



# Recommendation of the Council on Fighting Bid Rigging in Public Procurement

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## **Date(s)**

Adopted on 17/07/2012

## **Background Information**

The Recommendation on Fighting Bid Rigging in Public Procurement was adopted by the OECD Council on 17 July 2012 on the proposal of the Competition Committee. The Recommendation calls for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of bid rigging in public tenders. The Recommendation is a step forward in the fight against collusion in public procurement that the OECD has been leading for a long time especially through the issuing of the 2009 Guidelines for Fighting bid rigging in Public Procurement and the work related to its dissemination worldwide.

## **THE COUNCIL,**

**HAVING REGARD** to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

**HAVING REGARD** to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels, which invites “Member countries [to] ensure that their competition laws effectively halt and deter hard core cartels”, which include “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices [or] make rigged bids (collusive tenders)” [C(98)35/FINAL];

**HAVING REGARD** to the Recommendation of the Council on Enhancing Integrity in Public Procurement, which lists collusion among the “integrity violations” in the field of public procurement and recognises that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayers’ money [C(2008)105];

**HAVING REGARD** in particular to Principle 1 (Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers) and Principle 7 (Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly) of the Council Recommendation on Enhancing Integrity in Public Procurement;

**HAVING REGARD** to the Third Report on the Implementation of the Council Recommendation concerning Effective Action Against Hard Core Cartels, which lists the fight against anticompetitive behaviour in auctions and in procurement among the enforcement priorities that Members should pursue in their fight against hard core cartels [C(2005)159];

**RECOGNISING** that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

**RECOGNISING** that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, “value for money” to the benefit of end consumers, users of public services and taxpayers;

**RECOGNISING** that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers;

**RECOGNISING** that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition;

**RECOGNISING** that rules that unduly restrict competition often can be revised in a way that promotes market competition while still achieving public policy objectives; and

**RECOGNISING** the efforts to disseminate the Guidelines on Fighting Bid Rigging in Public Procurement adopted by the Competition Committee in 2009 [DAF/COMP(2009)1/FINAL];

**NOTING** that a number of OECD Members have developed tools to detect and limit bid rigging in public procurement tenders;

### **On the proposal of the Competition Committee:**

**I. RECOMMENDS** that Members assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive

for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money.

To this effect, officials responsible for public procurement at all levels of government should:

1. Understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser, and the potential suppliers of these products and/or services.
2. Promote competition by maximising participation of potential bidders by:
  - i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition;
  - ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products;
  - iii) allowing firms from other countries or from other regions within the country in question to participate, where appropriate; and
  - iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract.
3. Design the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies.
4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a continuing interest in bidding on future projects. Qualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders.
5. Strengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive, and to store information about public procurement opportunities in order to allow appropriate analysis of bidding behaviour and of bid data.
6. Require all bidders to sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.
7. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, suspension from participating in public tenders for a certain period of time, sanctions for signing an untruthful Certificate of Independent Bid Determination, and liability for damages to the procuring agency. Sanctions should ensure sufficient deterrence, taking into account the country's leniency policy, if applicable.

**II. RECOMMENDS** that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.

In particular, Members should encourage competition authorities to:

1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;
2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and
3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Members should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials.

**III. RECOMMENDS** that Members encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part.

**IV. RECOMMENDS** that Members develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

**V. INVITES** Members to disseminate this Recommendation widely within their governments and agencies.

**VI. INVITES** non-Members to adhere to this Recommendation and to implement it.

**VII. INSTRUCTS** the Competition Committee to:

- i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;
- ii) promote this Recommendation with other relevant committees and bodies of the OECD; and
- iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

## ANNEX

### GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT [DAF/COMP(2009)1/FINAL]

#### 1. Introduction

1. Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organisations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement<sup>1</sup>. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

2. Bid rigging is an illegal practice in all OECD Member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

#### 2. Common forms of bid rigging

3. Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

4. Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting "cover" (higher) bids<sup>2</sup>.

5. Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- Cover bidding. Cover (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: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.
- Bid suppression. Bid-suppression schemes involve 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.

- *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.
- *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.

### **3. Industry, product and service characteristics that help support collusion**

6. In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- *Small number of companies.* Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- *Little or no entry.* When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.
- *Market conditions.* Significant changes in demand or supply conditions tend to destabilise ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.
- *Industry associations.* Industry associations<sup>3</sup> can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- *Repetitive bidding.* Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.
- *Identical or simple products or services.* When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- *Few if any substitutes.* When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.



