

# GUIDANCE

## for Public Procurers on Bid Rigging

APRIL 2022



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### **Disclaimer**

The information in this publication is for general guidance only. It does not constitute legal or other professional advice and should not be relied on as a statement of the law.

Readers are advised to carefully study the Competition Act 2007, the Public Procurement Act 2006 and relevant regulations, directives, rules issued pursuant thereto and seek legal advice, wherever necessary.

**April 2022**

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# 1. INTRODUCTION

A hand holding a yellow pencil is positioned on the left side of the page, pointing towards the right. The background is a dark, semi-transparent overlay of a financial trading interface. It features a candlestick chart with green and red bars, a line graph with red and green lines, and various numerical data points. A large green arrow points upwards from the bottom center. Text elements like 'DCA', 'More', 'High / Low', 'Deal 27,228 / 510 00', and '539.24' are visible in the background. The overall aesthetic is professional and data-driven.

## 1. INTRODUCTION

This Guidance document is aimed at procurement officials (procurement officers) from public bodies involved in undertaking procurement exercises.

This Guidance document rests on the undoubted view that an effective procurement system would ensure that the bidder with the lowest evaluated and substantially responsive bid is selected for award of the procurement contract. The objective is to obtain **“value for money”**.

This paradigm can be achieved when there is competition among bidders, i.e., potential suppliers. Both public and private organisations rely upon a competitive bidding process through their transparent procurement activities aiming at better quality products and efficient use of resources.

In the absence of this element of competition and where suppliers engage in bid rigging, the public body ends up disbursing more funds and purchasing products or services of inferior quality.

The purpose of this **‘Guidance for Public Procurers on Bid Rigging in Mauritius’** is to be an integral part of public procurers’ toolkit and serves as a referral point. The main objective is to raise awareness of procurement officials at all levels of their respective hierarchies, on the possible signs of bid rigging, at the conception of the pre-bidding process, bidding as well as post bidding stages.

Introducing measures in the bidding documents against bid rigging will help in the mitigation and the elimination of such risks. This guidance will help procurers in identifying potential risks of collusion in bidding exercise and gives general directions on how to deal with suspicious case of bid rigging.

The content of this document is based on the Organisation for Economic Co-operation and Development (OECD)’s guiding principles on the fight against bid-rigging in public procurement and generally, on the work undertaken worldwide in the dissemination of these principles.

The Procurement Policy Office (PPO), Central Procurement Board (CPB) and Competition Commission (CC) are the key institutions engaged in the fight against bid rigging in public procurement in Mauritius. Moreover, procurement officials, being the frontliners have first-hand information in dealing regularly with bidders and have equal responsibility in this battle.





# 2.

## **PUBLIC PROCUREMENT IN MAURITIUS**

## 2. PUBLIC PROCUREMENT IN MAURITIUS

### 2.1 The Mauritian Procurement Model

Public procurement represents a substantial portion of expenditure in the Mauritian economy. On average it accounts for 3.7% of GDP at market price, which excludes procurements not falling under the purview of the Public Procurement Act (PPA) 2006, such as goods purchased for resale including services incidental to the purchase or distribution of such goods by the Agricultural Marketing Board, Central Electricity Board, Outer Islands Development Corporation, State Informatics Limited, and State Trading Corporation as per Part 1 of the First Schedule of the Public Procurement Regulations 2008.

Public procurement has a huge impact on the different aspects of the economy. This impact shall not be limited to savings generated from efficient and effective procedures but should rather focus on creating opportunities through strategic approaches. If used strategically, public procurement can lead to improvement in health care services, education, innovation resulting in a rise in the level of investment and vertical integration. It is imperative to propel the effective growth of our economy by stimulating private investment and generating employment opportunities. To achieve value for money, it is of prime importance that the process of competition on the market is clearly visible and free from any type of restriction or distortion.

In line with the above and to promote good governance, accountability and transparency in the use of public fund, the PPO has embarked in 2015 on the implementation of the e-Procurement System (e-PS). This web-based application serves to digitalise all public procurement processes being carried out in Mauritius. The e-PS has brought a change in the way procurement is conducted with a shift from paper based to an electronic platform. As such, the system enables all public bodies and suppliers, both local and international, to electronically conduct procurement proceedings from invitation to bid up to contract award.

This initiative is being supported by the Government through the budgetary measures announced in June 2020 whereby public bodies were informed that the use of e-PS would be mandatory as from 1<sup>st</sup> July 2020 for 55 public bodies and the remaining as from the 1<sup>st</sup> January 2021.

