

# Public Procurement and Other Anti-Competitive Conduct

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# Reach and Scope of the Competition Act

- Topic that encapsulates the wide and vast canvas of the Competition Act
- Emphasis of Public Procurement draws attention to coverage of the Act
  - Public Sector Enterprises
  - Departmental and Non-departmental Enterprises
  - Public and state institutions – high courts included
- Significance and Importance of Competition
  - Competitive pricing of goods and service
  - Provides for quality improvement and technological development
- Maximisation of consumer welfare by ensuring competition through implementation of the Act
  - Role of Competition Commission as against the MRTP

# Public Procurement and Anti-Competitive Conduct

- Market Structures that raise alarm bells for the Commission – Structures that can raise prices and lower quantity displaying the non-existence of competitive pressures
- A dimension of competition is its effect on keeping corruption at bay – a dimension different from CAG and CVC.
- Monopolisation Structures

Monopolistic Market Structure  
Section -4  
Abuse of Dominance

Combination  
Acquisitions, Mergers, Amalgamations  
Section (5) & (6)

Created Monopolies  
Section 3 (3)  
Cartels

Natural Monopolies  
Monopolies created by law  
Section 3(3)(d)

Section 3(3)(d) “*directly or indirectly results in bid rigging or collusive bidding*”

*Explanation:* For the purposes of this sub-section, “bid rigging’ means any agreement between enterprises or persons referred to in sub-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 of bidding

# Cartel v/s Bid Rigging

- Difference between Cartel and Bid Rigging – Bidders collude
  - Cartels involve multiple buyers but a **created** single seller
  - Bid rigging is usually a **single buyer** who is a monopolist often in the public sector but multiple sellers from the private sector
    - Public Procurement in public sector
    - Natural monopolies who are in the public sector
- There is emphasis in both on an Agreement – as under Sec 2(b)(i)&(ii)
- Bidding is the appropriate mechanism where there is limited scope for competition – the process has to be fair, transparent and open. It enhances consumer welfare
- Bidding is commonly associated with public procurement –extended to utilities infrastructure projects
  - Bidding in procurement
  - Bidding in coal blocks
  - Bidding in spectrum allocation
- Large volume of literature on different types of bidding suitable where there is asymmetry of information between the parties

# Types of Bidding-1

1. Competitive bidding/Collusive bidding - to enable the procurement of goods or services on the most favourable terms and conditions.

- Collusive bidding negate the process if the prospective bidders collude or act in concert - contravenes the very purpose of inviting tenders and is inherently anti-competitive
- Bidders agree among themselves to eliminate competition in the procurement process so as to raise prices and deny fair price to procurer

It is a type of cartel, where contract is pre-determined to one party even though several other parties also present a bid

2. Bid suppression - agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.

# Types of Bidding-2

## 3. Cover bidding

Cover bidding is designed to give the appearance of genuine competition also called complementary, courtesy, token, or symbolic bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following:

- a competitor agrees to submit a bid that is higher than the bid of the designated winner
- a competitor submits a bid that is known to be too high to be accepted,
- a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser.

## 4. Bid rotation

- In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

## 5. Market allocation

- Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

# 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

# Cases of CCI -1

## Market Sharing

Case No	Allegation	Inquiry	Results
Reference Case No. 01 of 2012 - Director General (Supplies & Disposals), Department of Commerce, Ministry of Commerce & Industry, Government of India	In respect of a tender enquiry dated 14.06.2011 for conclusion of new rate contracts for polyester blended duck ankle boots rubber sole - alleged bid rigging and market allocation by the suppliers while bidding against the above tender enquiry.	<p>Inquiry revealed bidder-suppliers quoting identical/ near identical rates - indirectly determined prices/ rates in the Rate Contracts finalized by DG S&amp;D.</p> <p>Bid rigging/ collusive bidding - contravention of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act.</p> <p><b>The Commission noted that the parties had controlled/ limited the supply of the product - market sharing</b> vide an agreement/ arrangement</p>	The Commission 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.



# Cases of CCI-3

## Boycott of e-reverse auction

Case No	Allegation	Inquiry	Results
<p>Coal India Limited v. GOCL Hyderabad &amp; Ors., Case No. 06 of 2010 •</p>	<p>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.</p>	<p>The Commission found the acts and conduct by the <b>opposite parties therein of boycott of e-reverse auction together with their past conduct of quoting identical rates and controlling the supply of explosives</b></p> <p>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.</p>	<p>A cease and desist order with a penalty @ 3% of the average turnover of the company upon each of the contravening party.</p> <p>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.</p>

# Cases of CCI-2

## Uncomfortable Coincidences

Case No	Allegation	Inquiry	Results
Ref. CaseNo. 05 of 2011 filed by by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v. M/s Orissa Concrete and Allied Industries Ltd. & Ors.,	On the matter of vendors contravening 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.	<p><b>Circumstantial evidence indicated a number of coincidences in terms of identical rates, division of quantity, similar handwriting, format of covering letter, tender fee payment, past conduct etc.</b></p> <p>The Commission held that the opposite party bidders had entered into an agreement to directly or indirectly determine the prices as also to rig the bid in question.</p>	<p>A 'cease and desist' Order was issued.</p> <p>Lack of awareness on the part of the parties as they were small organizations.</p>

# Cases of CCI-4

## Case of Mutual Understanding

Case No	Allegation	Inquiry	Results
LPG cylinder manufacturers, <u>Suo Moto</u> Case No. 03 of 2011	Allegation of bid rigging in price fixation to a tender floated by M/s India Oil Corporation Ltd.	LPG cylinder manufactures 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 –  <b>identical price quotations submitted actuated by mutual understanding/ arrangements.</b>	he 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.

