

# Public Procurement and Bid Rigging

A Seminar Organized by the Competition  
Commission of India

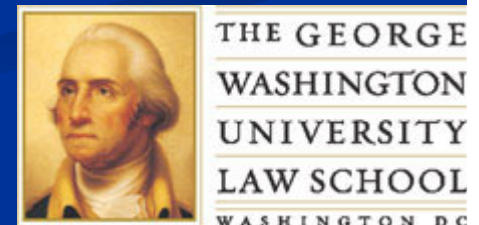
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# Agenda

- Introductions
- Session I: Anti-Competitive Practices
  - Scope of Bid-Rigging Problem
  - Balancing Procurement Norms and Their Anti-Competitive Effects
- Session III: Remedies and Reform
  - Anti-Corruption/Pro-Competitive Strategies
  - Practical Steps Forward – OECD and Others



# George Washington University Law School

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50 Years of  
Public  
Procurement  
Law

Government Procurement  
Law Program, 1960 - 2010



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## SESSION 1

# Public Procurement and Competition Issues: Anti-Competitive Practices in Procurement



7 Ottawa tech firms charged with bid-rigging

Former New York City Hospital Purchasing Official Pleads Guilty to Bid Rigging and Fraud Conspiracies

Defense contractors charged with bid-rigging

FAS Russia terminates case on bid-rigging collusion of companies in Kamchatka

How Japanese taxpayers' money is lost in bid-rigging

Bid-rigging on gov't contracts costs Brazil \$20 bn a year.

Strong flow of construction sector bid-rigging cases, commission reports

Australian court fines four marine hose makers for bid rigging

# Bid-Rigging: World-Wide Problem



# Bid-Rigging Under the Competition Act

- The Explanation to section 3, sub-section (3) of the Act defines "bid rigging" as “**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 for bidding.**”

Must assess anti-competitive behavior against backdrop of established procurement practices and principles

## Statutory Guidance to Commission in Section 3 Inquiry

- (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—
- (a) **creation of barriers to new entrants** in the market;
  - (b) **driving existing competitors** out of the market;
  - (c) foreclosure of competition by **hindering entry** into the market;
  - (d) accrual of **benefits to consumers**;
  - (e) **improvements in production or distribution of goods** or provision of services;
  - (f) **promotion of technical, scientific and economic development** by means of production or distribution of goods or provision of services.

Assess Against Key Elements of Procurement, Below



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# Historical Progression



Sealed  
Bids



“Competitive  
Dialogue”

“Frameworks”  
Contracting

What forms of procurement are subject to “bid-rigging”?





# U.S. Department of Justice

## *A Caution About Indicators of Collusion*

While these indicators may arouse suspicion of collusion, they are not proof of collusion. **For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list.** Only when a company submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists.



# WHEN IS PROCUREMENT ANTI-COMPETITIVE?



Principle	Anti-Competitive Practice
Competition	
Transparency	
Integrity	
Uniformity	
Risk Aversion	
Efficiency	
Socioeconomic	
Customer Satisfaction	

# OECD on Dangers of Rigid Competition Requirements

The lack of flexibility which may result from strict regulation of the procurement process limits the opportunities for the public purchaser to react strategically when confronted with unlawful co-operation among potential bidders seeking to increase profits. It is therefore important that the legislative and regulatory framework for public procurement be designed to allow sufficient flexibility on the purchasing side.

Introducing new and different procurement procedures such as reverse auctions **or direct negotiations**, or allowing the procurement entity to adapt the standard procurement procedures according to the market situation with which it is confronted, may achieve positive results.



# OECD: Tight Specifications Can Facilitate Bid-Rigging

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- “It is recommended that tender specifications be defined in terms of functional performance, where possible, rather than by reference to specific products.”

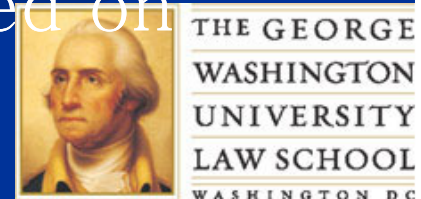


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# Benefits of an open & transparent procurement regime: Theory

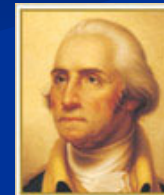
- More potential suppliers – results in more competition – lower prices & better quality goods & services
- Access to broader pool of talent & technology
- Translates into . . .
  - Reduced tax burden and/or
  - Ability to provide more, better government services with same resources
- Increased access to foreign markets by (your own) domestic producers (based on reciprocity)

*Slide: Courtesy World Trade Organization*



# OECD: Transparency May Be Anti-Competitive<sup>16</sup>

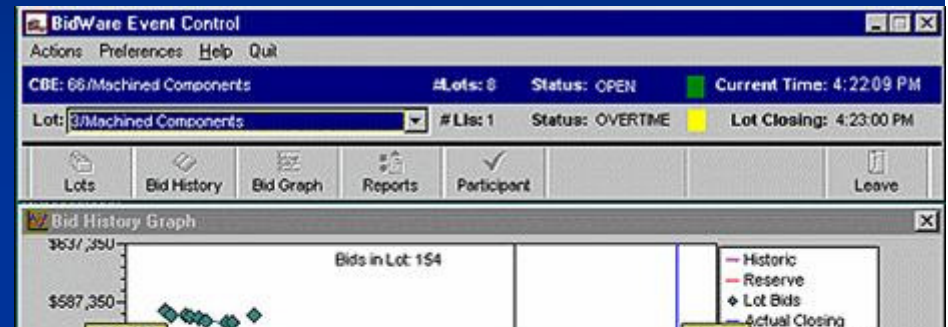
- **Signals and threats** may be possible if the auction rules give bidders a language in their bids. In one auction, bidders used insignificant digits in the bid amount to communicate. . . .
- **Disclosing the identities of losing bidders** helps bidders monitor possible collusion but makes it easier to monitor possible corruption between bid-takers and bidders.
- Procurement procedures can inadvertently make coordination easier. For example, a **bidtaker announcing a reference price** can provide a price on which rivals can base their coordination.





# U.S. Reverse Auction Technique

- What is a Reverse Auction?
- A Reverse Auction is a process in which a Buyer solicits Bids from interested Sellers, and those Sellers have the opportunity to submit a single Bid or multiple Bids that



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