No.5-ITPO(3)/Vig/2019

India Trade Promotion Organisation

(Vigilance Division)

...

November 05, 2019

CIRCULAR

Subject: Diagnostic Toolkit Towards Competitive Tenders- For Public Procurement Officers

Competition Commission of India vide its D.O. Letter No. Adv/106/Diagnostic Toolkit/CCI-2019/11643 dated 18th October, 2019 brought out a 'Diagnostic Toolkit for Public Procurement Officers' to serve as a practical guide for procurement officials who can use it to review their present public procurement system and its level of competition-efficiency.

2. The Toolkit provides detailed guidelines and recommended best practices towards designing a competitive efficient tendering system. All Divisions will find the Toolkit as a useful ready reference for assessment of procurement process in ITPO.

3. A copy of the "Diagnostic Toolkit Towards Competitive Tenders" may be downloaded from the ITPO's website (www.indiatradefair.com) under Knowledge Bank → Knowledge Management → Vigilance Division. However, a link of the Toolkit is given below:

https://www.cci.gov.in/sites/default/files/whats_newdocument/DT.pdf

4. This issues with the approval of CVO.

(S.R. Sahoo)
Dy. Chief Vigilance Officer

To,

All officials at Headquarters and Regional Offices.

Copy to :

1. PS to CMD
2. PS to ED/CVO
3. All HoDs with the request to bring the contents of above circular to the notice of all concerned under their control for use of the Toolkit.
4. IT Services Division – with the request to upload this circular along with toolkit immediately on the website under Knowledge Management → Vigilance Division

Diagnostic Toolkit Towards Competitive Tenders

For Public Procurement Officers

Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग

COMPETITION COMMISSION OF INDIA

Diagnostic Toolkit
Towards Competitive Tenders

For Public Procurement Officers

भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

निर्मला सीतारामन
वित्त एवं कार्पोरेट कार्य मंत्री
भारत सरकार

सत्यमेव जयते

Nirmala Sitharaman
Minister of Finance and Corporate Affairs
Government of India

MESSAGE

Efficient Public Procurement lies at the heart of successful implementation of policies and programmes that touch the lives of the common citizen of the country. Ensuring cost-effective procurement is vital for achieving the best value for precious public money.

Towards this end, it becomes necessary that the public procurement process followed by respective government agencies are 'competition-efficient'.

Delighted that Competition Commission of India, as a part of its advocacy initiatives, has brought out a comprehensive guidance tool in shape of *'Diagnostic Toolkit for Public Procurement Officers'* which can help the public procurement agencies in getting rid of the menace of bid-rigging and assessing their procurement system from a competition perspective.

Wish the Commission and its staff the very best in the days and years ahead.

(Nirmala Sitharaman)

Date: 8th August, 2019

अनुराग सिंह ठाकुर
Anurag Singh Thakur

सत्यमेव जयते

वित्त एवं कारपोरेट कार्य राज्य मंत्री
भारत सरकार
नई दिल्ली -110001
MINISTER OF STATE FOR FINANCE
AND CORPORATE AFFAIRS
GOVERNMENT OF INDIA
NEW DELHI-110001

MESSAGE

Public Procurement of goods and services forms a substantial part of the GDP. It is, therefore, vital to ensure transparency, fairness and above all, competition in these markets.

It is heartening to know that the Competition Commission of India has brought out a 'Diagnostic Toolkit for Public Procurement Officers' to serve as a guidance tool for procurement agencies towards aligning their procurement systems with best practices in terms of competition.

I extend my best wishes to the Competition Commission of India for its endeavours.

(Anurag Singh Thakur)

New Delhi
29.07.2019

FOREWORD

Public procurement has an overarching economic and social significance in the overall context of good governance. It relates directly to the delivery of goods, works and services in various sectors such as health, education, defence, oil and gas, transport and infrastructure, etc. and affects the efficiency of the Government. An efficient public procurement system is imperative towards ensuring that precious public funds get the best value for money. Further, a '*competition-efficient*' procurement process goes a long way towards achieving that goal. Collusive tendering in procurement can impose heavy cost on public exchequer by increasing the cost of procurement significantly. On the other hand, competition-efficient procurement would reduce costs, incentivize innovation and promote allocative, productive and dynamic efficiencies.

In furtherance to the same, the Commission has now brought out this *'Diagnostic Toolkit'* as a practical guide for procurement officials who can use it to review their present public procurement system and its level of competition-efficiency. The Toolkit provides detailed guidelines and recommended best practices towards designing a competitive efficient tendering system. However, the procurement agencies may devise their own procurement systems keeping in view their needs and requirements.

The first draft of this Toolkit was posted on the website of the CCI for comments. It has now been revised, drawing from national and international policy documents on the subject. The Commission acknowledges the contribution of a group of experts, namely, Mr. D.P. Sen, Executive Director,

GAIL; Mr. Sanjay Sharma, ED (Corporate Materials Management Group) and Ms. Neera Sud, Senior Manager, SAIL, Mr. Kanwalpreet, Director, Railways Stores(IC); Mr. A.K. Singh, Technical Examiner, CVC; Ms. Poornima Mittal, Chief Manager Procurement, BPCL; Mr. N. Balaji, Chief General Manager, MMTC for offering their invaluable comments and suggestions on the draft.

It is my sincere belief that this Toolkit will be instrumental in sensitizing procurement officials, across the spectrum of public procurement in the country, towards competition issues and will enable them to join us in our endeavour to make India's public procurement system competition-efficient.

Ashok Kumar Gupta
Chairperson

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1. INTRODUCTION

Markets bring together buyers and sellers who interact with each other to produce mutually beneficial outcomes. Best economic outcomes are produced in markets characterised by a high level of competition between producers of goods and services. High competition in markets among sellers ensure lower prices, better quality and incentivises continuous innovation on the supply side. On the other hand, where competition between producers/suppliers is low, buyers have to settle for higher prices, lower quality and lack of innovation, which not only diminishes consumer welfare but also impacts overall health of the economy.

If there is relatively less competition in a market, the reasons can be either structural or behavioural.

Structurally, there may naturally exist only a handful of producers/suppliers in the market due to specialised nature of product, limited access to raw materials, high barriers to entry such as technology or capital investment.

Competition may also be hindered through anti-competitive behaviour of an enterprise either on its own or together with other enterprises. On its own accord, a dominant entity in a market can abuse its dominance by charging unfairly high prices, imposing unfair condition(s) or denying market access to a potential entrant. On the other hand, acting in unison, producers/suppliers may collude amongst each other, whereby they may together decide to charge high prices, reduce output or divide markets (either product-wise or geographically) amongst each other.

Competition is vital in Public Procurement. Public Procurement, which essentially entails purchase of goods and services by the public sector, is a key economic activity of governments, accounting for on average 15% of GDP worldwide. In India, government procurement constitutes about 30% of the GDP. Procurement of goods and services in India is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both at the Centre and at the State level.

The primary objective of an effective procurement policy is the promotion of efficiency, i.e. selection of a supplier with the lowest price or, more generally, the achievement of the best value for money. Effective public procurement avoids mismanagement and waste of public funds. Vigorous competition among suppliers helps governments realize these objectives. Conversely, when competition is curtailed - for example, when suppliers engage in bid rigging, taxpayers' money is wasted as governments pay more than a fair price.

Competition Concerns in Public Procurement

The competition concerns arising from public procurement are largely the same that can arise in an ordinary market context such as collusive agreements between bidders during the tender process. The overarching concern with public procurement is that, as formal rules governing public procurement make communication among rivals easier, they can promote collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process. In particular, in those instances where entry is difficult and when bidding is not based on a 'winner-takes all' competition, collusion can emerge as easily in auctions and bidding processes as in ordinary economic markets.

It is frequently noticed that the procurement mechanism adopted in most government departments is itself not designed keeping in mind the importance of competition in ensuring efficient outcome. Moreover, in some cases the mechanism itself is facilitating anti-competitive practices. The peculiarity in case of public procurements is that, due to regulations and legislations, the officials have limited strategic options to curb such practices. Whereas, a private purchaser can choose his purchasing strategy flexibly, the public sector has limited options to respond dynamically to anti-competitive behaviours owing to strict regulatory/legislative framework and detailed administrative regulations/procedures at multiple levels. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, at times, full transparency of the procurement process and its outcome can promote collusion.

Importance of Competition in Public Procurement

An efficient public procurement policy can affect competition in a number of ways:

(i) Short-term effects on competition amongst potential suppliers i.e. effects on the intensity of competition amongst existing suppliers.

(ii) Apart from immediate impact (loss of public money) of anti-competitive practices, there is a deeper consequence on overall efficiency in the domestic market.

Public procurement can have other long-term effects on competition, as public procurement can affect important features of market (such as the degree of innovation, the level of investment, vertical integration etc). This, in turn, would be reflected in the level of competition in future tenders.

Role of Competition Agency in Public Procurement

Reducing collusion in public procurement requires strict enforcement of competition laws and education of public procurement agencies at all levels of government to help them design efficient procurement processes, and detect collusion.

A. Enforcement

The most direct way for the competition authority to promote competition in public procurement market is to identify and correct bid-rigging through strict law enforcement. By increasing the bid-rigging detection rate and heavily punishing identified bid-riggers, the competition authority can effectively prevent bid-rigging as companies will learn that the benefits of bid-rigging are smaller than the loss they will suffer once their collusion is identified.

Many jurisdictions have specific prohibitions in their competition laws forbidding bid rigging or considering bid rigging as per se violation of the competition rules. In India, the Competition Act, 2002 specifically prohibits bid-rigging or collusive bidding (direct or indirect) under Section 3(1) read with Section 3 (3) (d) thereof. It is one of the four horizontal agreements that are presumed to have Appreciable Adverse Effect on Competition (AAEC).

The Competition Commission of India ('Commission'/CCI) is empowered to inquire into such anti-competitive agreements, and to impose on each person or enterprises, which are parties to such agreements, a penalty of up to 10% of the average turnover for the last three preceding financial years.

Further, in case such agreement has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher.

The penalty can therefore be severe, and result in heavy financial and other cost on the erring party.

