

Introduction to Competition Law

(Part 4-Public Procurement
Government/ PSUs)



भारतीय प्रतिस्पर्धा आयोग

Competition Commission of India

Preface

The Competition Commission of India (Commission) has been established under the Competition Act, 2002¹ (the Act) to prevent practices having adverse effect on competition, to promote and sustain competition in Indian markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. It is mandated, inter alia, to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. It, therefore, pursues its objectives through two sets of instruments, namely, advocacy and enforcement targeted at enterprises. These measures are complementary and are expected to promote and ensure thereby freedom of trade by enterprises and consumer welfare to achieve ‘fair competition for greater good’.

As a measure to promote competition advocacy, that is, to disseminate the message of competition law, promote competition culture and competition compliance, the Commission has proposed to maintain a panel of “Competition Resource Persons”, to organise competition advocacy programmes for groups of stakeholders to supplement its own efforts on competition advocacy. In order to provide training to the selected Resource Persons and to equip them with adequate knowledge of competition law, the present study material has been prepared. This material will be used as advocacy material by the Resource Persons for educating the different stakeholders. This study material has been prepared for the benefit of the following stakeholders:

- Consumers, and Consumer Associations
- Trade/ Industry Associations
- Government Bodies
- Regulatory Bodies
- Compliance Professionals and Associations of Compliance Professionals

The study material is divided into six parts. The first part provides an overview of the Competition Law. The fourth part (this document) addresses competition issues in Public Procurement, with ‘Government and Public Sector enterprises’ as the stakeholders. The other four parts contain information and understanding of the law from the perspective of the stakeholders. The first part is a general introduction, while the others are stakeholder specific.

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Edited and prepared by Advocacy Division with inputs from other divisions.²

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1. The Competition Act 2002 can be accessed at <http://www.cci.gov.in/competition-act>

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Public Procurement- Government/ PSUs

1. Background

The Competition Act, 2002 (the 'Act') has been enacted with the objective of preventing practices having adverse effect on competition, promoting and sustaining competition in markets, protecting the interests of consumers and ensuring freedom of trade carried on by other participants in markets. The Act enjoins the Commission to deal with market failures ex-post that can be caused by enterprises either through unilateral conduct (Abuse of Dominance)³ or by concerted practice through anti-competitive agreements.⁴ In addition, through the mandatory notification regime under the Regulation of Combinations⁵ enterprises have to mandatorily seek approval of proposed merger, amalgamation, acquisition or acquisition of control.

If one goes by the age-old adage, 'King can do no wrong', then one can misconstrue that the policies /actions by the Government and its undertakings may be beyond the ambit of the market regulator. However, the Competition Act 2002, exempt only those activities of the Government Departments that are in the discharge of sovereign functions. These are inalienable functions of a sovereign Government that cannot be delegated. The activities of Government Departments relating to production, storage, supply, distribution, acquisition or control of goods or person of services of any kind, or in investment, or in the business of acquiring, holding, under writing or dealing with shares, debentures or other securities of any other body corporate but not relating to sovereign functions are fully covered under the provisions of the Competition Act. Only the activities carried on by the Central Government dealing with atomic energy, Currency, Defence and Space are per se sovereign functions for the purpose of the Act. The Commission is empowered to look into cases against the Government Departments when they are not discharging sovereign functions in case of contravention of any provision of the Act.

Therefore any entity whether Government department or Public Sector Undertaking which is engaged in activities related to production, storage, supply, distribution, acquisition or control of articles or goods etc., is fully covered under the ambit of the Competition Act. In the next section we undertake an analysis of the relevant clauses that define such wide scope of the term 'enterprise' and their 'activity'.

2. Definition of "enterprise" under the Competition Act

"Enterprise" is the object of Competition Act, 2002. The definition of enterprise is, therefore, at the core of the scope of the act, as it determines the dimensions of application of the Act. The Competition Act gives a very wide definition of "enterprise" in the section 2 (h) of the act as below:

"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision

3. Section 4 of the Act

4. Section 3 of the Act

5. Section 5 & Section 6 of the Act

of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

For the purpose of this clause

- (a) “activity” includes profession or occupation;
- (b) “article” includes a new article and “service” includes a new service;
- (c) “unit” or “division”, in relation to an enterprise, includes-
 - (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 - (ii) any branch or office established for the provision of any service.”

