

REPUBLIC OF SERBIA
Commission for Protection of Competition

INSTRUCTIONS
FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT PROCEDURES

Belgrade, June 2011

WARNING

ANY SITUATION LEADING TO THE SUSPICION THAT THE BID IN PUBLIC PROCUREMENT PROCEDURE IS RIGGED SHALL BE REPORTED TO THE COMMISSION FOR PROTECTION OF COMPETITION, PHONE NUMBER +381 11 38 11 911, OR EMAIL ADDRESS OFFICE.KZK@KZK.GOV.RS. THE PROTECTION OF PERSONAL DATA ON PERSONS REPORTING SUSPICIOUS SITUATIONS SHALL BE GUARANTEED.

Pursuant to Article 21(1/5) of the Law on Protection of Competition (“Official Gazette of the RS”, no 51/09), the Council of the Commission for Protection of Competition on its 33rd Session held on June 9, 2011, enacts the following

INSTRUCTIONS

FOR DETECTING “RIGGED” BIDS IN PUBLIC PROCUREMENT PROCEDURES¹

INTRODUCTION

The fundamental competence of the Commission for Protection of Competition (hereinafter: the Commission) in accordance with the Law on Protection of Competition (“Official Gazette of the RS”, no 51/09, hereinafter: the Law) is detecting, sanctioning of competition infringements, as well as removing consequences of competition infringements (acts or actions of undertakings that as their purpose or effect have or may have a significant restriction, distortion, or prevention of competition) in the market of the Republic of Serbia or its part. One of the most severe competition infringement is known under the name of “bid rigging”. Undertakings often, by acting in concert, participate in public tender procedures, that is, collude the performance prior to submitting a bid aimed at increasing product/service price, or reducing product/service quality, depending on the subject of procurement. Bid rigging is prohibited restrictive agreement pursuant to Article 10, Paragraph 1 and 2, Item 1 and 5 of the Law, for which in the proceeding conducted before the Commission for Protection of Competition the measure for protection of competition may be imposed, in the form of a monetary sum in the amount up to 10% of the total annual revenue of undertaking calculated prior to taxation for the accounting year preceding the year of instituted procedure. In detecting this kind of competition infringement, the Commission shall require assistance of the Public Procurement Office, which is the main purpose for enacting this Instructions.

The objective of every state is to prevent and deter implementation of acting in concert in public procurement procedures, particularly due to the fact that the result of such behavior of competing parties is not merely a considerable distortion of market competition, but significant outflow of budgetary funds as well. This collusion impose damage to contracting authority’s resources and tax payers, reduce the level of public trust in procedure transparency and minimize advantage of competitive market. The fact that bid rigging represents a criminal offence in a number of countries, demonstrates the importance given to this kind of competition infringement. Article 232 of the Criminal Code (“Official Gazette of the RS”, no. 111/09), envisages the criminal liability for responsible officer in legal entity who by entering into monopolistic agreements cause market disruptions or brings that entity into more favorable position in relation to others, thus acquiring material gain for that entity or for another entity or causes damage to other business entities, consumers or users of services, and who shall be punished by imprisonment from six months up to five years and a monetary fine.

Bid rigging occurs in all types of industries and circumstances, and in all parts of the world. When bid rigging impacts public procurement, it has the potential to cause great harm to

¹ Source: OECD - Guidelines for fighting bid rigging in public procurement (<http://www.oecd.org/competition>)

taxpayers, having in mind that public procurement is often a large part of every nation's economy. In many OECD countries, it amounts to approximately 15 per cent of the gross domestic product, and in most developing countries it is substantially more than this. Experience also shows that bid rigging conspiracies can last decades and impact many markets.

When rules regulating public procurement enable communication between competing parties, there is always a pronounced possibility of reaching an agreement between them. Thus is very important that rules regulating public procurements do not facilitate additional creating of agreement. In that sense, is necessary to create a balance between the request for procedure related transparency and the need to achieve a competition in public procurement.

1. COMMON FORMS OF BID RIGGING

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 bidders. For example, bidders 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. Also, bid rigging may also include monetary payments by the designated winning bidder effected to one or more of the conspirators. This so-called compensation payment is sometimes associated with bidders with higher offers ("cover/courtesy" bids). In many cases, the compensation payment scheme is facilitated by using false invoices for payment of subcontracted activities. The false contracts on consultancy services, in fatto not executed, may be concluded with the same goal.

Although bid riggers 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 example, "cover" bidding may be used in conjunction with so-called "bid rotation" scheme.

The most frequent forms of bid rigging schemes are:

- a) **Cover or fictitious bidding** (also called complementary, courtesy, token, or symbolic) is designed in such manner to give impression of real competition and represents the most frequent manner in which bid rigging schemes are implemented. It occurs when bidders agree to submit bids that involve at least one of the following:
 - bid that is higher than the bid of the designated (agreed) winner;
 - bid that is known to be too high to be accepted;
 - bid that contains special (specific) terms that are known to be unacceptable to the contracting authority.
- b) **Bid suppression** implies an agreements among competitors in which one or more bidders 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 bidder does not submit a bid for final consideration (decision making).
- c) **Bid rotation** implies that conspiring parties 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 company or to allocate volumes that correspond to the size of each company.