The e-PS portal can be accessed on the following web address <https://eproc.publicprocurement.govmu.org> by the public bodies for the preparation, reception, and evaluation of bids. Similarly, bidders use the platform to prepare and securely submit their bids online using a Digital Signature Certificate (DSC) which provides encryption of the bid data and authentication of the submission, thus maintaining integrity and confidentiality of the bid data.



## 2.2 Legal Framework

The PPA, the Public Procurement (Regulations 2008), Directives, Procedures, Instructions, Technical Notes and Manuals form the legal framework for the procurement of goods, works, consultancy services and other services by public bodies covered thereunder.

The PPA, which is based on the United Nations Commission On International Trade Law (UNCITRAL) Model Law on Procurement, aims at:

- optimising economy and efficiency in public procurement, and obtaining value for public expenditures;
- promoting economic development of Mauritius, including capacity building in the field of public procurement;
- promoting competition and fostering participation in public procurement proceedings of qualified suppliers, contractors and consultants;
- providing equal access without discrimination to all eligible and qualified providers of goods, works and services and fair and equitable treatment to all bidders;
- promoting integrity, fairness, accountability, and public confidence in the public procurement process; and
- achieving transparency in the procedures, process and decisions relating to public procurement.

## 2.3 Institutional Setup

The following institutions have been established under the PPA to manage the public procurement system:

- i. the Procurement Policy Office (PPO)**, as the independent procurement policy making and monitoring body, having oversight as a regulatory body for public procurement;
- ii. the Central Procurement Board (CPB)**, as an independent body to conduct the bidding process, recommend award and approve variation requests for major contracts; and
- iii. the Independent Review Panel (IRP)**, as an independent institution, responsible for dealing with applications for review from aggrieved bidders.



# 3.

## COMPETITION CONCERNS IN PUBLIC PROCUREMENT



### 3. COMPETITION CONCERNS IN PUBLIC PROCUREMENT

#### 3.1 Irregularities in Public Procurement

The competition concerns arising from public procurement are largely the same concerns that can arise in an “ordinary” market context: **the reaching of collusive agreements between rival firms/bidders during the tendering process or across tenders, instead of independent competitive bids from suppliers.** The term used to describe this type of collusion is ‘bid rigging’.

In this context, collusion involves an agreement (whether in writing or otherwise) between potential suppliers (bidders) in a public procurement exercise, who conspire to remove the element of competition from the process. In the normal course, independent bidders in a procurement process compete against each other to win the contract, and it is via this process of competition that value for money is achieved by the purchaser.

According to key findings of the OECD, the effects of collusion in public procurement are arguably more problematic than in private procurement. Monies lost because of subversion of the public procurement process represent wastage of public funds. Collusion in the form of bid rigging undermines the benefits of a competitive marketplace. This may reduce public trust in the public procurement process that could be detrimental for democracy and sound public governance while inhibiting investment and economic development.

##### 3.1.1 Attractive Sectors and Competition Concerns

Public procurement frequently involves large, high value projects, which present attractive opportunities for bidders to engage in bid rigging rather than compete and lose the procurement project amount. Given the highly regulated nature of public procurement, there are however limited strategic options available to public procurers to address these threats.

##### 3.1.2 Transparency Requirements and Competition Concerns

The spirit of public procurement law and regulations is the achievement of better accountability and transparency in the use of taxpayers’ money. If contracts are awarded without a fair and transparent procedure, there will, from a taxpayer’s perspective, be no guarantee that value for money has been achieved.

At the same time, these rules are set to avoid abuse of discretion by the public bodies and their procurement officials (public procurers).

As a result, this key peculiarity of public procurement as compared to a private purchaser is that the latter can flexibly choose his purchasing strategy, whilst the public sector is subject to rules of procurement under the PPA.

The procurement process has its merit and legitimate objectives. At the same time, the in-built rigidity and transparency in the process may trigger conditions for bidders to collude or rig the bid. For example, disclosing information such as the identity of the bidders, capacity of bidders and the terms and conditions of each bid may be used by bidders to collude for upcoming bidding exercises in particular recurring bids.

### 3.2 Conflict of Interest

Information relating to evaluation of proposals and recommendations concerning awards shall not be disclosed to a service provider not officially concerned with the process until the publication of the award. The undue use by the service provider of confidential information related to the process may result in the rejection of its proposal and may be subject to the provisions of the Government's antifraud and corruption policy.

