Improving Competition in Public Procurement

Experience from India

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WORLD BANK GROUP
Adverse Procurement Conditions

How Critical and Vital is the Requirement to your Operations

How much imperfect is Market competition
  • Monopoly/oligopoly
Categorization for Procurement Policies

- C. Supplier Niche: (Supplier’s Power)
- D. Volume Critical (Challenges)
- B. Volume Routine (Buyer’s Power)
- 1. Low Impact (Low Prospects)
Where will Cartels Attack

Expenditure

Adverse Procurement Conditions

1. At Buyer’s Mercy

C. Not much Volume Here

D. Suppliers’ Want to be Here

B. Hot Target for Cartels

Cartelization Shift
Essentials for Good Competitive Bidding

- Adequate number of sellers
- Sellers eager to bid
  - if Demand Supply
  - buyer’s integrity is good
  - No black Market/rent-seeking Exists
- No Rings and Cartels
- Large value of orders within the capacity of Majority of Suppliers
- Clear specifications
- Enough time for bidders
- Adequate time for delivery of goods
- Transparent and Fair reputation of Buyer
Essentials for Collusive Bidding

- Industry/associations not committed to fair play
- Rewards of Co-operation outweigh that of Competition Plus Penalties
- Opportunity of Bidders to meet regularly and hold prolonged negotiations for Horizontal Agreements
- Conditions facilitating Agreements – prolonged status quo
  - Repetitive Purchase of same kind of goods - no technology change
  - Predictable flow of demand packaging and Timing
Stages of Competition Risk in Procurement

• **Need Assessment** – Requirement Quantity & Specifications

• **Procurement Planning** – Packaging, Bundling & Slicing; Type of Bidding – Stages; Method of Procurement – restricted/ open

• **Bidding & Evaluation** – Transparency, publicity, Evaluation Criteria, Publishing Award, Grievance Mechanism/ de-briefing

• **Contract implementation and supervision** – Getting what you pay for

• **Policies and Procedures:** Inoculating Procurement against Anti-competition
Need Assessment – Quantity & Specifications

- Participation of relevant stakeholders, help in objective evaluation of need and relevance of the specification as they are being defined;
  - Avoid sharing information with only a few vendors

- Specifications and terms of reference:
  - Generic not Tailor-made
  - Think of the Market: Do not leave out large supplier base
  - Avoid Properties which are subjective – feel, finish, workmanship, shade/ tone, as per sample
  - Avoid Trials, Presentations and Performance appraisals after Bid-opening
Undifferentiated Specifications Facilitate Cartels

• Identical or simple requirements - little technological change - few, if any, substitutes - easier for firms to reach an agreement over time

• Performance specifications - rather than product Specification makes collusion difficult

• Define specifications allowing substitute/alternative products - or in terms of functional performance and requirements whenever possible
Procurement Planning – Packaging; Bidding – Stages; Restrictive/ Open

- **Buyer not aware** of the suppliers, competition and product choices – you would not notice Anti-competition Red-flags

- **Packaging, bundling and Slicing** of requirement to attract open competition – right size, right aggregation, to suit majority vendors

- **Exceptions to an open bidding** process to be avoided

- **When short-lists are used**, ensure transparency

- **Pre-qualification criteria (PQC):** Potential of misuse or restrict competition. PQC relevant, clear, unambiguous, neither be very stringent nor very lax, fair competition.
Stability of Demand and Packaging facilitates Cartels

- Same quantity and clubbing of demand - period after period, facilitates suppliers to arrive at an anti-competitive agreement

- Avoid predictability in contract requirements regarding the size and timing of tenders

- Avoid packaging contracts with almost identical values that can be easily shared among competitors

- Reconsider packaging and bundling of requirements. Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only
Bid Conditions Restricting Competition

- **Protective entry barrier** helps bidders to reach an agreement on how to rig bids.
- Avoid unnecessary restrictions that may reduce the number of qualified bidders.
- Reduce constraints on foreign participation whenever possible.
- Do not over-emphasise the exact performance records - consider other relevant experience.
- Avoid large monetary guarantees from bidders and reduce the preparation costs of the bid.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers. Do not favour incumbents.
Procedural Platform – Bidders Conspire

- Certain procedures provide platform for suppliers to interact and conspire to devise anti-competitive strategies.

