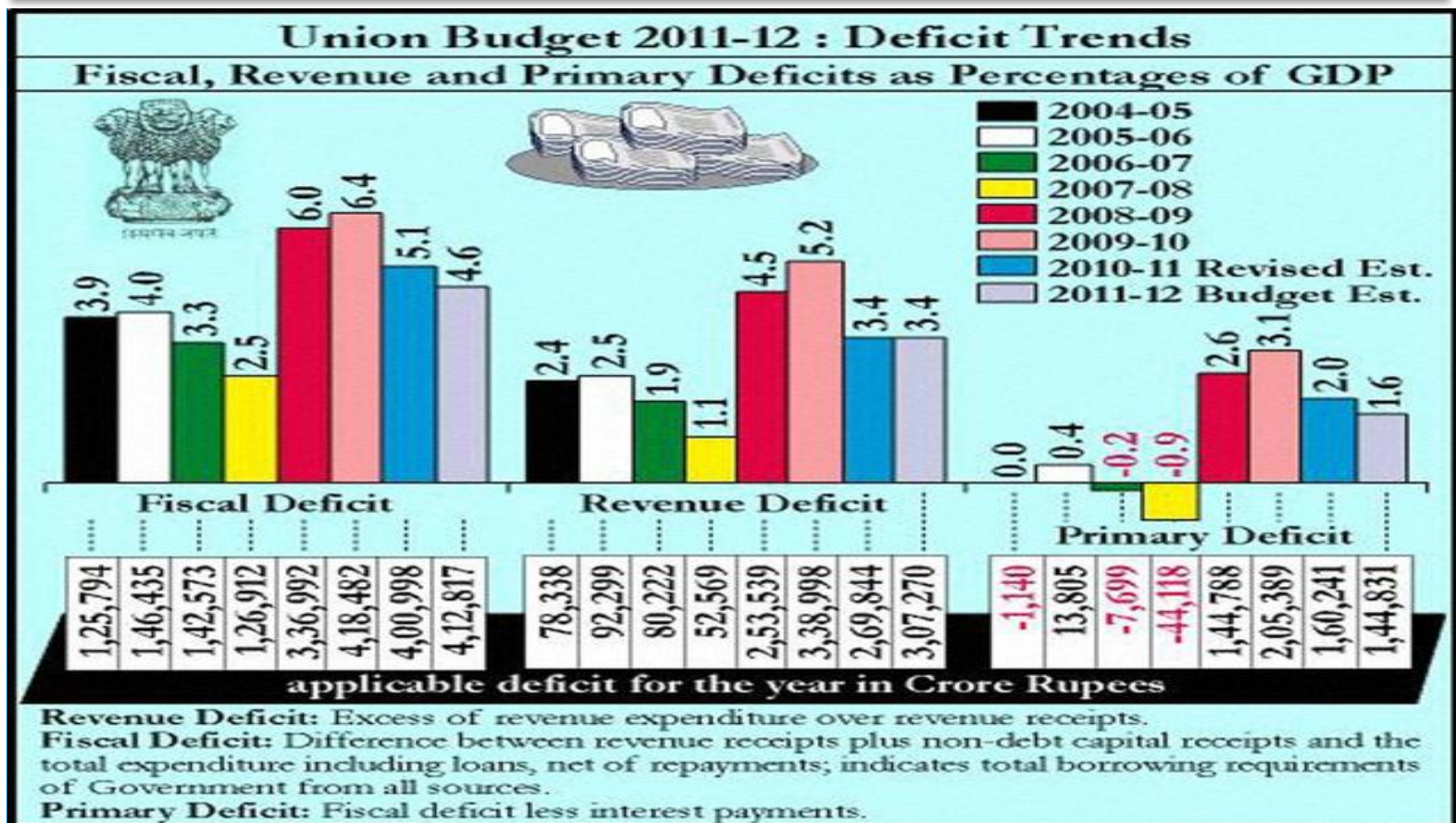


Source: Budget Documents

1.1 Fiscal Deficit over the years

In crore

	2010-11 Actuals	2011-12 BE	2011-12 RE	2012-13 BE
Fiscal Deficit	373591 (4.9)	412817 (4.6)	521980 (5.9)	513590 (5.1)



1.2 Scale of Public procurement in India

- **Public procurement 15-20% World Over. In India about 30% of the GDP.**
- **Departments like Defence, Railways and Telecom, devote about 50% of their budget to procurement, which happens to be higher than the expenditure of most of the State Governments.**
- **About 26% of the health budget is devoted to procurement.**

(Source: Special address by Shri Pratyush Sinha, Former CVC- Competition, Public Policy and Common Man, 16th November 2009)