All plans, drawings, specifications, designs, report, other documents, and related software submitted by the service provider under a contract shall become and remain the property of the Client. The service provider shall, not later than upon termination or completion of this Contract, deliver all such documents to the Client, together with a detailed inventory thereof.

The service provider may retain a copy of such documents and software. Restrictions about the future use of these documents, if any, shall be specified in the Service Contract.

Except with the prior written consent of the Client, the service provider shall not at any time communicate to any person or entity any confidential information acquired in the course of its Services.

In case such conflict of interest is identified, procurers are advised to be mindful of the above and may refer to PPO for advice.

### 3.3 Importance of Competition in Public Procurement

Competition brings value for money for the public procurers and also brings down barriers to entry; hence, allowing new entrants as well as SMEs to participate in procurement exercises. Competition therefore, creates a level playing field for businesses to compete.

During procurement exercises, it is noted that the competitive process only works when bidders set prices competitively and independently of each other as opposed to bidders who collude resulting in inflated prices. Good practices in procurement result in selecting firms that efficiently utilize their resources and propose innovative ideas products or services.

### 3.4 What is Bid Rigging?

- Bid rigging is one of the three forms of collusive agreement set out in the Competition Act 2007 - the other two being **Horizontal Agreement** between competitors and **Vertical Agreement** involving resale price maintenance.
- **Horizontal Agreement** occurs when businesses operating at the same level of the supply chain (therefore, competitors to each other) agree to fix prices or to share the market or to restrict output in respect of the supply of their products, instead of competing. This elimination of competition leads to higher price, lower quality and reduced choice to the detriment of consumers. It also reduces the innovative potential of the enterprises and thus, stifles economic growth and hampers progress/innovation.
- Collusive agreements also referred to as 'cartels', are by their very nature harmful to competition and are prohibited in Mauritius.
- Bid rigging also referred to as 'collusive tendering' displays the same objectives of cartels. Bidders secretly conspire to raise prices or lower the quality of goods or services resulting in the latter obtaining less for its money.
- Bid rigging eliminates competition in the procurement process and occurs when businesses that are otherwise expected to compete independently instead agree amongst themselves to collude over their response to invitations to tender.
- Bid rigging is the typical mechanism of collusion in contracts whereby the bidders determine between themselves who should "win" the tender by submitting such bids to ensure that the designated bidder is selected by the purportedly competitive process.
- Bid rigging thus, defeats the very purpose of a bidding process while maintaining the illusion of competition.

### 3.5 Bid Rigging under The Competition Act 2007

The Competition Act 2007 prohibits bid rigging and renders any such agreement between enterprises prohibited and void.

Under the Competition Act 2007, it is the existence of an agreement between bidders to pre-determine the outcome of a tender process which is prohibited as "bid rigging".

The common forms of bid rigging such as bid suppression/withdrawal, complementary bidding, bid rotation, market division fall under **section 42(1)(a)** of the Competition Act 2007.

Bid rigging may also take the form of other anti-competitive practices such as an agreement:

- to raise, lower, or maintain prices,
- not to negotiate on price;
- on price formulas or pricing guidance; or
- in relation to other terms of the contract.

Such agreements relating to price and terms of the bid **fall under section 42(1)(b)** of the Competition Act 2007. These agreements aim to determine the terms and conditions on which bids will be made at the very outset of the bid process.

## Competition Act 2007

### Section 42 – Bid Rigging



(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement –

- (a) agrees not to submit a bid or tender in response to an invitation for bids or tenders; or
- (b) agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.



(2) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.



(3) This section shall not apply to an agreement the terms of which are made known to the person making the invitation for bids or tenders at, or before, the time when any bid or tenders is made by a party to the agreement.





### 3.6 Common Forms of Bid Rigging

Bid rigging may take different forms. Nonetheless almost all forms of bid rigging schemes have one thing in common: an agreement among the bidders which predetermines who wins the bid and on what terms by eliminating competition among the conspiring bidders.



#### Bid Suppression

In bid suppression schemes, one or more competitors (bidders) 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 (other supplier's) bid will be accepted.<sup>1</sup>



#### Bid Rotation

In bid rotation schemes, all conspirators (colluding bidders) submit bids but take turns being the lowest bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator.

A strict bid rotation pattern defies the law of chance and suggests collusion is taking place.<sup>3</sup>



#### 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, or at time compensation payments from the successful low bidder.