From the above definition it is clear that no exemption from the provisions of the Competition Act, 2002 are available to government departments and public sector enterprises. The 1991 amendments to the MRTP Act had brought public sector enterprises under the purview of that Act. However, the Competition Act, 2002 the successor to the MRTP Act has brought under its purview even government departments when they are not engaged in discharge of sovereign functions. Thus it has been found that Railways, Public Works Departments of State Governments etc. are enterprises for the purpose of this Act.

3. Competitive Neutrality

“Competitive neutrality means that state-owned and private businesses compete on a level playing field”.⁶

The true spirit of the competition act is of competitive neutrality. It does not discriminate between Government and private enterprises. Therefore, to harness the full potential of competition, it is essential that government policies and rules do not prejudice against such level playing field.

Competitive Neutrality promotes effective resource management within the economy and thus helps in achieving higher growth and development. Therefore, the principle of competitive neutrality is gaining wide currency around the world. Competitive neutrality enhances allocative efficiency across all sectors of the economy. Markets wherein certain economic agents (whether state-owned or private) are put at an undue advantage do not produce goods and services most efficiently. This leads to a sub-optimal use of scarce resources, which, in-turn, results in higher costs and prices.

6. Competitive Neutrality Maintaining a Level Playing Field between Public and Private Business, OECD Publishing.

Yet, it is tempting for the Government to depart from competitive neutrality, since public sector enterprises are viewed as an extended arm of government and are expected to behave differently from private entities. However, preferential treatment to any type of enterprise can have detrimental effects on economic growth and consumer welfare.

4. Public Procurement/ Procurement by government departments and public sector enterprise

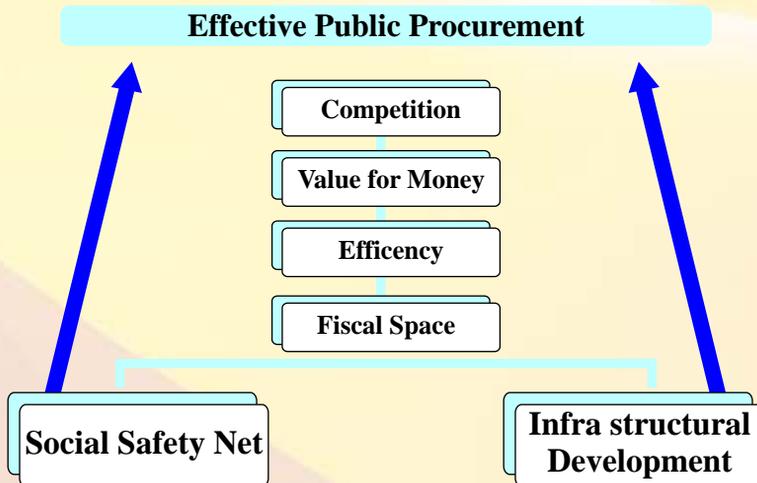
Public procurement means procurement by government departments or public sector undertakings for own consumption and not for commercial resale. In the words, the act of 'obtaining or buying goods and/or services' is called procurement. When procurement is done by Government or Government undertakings/ statutory authorities it is termed as 'Public Procurement'. Thus, public procurement is purchase of goods and services by the public sector entities and Government Departments in pursuance of achieving their objectives and fulfilling their mandate. It is being an essential means for meeting functional needs and achieving socioeconomic objectives of the nation. Besides, and more importantly, in the process of such procurement, public money is being spent. Thus there is a need to ensure that the process is efficient and is capable of ensuring value for money.

It is important to bear in mind that public procurement substantially differs from private procurement, as the Government and its agencies have often limited leverage due to the various administrative, procedural and accountability formalities that they have to follow as compared to private sector. A private procurer can choose his purchasing strategy flexibly, whereas public procurement is subject to transparency requirements and a number of regulations. Procurement has to be in a cost effective manner. Thus, efficiency and cost saving are necessary ingredients of the whole procurement process.