In case an enterprise is a 'company', its directors/officials who are guilty are also liable to be proceeded against.

In addition, the Commission has the power to pass, *inter alia*, any or all of the following orders under Section 27 of the Act:

i. direct the parties to a cartel agreement to discontinue and not to re-enter such agreement;

ii. direct the enterprises concerned to modify the agreement;

iii. direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

iv. and pass such other order or issue such directions as it may deem fit.

B. Advocacy

CCI aims to promote a culture of competition compliance amongst all its stakeholders, which include, Central and State governments, business enterprises, trade associations, professional bodies, consumers, academia among others. The Commission regularly conducts events such as seminars, workshops, trainings etc. with these stakeholders to sensitize them on benefits of competition, and various means to achieve and ensure it. Rich advocacy literature on competition is also published by the Commission to help and guide the stakeholders on this subject. This includes detailed *'Advocacy Booklets', 'Competition Compliance Manual', 'Competition Assessment Toolkit'* and *CCI's quarterly newsletter 'Fair Play'* among others.

Many competition authorities are also involved in advocacy efforts to increase awareness of the risks of bid rigging in procurement tenders. The old adage of 'Prevention is better than cure' holds true of competition enforcement as well. There are many examples of educational programs to this end. Some authorities have regular bid rigging educational programs for procurement agencies; others organize ad hoc seminars and training courses. These outreach programs have proved extremely useful for a number of reasons:

(i) They help competition and public procurement officials to develop closer working relationships;

(ii) They help educate procurement officials about what they should look for in order to detect bid-rigging through actual examples of bidding patterns and conduct which may indicate that bid-rigging is occurring;

(iii) They train procurement officials to collect evidence that can be used to prosecute bid-rigging conduct in a better and more effective manner;

(iv) They help educate public procurement officials and government investigators about the cost of bid rigging on the government and ultimately on the taxpayers; and

(v) They warn procurement officials not to participate in bid rigging and other illegal conduct which undermines competition in procurement tenders.

2. PUBLIC PROCUREMENT AND BID-RIGGING

The process of Public Procurement involves multiple bidders bidding in a tender floated by the buyer. When, instead of competing with one another, bidders agree with each other on distorting the bidding process towards manipulating bidding outcomes, such Cartels take the form of 'bid-rigging' or collusive bidding.

Types of Bid Rigging

- **Bid coordination**: The bidders collude to quote same or similar rates that are much higher than the reasonable prices to force the buyer to settle the procurement at exorbitant prices.
- **Cover bidding**: Cover bidding is designed to give the appearance of genuine competition, by way of giving supporting bids, for the leading bid-rigger.
- **Bid suppression**: Bid suppression means that a company does not submit a bid for final consideration in support of the leader.
- **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 in a group of tenders of a similar nature.
- **Market allocation**: Competitors carve up the market and agree not to give competitive bids in relation to procurement process for certain customers or in certain geographic areas.
- **Phantom bidding**: A phantom bid is a bid placed on an item where the bidder does not intend to purchase the item and attempts to raise the price of the item being offered. It is generally employed in auctions to compel legitimate bidders to bid higher than they normally would.

Section 3(3)(d) of the Competition Act, 2002 specifically deals with bid-rigging, which reads as follows:

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which- directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

It can be inferred from the reading of Section 3(3)(d) that agreements that amount to rigging of bids are presumed to have an '*appreciable adverse effect on competition*'. These are agreements amongst competing bidders or potential bidders that affect the prices they will bid for, or attempts to secretly influence the outcome of, a contract or a series of contracts.

Thus, CCI is empowered to penalize any form of bid rigging in public procurement under Section 3(3)(d) and Section 27 of the Act. Such instances of bid rigging can be brought to the notice of the Commission through an Information, a reference made to it by the Central Government or a State Government or a statutory authority. The Commission can also initiate enquiry on its own accord.

Penalties have been imposed on erring parties in many cases of bid rigging by the Commission. Chapter on '*Recommended Best Practices*' discusses some of such cases.

The Ministry of Finance has also revised its Manual for Procurement, wherein there is a specific mention of cartel formation.

Manual for Procurement of Goods 2017

7.5.8 Cartel Formation/Pool rates

"It is possible that sometimes a group of bidders quote the same rate against a tender. Such pool/cartel formation is against the basic principle of competitive bidding and defeats the very purpose of an open and competitive tendering system. Such and similar tactics to avoid/ control true competition in a tender leading to "Appreciable Adverse

Effect on Competition" (AAEC) have been declared as an offence under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. Such practices should be severely discouraged with strong measures. In case of evidence of cartel formation, detailed cost analysis may be done by associating experts, if necessary. Besides, suitable administrative actions can be resorted to, such as rejecting the offers, reporting the matter to trade associations, the Competition Commission or NSIC, etc., and requesting them, inter-alia, to take suitable strong actions against such firms. New firms may also be encouraged to get themselves registered for the subject goods to break the monopolistic attitude of the firms forming a cartel. Changes in the mode of procurement (GTE instead of OTE) and packaging/slicing of the tendered quantity and items may also be tried. A warning clause may also be included in the bid documents to discourage the bidders from indulging in such practices."

Role of Procurement Officers in Detection of Bid-Rigging

An officer entrusted with responsibility of planning, designing and implementing the tendering process and bound by the cannons of financial propriety is responsible for, and plays a crucial role in the detection of any signs of bid-rigging and eventual penalizing by CCI. Being at the heart of the process of bidding, such an Officer is in the best position to identify any red flags that might hint at a possibility of any mischief being involved on the part of the bidders. The Commission has, in the past, received multitude of cases wherein Information has been submitted by a public procurement officer, on which further investigation has been conducted by the Commission. The investigations have not only enriched the competition jurisprudence in India but have also emboldened purchase officers to raise such red flags.

Apart from simply reporting any possible cases of bid rigging for further investigation to the CCI, the officer in charge of Public Procurement also has a crucial responsibility in designing his tender process in a manner that makes it as less prone to bid-rigging as possible, if not 'bid-rigging proof'. If the manner in which tenders are planned, designed and implemented is made '*competition-efficient*', the chances of manipulation of tendering process can be minimized.

The procurement Officers may identify i) Industry, Product and Service Characteristics that help support collusion, ii) Warning signals of Bid-Rigging and iii) Competition distortions caused by government policies and laws which require periodical reviews.

I) Industry, Product and Service Characteristics that help Support Collusion

The Organisation for Economic Co-operation and Development (OECD) has enlisted typical industry and product characteristics of markets that are prone to collusion. These are:

(i) *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.

(ii) *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.

(iii) *Market conditions*: Significant changes in demand or supply conditions tend to destabilize 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.

(iv) *Industry associations*: Industry associations 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, anti-competitive 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.

(v) *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.

(vi) *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.

(vii) *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, good alternatives and thus, their efforts to raise prices are more likely to be successful.

(viii) *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.

(ix) *Relative stability of the market shares of undertakings*: The participants in these types of agreements aim at maintaining the stability of their market shares, calculated in accordance with their incomes from the selling of the respective goods or services purchased under public procurement procedures. To this aim, they allocate the procurements among themselves in such a way as to ensure that the previously agreed balance of their market shares would be maintained for a long period of time. The longer the market shares of the respective undertakings remain stable, the more important the role of this factor grows as it facilitates bid rigging in the procedures in which the undertakings submit bids.

II. Warning Signals of Bid Rigging

The following factors are helpful in detecting bid-rigging:

(i) Warning Signals in Bids

- 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 in a tender they would normally be expected to bid 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, or lowest bidder does not bid for the full tendered quantity.
- The winning bidder repeatedly sub-contracts work to unsuccessful bidders.
- Competitors regularly socialize or hold meetings shortly before the tender deadline.
- Only a small number of the bidders which bought the tender documentation have submitted bids.
- None of bidders have participated in the tender although there are no. of bidders available in the market for the work/service.
- On the day set for opening the bids, only one or several of the bidders are present.
- Same bidder has been found to be technically disqualified, although, was found qualified in the past against same PQ conditions/procurement.
- Only one bidder found qualified after number of stages of a tender.
- Bidder has participated in the tender as consortium/JV with other bidders.
- No. of partner firms participated as JV/Consortium does not commensurate with their respective experiences/ requirement.
- No. of bidders are as much as the no. of packages tendered under the Main Project

(ii) Warning Signals in Documents

- Bids were prepared by the same person or were prepared jointly.
- Identical mistakes/corrections in the bid documents or letters submitted by different companies, such as spelling errors (the use of identical terminology, identical mistakes

in the calculations, identical crossing outs or changes of certain figures, identical handwriting when the tender documentation should be completed in handwriting).

- 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 packagings from different companies have similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasers or other physical alterations.
- Bid documents submitted by different companies contain less detail that would be necessary or expected, or give other indications of not being genuine.
- Two or more bidders offered same nomenclature or brand name of specialized product although they claim to be manufacturers.
- Bids submitted by firms are sister concerns or have common directors in their Board of Directors or have more than 50% stake or shareholding in the other firm.
- Bids submitted by the bidder is incomplete or the bidder submits less credentials although has the potential to do the work or qualify in the tender.

- When submitted electronically the documents of the different bidders, contain edits made by the same people, or edits made at one and the same time.
- Bidders are having the same address/office/authorized signatory etc.
- Bidders having position of common Key Managerial Person (KMP) or Partner or Proprietor.
- Bidders using same email ids.
- Bids received from same IP address.
- Bids submitted within short span of time.

(iii) Warning Signals in Bid Pricing

Bid prices can be used to help uncover collusion. When other bids are much higher than the winner's bid, bidders may be using a cover bidding scheme. 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 considered 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.
- Different bidders submit very similar price offers or the prices they offer are different from one another by the same margin that has been observed as part of their participation in other procedures of the same contracting authority.
- A new participant in the market submits a bid and at the same time the traditional participants reduce their price offers drastically compared to the offers they have submitted before for similar projects of the same or other contracting authorities.
- The market prices of the products purchased under similar public procurement procedures are stable and do not change over a comparatively long period of time.
- Overall discount/discount in separate envelope or letter head is being quoted by bidders.
- Lower rate for less quantity. (stating vendor has that quantity surplus out of older order).
- Part quantity to tendered specification, balance at higher rate to different specification.