- d) **Market allocation** implies that bidders carve up the market and agree not to compete for certain contracting authorities or in certain geographic areas. Competing parties may, for example, allocate specific contracting authorities or categories of contracting authorities to different companies, so that companies will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential contracting authorities which are allocated to a specific company. In return, that competitor will not competitively bid to a designated group of contracting authorities allocated to other firms in the agreement.

2. INDUSTRY, PRODUCT AND SERVICE CHARACTERISTICS THAT HELP SUPPORT COLLUSION

Although bid rigging schemes may 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 the product involved. Such characteristics tend to support the efforts of firms to rig bids. In such instances, procurement agents should be especially vigilant.

The most frequent indicators of bid rigging schemes are:

- a) **Small number of bidders** – the fewer number of bidders, the higher is the possibility of reaching an agreement on how to rig bids;
- b) **Little or no entry** – markets with fewer number of participants are more susceptible to participants' agreements related to tender performance. When few businesses have recently entered or are likely to enter a market (because it is costly, hard or slow to enter), it is considered that exist a protective barrier that helps support bid rigging efforts;
- c) **Market conditions** – constant, predictable demand flow from the public sector tends to increase the risk of bid riggings in tender procedures, and opposite to that, considerable changes in demand or supply conditions tend to destabilize ongoing bid rigging agreements. 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;
- d) **Industry (trade) associations** – these associations are composed of individuals and undertakings with common commercial interest, associated for achieving future commercial or professional objectives and 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;
- e) **Repetitive bidding** – repetitive tender procedures increase the chances of collusion.

The bidding frequency helps members of a bid-rigging agreement to allocate contracts among themselves. In addition, members of the cartel (collusion of competing parties in tender procedure) can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are recurring may require special tools and vigilance of competent authorities responsible for implementation of public procurement to discourage collusive tendering;

- f) **Identical or similar products or services** – if products or services that bidders sell are identical or very similar (homogeneous), it is easier to reach an agreement on a common price structure;
- g) **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, bid riggers 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;
- h) **Little or no technological change** – little or no innovation in the product or service helps companies to reach an agreement and maintain that agreement over time.

3. ACTIVITIES FOR DESIGNING THE PUBLIC PROCUREMENT PROCESS AIMED AT REDUCING RISKS OF BID RIGGING

3.1 Collecting information prior to designing the tender procedure

Collecting information on the range of products and/or services available in the market that would suit the requirements of the contracting authority, as well as information on the potential suppliers of these products, i.e. providers of services, is the best way for procurement officials to design the procurement process to achieve the best value for money. Develop in-house expertise should be performed as early as possible, whereas the following should particularly be considered:

- influence of characteristics of the market in which the purchase is performed and recent industry (sector) activities or trends that may affect competition for the tender procedure;
- size (range) of the market in which the purchase is performed related to characteristics that make collusion more likely;
- information on potential suppliers, their products, prices and costs. If possible, compare prices offered in business-to-business procurements of potential suppliers;
- information about recent price changes, prices in neighboring geographic areas (regions) and about prices of substitutes (possible alternative products);
- information about past tenders for the same or similar products;
- cooperation with other public sector procurers and clients who have recently

- purchased similar products or services, for improvement of understanding of the market and its participants;
- pre-signing of the statement on confidentiality if external consultants are hired in the process of estimate prices and costs.

3.2 Designing the tender process to maximize the potential participation of genuinely competing bidders

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

With the aim of increasing number of potential bidders, the following should particularly be considered:

- 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, so that they do not create an obstacle to participation (size, composition, or nature of companies that may submit a bid);
- determine the value of public procurement so that necessary guarantee may be secured, without setting high demands in this segment so that small companies might enter the tender process;
- reduce constraints on foreign companies participation in procurement whenever possible;
- avoid a very long period of time between qualification and award, as this may facilitate collusion;
- reduce the preparation costs of the bid;
- whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof. 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 companies from whom a bid is required. For example, if it started with a requirement for five bidders but receive bids from only three, first it should be considered whether is possible to obtain a competitive outcome from the three bidders, rather than insisting on a retendering exercise.

3.3 Clear defining of requirements for avoiding predictability

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 in any way. 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. 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 in tender. Where possible, the following should particularly be considered:

- define requirements as clearly as possible in the tender offer;
- use performance specifications and clearly 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;
- avoid predictability in 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 public procurements;
- avoid presenting contracts with identical values that can be easily shared among competitors.

