

COMPETITION COMMISSION OF INDIA



RESEARCH PAPER

ON

BID RIGGING IN PUBLIC PROCUREMENT

UNDER THE GUIDANCE OF:

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DISCLAIMER

This project report/dissertation has been prepared by the author as an intern under the Internship Programme of the Competition Commission of India for the period of one month *i.e.* from 6th May 2013 to 31st May 2013, academic purposes only. The views expressed in the report are personal to the intern and do not necessarily reflect the view of the Commission or any of its staff or personnel and do not bind the Commission in any manner. This report is the intellectual property of the Competition Commission of India and the same or any part thereof may not be used in any manner whatsoever, without express permission of the Competition Commission of India in writing.

UNDERTAKING

I do hereby undertake that this particular report has been prepared as a part of the internship program at the Competition Commission of India by the intern. All the information contained herein is true to my knowledge and understanding.

The report has been drafted from various resources and is the result of the research carried on. Various resources from which the data is taken and incorporated have been duly acknowledged.

ACKNOWLEDGEMENT

I would like to extend my sincere gratitude to The Competition Commission of India, for giving me an opportunity to intern at the commission.

In specific, I would like to thank Dr. K.D. Singh, Deputy Director (Law) for being a guiding force throughout this submission and being instrumental in the successful completion of this project without whom every effort would have been in vain. He has been kind and patient throughout, to give me his precious time. His invaluable inputs and suggestions are deeply acknowledged. Library Staff of CCI also helped me throughout the internship period.

Lastly I would like to thank Ms. Manisha Gupta, Office Manager, and the library staff who have been very co-operative throughout.

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PREFACE

As is evident from the title of the Research Paper, it primarily focuses on the malice of bid rigging rampant in the Indian public procurement regime. This report has been comprehensively drafted to cover the concept of public procurement, its impact on the economy of a country, the problem of bid rigging and other challenges to efficient procurement along with an analysis of the Public Procurement Bill, 2012.

An attempt has been made to highlight Indian and foreign jurisdiction cases dealing with bid rigging in order to throw light on the factors, which prove the existence of an agreement for bid rigging. The Report also covers certain OECD guidelines and certain warning signs useful to detect bid rigging. As part of the conclusion, some other factors have been pointed out which might be useful in combating the problem of bid rigging in public procurements.

RESEARCH METHODOLOGY

Research Methodology in this project is doctrinal and secondary sources of information are relied upon. Articles, case laws and books by various writers are referred to.

SCOPE AND LIMITATIONS

The scope of the research paper is limited to bid rigging in public procurement in India. The objective of the researcher is to find out feasible solutions to combat this plague.

CHAPTER – I

INTRODUCTION

Public Procurement:

Public procurement is the act of purchase of goods and services by a public sector entity for achieving certain specified and identified objectives. According to Wikipedia, procurement is the acquisition of appropriate goods and / or services at the best possible 'total cost of ownership' to meet the needs of purchaser in terms of quality and quantity, time and location. When goods or services are purchased by a public sector, it is called public procurement. As has been stated, *'it is the process by which Governments and public sector institutions buy inputs for vital public sector investments in physical infrastructure and for strengthening institutional human capacities which lay the foundation for national development'*¹.

Public Procurement is an essential government activity that affects a country's economy. With 10 to 15 percent of the national budgets in developed countries, and upto 20 percent in developing countries, government procurement accounts for a substantial part of the economy.² Similar case exists for India where public procurement is an important means for not only meeting day-to-day functional needs, but also for fulfilling socio-economic objectives and promoting economic growth. Various ministries, departments, municipalities, other local bodies, statutory corporations and public undertakings both at the Centre and State levels in India carry out public procurement. In India it constitutes around 25-30 per cent of GDP. It is noteworthy that key departments of the Government such as defence, railways and telecommunications spend about 50 per cent of their budget on procurement. It is estimated that the annual expenditure on public procurement for the Union Government is in the range of Rs. 2.5 ó 3 lakh crores. As public resources are limited, the primary goal of public procurement policy is to achieve 'value for money', i.e. to

¹ Unidentified author, *'Public procurement reforms to enhance value for money'*, 16th November 2009, http://saiindia.gov.in/sites/default/files/6publicprocurementreforms15_12_09pdf

² Pratyush Sinha, CVC, *'Enhancing value in public procurement'*, Conference on Competition, Public Policy and Common Man, 16th November 2009, <http://www.cci.gov.in/menu/speechesbypratyushsinhacvc.pdf>

procure best goods and services at the lowest price.