(iv) Warning Signals in the Statements of Bidders

Suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

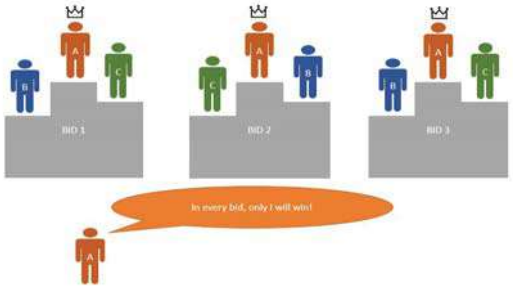
(v) Warning Signals in the Behavior of Bidders

Meetings or events at which suppliers may have an opportunity to discuss prices, or behavior that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

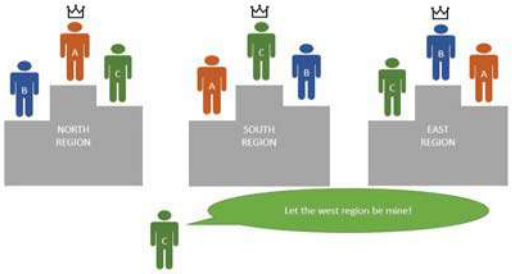
- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialize together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.
- There is evidence revealing that a payment has been made on the part of the winning bidder to other bidders or market participants which have not participated in the procedure.
- The winning bidder sub-contracts part of the procurement to other bidders or market participants which have not taken part in the bidding.
- Certain bidders always or often participate in bidding but never win, whereas, other bidders rarely take part in bids but when they do, they necessarily are the winning bidders.
- A given bidder always submits the lowest offers, or always submits the highest possible price offer.
- Several bidders withdraw their bid without a sufficient reason.

Warning signals to detect bid rigging

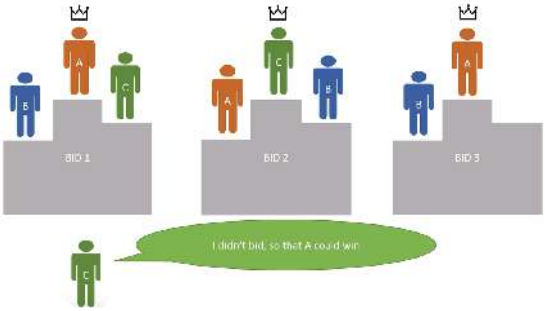
1. **The same supplier is often the lowest bidder**



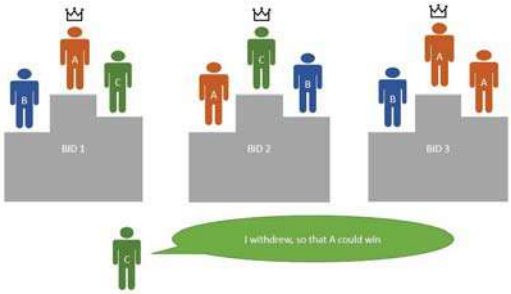
2. **There is a geographic allocation of winning tenders**



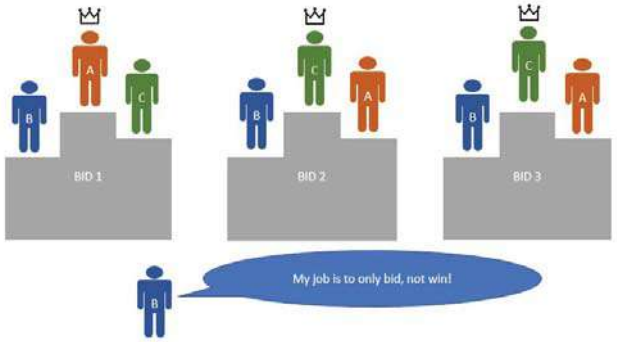
3. **Regular suppliers fail to bid on a tender they would normally be expected to bid for**



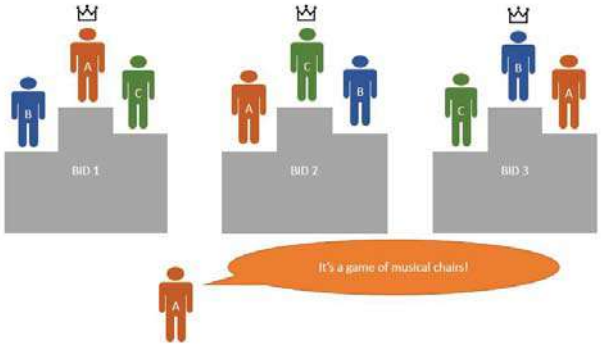
4. **Some suppliers unexpectedly withdraw from bidding**



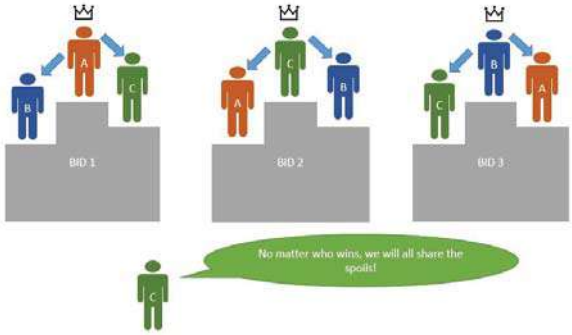
5. **Certain companies always submit bids but never win**



6. **Each company seems to take a turn being the winning bidder**



7. **The winning bidder repeatedly sub-contracts work to unsuccessful bidders**



8. **Competitors regularly socialize or hold meetings shortly before the tender deadli**

III. Competition Distortions Caused by Government Policies and Laws

Competition distortions may be caused by government policies and laws which require periodical reviews. Some such factors causing distortions to fair competition in bid riggings are:

Limiting number of suppliers

The number of suppliers in the procurement process may be limited when procurement rules lay down technical specification in terms of a proprietary product but do not lay down generic specifications.

Barriers to entry

There is a tendency among public procurers to restrict participation to select big and reputed firms. Often this is done to reduce the cost of evaluating bids or to ensure the stability and quality of supply. However, this tendency could raise high entry barriers for new entrants, leading to inefficient outcomes.

Competitive Neutrality

Competitive neutrality aims to provide a level playing field to public as well as private entities in the markets. The markets tend to be distorted as a result of structural advantages enjoyed by public entities which may cause distortionary effects on competition.

Information Asymmetry

It has been observed that there is no information available in the public domain suggesting goods or services and their quantum to be procured by the public authorities, and sudden decision to procure any good or service strains the existing capacity of supply, which creates a price pull factor often leading to inefficient procurement.

Check List

In order to avoid bid-rigging, a check-list can be devised, which can be used by procuring agency. Such a check-list can be on following lines:

- Learn about the market and suppliers
- Maximize participation of potential bidders
- Define requirements clearly and avoid predictability
- Minimize communication among bidders to the extent possible

- Use Certificates of Independent Bid Determination (CIBD) on an affidavit. CIBD typically require each bidder to sign a statement under oath that:
  - it has not agreed with its competitors about bids, and it has not disclosed bid prices to any of its competitors,
  - it has not agreed to join or collude with others in any form which could lead to bid rigging in any manner whatsoever, and it has not attempted to convince a competitor to rig bids.

Methodology to Reduce the Risk of Bid Rigging

The procurement officials may reduce the risk of bid-rigging by adopting following methodology;

(i) Gather all Relevant Information of the Product/ Services

- Be aware of the characteristics of the market from which one will purchase, and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which one will purchase has characteristics that make collusion more likely.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B procurement.
- Collect information about recent price changes. Inform oneself about prices in neighboring geographic areas and about prices of possible alternative products.
- Collect information about past tenders for the same or similar products.
- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If one uses external consultants to help estimate prices or costs, ensure that they have signed confidentiality agreements.

- Arrive at a preliminary calculation of the fair, cost-oriented price offers that could be submitted under the specific public procurement procedure.

(ii) Encourage Participation of Maximum Potential Bidders

- 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 (unless unavoidable) minimum requirements that create an obstacle to participation, such as control on the size, composition, or nature of firms that may submit a bid.

- 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.

- 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 regarding 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.).

  - 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 reasonable 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.

- 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.

- The tender documentation should contain clear and specific requirements as special attention is paid to the technical specifications of the procurement with a view to ensuring that they are unambiguous as well as easy to understand and implement.

- Draft the technical specifications of the procurement by putting emphasis on its aims, rather than describing the way in which it should be implemented; in this sense, a specific description of the products or services should be avoided and emphasis should be put on the functional requirements they need to meet.

(iii) Train Staff Members

- 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.

(iv) 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 put in place a mechanism to maintain 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.
- Whistleblower Protection: 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 cooperative relationships with the competition authority, and share data of suspect cases.

(v) Define Requirements of Procurement clearly (so as not to leave any room for the suppliers to define key terms to its own advantage).

(vi) Criteria for evaluating tender should be such that facilitates participation by maximum number of bidders in the bidding process, especially the small and medium level bidders.

vii) Public Procurement tenders should encompass a wider definition of goods and services so as to obtain competitive price.

Steps that Procurement Officials Should Take in Case of Suspected Bid-Rigging

- Have a working understanding of the Competition Act, 2002 and other related laws/ rules dealing with public procurement.
- Do not discuss one's concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behavior/events/ statements.
- After consulting with internal legal staff, consider whether it is appropriate to proceed with the tender offer.
- File a formal reference with the CCI.

Reducing collusion in public procurement requires efficient regulatory mechanism, strict enforcement of competition laws and awareness among public procurement agencies at all levels towards the adverse impacts of collusion. Fight against corruption and competition promotion policies are highly complementary.

The policy planners, public procurement officials and CCI should work together as a team to deter bid rigging through robust enforcement, increased vigilance, and better designed public procurement programs.

3. DIAGNOSTIC TOOLKIT

Diagnostic Toolkit – Towards Competitive Tenders" has been designed by the CCI to enable the officers involved in procurement process in their organizations to evaluate their procurement systems and facilitate them to make such systems more competitive in nature and less prone to bid rigging. The objective is to build capacity in organizations involved in procurement on planning, designing and implementing '*competition-efficient*' procurement processes, which would go a long way towards ensuring an efficient use of precious public funds.