1.2 Agents to curb deficit



CBDT, CBEC - Taxes

Deptt. Of Disinvestment – Disinvestment



Department of Expenditure – Expenditure Management

- Taxes- Not so buoyant
- Expenditure - Committed and Increasing;
- Hence, role of CCI becomes important on expenditure side;



CCI – Enforcement of competition laws to check cartelisation and abuse of dominance and consequential savings for Government + Advocacy for promoting competition

1.3 Change Agents for Expenditure Management -Contd.

- **Demand Side**

Department of Expenditure, CAG and CVC

- **Supply Side as enforcer**

Demand side as enabler

CCI

CCI takes care of;

supply side while enforcing laws on the firms who engage in anti-competitive behaviour and;

demand side as enabler while sensitizing the govt. ministries and departments for framing better tender documents and need for ushering more competition in the market.

2. Legal Framework of Competition Law in India.



Economic Reforms of 1991

- **Post 1991 policy of Liberalisation, Privatisation and Globalisation introduced.**
- **MRTTP Act was found inadequate to meet the challenges of a modern globalised economy.**
- **Government of India in October 1999 appointed a high level Committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law in consonance with international developments.**

Competition Act, 2002

- Acting on the report of the Committee, the Government of India passed the Competition Act in the year 2002; to which the President accorded assent in 2003.
- It was subsequently amended by the Competition (Amendment) Act, 2007.
- CCI has one chairperson and six other members

2. Legal Framework in India- Contd.

2.1 Competition Act, 2002;

- Prohibits Anti-Competitive Agreements (Sec 3)
- Regulates Acquisitions, Mergers and Combinations (S. 5&6)
- Prohibits Abuse of Dominant Position if it destroys competition in the market (Sec 4)



Legal Framework-Contd.

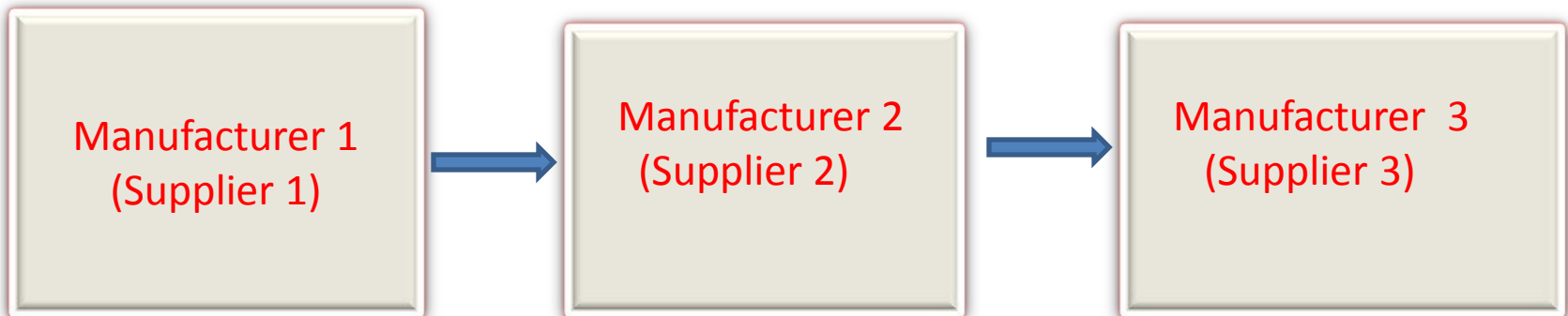
- **Mandates Competition Advocacy (Sec 49)**



Under the ambit of section 2(h), government ministries and departments engaged in commercial activities in any manner are covered (exception sovereign functions of Govt. Ministries/Departments, Defence, Space, Atomic Energy, Currency).

Horizontal Agreements-Contd.

- Provisions as regards Horizontal Agreements – Section 3(3)
- Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprises or practice carried on, or decisions taken by, any association of enterprises or association of persons, **including cartels**, engaged in identical or similar trade of goods or provision of services, **shall be presumed** to have appreciable adverse effect on competition and therefore void if it :



2.2 Horizontal Agreements and Bid-Rigging

- **directly or indirectly determines purchase or sales prices.**
- **Limits/controls production, supply, markets, technical development, investment or provision of services.**
- **shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.**
- **directly or indirectly results in bid rigging or collusive bidding.**

How CCI is A change Agent



Preamble of Competition Act, 2002:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

3.1 Role of CCI in Public Procurement

- **Enforcement measures - Penalise Bid-rigging**
– **Section 3(3) of the Act**
- **Advocacy measures;**
 - **enable Ministries/Departments to identify manipulative bidding**
 - **for better tender designs and tender specifications**

3.2 CCI - Action Matrix

Enforcement

Advocacy

Enforcement

1. Action against firms into Cartelization, indulging in Abuse of Dominance

2. Action against delinquent firms and also request Govt. Departments to prevent recurrence in future

Advocacy

3. Pro-actively asking Govt. Ministries/Departments to take measures promoting competition leading to enforcement in future by them