In some schemes, a low bidder will agree to withdraw its bid in favour of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.



#### Complementary Bidding

Complementary bidding (also known as “cover” or “courtesy” bidding) occurs when some competitors (bidders) agree to submit bids that either are 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 competitive bidding.

Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.<sup>2</sup>



#### Market Division

Market division or allocation schemes are agreements in which competitors (bidders) divide markets among themselves. In such schemes, competing suppliers allocate specific customers or types of customers, products, or territories among themselves. For example, one bidder will be allowed to sell to, or bid on contracts for certain customers or types of customers. In return, he or she will not sell to, or bid on contracts for customers allocated to the other competitors.

In other schemes, competitors (bidders) agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to other conspirator companies (bidders).

<sup>1</sup>CC 3: *Guidance Collusive Agreements* at paragraph 3.5

<sup>2</sup>*Ibid* at paragraph 3.6

<sup>3</sup>*Ibid* at paragraph 3.7

### 3.7 The Public Procurement Act 2006 on Bid Rigging

Although the term bid rigging is not mentioned in the PPA, it is implied by the following provisions contained therein and in the Public Procurement (Regulations 2008):



#### Section 52 (3):

*“A bidder shall not engage in collusion, before or after a bid submission, designed to allocate procurement contracts among bidders, establish bid prices at artificial non-competitive levels or otherwise deprive a public body of the benefit of free and open competition.”*



#### Section 53 (1) (d):

*“The Policy Office may, under such conditions as may be prescribed, suspend or debar a potential bidder or supplier from participation in procurement on the following grounds - misconduct relating to the submission of bids, including corruption, price fixing, a pattern of underpricing bids, breach of confidentiality, misconduct relating to execution of procurement contracts, or any other misconduct relating to the responsibilities of the bidder or supplier”.*

Accordingly, by virtue of Regulation 7(1) of the Public Procurement (Suspension and Debarment) Regulations 2008, the PPO “may request from any source, information or evidence concerning possible grounds for suspension or debarment of a potential bidder or supplier”. Further deterrents with regards to collusive practices in public procurement are detailed under the heading “Corruption and Fraud” in section “Instructions to Bidders” in the Standard Bidding Documents issued by the PPO pursuant to section 7(c) of the PPA. The section highlights the policy of Government to ensure that public bodies as well as bidders observe the highest standard of ethics during the procurement and execution of contracts.

Thus, “[a] public body shall reject a bid if the bidder offers, gives or agrees to give an inducement referred to in subsection (1) and promptly notify the rejection to the bidder concerned and to the Policy Office”.

Moreover, in the General Conditions of Contract, it is stipulated that “[i]f the Purchaser determines that the Supplier has engaged in corrupt, fraudulent, **collusive**, coercive or obstructive practices, **in competing for or in executing the Contract**, then the Purchaser may, after giving 14 days’ notice to the Supplier, terminate the Supplier’s employment under the Contract and cancel the contract.”

Under these provisions, the term ‘collusive practice’ is defined as “an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party”.

In this context,

‘**parties**’ refers to participants in the procurement process attempting to establish bid prices at artificial, non-competitive levels;

‘**another party**’ refers to a public official acting in relation to the procurement process or contract execution, and;

‘**public official**’ includes the purchaser’s staff and employees of other organizations taking or reviewing procurement decisions.

## 3.8 Role of Competition Commission in Public Procurement

The role of the Competition Commission is to enforce the prohibition against bid rigging both in public procurement and private sector procurement. This includes investigating suspected cases of bid rigging and to impose directions and financial penalties on the enterprises found to have infringed the Competition Act 2007 by participating in bid rigging. The Competition Commission is also mandated to carry out advocacy initiatives with the view to promote, educate and advertise the provisions of the Competition Act 2007 and the activities of the Commission.

### 3.8.1 Enforcement

The most appropriate way for a competition authority to safeguard competition in the public procurement market is to identify and correct bid-rigging practices through strict enforcement. Prompt identification mechanisms and the imposition of heavy penalties can effectively deter businesses from indulging in bid-rigging. Some unscrupulous bidders may carry out a weighing exercise between the illicit gains they may derive from a cartel against the risk of being caught and ultimately, the risk of financial penalties being imposed.

It should, however, be noted that the consequences of such risky strategy is not only the financial penalties that will be imposed upon them being caught but it also involves reputational damage vis-à-vis customers, suppliers and investors, and debarment.