Who will be using the Diagnostic Tool?

The Diagnostic Toolkit is designed to help the officers dealing with procurement in procuring agencies such as Central Government, State Governments, Municipalities, Public Sector Units (PSUs) and other statutory authorities.

The Diagnostic Toolkit is a self-assessment exercise that enables the officer dealing with procurement to analyse the procurement process based on past data/information available. Sets of questions are provided regarding each stage of procurement process i.e. planning, design, selection, execution and monitoring. As an exercise in self-assessment, the officer will answer these questions to self and based on such answers, will be guided by the tool to identify possible gaps in the procurement process from a competition point of view, following which appropriate steps for improvement will be suggested. The Tool also contains a range of methods for detecting suspicious conduct of bidders, to deal with it internally, and procedure of filing a reference with the CCI.

Objectives of the Diagnostic Tool

This tool shall:-

- Equip officers with the information to appreciate various dimensions of the procurement processes.
- Provide a standardized diagnostic method and implementation guide to improve the quality of tenders.

- Help detect anti-competitive behavior amongst the participants of the tenders.
- Promote best practices developed to design tenders and bring competitiveness along with transparency, confidentiality, objectivity and efficiency in the tender processes.
- Help in capacity building of the personnel actually engaged in the procurement processes and sensitize them about the advantages of competition in procurement.

Why use the Diagnostic Tool?

- To enable a robust procurement system in government organizations.
- To design tenders that result in achieving value for money.
- To detect anti-competitive practices at an early stage.
- To refer cases of bid-rigging to CCI.

Diagnostic - Self-Assessment of Procurement System

For better and efficient procurement system, Procurement Officers should devise a system of self-assessment of procurement system. Following steps towards this may be helpful;

STEP 1 – Data Collection

As part of self assessment of procurement system, the first step is to collect all available information/data of past tenders issued on the subject matter of procurement during the last 3- 5 years. Data may also be collected, if available, for similar tenders issued in the past by any other unit of your organization. The data so collected will serve as a reference for conducting self assessment for all five stages of the tender process i.e. Planning, Design, Selection, Execution and Monitoring.

STEP 2 –Application of Data to Past tenders

Apply the Diagnostic Questions to data of the past tenders. On the basis of the 'yes' or 'no' response, it can be ascertained whether the tender was competition compliant or not.

STAGE 1: PLANNING

1. Whether market information[1] on the subject of procurement was collected before inviting bids?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

2. Whether you have directly awarded work to suppliers without following the process of tendering?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

3. Whether past tenders on the subject matter of procurement have led to a single vendor / only a few vendors situation?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

4. Whether procurements have been made by packaging of two or more tenders[2]?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

5. Whether any lists of the suppliers have been updated?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

[1]Market information, may include alternative specifications available, new technology, price trends, whether subscription to the relevant websites where price trends are available.

[2]More packaging would lead to lesser coordination among bidders, should be followed whenever possible

6. Whether bids are invited at definite/predictable times?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

7. Whether bids are invited at definite/predictable quantities?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

8. Whether detailed estimate has been prepared for the subject work by following due process as per GFR/Procurement Manual/through GeM?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

9. Whether the tender was widely advertised?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

10. Whether sufficient number of competent bidders likely to comply with the required technical specifications are available?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

STAGE 2: DESIGN

1. **Whether the qualification criteria (Professional/Technical/ Financial) for the bidders was restrictive in proportion to the requirement of the work involved (which might have reduced the number of bidders)?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

2. **Whether the change in qualification criteria (Professional/ Technical/Financial) from pervious tender(s) has been deliberated upon (wherever applicable)?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

3. **Whether a particular brand or names of particular firms was/were mentioned in the qualification criteria for the bidders?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

4. **Whether lessons learnt from pervious tender(s) have been incorporated (wherever applicable)?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

5. **Whether conditions (which discourage competition) such as getting NOC from a manufacturer/getting certification from only one particular agency/ testing specified in the tender have been followed (or complied with)?**

IF, YES	IF, NO
Not Competition Compliant (unless such conditions are required)	Competition Compliant

6. Whether warning clause (including a provision for penal action) has been included in the bid documents to discourage the bidders from indulging in collusive practices?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

7. Whether provision of Integrity Pact has been included in the tender documents?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

8. Whether the following disclosures were inserted in the tender document:

I. Disclaimer that suspected instance of collusion will be reported.

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

II. Disclosure to inform all sub-contracting arrangements including those made after the contract with the competitors, and notification to the procuring agencies if winning bidder assigns contract to a competitor.

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

III. A statement confirming that the bids have been developed independently from their competitors.

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

IV. Disclosure of any prior conduct involving anti-competitive behaviour, in India or overseas.

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

STAGE 3: SELECTION

1. **Have the tenders been uploaded on the Central Public Procurement Website or any departmental/organizational website (for example Railways)?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

2. **Is the selection process or methodology clearly defined in the tender document?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

3. **Does it minimize communication between bidders during tender process?**[3]

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

4. **Were the tenders based primarily on prices?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

5. **Were some efforts made for vendor development?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

[3] There could be situations where pre-bid meetings, which are essential part of the tender process are held in presence of participating bidders and hence, cannot be avoided.

6. Are there similarities between vendor applications or proposals?

I. Two or more proposals contain similar handwriting, typographical, or mathematical errors.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

II. Two or more proposals are sent from the same mailing address, e-mail address, uniform resource locator address, fax number, or overnight courier account number.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

III. Bids from different bidders were submitted from the same IP address.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

IV. Bank drafts were from same branch of a bank to pay tender documents or earnest money.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

V. Two or more proposals reflect that last-minute changes (such as white-outs and cross-outs) were made to alter price quotes.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VI. Two or more proposals having common address or authorized signatory

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VII. Two or more proposals having common Key Managerial Person/ Partner/ Proprietor.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VIII. The document properties of two or more electronic proposals show that the proposals were created or edited by one vendor.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

IX. Document was authored by someone other than the supplier making the submission.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

7. Have following patterns developed among competing vendors?

I. Over a series of awards, competing vendors rotate as the award winner.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

II. Over a series of awards, routine competing vendors win the same or similar amount of work.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

III. Over a series of awards, one vendor always wins, regardless of competition.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

IV. As compared with prior quotes, a smaller number of vendors submitted proposals for a particular award.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

V. Regular suppliers decline to participate in tender for no reasons.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VI. Bidders are offering overall discount in bid/ separate envelope.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VII. Different bidders are controlled/owned by members of same family.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VIII. Are local suppliers bidding higher rates?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

8. Have vendors demonstrated behaviour that suggests that they worked together on the award?

I. A vendor submits a proposal for a procurement or grant award, and you know that the vendor lacks the ability to provide the goods or services requested.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

II. A vendor submits multiple proposals.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

III. A vendor makes statements on the phone or by e-mail indicating advance knowledge of a competitor's prices or likelihood of winning the award.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

IV. The bidder whose bid has been found to be the lowest evaluated bid withdraws from the procurement process.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

V. The bidder whose bid has been accepted, fails to sign the procurement contract or fails to provide the security as may be required for the performance of the contract.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VI. Voluntary discounts have been given by bidders after the price discovery process.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VII. Number of empanelled/Qualified contractors have not submitted their bids.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

VIII. More than one losing bidder submits identical line item bids on non-standard line items.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

IX. Bids have been received from such bidders/contractors who are incapable of successfully performing the contract.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

X. Competitors have changed prices in similar amounts at about the same time.

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

STAGE 4: EXECUTION

1. **Was the product that was procured / service rendered / contract undertaken eventually up to the mark, and did it provide the best value for money?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

2. **Were the terms and conditions in past tenders that were originally stipulated changed / amended in any substantial manner?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

3. **Has any of the Winning Bidder sub- contracted his work in past?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

4. **Are there any patterns in the price data that suggest similarity of prices quoted in the bids?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

5. **Are there any sudden and identical increase in the price or price ranges by bidders that cannot be explained by cost increase?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

6. **Is there identical pricing of the products over different geographical region by different suppliers?**

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

7. Is there a large difference between the price of the winning bid and other bids?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

8. Is there a significant difference in the bid of a supplier for a particular contract and for another similar contract?[4]

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

9. Have abnormally higher rates been received vis-à-vis the estimate?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

10. Is the increase in price quoted not explainable?

IF, YES	IF, NO
Not Competition Compliant	Competition Compliant

[1] Unless this situation arises owing to different geographical locations, working conditions of a location, shop loading etc.

STAGE 5: MONITORING

1. **Have you established a complaint mechanism for firms to convey competition concerns?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

2. **Is there an identified office to receive, redress and review the nature of complaints received?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

3. **Do you use complaints for systemic improvements of your tender processes?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

4. **Have you established a whistleblower mechanism to collect information on bid rigging from companies and their employees?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

5. **Have you informed yourself of the Lesser Penalty Programme of CCI well enough to refer the same to a bidder having inside knowledge of bid rigging?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

6. **Do you conduct regular internal audits of your procurement systems?**

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

7. Do you report suspicious behavior of bid rigging to CCI?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

8. Do you conduct regular training program on bid rigging and cartel detection for your staff, with the help of CCI or any other resource persons?

IF, YES	IF, NO
Competition Compliant	Not Competition Compliant

4. RECOMMENDED BEST PRACTICES

Some of the recommended best practices that may be followed by procurement officers at various stages of procurement process are discussed below:

PLANNING STAGE

1. Collect Market Information:- Collecting market information and subsequent analysis helps the procuring agency to get a clear picture of the market and facilitates appropriate designing of the tender. Information may be collected on the relevant parameters (such as characteristics of the product, number of suppliers, size of the market, prevailing prices, prices in neighboring areas, prices of substitutes, price trend of raw materials, transport costs, information on past tenders for similar products *etc.*).