Public procurement as share of Gross Domestic Product is substantial in countries across the world; more so in India, being a developing country. An effective public procurement practice aims to meet multiple regulatory, commercial and socio-economic objectives, viz. achieving value for money through transparent and fair procurement process, promoting innovation, ensuring equality of opportunity for all businesses, particularly small and medium enterprises of India, ensuring quality, effective service delivery and diversifying supplier base. While transparency in public procurement can increase society's capacity to hold governments accountable, it also provides information and data for everyone which could be used by the prospective bidders to monitor each other's price strategy closely, making it more prone to cartelisation and collusion. Hence, due care has to be taken in public procurement so that the transparency requirement may not encourage such collusion and cartel formation among the group of sellers selling the product or services to the public agencies. Introduction of competitive practices will not only prevent collusion but also help Government to fight corruption by ensuring integrity. International experience suggests that substantial savings can be achieved by infusing greater competition in public procurement and investment in social sector development of the country.

The scale of public procurement makes it an important activity of the economy. However, there are other aspects related with public procurement which make it even more important. Firstly, government spending on procurement creates a cycle of income and investment which contributes to the economic growth of the country. Government expenditure increases the gross income of the market participants producing more demand which in-turn further accelerates the economic activity. The general increase in the income of market participants, in-turn, improves the business and investment environment. The increase in the level of participation also enhances competition in the market in the long run. Thus, there is need for public procurement to be efficient for the reason that an efficient public procurement not only reduces public expenditure but also has positive externalities which affect many aspects of the economy. Here efficiency essentially entails the selection of suppliers with the lowest price (at a given quality). If expenditure is made in an efficient way all the secondary effects or externalities associated with public procurement can be realized. The relation may be depicted in the diagram below:

Figure 1 : Effective Public Procurement



The relation signifies that value for money or the least possible cost is essential for an effective and efficient public procurement. Another observation that can be made from the diagram above is that competition is essential for efficient procurement. Competition among suppliers/manufacturers by providing them a fair chance to participate in public procurement, as in any other market, ensures that most efficient supplier is incentivized. Thus competition is a core element for any efficient and effective public procurement. Therefore, inefficient public procurement can seriously impair the economic growth of a country.

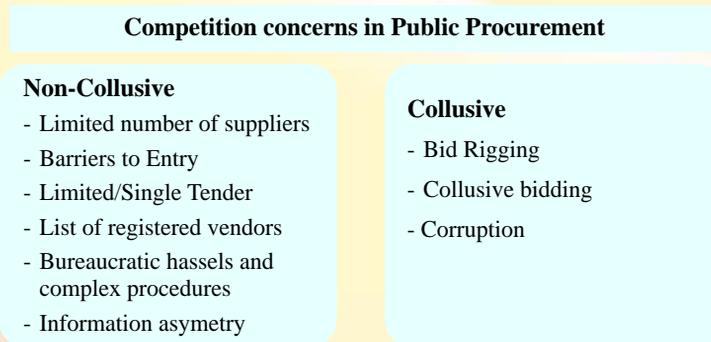
In India, legal and organisational framework for public procurement operates through Article 53 of the Constitution, the Government of India (Allocation of Business) Rules, 1962 and the Transaction of Business Rules, 1961. The financial

powers of Government are vested in the Ministry of Finance, which are delegated to subordinate authorities under the General Financial Rules⁷ (GFRs) and Delegation of Financial Powers Rules⁸ (DFPR).

5. Competition Issues in Public Procurement

In Public Procurement, transparency and non-discrimination obligations, as well as due procurement processes are necessary. The basic purpose is to deter abuse of discretion by the public authorities/personnel. However, the resulting lack of flexibility limits the public purchaser's options in which procurement can be done. Therefore, public procurement takes place primarily through bidding, especially if the procurement is large in value terms. If bidding is competitive, it helps in identifying the most efficient supplier of a certain good or service at the most competitive price. The competition concerns which can arise in public procurement can be classified as follows:

Figure 2: Competition concerns in Public Procurement



5.1 Competition Concerns from Non Collusive Aspects

Non collusive concerns in public procurement arise when the bidding process results in distorting the competition, and as a result public procurement brings in inefficient outcomes. Such concerns can be:

- Conditions that limit the number of bidders: The number of suppliers in the procurement process may be limited when procurement rules lay down technical/financial specifications which are more stringent than necessary and render a number of potential suppliers ineligible for bidding.
- Shortlisting suppliers: Some organizations limit the suppliers using a process of vendor approval and pre-vendor registration. Such registered suppliers become the only suppliers eligible for participation in the bidding process. This type of