Optimal enforcement by the Competition Commission can be reached when public procurers report suspicious behaviours, either independently or through the PPO. In case public procurers suspect any practice of bid rigging, the Competition Commission will peruse the element of information at hand through our enquiries or if there are sufficient information showing reasonable grounds, the Competition Commission will launch formal investigation.

# 1

## Reasonable grounds for launch of Investigation

- The Competition Commission initiates an enquiry which is an internal process, to determine whether reasonable ground(s) exist(s) to believe that bid rigging is occurring or has occurred.
- The requirement of reasonable ground is as per section 51 of the Competition Act 2007.
- If there is no reasonable ground, the Competition Commission will close the matter.
- If there is reasonable ground, the Competition Commission will launch a formal investigation and use its wide powers of investigation.
- The Competition Commission may, on the basis of a complaint, referred to it by the PPO, CPB or a public body or procurement officials, launch an investigation, if the test of reasonable grounds is passed.

# 2

## The Competition Commission's powers of investigation

- Section 52 of the Competition Act provides a wide range of powers to the Executive Director of the Competition Commission during an investigation.
- The Commission can compel any person including bidders and their employees to produce documents and any other relevant information. The Executive Director also has the power to compel attendance for purposes of oral examination or to take statements under oath or affirmation.
- Section 53 of the Competition Act gives the power to enter premises of the bidders to carry out searches and to seize information relevant to the investigation.

# 3

## Imposition of Financial Penalty

- The Competition Commission may, in relation to a finding of bid rigging, in addition to, or instead of giving a direction, impose financial penalty where businesses have been found to intentionally or negligently participate in the bid rigging.
- The financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Mauritius during the period of the breach up to a maximum period of 5 years.

### 3.8.2 Advocacy

In other jurisdictions, outreach programmes such as ad-hoc seminars and training courses of public procurement officials have proved extremely useful to increase awareness of the risks of bid rigging in procurement tenders.

The Competition Commission is mandated to carry out advocacy programs. Such programs may involve the following:

1. help competition and public procurement officials to develop closer working relationships;
2. educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conducts which may indicate that bid-rigging is occurring;
3. train procurement officials to collect evidence that can be used to effectively investigate bid rigging conduct; and
4. educate public procurement officials and government investigators about the cost of bid rigging on the government and ultimately on the taxpayers.

## 3.9 Remedial Action by the PPO

Section 52 (3) of the PPA prohibits bidders to engage in collusion, before or after a bid submission, designed to allocate procurement contracts among bidders, establish bid prices at artificial non-competitive levels or otherwise deprive a public body of the benefit of free and open competition.

Section 53 (1) (b) of the PPA allows the PPO to suspend or debar potential bidders or suppliers on ground of collusion between the bidders or a bidder and a public official concerning the formulation of any part of the bidding documents.

Section 53 (1) (d) of the PPA allows the PPO to suspend or debar potential bidders or suppliers on, inter alia, ground of price fixing, a pattern of under-pricing bids.



# 4.

## DETECTING BID RIGGING



## 4. DETECTING BID RIGGING

### 4.1 How does Bid Rigging operate?

Members of a collusive tendering are aware of the illegality of their conduct and will go to great lengths to keep the collusion secret.

However, for the collusion to remain operationally effective, the following features or indications are generally observed:

**1**

#### Stable membership and reward

- Membership to the collusive scheme is steady and constant.
- Losing members may be given cash compensation, or subcontracts or they may be granted other business opportunities.
- Each member takes turn to win bids (bid rotation).

**2**

#### Long term Scheme

- Bid rigging are often long-term agreements where all the members are allowed to benefit from the collusion in turn.
- It is often observed that new suppliers are attracted to the market since bid rigging practices results in inflation of profits realised by existing suppliers.
- Hence, a long-term strategy also allows members to deal with new entrants.

**3**

#### Effective control and conscription of members

- Effective control of members requires monitoring the behaviour of participants to detect whether they are deviating from the agreement.
- Threats of retaliation against non-conforming members may also be used to ensure that members keep to their agreements and do not cheat on each other.

**4**

#### Strategies to deal with competitors outside the collusive agreement

- Threats of retaliation are also wielded against new entrants.
- Alternatively, other strategies are adopted to try to buy new entrants or to invite them to join the bid rigging.
- There are also strategies to dissuade competitors from entry via other anti-competitive measures such as predatory pricing, margin squeeze, and other forms of market foreclosure.<sup>4</sup>
- These strategies are possible as members pull their resources together to increase their individual market power into a monopoly.