Usually markets that are susceptible to bid rigging are characterized by –

- Relatively low number of suppliers
- Product has no/poor substitutes in the market
- Product is highly specialized in nature
- Demand for product is stable and can be forecasted with relative certainty
- Rising Price of product despite cost of raw material stable

Commission has dealt with a number of cases in which it found bidders in contravention of the Act, while observing the following market conditions which are conducive of cartelization and bid rigging:

- Small number of companies: A fewer number of companies are likely to incentivize them to collude as the chance to monitor the behaviour of all the players in a cartel is easier. *In Re: Aluminium Phosphide Tablet Manufacturers,*[5]

[5]Suo Moto Case No 02/2011, decided on 23/04/2012; available at: http://www.cci.gov.in/sites/default/files/Case2of2011MainOrder_0.pdf

Commission noted that there are only four manufacturers of Aluminium Phosphide Tablets in India which are quoting identical prices for last eight years, and sales were restricted only to the government agencies which made collusion easier.

- Industry associations: These are often used to promote pro-competitive activities that further the cause of their constituent firms. However, they can and are, used to also indulge in anti-competitive acts. Quoting of identical prices by bidders followed by meeting of their trade associations makes relevant factor in inquiry of bid rigging. *In Re:* Western Coalfield[6], Commission noted that identical price bids by the bidding firms engaged in sand and coal transportation followed by their association, Central India Mining and Transport Association (CIMTA), demanding higher prices in the tenders floated by the Western Coal Fields Ltd. makes such demand of CIMTA a relevant factor in the inquiry of bid-rigging.

2. DO NOT Directly award work:- Direct award to suppliers on nomination basis should not be encouraged as it inhibits competition. Effective competition can be enhanced if sufficient number of credible bidders participate in the tendering process. It is also imperative to receive the requirement from the user department promptly in order to give procuring division sufficient time to design the tender, and also give time to the participating firms to prepare and submit their bids. Delays in assessment of need may lead to shortcut procurement procedures that dilute transparency and prevent achieving value for money. It may also lead to delays in delivery of goods. Paucity of time is often used as a reason for direct award of contract.

[6]Case no. 34 of 2015, decided on 14/09/2017, available at: http://www.cci.gov.in/sites/default/files/34%20of%202015.pdf

3. **Combine/package tenders:-** The packaging of tenders helps in spreading the fixed costs of preparing a tender. Regular procurement opportunities and repetitive bidding increases the chances of collusion as it helps members of a bid rigging agreement to allocate contracts amongst themselves. This is so because in a packaged tender, the winner takes all and there is accordingly, less scope for bid rigging. Tenders should be carried out at irregular intervals, and for dissimilar amounts and quantities, making collusive agreements difficult to reach.

4. **Publication of Tenders:-** Tenders may be published on the Procuring Agency's /Company website and Central Public Procurement Portal. The requirement of publishing tender details on newspaper may be dispensed with to save costs.

5. **Deposit of Earnest Money:-** EMD amount may be kept at 3-4%. Prescribing huge EMD discourages participation.

6. **Follow the due process as per GFR/Procurement Manual:-** Prepare detailed estimate for the subject work by following due process as per GFR/Procurement Manual.

7. **Make procurement through GeM:-** The Procurement Officer must make the procurement through the GeM website unless intended items/ works services are not available on GeM.

DESIGN STAGE

1. **Avoid Single vendor/ very few vendors situation**: Sometimes, against advertised/limited tender cases, the procuring entity may not receive a sufficient number of bids and/or after analysing the bids, ends up with only one responsive bid – the situation is referred as 'Single Offer'. This may be due to the fact that i) The procurement was ***not satisfactorily advertised*** or sufficient time was not given for submission of bids; ii) The ***qualification criteria were restrictive***; or iii) ***Prices were unreasonable*** in comparison to market values. In all such likely cases: -

   - The procuring authority should design the tender to meet the expected outcome and not the manner in which it is to be achieved. Thus, the emphasis should be on 'what' to achieve rather than 'how' to achieve.

   - The procuring authority should ensure that specifications are developed to ***ensure value for money, level playing field and wide competition in procurement***. The procurement agencies should spell out the specifications in a vendor neutral manner. (e.g. not specifying a brand of a product, or not specifying names of particular firms as examples in the tender etc.).

   - The procuring agency ***should not apply conditions that are restrictive and unreasonable*** or that require NOC, (e.g. getting NOC from a manufacturer/getting certification from only one particular agency/testing) etc. (unless required for example ISO 2008; ISO 2014).

   - The procuring agency ***should not apply professional, technical and financial conditions*** or terms of reference that may either be ***disproportionate to the need identified*** or tilt the tender in favour of one or a group of vendor(s) or contractor(s) in order to artificially restrict competition. Care must be taken to ensure that conditions such as size, composition or nature of firms, monetary guarantees do not become too restrictive to create obstacles to

participate in the bids. Such conditions lead to a situation where only a few bidders may be able to compete and qualify for bidding

2. **Avoid Pre-qualification criteria:** The clause for pre-qualification/ registration is introduced to ensure a ready list of suppliers for faster procurement. ***This list must be updated continuously*** or at least once in a year to ensure that entry of new firms are not barred for a long period of time. There is no need to have pre-qualification process for regular procurement process. The technical evaluation can serve as pre-qualification. The information on the list of registered bidders should be made available on the Central procurement portal as it makes it easy to access information, and promotes competition in the long run.[7]

3. **Ensure insertion of necessary disclosures by the bidders:** Disclaimers and disclosures regarding prior transaction create awareness amongst the bidders about their duties and also help in reducing the possibility of cartels as it encourages voluntary compliance. The disclosure of independent bids should include an undertaking that no consultation, contract, arrangement or understanding with any competitors, directly or indirectly has occurred with regards to prices; methods, factors or formula used to calculate, intention to submit or not submit a bid; the submission of a bid that is non-conforming; the quality, quantity, specification of delivery particulars of products or services to which the call for bid relates; the terms of the bid. Inclusion of disclaimer and disclosure will nudge the bidders towards integrity in the bidding process[7].

4. **Ensure insertion of warning clause:** A warning clause (including a provision for penal action) must be included in the bid documents to discourage the bidders from indulging in collusive practices. It must be mentioned that suspected instance of collusion should be reported.

[7]Depending on the exigency of requirement, sometimes at short notice, PSUs are required to procure material. Normal NIT have a closing window of 21-28 days. If a panel of eligible suppliers re-created through a tender process, subsequent procurement could be through limited tender through this empaneled supplier's rote. This would save time and effort. The empanelment may be kept open once a quarter so that new entrants can also be considered.

In Foundation for Common Cause v. PES Installations Pvt. Ltd. And Anr.[8]

The Commission while acting on information filed by an NGO found that three firms (bidders) had rigged bids in tender floated by the Hospital Services Consultancy Corporation (HSCC) for the procurement of equipment at the Sports Injury Centre, Safdarjung Hospital, New Delhi.

The Commission noted that the evaluation committee of bids after opening the bids changed the operation cost and maintenance cost after realizing that detailed estimates were never prepared for the complete work as tender design and specification were uncertain. Commission observed that earlier INR 10 crore were allocated for the quoted product with warranty of 5 years, Comprehensive Maintenance Cost (CMC) for 5 years and operational and running cost for 10 years but the contract was given at INR 16 crore with 5 years warranty and 5 years of operation cost.

The Commission held that in case where tender specifications, terms and conditions and estimated cost are uncertain, firms tend to collude and manipulate the entire bidding process to their advantage. Wide variation in bid prices quoted by the firms and initial cost estimates projected in Notice Inviting Tender (NIT) showed that firms had taken advantage of lack of expertise with HSCC. A better tender design and better cost estimation would have avoided a situation where winning firm was awarded contract at price almost 142% more than the estimated cost of bid. Moreover, HSCC combined conventionally two different segments i.e. Modular Operation Theatre (MOT) and Medical Gas Manifold System (MGMS) into one and asked bidders to have relevant experience in both the segments, resulting in elimination of competent suppliers specializing in one single field. This qualification criterion led to single vendor type of situation also.

[8] Case No. 43 of 2010, decided on 16/04/2012, available at: http://www.cci.gov.in/sites/default/files/432010.pdf (The case is currently at appellate stage)

SELECTION STAGE

1. **Clearly define selection process or methodology in the tender document:** To ensure that there is a competition compliant tendering process, it must be ensured that the selection processes are clearly defined in advance within the tender document.

2. **Conduct Electronic Bidding:** The Government of India has issued guidelines to upload the tenders electronically on the website www.cprocurc.gov.in or specific departmental websites for this purpose. Encouraging procurement agencies to use electronic bidding systems makes it accessible to a wider group of bidders. It enables the bidders to download the tender schedule free of cost and submit bids online. It also widens the supply base, increases transparency, reduces delays and is cost-effective.

3. **Maintain Confidentiality:** The bid selection process should be confidential and the mode of submission of the bid physically in office should be discouraged as it may lead to last minute communication/ signaling/deal making between the bidders. The bids should be received in a sealed envelope. Consider carefully what information to reveal at the time of bid opening. Only such information should be revealed to the bidders that is essential.

4. **Award of Tenders:** A single stage tender based primarily on price does not reveal efficient results. Price, as the only parameter for awarding contract can lead to inefficient procurement. Quality of the work may be compromised as price is the only criteria and the winning bidder may supply low quality product or give poor services. It may also encourage collusive bidding as it is easier to manipulate the price bid. Any of the past cases where the lowest bidder had refused to accept the award and/ or the tender was subjected to negotiation, may also be indicative of collusive bidding.

   Check reasons for not awarding to the lowest bidder in the past. If no cogent reason is there, there could be a possibility of withdrawal of bid by the winning bidder for some other consideration. Also check the reasons

for negotiation of the price, as the price quoted may be higher than market price on account of cover bidding.

5. **Check for similarities among proposals of bidders:** The award may be the victim of collusion, if on close examination of the proposals or applications submitted by the competing vendors are similar in following ways:

- Proposals contain similar handwriting, typographical, or mathematical errors.

- Two or more proposals are sent from the same mailing address, e-mail address, uniform resource locator address, fax number, or overnight courier account number.

- Bank drafts/ cheques were made from same bank to pay tender documents or earnest money.