7. General Financial Rules 2005, as amended, http://finmin.nic.in/the_ministry/dept_expenditure/gfrs/GFR2005.pdf

8. DFPR, http://finmin.nic.in/the_ministry/dept_expenditure/notification/dfpower/index.asp

pre-selection is generally done by procurers where there are safety, expediency and security concerns. However such processes result in creating a barrier to entry itself, thereby impinging on efficient outcome. Railways and Defense sector in India resort to these kind of vendor pre-approval and registration. Such registered vendor lists create a fertile ground for the suppliers to form supplier's cartels. Last year in its final report on Railways procurement, the E. Shreedharan committee stated⁹ that, "Procurement is through cartel only, list of approved sources and cartels are synonymous ... there is no item in which there is no cartel .. Committee feels that vendors thus continue to fleece at will".

c) Information Asymmetry: Many a time there remains information asymmetry in the market for public procurement. Existing and resourceful players often have access to information which other potential bidders in the market lack. Lack of proper publicity, advertising, and calling for limited tenders enquiries (LTE) are issues that come under this category. However, with mandatory e-bidding and common procurement portal for all government procurement such information asymmetry has been largely addressed.

d) Bureaucratic hassles and complex procedures: This can take many forms such as providing insufficient time for filling the bid documents or lengthy procedural requirements. Excessively tedious process for participation discourages the new vendors, thus limiting the number of bidders.

5.2 Concerns from Collusive bidding and bid rigging

Collusive behavior here implies understanding or agreement between two or more than two enterprises/ persons who are participating in a procurement process.

The biggest threat to competition in public procurement is that of bid-rigging. Competition Act, 2002 defines bid rigging as "any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

Clearly for bid rigging to exist, there has to be an agreement between bidders placed horizontally. Suppliers that are engaged in trading or production of identical or similar products or supplying identical services. Collusion among bidders defeats the very purpose of the open tender/ bidding process which is to determine the most efficient price offered in a market. Bid rigging occurs when bidders act in concert and intentionally predetermine outcome of the bidding process. Bid rigging may take many forms which are as follows:

- **Collusive bidding:** Agreement between firms to divide the market, set prices or limit production - involves kickbacks and misrepresentation of independence.

9. Cartels in procurement loot railways of Rs 10,000 crore a year: E Sreedharan, <http://timesofindia.indiatimes.com/india/Cartels-in-procurement-loot-railways-of-Rs-10000-crore-a-year-E-Sreedharan/articleshow/46776821.cms>

- **Bid rotation:** Conspiring firms continue to bid but they agree to take turns being the winning bidder.
- **Cover bidding:** Also called complementary or symbolic bidding- where the bidder agrees to submit a bid which is higher than the designated winner bid or puts certain conditions which are known to be unacceptable to the procurer. It is designed to give the appearance of genuine competition.
- **Bid suppression:** Bidders agree to refrain from bidding or withdraw bids in favor of winning bidder.
- **Market territory/ customer allocation:** Competitors divide up the market and agree not to compete for certain customers or in certain geographic areas.

6. How to address anti-competitive concerns in public procurement

The procurement agencies world over grapple with this question. 'By adapting fair and transparent procurement', is a simple answer. This issue requires continuous monitoring and review. Transparent tender process is just one side of the solution. Standardizing the process of writing technical specifications and also preparing template tender specifications with standard commercial clauses including the supply schedules is necessary. In general, there are three main aspects to be looked into viz.: 1) Limit the possibility of bid rigging by adapting transparent tender process; 2) Ensure that a sufficient number of bidders are qualifying and are willing to participate; and 3) Scrutinize the tender allocation keeping a tab on participating firms, their financial quotes to observe the cases of bid-rotation, collusive bidding or territory allocation.