<sup>4</sup>Predatory pricing and margin squeeze are anti-competitive practices with the aim of harming the business of rivals and excluding the later from the market. See CC 4: 'Guidance on Monopoly Situations and Non-Collusive Agreements'



## 4.2 Market Structure and Market Characteristics

Bid rigging can occur in almost any sector of the economy and can involve goods or services at the manufacturing, distribution or retail level. Certain industries possess particular characteristics which makes it more conducive for suppliers to collude with one another.

The OECD lists out pertinent industry and product characteristics that make such markets more prone to collusion are as follows:

- **A small number of suppliers** make it easier for bid rigging to occur, it is easier to reach agreements on how to rig bids. Where there are few suppliers, the same bidders will regularly and repeatedly be involved in the procurement exercises. This recurrence allows bidders to know their rivals and they often decide to share the market or rotate winning bids. This allocation of contract enables members to eliminate the hassle of competing with each other and yet maintain high profit margins.
- **High barriers to entry** making it difficult for new or smaller firms to bid for contracts. Little or no new entry to the bidding market results in a few number of competitors with little or no competitive restraint from the supply-side.
- New entrants find it difficult to penetrate in **industries that are specialised or capital intensive**. Firms in these markets are protected from the competitive pressure from new entrants and these make bid rigging easier and also more attractive.
- Collusion may also be attracting **following a period of vigorous competition**, e.g., a price war, as competitors try to find a way to recoup lost revenue by colluding to raise prices again.
- Generally, collusion may also become more prevalent during an **economic downturn** as businesses seek to replace lost business with gains from collusive activity.
- **Few substitutes** - Where there is a lack of suitable alternative goods or services, or a limited availability of substitute products or services, suppliers may be more inclined to rig bids. The suppliers are aware that their efforts to raise prices are more likely to succeed as the procurement body has no alternative product available to them.
- **Standardised or simple products that do not change over time** leave little scope for competition. Optimum quality and innovation may have been reached. The static nature of the product makes it easier for competitors to reach agreement on a common price structure and to make that agreement longstanding.
- The **existence of trade associations or other forums** (professional or social) in which competitors are given the opportunity to get together and discuss matters highly increases the risk of collusive bidding.

### 4.3 Warning Signs of Bid Rigging

# 1

The following observations from the bidding behaviour may be indicative of collusion –

- The same bidder often wins, or the same bidder is often the lowest bidder.
- Bidders win in a rotating pattern. Each company seems to take turn into being the winning bidder.
- Certain bidders always fail to win. Certain companies always submit bids but never win.
- Bidders withdraw bids with no clear reason. Some suppliers unexpectedly withdraw their bid/offer.
- A fewer number of competitors participate in the bid exercise than normal.
- The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.
- Bidders making joint bids with no real justification (at least one of them could have bid on its own). Joint bids can be a way to split profits among bid riggers.
- Some bidders submit tenders for contracts in certain locations only, this might indicate a geographic allocation of contract between bidders.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for but have continued to bid for other tenders.
- A company which is incapable of performing the contract submits a bid.
- Bidders appear to deliberately include unacceptable terms and conditions in their tenders.
- A bidder modifies, substitutes, or withdraws its bid after submission.

## 2

The following observations from the bid submission documents may indicate the existence of collusion –

- Different bidders make identical mistakes in the submitted bid documents. A few examples of such mistakes are common spelling errors, same miscalculations, identical errors in the costing and dates and other terminologies.
- Bids from different bidders contain similar handwriting, similar typography, and similar style or use identical forms or identical writing material.
- The documents share similar postmarks; posted via the same service provider at the same time.
- Where electronic bids are submitted, it is noted that different bidders' electronic documents have similar document properties (metadata etc.) or were sent from the same IP address.
- One bidder submits his bid using letterhead of a rival bidder or the telephone/ fax number of the rival is mistakenly inserted in the document.
- Bid documents from different companies show identical estimates of the cost of certain items.
- Common last-minute changes in the bid documents such as cross-outs, the use of erasures, and other physical alterations and paste-overs especially on bidding prices.
- Incomplete bid documents wherein critical details that would normally be required for the bid evaluation are omitted, is an indication that the bid submitted may not be genuine.