- Proposals contain apparent last-minute changes (such as white-outs and cross-outs) to alter price quotes.

- The document properties of two or more electronic proposals show that the proposals were created or edited by one vendor.

- Two or more proposals have common authorized signatory.

- Two or more proposals have common Key Managerial Person/ Partner/ Proprietor.

- The document was authored by someone other than the supplier making the submission.

5A. Action that may be taken by Procurement Officers

- Collect further information

- Do not discuss with suspected participants

- Keep documents, including bid documents, correspondences, envelopes etc.

- Keep records of all suspicious behavior

- Refer the case to CCI (Appendix A gives details of how to file an information and also process flow of processing of such information)

6. **Check for discerning patterns among winning bidders: -** The award may be the target of collusion if review of the outcome of prior awards for the same product or service shows patterns over time. The absence of regular suppliers may indicate that they have not participated in the bid to avoid competition in exchange of some other consideration. Such patterns may be as follows:

- Over a series of awards, competing vendors rotate as the award winner.

- Over a series of awards, routine competing vendors win the same or similar amounts of work.

- Over a series of awards, one vendor always wins, regardless of competition.

- The vendor that wins the award sub-contracts work to losing vendors or to vendors that withdrew their proposals or refused to submit proposals.

- As compared with prior awards, a smaller number of vendors submitted proposals for the current award.

- Regular suppliers declined to participate in tender for no reasons.

- Local suppliers bidding higher rates.

7. **Look out for suspicious behavior:** The award may be the target of collusion if suspicious behaviour indicates that vendors worked

together instead of competing for the award. Such behavior may consist of the following:

- A vendor submits a proposal for a procurement or grant award, and it is known that the vendor lacks the ability to provide the goods or services requested.

- A vendor brings multiple proposals to an in-person procurement or grant process or submits multiple proposals.

- A vendor makes statements on the phone or by e-mail indicating advance knowledge of a competitor's prices or likelihood of winning the award.

- The bidder whose bid has been found to be the lowest evaluated bid withdraws from the procurement process.

- The bidder whose bid has been accepted, fails to sign the procurement contract or fails to provide the security as may be required for the performance of the contract.

- Voluntary discounts have been given by bidders after the price discovery process.

- Number of empanelled/Qualified contractors have not submitted their bids.

- More than one losing bidder submits identical line item bids on non-standard line items.

- Bids have been received from such bidders/contractors who are incapable of successfully performing the contract.

- Competitors have changed prices in similar amounts at about the same time.

Case References

Commission has found bidders indulging in following suspicious activities in various cases which procurer should monitor while evaluating the bids:

- Two bidders shared a common fax number and were related through common directors[9].
- Bidder have stated that their blue ink pen being used to fill up the cover page of the tender got exhausted when they were filling the price schedule. Hence, they used black pens to fill the price schedule of their bids. Such a co-incidence casts doubt upon the activities of the bidders[10].
- Tender documents were usually submitted in-person and the rates were normally filled with hand. It was further observed that the tender documents were to be submitted by 2:00 p.m. on May 08, 2009 and bid was to be opened at 3:00 p.m. on the same day. For submitting the bids, representatives of the bidding companies made common entries in the Visitors' Register. In fact, a representative of one bidding company made these entries on behalf of the representatives of other competitors as well[11].
- Scrutiny of the bid documents revealed that the 19 firms had similar handwriting in which the prices were quoted in figures and words in their respective bid documents. Demand Drafts (DDs) amounting to Rs.2000/- towards payment of tender documents fee by some of the bidders; both of same dates were in sequence and hence made from the same banker and at the same time. DDs having been submitted from one bank or set of banks by different banks were corroborative evidence to show some kind of collusion in rigging the bids[12].

[9] Suo Moto Case No. 04 of 2013 decided on 10/06/2015; available at: https://www.cci.gov.in/sites/default/files/04201327_0.pdf

[10] Case No. 34 of 2015 decided on 14/09/2017; available at: https://www.cci.gov.in/sites/default/files/34%20of%202015.pdf

[11] Suo Moto Case No. 02 of 2011 decided on 23/04/2012; available at: https://www.cci.gov.in/sites/default/files/Case2of2011MainOrder_0.pdf

[12] Reference Case No. 05 of 2011, decided on 21/02/2013; available at: http://www.cci.gov.in/sites/default/files/REF-052011_0.pdf

- Quoting identical prices right upto the last paisa alone is a very strong indicator towards a possible collusion amongst the bidders[13].

Foundation for Common Cause v. PES and Anr

Commission noted suspicious behavior of about three bidding firms (PES, MDD and MPS) as there was huge difference between the two losing firms (PES and MPS) and the winning bidder (MDD) in addition to one bid submitted by the losing firm (MPS) despite knowing the fact that neither it nor winning bidder (MDD) is eligible to bid. It established the fact that bidders acted in concert to share the profits by submitting complementary bids. Moreover, losing bidder (PES) despite being a major player in installation of quoted products submitted a losing bid by quoting a substantially higher financial bid and allowed MDD to win. It was a clear case of bid rigging in the form of sub-contracting wherein PES submitted a losing bid in favor of MDD, and thereafter received sub-contract from MDD. The story gets complicated with PES bagging contract for similar work at different hospital, with MDD and MPS submitting complementary bids.

In Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab[14]

Commission found all the three Research Designs & Standards Organization (RDSO) of the Indian Railways approved vendors, guilty of rigging the bids in a tender floated by the Diesel Loco Modernization Works (DLMW) for procurement of feed valves used in diesel locomotives. Commission discerned that two out of three bidders submitted complementary bids in response to the tender enquiry under consideration as two bidders were not, as a matter of fact, in competition with the third bidder in the procurement process. Offer of one bidder was found technically suitable, but its offer was passed over as it did not submit the cost of tender documents and other firm's offer was passed over as it did not accept the warranty clause as per conditions of the contract.

[13]Suo Moto Case No. 03 of 2012 decided on 05/02/2014; available at: https://www.cci.gov.in/sites/default/files/032012_0.pdf

[14]Suo Moto Case No. 03 of 2012. decided on 05/2/2014; available at: http://www.cci.gov.in/sites/default/files/032012_0.pdf

Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna[15]

In this case the Commission investigated 'bid rigging' by the Insurance Companies, in the tender floated by the Government of Kerala on 18 November 2009 for selecting the insurance service provider for implementation of the 'Rashtriya Swasthya Bima Yojana' (RSBY) (Tender). The Tender was intended as public procurement for social welfare schemes for families below the 'poverty line'.

The CCI considered the minutes of meetings attended by the parties which confirmed that the winner of the Tender was pre-decided by the Insurance Companies and that the Insurance Companies had agreed to share the business resulting from the Tender among them in an agreed ratio in which (United India Insurance Company Limited) UIICL quoted the lowest price.

The CCI also found that UIICL, in order to annually raise the premium price, terminated its contract with the Government of Kerala and forced re-tendering in the subsequent years 2011-12 and 2012-13. Both times, all four of the Insurance Companies, among others, submitted bids for the tenders and UIICL's price bid was found to be the lowest among the technically qualified bidders. The contract was, thus, re-awarded to UIICL in 2011-12 and 2012-13 at the raised premium priced demanded by it. CCI observed that in both these years, UIICL entered into business sharing arrangements with other Insurance Companies, namely, NICL and NIACL.

The internal office notes of UIICL and OICL indicated that the UIICL had contemplated jointly quoting higher premiums with the other Insurance Companies, and that OICL had participated in joint meetings of the

[15]Case No: SMC: 02 of 2014. Decided on 10/07/2015; available at: https://www.cci.gov.in/sites/default/files/022014S.pdf

Insurance Companies. For these foregoing reasons, CCI concluded that the Insurance Companies were cartelising to fix higher insurance premium rates. CCI ordered the Insurance Companies to cease and desist from such anti-competitive practices and also imposed penalties on them.

Delhi Jal Board v. Grasim Industries Limited and Others[16]

Delhi Jal Board (DJB) (the Informant) has been procuring Poly Aluminum Chloride (PAC), Alum (coagulant) and Liquid Chlorine (LC) (disinfectant) from the Opposite Parties for purification of water through tendering process. The Informant alleged that in case of negotiations over the bid price of PAC/LC, the Opposite Parties used to negotiate/ decrease the prices, to an equal extent and that the Opposite Parties were bidding collusively by quoting similar prices with a difference of INR 200-400 for certain quantity of the said chemicals from the year 2006-07 till the year 2012.

The Commission observed that the rates besides simultaneously increasing every year, were converging on a narrow band. Also, despite the fact that the plants were located in different geographical areas, the rates quoted by all the bidders remained substantially similar. It was also observed that in normal market conditions, the freight rate/km should decrease with the increase in the distance covered. However, contrary to the same, the freight rate of Gujarat Alkalies and Chemicals Ltd (GACL) which was farthest from DJB had the highest freight rate.

On examination of the cost of production of the product by the respective companies, CCI observed that the cost of production of GACL has been nearly constant whereas the cost of production of Grasim Industries Ltd (GIL) and Aditya Birla Chemicals (India) Ltd. (ABCIL) has been

[16]Ref. Case Nos. 03 & 04 of 2013 decided on 5/10/2017; available at: https://www.cci.gov.in/sites/default/files/Ref.C.%20Nos.%2003%20%26%2004%20of%202013%20%5BMajority%20Order%20%28p.1%20to%20p.90%29%2C%20Dissent%20Note%20by%20Member%20Sudhir%20Mital%20%28p.91%20to%20p.105%29%5D.pdf (The case is currently at appellate stage)

increasing, which was contrary to explanations of narrow band pricing offered by the parties, which attributed the same to PAC being a homogenous product.

The examination of the rates offered by the parties to other customers also revealed that the parties have been charging DJB higher rates than the rest of their customers. With respect to the conduct of GIL and ABCIL, it was noted that they have been continuously and throughout the tender process exchanging vital information with each other, be it sharing of the bid documents, prices to be quoted or even the negotiated prices to be offered.