The tendering agency should take care of following issues:

- a) **Avoid too stringent qualifying criteria:** The technical and financial criteria to be fulfilled by potential bidders must not be prohibitively complex and stringent. Financial and technical standards in tenders must be in proportion to the criticality of the products to be procured. For example, for procuring simple products like computer hardware and electrical supplies technical and financial standards for suppliers can be kept low to encourage wider participation. However this tendency could cause high entry barriers for new entrants leading to inefficient outcomes. As far as possible rather than specifying minute details of products, performance expected from products should be specified. One should specify the minimum requirements that do not create obstacles to participation, such as controls on the size, composition, or nature of firms that may submit a bid. It is important to note that the minimum requirements/ standards of the firms must depend on the product being procured. Thus, it essential that procurement officials are well versed with the market conditions of the product being procured. Prior information about demand and supply conditions and nature of firms in the market must be collected to set eligibility criteria for bidding firms.
- b) **Remove entry barriers:** Some organizations have established a mechanism whereby only approved vendors by the departmental agency are allowed to participate in tenders. Thus, the set of potential participants in bidding process

consists of only a selected few. This in effect works as an entry barrier. As far as possible, the approving agency should be independent certifying body that follows well established procedures. Further the specifications for such products needs to be based on internationally acclaimed standards and should not favour certain technology(ies) or manufacturers. As stated in para a) above, the emphasis should be on the performance standards and not on the material/ parts used. For example, if approved list for a product includes just four suppliers then open tender in effect becomes a limited tender (because bidding is restricted to the four approved firms). A limited set of potential competitors also helps in cartel formation.

- c) Ensure cost of bidding is reasonable: Tenders must be designed with a view to keep the participation costs of the bid to the minimum. The costs of participation may be monetary in nature or otherwise (labor and time). 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.).
 - By combining tenders (i.e. different procurement projects) together to spread the fixed costs of preparing a bid.
 - 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.¹⁰
 - Tenders must state the requirements as clearly as possible in the tender offer documents. Specifications should be independently checked before final issue to ensure they can be clearly understood by all the potential participants.
 - Provide scope for vendor consultation and response to vendor queries/ clarifications.
- d) Provide sufficient time for bidding: Complex tender bids for large projects, especially in infrastructure projects require detailed studies to be undertaken by the bidder. The tenderer must share all the possible information including the detailed project reports prepared by project consultations and future estimates of revenue. In addition, sufficient time is necessary for potential bidders to prepare and submit the bids. It should be ensured that time is not too short so that only the incumbents or big players with prior experience and resources are able to submit the bids.
- e) Reasonable bid security/ guarantees: Large monetary guarantees which limit participation by small firms should be avoided by those issuing tenders. As a general principle upfront payment of depositing amount must be avoided and monetary guarantees should be used. Monetary guarantees must also be just sufficient enough to ensure that serious bidders participate and not be such that discourage potential bidders.

10. OECD; Guidelines to fighting bid rigging.

- f) **Avoid sub-contracting:** Tenders should avoid sub-contracting by the winner of the tender and this should be stated clearly in the tender offer. Sub-contracting is often a tool to share excess profits generated through bid rigging.
- g) **Design suitable mechanism promote competitive bidding:** Many a time, there is the practice of splitting the quantity among bidders by Public Sector enterprises. Where there are limited number of potential bidders such splitting decreases the incentive for vendors to compete in the bid as they all (or most of them) are assured of orders. In such a situation there is an incentive for them to keep the bids high through collusion. Therefore, as far as possible every contest must be a “winner takes all” contest. (System of placing educational/ developmental orders e.g. 5% of supply orders to non RDSO approved firms in Railway are, however, a useful strategy).
- h) **Avoid negotiations:** Practice of conducting Negotiations with bidders after receiving the bids also affects competition in the market. Though the CVC guidelines allow negotiations in rare and exceptional situations and that too only from lowest technically suitable tenderer, in Railways tender negotiations are held in almost all high value items. Negotiations discourage quoting of competitive rates. In fact, firms tend to quote inflated rates which result in negotiation to reduce rates and the same process continues in subsequent tenders. The final rates in in such cases would normally be higher than would be thrown up in a competition process. In such cases market rate is never received and the last accepted rate is taken as basis for settlement of future tenders.

OECD CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT¹¹

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.

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

11. <http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf>

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 Tell-tale 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 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.