# Cases of CCI-5

## Commonality of Mistakes

Case No	Allegation	Inquiry	Results
<p>1.A Foundation for Common Cause &amp; People Awareness v. PES Installations Pvt. Ltd. &amp; Ors., Case No. 43 of 2010</p> <p>2, Gulshan Verma v. Union of Indian &amp; Ors., Case No. 40 of 2010</p>	<p>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.</p> <p>2. Same Allegation but reference to Jai Praksah Narain Trauma Center</p>	<p>1.The Commission <b>found commonality of mistakes in the tender forms by the bidders as indicative of collusion</b> amongst them to manipulate the process of bidding.</p> <p>2. No penalty was levied as party was involved in the earlier case.</p>	<p>1.The Commission imposed a penalty upon each of the contravening party @ 5% of the average turnover of the company.</p> <p>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.</p> <p>2. COMPAT vide its order dated 14.03.2013 passed in Appeal No. 98 of 2012 set aside the order of the Commission.</p>

# Cases of CCI-6

## Identical bid price of a dominant player

Case No	Allegation	Inquiry	Results
Aluminium Phosphide Tablets Manufacturers, Suo Motu Case No. 02 of 2011	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 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. Questioned by COMPAT and under investigation.

# Cases of CCI-7

## Case of High Court Tendering – Not in the same line of Business

Case No	Allegation	Inquiry	Results
Arun Kumar Tyagi v The Software Engineer Institute and others (Case No. 19 of 2011)	<p>It was alleged that the Software Engineer Institute, USA, High Court of Uttarakhand and HCL Technologies Ltd. had acted in concert in the tender for the procurement of computer software floated by High Court of Uttarakhand for digitizing its old records.</p> <p>It was averred that High Court of Uttarakhand was misguided by Software Engineer Institute, USA in setting the minimum technical conditions for bidders in the tender notice in order to favour HCL Technologies Ltd. in the said tender.</p>	<p>The Commission firstly stated that in order to attract the provision of section 3(3) of the Act, the enterprises in question <b>must be engaged in similar trade or business.</b></p> <p>Secondly, it was noted that neither of the Opposite Parties were engaged in the same business or trade.</p> <p><b>High Court of Uttarakhand was the tender (Procurer) , HCL Technologies Ltd. was the bidder for the tender (Supplier) and Software Engineer Institute, USA was the agency that accredited 'CMM1 Level 5' to HCL Technologies Ltd.</b></p>	<p>Therefore, it was held that the agreement between the three will not attract the provision of section 3(3) of the Act.</p>

# Cases of CCI-8

## Government of India –Office Memorandum

Case No	Allegation	Inquiry	Results
<b>Travel Agents Association of India v. Balmer Lawrie &amp; Co. Ltd. &amp; Anr. (Case No. 39/2010)</b>	<p>It was alleged that the opposite parties entered into an agreement with the Government of India and in pursuance of which an Office Memorandum was issued to all government departments with strict directions to purchase travel tickets/ tour exclusively from opposite parties, namely, Balmer Lawrie &amp; Co. Ltd. or Ashok Travels and Tours Ltd. Therefore, informant alleged violation of sections 3 and 4 of the Act.</p>	<p>Observation of CCI: Government of India is the consumer of air ticketing services – <b>exercise of consumer choice</b></p> <p>Condition to procure the air tickets on the <b>best bargains available across</b> all airlines.</p> <p>Department of Expenditure, Ministry of Finance, <b>Government of India could not be said to be engaged in any activity which fits in with the definition of ‘enterprise’.</b></p> <p><b>O.M. issued cannot be termed as an economic activity.</b></p>	<p>No merit in the case</p>

# Cases of CCI-9

## Cartels and Bid Rigging among PSU Insurance Companies

Case No	Allegation	Inquiry	Results
<b>Suo Moto Case No. 02 of 2014</b> <b>In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna.</b>	<p>It was alleged in the anonymous information that the above named public sector insurance companies rigged the tender floated by the Government of Kerala on 18.11.2009 for selecting insurance service provider for implementation of the 'Rashtriya Swasthya Bima Yojna' ('RSBY') for the year 2010-11.</p> <p>It was also alleged that OPs formed a cartel and quoted higher premium rates in response to the aforementioned tender.</p>	<p><b>Concept of single economic entity not established. PSU insurance are separate entities.</b></p> <p><b>All decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval/ directions from Ministry of Finance.</b></p> <p><b>Evidence of collaboration.</b></p>	Fine Levied



# Conclusion

- Cases have emerged from information filed by officers
- Process of creating awareness during the period of transition
- Suo moto cases are references where the informant did not want disclosure of identity
- Cases of procurement showed a tradition of bid rigging that prevailed with out any concern clearly reflecting the requirement of competition law
- Amounts are small and a few cases COMPAT has referred back
- No big cases as yet for instance defense contract or oil exploration
- A good beginning