Accordingly, in the absence of an economic rationale behind the behaviour of quoting similar rates by the bidders together with the prolonged supra-competitive pricing by GACL, the bid rotation, the tenders floated by other municipal corporations and the exchange of vital information taken in totality were sufficient enough as 'plus factors' and established concerted action and meeting of minds.

Consequently, the bidders i.e. ABCIL, GIL and GACL were found to have acted in a concerted manner in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act.

Coal India Limited versus Gulf Oil Corporation Limited and others[17]

The Informant in this case was using explosives manufactured by OPs for mining operations depending upon the type of coal mines. It used to procure explosives *via* a two stage process i.e. by inviting techno-commercial bids and price bids. However, after 2007-08 the Informant initiated Electronic Reverse Auction (ERA) for inviting bids. It was submitted that the respondents were in possession of 75 % of the total market and acted in a cartel like manner to hinder the transparent bidding process.

[7]Ref Case 06/2011: decided on : 16/04/2012; available at: https://www.cci.gov.in/sites/default/files/062011_0.pdf

It was submitted that the OPs did collective boycott of ERA for running contracts in January 2010, collectively gave threats to stop/stopping the supply of coal to the Informant, and fixed bid prices in 2009.

The Commission observed that bids quoted by the explosives suppliers were identical for the years *2006 -2007, 2008-2009* holding that there was a cartel and the suppliers were not taking decisions in an independent manner.

In Re: Aluminium Phosphide Tablet Manufacturers[18]

In a reference case against Excel Crop Care Limited ("Excel"), United Phosphorous Limited ("United"), and Sandhya Organics Chemicals ("Sandhya"), the Food Corporation of India alleged that OPs had formed a cartel and agreed to raise bid prices between 2007 and 2009 for Aluminium Phosphide Tablets (APT). FCI also claimed the companies had submitted identical rates in the tenders for the purchase of APT since 2002. The DG also found that the companies had uniformly boycotted a tender offer made by FCI in 2011.

Considering the arguments and findings, the CCI ruled that the companies had violated the provisions of Section 3 by their actions between 2009 and 2011. CCI held the "coincidence" of identical price quoting had a zero percent chance of happening without some type of agreement. Despite no "physical" evidence, the circumstantial evidence was enough. The companies had varying cost structures and geographical locations that would, in normal circumstances, assume different bid prices. Accordingly, penalty was imposed at the rate of 9% of the total turnover of the companies.

[18] Suo motu Case 02/2011 decided on : 23/04/2012; available at: https://www.cci.gov.in/ sites/default/files/Case2of2011MainOrder_0.pdf

India Glycols Limited versus Indian Sugar Mills and Others[19]

The Government owned Public Sector Oil Marketing Companies (OMCs) viz. IOCL/ HPCL/ BPCL invited quotations from alcohol manufacturers for supply of ethanol through a Joint Tender dated 02.01.2013 which was issued by BPCL on behalf of OMCs - as the coordinator of the tender process.

The Informant (India Glycols Limited), however, alleged that the sugar manufacturers who had participated in the Joint Tender of 2013 manipulated the bids by quoting similar rates and in some cases identical rates through an understanding and collective action in violation of the provisions of Section 3 of the Act.

The Commission observed that identical Basic Price of Rs.35600/- KL was quoted by Bajaj for 10 depots, by Dhampur for 6 depots, by Mawana for 2 depots, by Shamli for 2 depots and by Upper Ganges for 2 depots. Similarly, identical Net Delivered Cost of Rs. 41850.16/- per KL were quoted at 2 locations by 5 bidders.

Commission concluded that the parties have indulged in bid-rigging and that it was facilitated by Indian Sugar Mills Association on signals given by Ethanol Manufacturers of India. Consequently, penalty was levied upon the parties.

[19]Case No. 21, 29, 36, 47, 48 & 49 of 2013, decided on : 18/09/2018 (The case is currently at appellate stage); available at:
https://www.cci.gov.in/sites/default/files/C.%20Nos.%2021%2C29%2C36%_2C47%2C48%20%26%2049%20of%202013.pdf

EXECUTION STAGE

1. **Evaluate past performance:** The overall success rate of the past procurement processes may be evaluated to appreciate the outcomes of procurement. However, the importance of performance records should not be overemphasized for future contracts and wherever possible other relevant experience may be considered. In case of low performance, review reasons for such low performance and review procurement conditions for future tenders.

2. **Review changes in Terms and Conditions:** Any subsequent substantive change in the original terms and conditions should raise suspicion of collusive behaviour as it may affect the expected outcomes. Review reasons for change in terms of contract to see likelihood of collusion.

3. **Discourage Sub-Contracting:** The tender document should require bidders to disclose upfront if they intend to use sub-contractors. In case the winning bidder sub-contracts the work to unsuccessful bidders or the winning bidder does not accept the contract or is later found to be a sub-contractor of the winning party, then it must raise suspicion about collusive tendering. Similarly, greater vigilance is required if two or more businesses submit a joint bid even though at least one of them could have bid on its own, as it could be a way to split profits among bid riggers.

4. **Check patterns in Prices for Price-Fixing:** Price Fixing occurs when there is an agreement among competitors to raise, fix or otherwise maintain the price of goods or services.

   (a) The patterns in bid prices submitted by different parties indicate that there might be collusive behavior in bid prices. If the price quoted in the bids is similar, especially when the production

capacity and utilization for each bidder is different; this is a strong indicator of price fixing.

(b) Any sudden or identical increase in prices or price range would indicate that the bidders have no legitimate justification for increasing the bid price.

(c) The variation in the location of each bidder would normally be reflected in the bid price; any uniformity in the bid price should be viewed with suspicion.

(d) Price differences between winning bid and other bids indicate that the winning bid is not actually cost effective, but rather has been selected as such due to inflated prices being quoted by the other bidders – a form of cover bidding.

A comparative analysis of the bids offered by the same bidder, wherever possible also helps gauge the approximate cost incurred by that bidder. A significant difference between the same kinds of bids would clearly indicate that the bid price is being manipulated and inaccurate.

In Foundation for Common Cause v. PES and Anr

The evaluation committee of the Safdarjung Hospital (tendering authority) changed the terms and conditions, regarding the Comprehensive Maintenance Contract and Operation and Maintenance Cost, at the time of the evaluations of bids and added few additional items after Notice Inviting Tender (NIT) and pre-bid meeting. Moreover, winning bidder (MDD) did not have technical qualifications i.e. condition of exclusivity and requisite experience which was overlooked by the tendering authority. This led to bidders to collude and manipulate the

entire bidding process to their advantage because of lack of expertise with tendering authority. Finally, the order was placed at almost 142% more than the estimated cost of bid with reduced warranty and charges. Moreover, losing bidder (PES) is a major player in installation of quoted products but still submitted a losing bid by quoting a substantially higher financial bid and allowed MDD to win. It is a case of bid rigging in the form of sub contracting wherein PES submitted a losing bid in favor of MDD and thereafter received a sub contract from MDD.

MONITORING STAGE

1. **Establish a Complaint Handling System:** The establishment of complaint handling mechanism helps in identifying any anti-competitive behavior and making improvements in future bids.

2. **Establish a Whistleblower System**: The whistleblower system is a robust way to gauge any anti-competitive concerns/cartel detection. However, care must be taken to ensure that false complaints or anonymous/pseudonymous complaints do not derail the procurement process.

3. **Regularly Conduct Internal Audits:** The diagnostic tool can be used as an internal audit of the procurement process. The persons undertaking the diagnostic analysis should be technically competent and should also be aware of the market segments in which the procurement is taking place. Any suspicious tenders may be reported to the CCI for further investigation.

4. **Training Programs:** Conducting training programs would not only equip the employees with the requisite information to identify bid rigging on the supply side, but also apprise them of the way a procurement process is supposed to be run (a demand side issue).

5. **Educate yourself about Lesser Penalty Programme and refer it to any bidder in knowledge of a cartel:** The Lesser Penalty programme is internationally the best means of detecting presence of a cartel. This programme enables an entity which is a part of or has inside knowledge of a cartel to voluntarily disclose details of such a cartel to the Commission in exchange of Lesser Penalty that may be levied to the entity. If any bidder approaches you with any such information or willingness to disclose such information, refer the Lesser Penalty programme of CCI to such party and encourage it to file a lesser penalty application with the Commission. Please refer to Appendix B for details of Lesser Penalty Programme of the Commission.

APPENDIX A - HOW TO FILE AN INFORMATION / REFERENCE

If Departments/ Organizations while reviewing their tender processes detect cartelization or bid-rigging, they can approach CCI by filing 'Information' or 'Reference' under Section 19 of the Act.