4. Seminars, Conferences, publishing literature, sensitizing the stakeholders (We are here today)

3.3 Bid-Rigging

3.3.1 Bid-Rigging under explanation to Section 3(3)

- Bid rigging means any agreement, between enterprises or persons referred to in sub-section (3) of Section 3, 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.
- Consider this : Tender 
Sector: Dam Construction
Location: XYZ - India
Tender Value: 1090 Lakh
- Closing Date: 20th – October - 2012



Meeting of Bidders



Forms of Bid-Rigging

- Bid rigging may take many forms, but most bid rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression

- In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Forms-Contd.

- **Complementary Bidding**

- **Complementary bidding ('cover' or 'courtesy' bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding.**
- **Complementary biddings are the most frequently occurring forms of bid rigging, and the bidders defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.**

Forms of Bid-Rigging

Complementary Bids

	ITEM -X		ITEM-Y	
Year 1	A	Rs. 100	B	Rs. 110
	B	Rs. 130	A	Rs. 140
Year 2	A	Rs. 120	B	Rs. 130
	B	Rs. 150	A	Rs. 160
Year 3	A	Rs. 140	B	Rs.150
	B	Rs. 170	A	Rs.180

Forms of Bid-Rigging

- **Bid Rotation**

- In bid rotation schemes, all parties submit bids but take turns to be the lowest bidder.
- The terms of the rotation may vary; competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each party in agreement or allocating volumes that correspond to the size of each such party.

Forms of Bid-Rigging

- **Bid-Rotation**
- **All parties submit bids, but take turns being the lowest bidder**
 - - **Company X submits the low bid first time**
 - – **Company Y submits the low bid next time**
 - – **Company Z submits the low bid third time**

Forms of Bid-Rigging

- Rotation of Bids

	ITEM - A			ITEM - B	
	Year 1	Year 2		Year 1	Year 2
Firm A	Rs. 100	Rs. 140	Firm B	Rs. 100	Rs. 140
Firm B	Rs. 120	Rs. 120	Firm C	Rs. 120	Rs. 130
Firm C	Rs. 130	Rs. 130	Firm D	Rs. 130	Rs. 120
Firm D	Rs. 140	Rs. 100	Firm A	Rs. 140	Rs. 100
	ITEM - C			ITEM - D	
	Year 1	Year 2		Year 1	Year 2
Firm D	Rs. 100	Rs. 140	Firm C	Rs. 100	Rs. 140
Firm A	Rs. 120	Rs. 130	Firm D	Rs. 120	Rs. 120
Firm B	Rs. 130	Rs. 120	Firm A	Rs. 130	Rs. 130
Firm C	Rs. 140	Rs. 100	Firm B	Rs. 140	Rs. 100

Forms of Bid-Rigging

- **Subcontracting**
- Subcontracting arrangements are often part of a bid rigging scheme.
 - Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder.
- In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Forms of Bidding

- **Market Allocation**
- **Agreements by which competitors divide markets among themselves.**
- **Division could be by territory, by customer type or by Product. For example;**
- **Company A only submits bids for north;**
- **Company B only submits bids for south ;**

3.4 Cases of Bid-Rigging investigated by Bid-Rigging and penalty imposed

Case	Amount in crore
LPG Cylinder Manufacturers	165
Medical Equipment Suppliers to Govt. Hospitals	3
Supply of ALP Tablets to FCI	317
Explosives manufacturers	59

3.5 Remedies and Penalties under Indian Competition Act

After inquiry if contravention is established, the Commission may pass all or any of the following orders;

- Cease and desist
- **impose such penalty** as it may deem fit not exceeding 10% of the average of the turnover for the last three preceding financial years upon each of person or enterprise
- (In case of cartel, **a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, which ever is higher ON** each producer, seller, distributor, trader, or service provider included in that cartel,)
- **direct that agreements shall stand modified to the extent and in the manner as may be specified in the order of the Commission.**
- **Any other orders**

3.5 Join Hands To Prevent Bid Rigging

- Bid-rigging and other anti-competitive practices can cause serious economic harm.
- Prevention, detection, and reporting may go a long way.
- Working together, we can help maintain a competitive marketplace.