3.4 Designing the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process shall 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, but should be designed to fit the situation. Where possible, the following should particularly be considered:

- invite interested bidders to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity, but avoid bringing potential bidders together by holding regularly scheduled pre-bid meetings;
- limit as much as possible communications between bidders during the tender process. Instead of submitting bids in person, enabling for last minute communication and deal-making among bidders, prior to submitting a bid, opt for electronic bidding system;
- 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. Avoid disclosing competitively sensitive information that 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 open auction;
- consider if procurement methods, other than single stage tenders based primarily on price, can yield a more efficient outcome. Other types of public procurement may include negotiated tenders (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) and framework agreements (the contracting authority calls a large number of companies to submit details of their ability in terms of previously determined qualitative factors of selection, that is, determines so-called framework, composed of a small number of

bidders fulfilling designated criteria, while all subsequent steps of contracting authority are then allocated primarily according to the ability of selected bidders to fulfill contracting authority's requests, with the possibility to conduct so-called „mini“ tenders with each of selected framework bidders submitting a price for the job);

- beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders;
- whenever possible, request that bids be filed by identifying bidders with numbers or symbols, instead of business names of companies or personal names of individual bidders. It should also be allowed to place bids by telephone or mail;
- avoid unnecessarily limit the number of bidders in the bidding process;
- require bidders to disclose all communications with competing parties. Consider requiring bidders to sign a certificate of independent bid determination, whereby certifying that the bid is original (genuine), non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to adding separate penalties for statements that are fraudulently or inaccurately made;
- require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers;
- invest particular vigilance about joint bids, especially in case of undertakings that have been convicted or fined by the Commission for Protection of Competition for collusion;
- when publishing the call, include in the tender offer a warning regarding sanctions for bid rigging, such as the suspension from participating in public tenders for a certain period of time, 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 Law on Protection of Competition and Criminal Code;
- indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated;
- if, during the procurement process, the external consultants are hired, 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 behavior or any potential conflict of interest.

3.5. Carefully choosing criteria for evaluating and awarding the tender

Bidder 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 tenders. 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. Where possible, the following should particularly be considered:

- when designing the tender offer, think of the impact that the choice of criteria will have on future procurement competition;
- whenever evaluating bidders on criteria of product quality, post-sale services, etc., such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges;
- avoid any kind of preferential treatment for a certain class, or type of bidders;

- do not favor companies currently supplying the goods or services to the public administration and whose contract is coming to an end (the incumbents). Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages;
- avoid splitting contracts between bidders with identical bids and investigate the reasons for such bids;
- make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively;
- secure full protection of data from submitted bids;
- reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

3.6 Raising awareness among officials about the risks of bid rigging in public procurement procedures

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 behavior, by constantly monitoring bidding activities and by performing analyses on bid data. This helps public procurement agency (and competition authority) to identify problematic situations. It should be particularly 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.

Raising officials' awareness on bid rigging risks in public procurement procedures particularly involves the following:

- implement a regular training program on bid rigging and cartel detection for officials;
- periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion;
- adopt a policy to review selected tenders periodically;
- conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors;
- identify the person who shall receive the complaints related to procurement procedure;
- secure the use of mechanisms such as a whistleblower system, to collect information on bid rigging from companies and their employees;
- inform about the leniency policy (possibility for the party to a bid rigging scheme to inform the Commission for Protection of Competition on the collusion and provide evidence on its participants, receiving in return the relief or deduction from commitment payment from measure for protection of competition);
- establish internal procedures that require officials to report suspicious statements or behavior to the competition authority in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.

3.7 Checklist for detecting bid rigging in public procurement

The contracting authority should consider the following circumstances in public procurement procedures, and upon noticing, the said should be reported immediately to the Commission for Protection of Competition, in addition to keeping the fact in utmost secrecy:

- the same supplier is often the lowest bidder;
- some bidders 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;
- some suppliers unexpectedly withdraw from bidding;
- certain companies always submit bids but never win;
- two or more companies 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 socialize or hold meetings shortly before the tender deadline.

Tender documentation might point to the suspicion that it relates to the agreed (joint) performance of bidders, and particularly considering the following:

- identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors;
- bid documents from different companies are sent from identical facsimile number or same post office;
- bids from different companies contain a significant number of identical estimates of the cost of certain items;
- bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.

The price that different bidders offer can be a warning signal to a rigged bid, and particularly considering the following:

- sudden or identical increases in price 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:
 - bidders' prices were the same for a long period of time,
 - bidders' prices were previously different from one another,
 - bidders' increased price and it is not justified by increased costs, or

- bidders eliminated discounts or rebates, especially in a market where discounts were historically given;
- a large difference between the price of a winning bid and other bids;
- a certain bidder's offer is much higher for a particular contract than that bidder's offer for another similar contract;
- there are significant reductions from past price levels after a bid from a new or infrequent bidder;
- local bidders 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.

It can frequently happen that bidders provide statements pointing to a possible coordination of prices, for example:

- justify their prices by stating that they are looking at "industry suggested prices", or "standard market prices";
- statements indicating that certain companies do not sell in a particular area or to particular customers;
- statements indicating that an area or customers "belongs to" another supplier;
- statements indicating that a bidder submitted a courtesy, complementary, token, symbolic or cover bid;
- use of the same terminology by various bidders when explaining price increases.

Also, the following behaviors are considered as suspicious:

- bidders meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted;
- bidders participate together in the same social event;
- one bidder submits an offer and tender documentation for several bidders;
- bidder is a company for which is reasonably assumed that it cannot successfully fulfill contract requirements;
- 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 contracting authority or submit similar requests or materials.

PRESIDENT OF THE COMMISSION

Vesna Janković