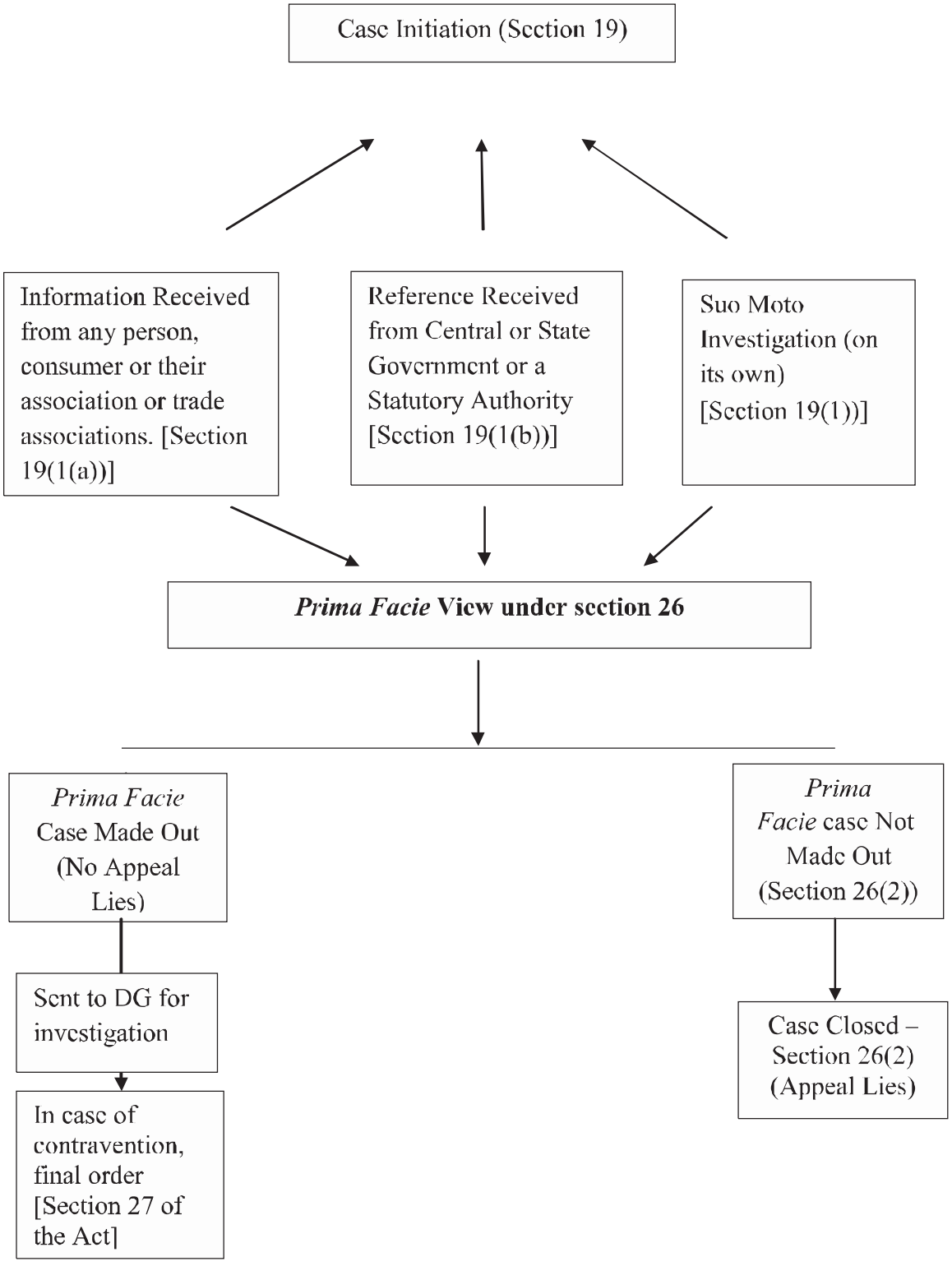
Any person, consumer or their association or trade association can file 'Information' as required under Section 19 of the Act, before the Commission. Central Government or a State Government or a Statutory Authority can also make a reference to the Commission for making an inquiry under Section 19(1)(b) of the Act. 'Person' includes an individual, Hindu Undivided Family (HUF), firm, company, local authority, cooperative or any artificial juridical person.

For further information on:

- The details required in the 'Information'
- The specific provisions to be invoked in an Information, and
- The fees to be paid and the address details

Please refer to the advocacy booklet 'How to File Information' available under 'Advocacy' section on CCI's official website. (www.cci.gov.in)

PROCESS FLOW



APPENDIX B – LESSER PENALTY PROGRAMME OF CCI

A transparent and predictable leniency programme has proven to be an effective tool in detecting, investigating and combating cartel cases worldwide.

In India, Lesser Penalty Programme is available for those enterprises/ individuals who disclose to the Commission their role in a cartel and cooperate with subsequent investigations and are rewarded by a reduction upto 100% of the penalty.

Lesser penalty can be imposed on account of such disclosure provided the following conditions are met:

a. The disclosure must be full, true and vital;

b. The disclosure must have been made before the Director General submits his findings under Section 26;

c. The person making the disclosure must continue to cooperate with the CCI till the completion of proceedings;

d. The person making the disclosure must not have given (i) false evidence and (ii) must continue to comply with the condition on which lesser penalty was initially imposed by the CCI.

Recently, the CCI amended its Competition Commission of India (Lesser Penalty) Regulations, 2009 *vide* notification dated 8th August, 2017. The key changes are as follows:

a. *Enlargement of the scope of Lesser Penalty programme*: Earlier, only enterprises could avail the benefit of the Lesser Penalty Regulations. The same has now been extended to individuals as well.

b. *Clarification on number of applicants covered under Lesser Penalty:* It has been now clarified that lesser penalty benefits can be accorded to more than three applicants.

c. *Clarification on officials of enterprises*: Explicit provisions have been incorporated to extend lesser penalty benefits to the officers of Lesser Penalty applicant, in case applicant is an enterprise.

In Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans[20]

The first instance in which Commission granted reduction in penalty to leniency applicant is in case of Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items. Commission initiated *suo-moto* investigation, based on the information received from the Central Bureau of Investigation (CBI), New Delhi *vide* letter wherein it was stated that during an inquiry into alleged misconduct by the public servant, CBI found that three firms (bidders), had cartelized in respect of the tenders floated by the Indian Railways and the Bharat Earth Movers Limited (BEML) for the supply of Brushless DC fans (BLDC fans) and other electrical items. One of the bidders during an investigation admitted that he had rigged the three tenders of Indian Railways for BLDC fans along with other two bidders and exchanged numerous calls, emails amongst bidders which continued during period of the tenders for rates to be quoted and quantities to be shared. Commission imposed penalty on the three bidders and on their respective office bearers at the time of the tender. Commission granted a 75% reduction in penalty to the enterprise and its office bearer each under Section 46 of the Act.

In Re: Nagrik Chetna Manch[21]

In this case the information was filed by Nagrik Chetna Manch before the CCI regarding alleged bid rigging by two bidders with respect to the tenders that were floated by the Pune Municipal Corporation (PMC) for the 'Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)' (i.e., the cartelized product). Thereafter, upon the request of the Director General (DG), four more bidders were added as parties to the action. During the course of investigation, all such parties, except for PMC, filed 'leniency application' under regulation 5 of the

[20]Suo Moto Case No. 03 of 2014, decided on 18/01/2017; available at: http://www.cci.gov.in/sites/default/files/Order__Suo_Moto_03_of_2014%20%28Final%29_1.pdf (The case is currently at appellate stage)

[21]In Re: Nagrik Chetna Manch (Case No. 50 of 2015), decided on 01/05/2018 available at: https://www.cci.gov.in/sites/default/files/50%20of%202015.pdf (The case is currently at appellate stage);

Competition Commission of India (Lesser Penalty) Regulations, 2009 (the Leniency Regulations) read with section 46 of the Act.

During the course of investigation, Lesser Penalty applications that were filed by some of the OPs disclosed the modus operandi of the cartel and provided documents and evidence in the Case. There were several apparent indications of collusion like same IP addresses, common proprietor/ director, same office address, consecutive serial number for DDs etc. Thus, on the basis of such evidences, the Commission held the OPs to be in contravention of Section 3(3)(d) of the Act. The Commission granted reduction in penalty to the OPs keeping in view the stage at which the lesser penalty application was filed, the evidences gathered by the DG independent of Lesser Penalty Application and co-operation extended in conjunction with the value addition provided in establishing the existence of cartel. Accordingly, 50 (fifty) percent reduction in penalty was granted to Mahalaksmi and Lahs Green and their individuals, 40 (forty) and 25 (twenty-five) percent reduction in penalty was granted to Sanjay Agencies and Ecoman, along with their individuals, respectively.

In re: Cartelization in Tender Nos. 21 and 28 of 2013 and No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing[18]

The Commission had taken *suo motu* cognizance of the case when lesser penalties applications were filed by the parties. It was found that the parties had cartelized in Tender No. 21 & 28/2013 and 59 of 2014 issued by Pune Municipal Corporation for design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s).

The Commission held that the parties engaged in the practices which directly or indirectly resulted in bid-rigging/collusive bidding in tender no 59 of 2014. During the investigation it was found that even though

[18]Suo motu case 02 of 2013; decided on 11-07-2018; available at: https://www.cci.gov.in/sites/default/files/Suo%20-%20Moto%20Case%20No.%2002%20of%202013.pdf

OP-2 (Eco Man Enviro Solutions Pvt Ltd) and OP-3 (Fortified Security Solutions) were separate legal entities and had bid as competitors, they had a common place of business and had a common managerial person. Further, the leniency application submitted confirmed that the OPs had formed a cartel to rig the bid and thereby had exchanged documents for submission of cover bids.

Suo motu Case No. 02 of 2013 In Re: Cartelisation by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters.[19]

In this case, the investigation by CCI was initiated on the basis of disclosures by Globecast India Private Limited and Globecast Asia Private under Section 46 of the Competition Act, 2002 (Act) read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 ('Lesser Penalty Regulations'). Subsequently, during the course of the investigation by the DG, Essel Shyam Communication Limited (ESCL), now Planetcast Media Services Limited, also approached the CCI. *Via* these leniency applications, it was disclosed to CCI that there was exchange of commercial and confidential price sensitive information between ESCL and Globecast through Mr. Bharat K. Prem, an employee of Globecast India Pvt. Ltd, which resulted in bid rigging of tenders for procurement of broadcasting services of various sporting events, especially during the year 2011-12.

From the evidence collected by the DG, CCI found that the ESCL and Globecast operated a cartel amongst themselves in the various sporting events (numbering fourteen) held during the years 2011-12 including IPL-2012. While submitting bids for the tender floated by various broadcasters during the period July 2011-May 2012 for provision of

[19] Suo motu case 03 of 2016, decided on 31-05-2018; available at:
https://www.cci.gov.in/sites/default/files/Suo%20Motu%2003%20of%202016%20.pdf
Suo motu case 04 of 2016, decided on 31-05-2018; available at:
https://www.cci.gov.in/sites/default/files/Suo%20Motu%2004%20of%202016.pdf

end-to-end broadcasting services, they exchanged information and quoted bid prices as per the arrangements arrived at amongst them. Accordingly, it was held that they committed an infringement of the provisions of Section 3(3)(d) read with Section 3(1) of the Act during this period.100 (hundred) percent reduction in the penalty was granted to Globecast and its individuals for making vital disclosure by submitting evidence of the alleged cartel, enabling the Commission to form a *prima facie* opinion. 30 (thirty) percent reduction in the penalty was granted to ESCL as the evidence furnished by it added value to the on going investigation.

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