- Little or no technological change. Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

## **A. CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE RISKS OF BID RIGGING**

1. 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 should consider adopting the following measures:

### **1. Be informed before designing the tender process**

2. Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best “value for money”. Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more likely<sup>4</sup>.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B<sup>5</sup> procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.
- Co-ordinate 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 you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

### **2. Design the tender process to maximise the potential participation of genuinely competing bidders**

3. Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- 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 controls 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 as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
  - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.)<sup>6</sup>.
  - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
  - By keeping official lists of approved contractors or certification by official certification bodies.
  - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
  - By using an electronic bidding system, if available.
- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only<sup>7</sup>. For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
- 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.

### **3. Define your requirements clearly and avoid predictability**

4. Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.

- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.
- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

#### **4. Design the tender process to effectively reduce communication among bidders**

5. When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process<sup>8</sup>. Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
- Carefully consider what information is disclosed to bidders at the time of the public bid opening.
- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.
- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders<sup>9</sup> and framework agreements<sup>10</sup>.
- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.

- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination<sup>11</sup>.
- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated<sup>12</sup>.
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

## **5. Carefully choose your criteria for evaluating and awarding the tender**

6. All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.
- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to co-ordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents<sup>13</sup>. Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.

- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

## **6. Raise awareness among your staff about the risks of bid rigging in procurement**

7. Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- 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<sup>14</sup>.
- 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.
- 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.
- Inform yourself about your country's leniency policy<sup>15</sup>, if applicable, and review your policy on suspension from qualification to bid, where there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.
- 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 co-operative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

## **B. CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT**

1. Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as

unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

**1. Look for warning signs and patterns when businesses are submitting bids**

2. Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Subcontracting and undisclosed joint venture practices can also raise suspicions.

- 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 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.

**2. Look for warning signs in all documents submitted**

3. Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes 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 than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

### **3. Look for warning signs and patterns related to pricing**

4. Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be co-ordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. 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 suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
  - Suppliers' prices were the same for a long period of time,
  - Suppliers' prices were previously different from one another,
  - Suppliers increased price and it is not justified by increased costs, or
  - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- 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.
- 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.

### **4. Look for suspicious statements at all times**

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

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at “industry suggested prices”, “standard market prices” or “industry price schedules”.
- Statements indicating that certain firms do not sell in a particular area or to particular customers.
- Statements indicating that an area or customer “belongs to” another supplier.
- Statements indicating advance non-public knowledge of competitors’ pricing or bid details or foreknowledge of a firm’s success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complimentary, token, symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.
- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

## **5. Look for suspicious behaviour at all times**

6. Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour 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 socialise 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.

## **6. A caution about indicators of bid rigging**

7. The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.



## 7. Steps procurement officials should take if bid rigging is suspected

8. If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

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<sup>1</sup> In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures, 2007*.

<sup>2</sup> In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for subcontracting works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

<sup>3</sup> Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

<sup>4</sup> See "Industry, product and service characteristics that help support collusion" above.

<sup>5</sup> Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

<sup>6</sup> Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

<sup>7</sup> Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the 'splitting contracts' technique could provide an opportunity to conspirators to better allocate contracts.

<sup>8</sup> For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

<sup>9</sup> In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

<sup>10</sup> In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

<sup>11</sup> A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the

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signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

- <sup>12</sup> Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.
- <sup>13</sup> The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.
- <sup>14</sup> See “Industry, product and service characteristics that help support collusion” above.
- <sup>15</sup> Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to co-operate with the competition authority’s investigation.

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\* Additional information and statements are available in the Compendium of OECD Legal Instruments:  
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## About the OECD

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD Member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

## OECD Legal Instruments

Since the creation of the OECD in 1961, around 450 substantive legal instruments have been developed within its framework. These include OECD Acts (i.e. the Decisions and Recommendations adopted by the OECD Council in accordance with the OECD Convention) and other legal instruments developed within the OECD framework (e.g. Declarations, international agreements).

All substantive OECD legal instruments, whether in force or abrogated, are listed in the online Compendium of OECD Legal Instruments. They are presented in five categories:

- **Decisions:** OECD legal instruments which are legally binding on all Members except those which abstain at the time of adoption. While they are not international treaties, they entail the same kind of legal obligations. Adherents are obliged to implement Decisions and must take the measures necessary for such implementation.
- **Recommendations:** OECD legal instruments which are not legally binding but practice accords them great moral force as representing the political will of Adherents. There is an expectation that Adherents will do their utmost to fully implement a Recommendation. Thus, Members which do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms.
- **Declarations:** OECD legal instruments which are prepared within the Organisation, generally within a subsidiary body. They usually set general principles or long-term goals, have a solemn character and are usually adopted at Ministerial meetings of the Council or of committees of the Organisation.
- **International Agreements:** OECD legal instruments negotiated and concluded within the framework of the Organisation. They are legally binding on the Parties.
- **Arrangement, Understanding and Others:** several ad hoc substantive legal instruments have been developed within the OECD framework over time, such as the Arrangement on Officially Supported Export Credits, the International Understanding on Maritime Transport Principles and the Development Assistance Committee (DAC) Recommendations.