Prevention and Detection of Bid-Rigging



Bid-Rigging

- Collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive
- If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending.
- Bid rigging is harmful because it;
 - Eliminates or reduces competition
 - Artificially raises prices

4.1 Steps to Prevent Bid-Rigging

- Design the tender process to maximize the potential participation of genuinely competing bidders
- Define requirements clearly and avoid predictability
- Design the tender process to effectively reduce communication among bidders
- Carefully choose the criteria for evaluating and awarding the tender

4.2 Identification of Bid-Rigging

Bid rigging takes place;

When bidders collude;

- ✓ **To keep the bid amount at a pre-determined level.**
- ✓ **Such pre-determination is by way of intentional manipulation by the members of the bidding group.**
- ✓ **Bidders could be actual or potential ones.**

4.3 Detection of Bid-Rigging- Red Flags

- **Suspicious may be aroused by unusual bidding or something a bidder does.**
- **Situations of suspicious behavior include the following (illustrative):**
 - **The bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation).**
 - **Bid documents contain the same corrections and alterations indicating last minute changes.**
 - **A bidder seeks bid documents for the competitor.**

4.4 Red Flags

- A bidder submits bid of the competitor's also
- A party brings multiple bids to a bid opening and submits its bid after coming to know who else is bidding.
- A bidder makes a statement indicating advance knowledge of the offers of the competitors.
- Same e-mail, same telephone, same address, same letter head.

4.5 Problem Identification

- Many officers have no training in procurement procedures.
- Most of them think that as long as they select L1, they are following the correct procedure.
- Importance of institutional mechanism in place.
- Many countries use electronic system of surveillance and detection like BAMS in USA.

4.6 Identification - Contd.

- Close scrutiny of Bid Documents
- Watch on public Announcements by bidders
- Trade Association Documents

4.7 Warning Signs During Tendering

- Significant change from past price levels.
- Competitors' bids are received together or common agents are appointed to submit bids.
- Identical irregularities in bids.
- Winning bidder subcontracts work to unsuccessful bidders

4.8 More Warning Signs

- Suppliers that would normally tender fail to do so.
- The same supplier is often the successful bidder.
- Winning bidder does not accept the contract.

4.9 Warning Signs-Contd.

- Bids from local companies involve similar transportation costs as non-local bidders.
- Large difference between price of winning bid and other bids.
- Range of quoted prices has moved suddenly.
- Pattern of rotating successful bids among suppliers.

4.10 Steps to Check Bid-Rigging

- Maintain procurement records, e.g., bid lists, abstracts, and awards. When collusion is suspected, review the procurement history of a product to determine if a pattern of bid allocation or rotation exists.
- Ask questions If the prices or bids submitted don't make sense, ask the vendors to explain and justify their prices.
- Know and understand the dynamics of the markets in which major purchases are made. A knowledgeable buyer may correctly suspect collusion from market behavior. **(Bright line Test)**

4.11 Some Industries are More Susceptible

- **Be especially vigilant when dealing with:**
- Homogeneous products
- Non-complex product or service
- No significant technological changes
- Products with few or no close substitutes
- A small number of suppliers
- Few new entrants
- An active trade association



Global Experiences



5. Global Experiences

- **OECD Survey- 17% to 43% savings in developing countries through implementation of competition law in developing countries .**
- **Savings of around Euro 25 billion in EU between 1993- 2002.**
- **Saving of USD 7 Bullion in Russia**

Experiences- Contd.

Bid rigging is a criminal offence in many countries such as :

US

UK

Canada

Japan

Ireland

Russia



Experiences-2012

- Penalties imposed on 103 construction companies involved in bid rigging in UK in 2009 -129 Million Pounds – quantum of penalties reduced but order sustained by UK Appellate Tribunal (2012).
- The US DoJ obtained guilty plea by two Japanese suppliers of automotive electrical components imposing a \$548 M fine for their involvement in price fixing and bid rigging conspiracies in the auto parts sales-2012.
- Portugal imposed fines on industrial cleaning firms-2012.
- Danish imposed fines on environmental labs -2012

What to do?
.....Conclusions



6. What to do when one suspects bid-rigging

- Record details thoroughly.
- Decide whether or not to continue with the tender.
- Contact Competition Commission of India.



Way forward

- **Competition Audit by public procurers**
- **Reference to CCI**
- **Training of procurement officials**
- **Coordination between CCI and procurement agencies**

7. Conclusions- Importance of Competition

- Competition - **fourth corner-stone of the public policy framework, along with the monetary, fiscal and trade policies.** The benefits of competition to;

CONSUMERS

- Wider choice of goods, services and suppliers
- Better quality and improved value for money

BUSINESSES

- Level playing field; redressal against anti-competitive practices
- Competitively priced inputs
- Greater productivity and ability to compete in global markets

GOVERNMENTS (Central and State)

- Optimal realization from sale of assets
- **Savings of public money in procurement**
- Enhanced availability of resources for social sector

Conclusions

- CCI together with Ministries/Departments may forge partnership for India's growth



**Achieve Best Value
for Money through
competition in Public
Procurement**



- **Thanks**

- **Data/information have been collected from different sources in public domain**