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, and 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

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 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. Some Bid Rigging Cases in India

1. A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. &Ors., Case No. 43 of 2010

The Commission examined inter alia allegations of bid rigging by the bidders in the tender floated by Hospitals Services Consultancy Corporation, for supply, installation, testing and commissioning of Modular Operation Theatre and Medical Gases Manifold System to Sports Injury Centre, Safdarjung Hospital, New Delhi. The Commission found commonality of mistakes in the tender forms by the bidders as indicative of collusion amongst them to manipulate the process of bidding. The Commission imposed a penalty upon each of the contravening party @ 5% of the average turnover of the company. However, COMPAT vide its order dated 25.02.2013 passed in Appeal No. 93 of 2012 after considering the aggravating and mitigating factors reduced the penalty to 3% of the average turnover.

2. Aluminium Phosphide Tablets Manufacturers, Suo Moto Case No. 02 of 2011

The Commission examined the allegation of anti-competitive acts and conduct in the tender for procurement of Aluminium Phosphide Tablets required for preservation of central pool food grains by Food Corporation of India. In this case, the Commission inter alia noted that the identical bid price is not possible unless there is some sort of prior understanding. The Commission found the collective action of identical bids and simultaneous entry into the premises of FCI before submission of bids as indicative of 'plus' factors is support of existence of an understanding among the parties. The Commission apart from issuing a 'cease and desist' order, imposed a penalty upon each of the contravening party @ 9% of the average turnover of the company.

In LPG cylinder manufacturers, Suo Moto Case, the Commission initiated suo moto proceedings against LPG cylinder manufacturers who were found to be involved in bid rigging in supplying LPG cylinders to M/s Indian Oil Corporation Limited pursuant to a tender floated by it. It was noted by the Commission that the identical price quotations submitted by the opposite parties therein pursuant to the impugned tender were actuated by mutual understanding/arrangements. The Commission apart from issuing a cease and desist order imposed a penalty upon each of the contravening party @ 7% of the average turnover of the company.

Conclusion

There is a serious need for designing and implementing public procurement and managing all its processes in such a manner that while it is transparent and fair, and conforms to the competition law, the procurer must get value for money. On one hand, the step wise approach of procurement process makes it akin to 'science' whereas becoming unpredictable in an open and participative environment is an 'art' of the procurement agencies. The approach of the Commission in relation to procurement is two-fold. First is to be an advocate of competition in public procurement and, second is to penalise the violators of law by civil sanctions as per the Act. Fair, transparent and competitive bidding process will certainly help the

procurers to get the best value for money.

Suggested Further Readings

1. The Competition Act 2002 at http://www.cci.gov.in/hi/sites/default/files/cci_pdf/competitionact2012.pdf
2. General Financial Rules 2005 as amended, Ministry of Finance, Government of India at http://finmin.nic.in/the_ministry/dept_expenditure/gfrs/GFR2005.pdf
3. Delegation of Financial Powers DFPR, at http://finmin.nic.in/the_ministry/dept_expenditure/notification/dfpower/index.asp
4. Study on Government Procurement by Ms. Devika Malhotra, 2012, available at website of Indian Institute of Corporate Affairs
5. Enhancing Integrity in Public Procurement: A Checklist -OECD 2008. <http://www.oecd.org/dataoecd/54/41/41760991.pdf>
6. Public Procurement: Achieving Best Value through Competition -The Public Procurement Capacity Development Guide (UNDP 2010), www.unpcdc.org
7. Indian Railways Code for Stores department, (Revised Edition). (Embodying all advance correction slips up to No. 32 dated 06-02-2009).Published by Ministry of Railways. Available at: <http://www.indianrailways.gov.in/railwayboard/uploads/codesmanual/StoreDept>
8. OECD-Public Procurement: The Role of Competition Authorities in promoting Competition, Round-tables on Competition Policy, No. 71, OECD, <http://www.oecd.org/dataoecd/25/48/39891049.pdf>
9. Fighting Cartels in Public Procurement—Policy Brief-OECD 2008
10. Competition issues in regulated Industries: Case of Indian Transport Sector- Railways and Ports-- Final Report – The Energy and Resources Institute (TERI), www.cci.gov.in
11. Public Procurement Guidelines- Competitive Process. Available at: www.etenders.gov.in

Other Resource Persons' Material

Part 1: Basic Introduction

Part 2: Consumer Associations

Part 3: Trade/Industry Associations

Part 5: Regulatory Bodies

Part 6: Competition Compliance Programme

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