## 3

The following observations from the 'Bid Pricing' may indicate the existence of collusion –

- A price increase with no parallel increase in costs.
- A bidder unexpectedly submits a higher price as compared to its previous bids - made on tenders of similar scope.
- Tenders for similar contracts fetch different bid prices from the same company/ supplier.
- Uniform price for contracts to be carried and delivered at different locations. Transportation costs have no bearing on bid prices.

- Unusual high margin between the winning bid and the losing bids.
- Losing bidders quoted identical prices and terms or a tendency for losing bids to fall within a certain range in terms of pricing.
- Usual discounts are withdrawn from bids.
- The prices submitted by bidders increase in regular increments.
- A reduction in the bid prices as compared to the price in previous bids following a bid by an infrequent bidder or following the entry of a new supplier in the market.
- Costing from losing bidders does not show updated cost from their suppliers/wholesalers.
- Only one bidder contacted wholesalers (suppliers) for pricing information prior to the bid submission.
- Identical bid prices may also indicate price fixing in the industry.
- The lowest bid submitted exceeds the maximum amount prescribed for the procurement by the public body.

## 4

Statements about agreements, meetings, communications between bidders and other Suspicious behaviours –

- A reference to an agreement among bidders.
- A reference to meetings or events where bidders might have the opportunity to discuss about contracts.
- A reference by bidders to “industry suggested prices”, “standard market prices” or “industry price schedules” to justify their prices.
- A statement making reference to discussions between bidders.
- A statement indicating that a company or companies do not operate/supply in certain location or a statement otherwise indicating that certain location “belongs to” other companies.
- A statement that a bidder is a complementary or cover bid.
- Bidders try to extract identity of potential bidders from you.

- Statements from bidders that indicate they have knowledge of each other including submitted bid prices.
- Similar enquiries and/or requests are made to the procurement body by different bidders.
- Similar reasons explained with similar terminology by different bidders when justifying price increases.
- Rival companies hold regular meetings or employees of rival companies socialise together regularly.
- Bidders hold private meetings prior to submitting their bids.
- A bidder comes with multiple bids (formal bid documents) and submits its bid after identifying who else have submitted bids.
- A bidder or a single agent or professional advisor requests a bid package and submits bids for different competitors.

## BE ON THE LOOK OUT FOR :

Opportunities that bidders have to communicate with each other

Relationships among bidders (e.g., JVs and subcontracting)

Suspicious bidding patterns and pricing patterns (e.g., unexpectedly high prices or unexpectedly low discounts)

Unusual behaviour (e.g., unjustified withdrawal from tender, submitting the bid without required information).





# 5.

## HOW TO REDUCE THE RISK OF BID RIGGING?



## 5. HOW TO REDUCE THE RISK OF BID RIGGING?

According to the OECD Recommendations, there are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging.

Procurement agencies may consider adopting some of OECD Recommendations<sup>5</sup> such as:

### 1

#### Before designing the tender process

- 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.
- Collect information on potential suppliers, their products, their prices and their costs.
- Be informed of prices in neighbouring 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.

### 2

#### Attracting Potential Bidders:

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. E.g., 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, unless same are justified.
- 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.

<sup>5</sup>Guidelines for fighting bid rigging in public procurement



- To the extent possible, 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.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only. (Possibility of Framework Agreement)
- 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 clearer that competition is scarce.

### 3

#### Deterring bid rigging agreements

- Reduce communication between bidders. This will make contact between bidders more difficult.
  - Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid as far as possible bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
  - Carefully consider what information is disclosed to bidders at the time of the public bid opening.
  - Do not discuss any issues with bidders collectively for example, if bids or bid prices do not make sense discuss with bidders individually or other technicalities of the contract.
- Avoid predictable procurement patterns as this tends to facilitate bid rigging schemes such as bid rotation.
  - Vary the scope of successive contracts by aggregating or disaggregating contracts or
- As far as possible avoid appointing any external consultant which has established working relationships with bidders. You may require external consultants to sign confidentiality agreements and require them to report any inappropriate competitor behaviour.



# 6.

## REPORTING BID RIGGING

## 6. REPORTING BID RIGGING

To enforce the provisions of the Competition Act 2007 and the PPA 2006 against collusive bids in public procurement exercises, it is important for the Competition Commission to obtain reliable information on suspicious bidders and their bids to initiate relevant actions at their end.