- Use post-qualification to avoid collusive practices among a pre-qualified group. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

- Avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings. Open tenders enable communication and signalling between bidders. Use electronic bidding or allowing tender boxes in more than one location.
Bidding & Evaluation – Transparency, publicity, Evaluation Criteria, Award, Grievance Mechanism

- **Simplify System**: Costs, not requiring experts to fill in
- **Invitation to tender**: (an open bid) well publicised; Sufficient Time
- **Evaluation criteria**: objective not prone to being abused, clearly stated and demonstratably followed
- **Evaluation of bids**: Objective - no room for manipulation and biased assessments;
- Comparison checks - companies that bought documents/expressed interest and companies submitted bids. Interviews vendors who no longer bid/unsuccessful
- **Detect and Act against Cartels**
- **Contract awards**: Publicised
- **Independent Grievance Redressal Framework**: de-brief, possible to seek review
Contract implementation and supervision – Getting what you pay for

- Non-transparency in Execution creates an Asymmetry in Information available to vendors.

- **Contract changes and renegotiations** after the award should not vitiate the substance of the contract itself;

- **Subcontractors** and partners, chosen in a non-transparent way can be sign of Cartel

- **Contract Implementation** – Mirror PQC, Evaluation Criteria and Assumptions involved

- Ensure you get what you are paying for
Inoculating Public Procurement against Anti-competition

• Implement a regular training programme on bid rigging and cartel detection for your staff

• Involve Industry/Associations to adopt commitment against Anti-competition

• Include a warning about the punitive measures for anti-competitive practices in the bid document and in the Competition Law.

• Make it mandatory for bidders to sign a Certificate of Independent Bid Determination

• Establish a complaint mechanism for firms to convey competition concerns. Clearly identify the person or the office - ensure confidentiality

• **Leniency Clauses:** To encourage cartel breakers
Inoculating Public Procurement against Anti-competition

- Reserve the right not to award the contract if Anti-competition is suspected – controversial – arbitrariness in face of anti-competition
- Stipulate bidding for at least 25% of Quantity
- Ensure that bidders disclose intention to use subcontractors
- Be particularly vigilant about joint bids by firms
- Avoid splitting contracts between suppliers with identical bids
- Beware of using industry consultants to conduct the tendering process. Ensure - sign confidentiality agreements - reporting requirement - improper competitor behaviour - potential conflict of interest
Indian Railways Tryst with Cartels
Competition Regime and Railways

• Railway had tried many cases with erstwhile MRTP but without much effect

• Railway Procurement was the first few cases taken up by CCI

• In a case of suspected cartel formation, DMW/ Patiala had reported a matter to CCI. The case was investigated and penalties were imposed on the companies at the rate of 2% of the average turnover of the company - Rs. 54.70 cr. for M/s Escorts Ltd., Rs. 5.70 cr. for M/s FTIL and Rs. 1.91 cr. for M/s Stone India Ltd.
In case Cartel is suspected

• Deviation from normal Selection of Vendors:
  – Exclusion one or more firms based on characteristics
  – The instructions of ordering not more than 15% of quantity on Part II approved sources and 5% of quantity on new source – may be deviated
  – Firms quoting less than 50% (adjustable considering capacity of firms) quantity liable to be rejected.
  – Negotiations as an exception - cartel formation with unreasonable rates.

• Action for down gradation/deletion of such firms from list of approved sources

• Taking up the matter with Competition Commission of India

• Global Procurement in case of repeated Cartels
Bid Documents Warnings - Cartels

- Deviating from normal selection of vendors – as discussed
- Downgrading/deletion from List of Approved Sources
- Complaints to CCI and Penalties provided in Competition Act
Reforms Approved Lists of Vendors

- Undertaking - quoting competitive rates and not be part of a cartel
- Downgrade/ Delete Cartel firms from Approved List
- Make it Transparent - publicise system of approval, status of requests
- Time frame and the criteria for approval of new vendors as well as for upgrading from Part-II to Part-I category clearly indicated.
Bring New vendors to Break Cartels

• Where Approval is graded as Part-I / part-II
  – Upto 5% for new Vendors suitable for development
  – Upto 15% for Part II Vendors
  – These Limits can be increased in case of Cartel Suspicion
  – In inadequacy of approved vendors, these limits can be increased with prior declaration in Bid Documents

• Where approval is not graded
  – Upto 20% for new Vendors suitable for Development
  – These Limits can be increased in case of Cartel Suspicion
  – In inadequacy of approved vendors, these limits can be increased with prior declaration in Bid Documents

• Where number of approved sources or their capacity not adequate or cartel suspected - develop more sources through EOI – Timeframe laid down

• Offer from new sources found suitable - developed in a time bound manner - ascertaining the capacity/capability in Time bound manner
Thank You for Listening