The Competition Commission is proactively employing different mechanisms to screen bidding markets for potential bid rigging. However, procurement officials remain at the frontline for detecting red-flag signs of collusion and reporting suspected rigged bids to relevant authorities such as the Competition Commission and/or the PPO.

Public bodies and their officials are strongly encouraged to raise the alarm bell whenever they come across such practices in tenders. The PPA 2006 and the Competition Act 2007 together provide a strong framework to facilitate reporting by procurement officials / public bodies of potential bid rigging cases and their submission of relevant (bid) information to the Competition Commission and/or the PPO.

### 6.1 Protection of Informers under the Competition Act 2007

To encourage whistleblowing of suspected anticompetitive practices such as collusion/ bid rigging, the Competition Act 2007 (**Section 51A**) affords statutory protection to the identity of any informer (including a public official) reporting such practice.

As such, **the information and the identity of the informer are treated as confidential between the Competition Commission and the informer.** Additionally, the information provided by the informer shall be **privileged** that is, **cannot be disclosed to any third party** including in any proceedings before the Commissioners or any Court, tribunal or other authority, except in strict circumstances and by order of a Judge where the latter is satisfied that no prejudice will be caused to the informer following the disclosure of his identity or any information received under subsection.

To benefit from 'Section 51 – Protection of informers', the informer must, at the time of reporting the matter, make a request for protection of his identity under Section 51A of the Competition Act 2007.

### 6.2 Disclosure of Bidding Information under the PPA 2006

The PPA 2006 has been amended in 2021 to enable public officials/bodies to disclose information on bids / bid proceedings to the Competition Commission. The amendment was brought to '**Section 51 (1) (e) of PPA 2006 – Conduct of public official**' via section 73 of the Financial (Miscellaneous Provisions) Act 2021. Thus, public officials/bodies are specifically allowed to disclose information on bids / bid proceedings without the requirement of a Court order, "**where disclosure is required by an investigatory body vested with powers of investigation, including the Independent Commission against Corruption, Competition Commission or Police**".

### 6.3 Recommended actions upon suspicion of collusion

Whenever public officials come across signs of bid rigging or uncover market characteristics indicating possibility of bid rigging arrangements, public officials are advised to:

- Not to disclose or discuss their suspicions with bidders and other potential participants in the bid.
- Carefully record details of all suspicious behaviours and statements including amongst others, dates; identification of bidders involved; email communications from bidders.
- Report the matter personally to the **Executive Director of the Competition Commission:**

Competition Commission

 10<sup>th</sup> Floor, Hennessy Court  
Corner Suffren Road and Pope Hennessy Street, Port Louis

 211 2005

 211 3107

 [info@competitioncommission.mu](mailto:info@competitioncommission.mu)

- ✓ Reporting to the Competition Commission may be done via telephone call, email, fax or by walking into its office. The Executive Director of the Competition Commission has a dedicated team available to discuss any suspected collusion/bid rigging and to guide public officials on the way forward.

- Report the matter personally to the **Director of the Procurement Policy Office:**

Procurement Policy Office  
Ministry of Finance, Economic Planning and Development

 8<sup>th</sup> Floor, Emmanuel Anquetil Building  
Cnr SSR and Jules Koenig Streets, Port-Louis

 260 8600

 201 3758

 [pposecretariat@govmu.org](mailto:pposecretariat@govmu.org)

- Consider whether it is appropriate to proceed with the tender offer by consulting with internal legal staff and with the advice of the PPO.

## References

The Competition Commission acknowledges the following sources of information used in the Guidance document:

- Australian Competition and Consumer Commission Cartels: Deterrence and Detection A Guide for Government Procurement Officers (2009);
- OECD Guidance for Fighting Bid Rigging in Public Procurement;
- OECD Detecting Bid Rigging in Public Procurement;
- OECD Designing Tenders to Reduce Bid Rigging;
- OECD Policy Brief – Fighting Cartels in Public Procurement (2008);
- United Kingdom Office of Fair Trading Making Competition Work for You – A Guide for Public Sector Procurers of Construction. Ministry of Economic Development Mandatory Rules for Procurement by Departments (2006);
- United Kingdom Office of Fair Trading Cartels and the Competition Act (1998);
- United States Department of Justice Price Fixing and Bid Rigging, and Market Allocation Scheme: What They Are and What to Look For;
- New Zealand Commerce Commission – Guidance for Procurers – How to recognise and deter bid rigging;
- Competition Commission of India – Provisions Relating to Public Procurement.



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