Guiding Principles of Public Procurement:

Rule 137 of GFR enunciates the fundamental principles of public buying:

- “ Adequate information and announcement
- “ Transparency of bidding as well as evaluation process
- “ Accountability
- “ Non-restrictive bidding conditions to unlock market
- “ Non-discriminatory practices to provide equality of opportunity

Process Of Public Procurement:

One of the most common and popular mechanisms of public procurement is the tendering system. In the usual course, it involves the following stages:

- a) Identifying the broad scope of work and prescribing technological specifications/standards by the Government or authority concerned;
- b) Inviting tenders from various interested parties. Technical and financial bids being usually invited separately;
- c) Evaluation of technical bids. This enables to shortlist bidders whose financial bids would be evaluated;
- d) Evaluation of financial bids of the shortlisted bidders. After this step the bidder that can provide the goods or services to the Government at the lowest cost is identified; and
- e) Executing a legally binding contract with such shortlisted bidder.³

Public Procurement- An Important Governmental Activity:

In recent times, public procurement has been impacting the economy significantly by generating demand and consumption. Government, by virtue of its purchasing power can steer the market in a particular direction. Public procurement also serves as an instrument to attain social outcomes. By way of preferential treatment in procurement, it may be used to promote indigenization of foreign technology, development of

³ http://indialawjournal.com/volume4/issue_4/article_3.html

backward regions or protection of small-scale industry. Of late, procurement is also being leveraged to promote the causes of environment, human rights, protection of children and gender equality⁴. Following are some of the representative factors that highlight the academic importance of public procurement:

- Very large sum involved.
- Large size of contracts involved, particularly those relating to infrastructure and defence.
- **Huge stakes:** while the taxpayers look for value for money, transparency and nondiscrimination, the general public look for quality of goods / services and responsiveness / efficiency.
- **Significant impact on domestic industry:** through development, construction work, purchases and overall buoyancy in the economy.
- **Significant impact on society:** through provision for labour laws, minimum wages and health standards.
- **Governance:** the image of any Government is largely influenced by the quality of public procurement.

Need For Transparency And Fairness In Public Procurement:

Public procurement has a pivotal importance in our everyday lives as it plays a key role in the creation of both social and economic infrastructure like roads, schools, hospitals, provisions for drinking water and sanitation etc. As stated above, sectors like railways, defence, health, and telecommunication have allocated significant portions of their budgets to public procurement. In many OECD countries, expenses related to procurement amount to 15 per cent of the gross domestic product and in most developing countries, this could be substantially higher. Also, in view of the fact that in India, public procurement system accounts for around 30% of the country's GDP, the importance of having an effective public procurement system can never be understated. Taken ideally, public procurement would mean acquisition of goods or services at the best possible cost, in the right quality and quantity, at the right time, in the right place and from the right source, for the ultimate benefit of the people at large.

⁴*Supra* footnote 2

Public sector, being a large purchaser of goods and services, can influence the overall resource allocation, competitiveness and economic efficiency in the economy. Transparency in public procurement is sought to be achieved through an open and nondiscriminatory competitive bidding. It is, therefore, important that the procurement process is not distorted by practices such as collusion, bid rigging, fraud and corruption.⁵ Efficient and competitive procurement processes are thus key to obtaining goods and services at the best value for money to the benefit of taxpayers, end consumers and users of public services in general.

However, certain rules that govern procurement, the way in which a tender is carried out and the design of the tender itself can hinder competition and promote collusion arrangements or bid-rigging conspiracies between competitors.

Public Procurement And Corruption:

Procurement is the acquisition of goods or services by public bodies and private companies. The prime objective of any procurement is getting the right product or service, at the right price and quality at the right time. However, procurement processes are also highly vulnerable to corruption, collusion, fraud and manipulation. Estimates suggest that 20-30 per cent of the value of procurement may be lost through corruption while on the other hand procurement itself is estimated to constitute 15 per cent of gross domestic product (GDP) in OECD¹ countries, a higher percentage in developing economies and up to 45 per cent of government spending in some economies⁶.

Objectives In Public Procurements:

Following are some of the representative objectives in public procurement:

- Get the best value for taxpayer's money.
- Provide opportunity to all eligible bidders.

⁵*Fair Play Promoting and Sustaining Competition in Markets*, Quarterly Newsletter of CCI, Vol. III, Oct 6 Dec 2012

⁶ United Nations Convention against Corruption: Implementing procurement-related aspects - Submitted by the United Nations Commission on International Trade Law

- Promote and sustain competition.
- Ensure transparency and openness.
- Build in accountability and responsibility.
- Reduce scope for corruption and abuse.
- Develop domestic economy.
- Be a model purchaser and employer.

CHAPTER – II

PUBLIC PROCUREMENT IN INDIA

Status Of Procurement System In India:

In India, in spite of the acknowledgement of the expediency of having a properly established procurement system, no such institutionalized system of procurement exists as of date. The principal role is played by Ministry of Finance in the Central Government, which issues basic guidelines that are supposed to establish the 'canons of financial behaviour'. Central agencies like the Central Vigilance Commission (CVC) supplement this effort by laying down vigilance benchmarks in the procurement system. Yet, some ministries come out with their own rules and regulations that are supposed to be followed by all ministries while implementing their procurement policies. These manuals provide for preferential treatment to earmarked sectors such as micro, small and medium enterprises (MSME)⁷, khadi and village industries (KVI), Kendriya Bhandar, co-operative sectors etc. Apart from that, the individual ministries and departments in the Government of India also are increasingly having their own procurement policy.

The situation at the State level is in an even further degraded condition. Many state governments are yet to institutionalize a procurement system that is transparent, flawless and consistent with the three Es i.e. economy, efficiency and effectiveness. In fact, at state level, procurement procedures are not available, financial advice system is not established and audit mechanism is questionable.

Such a haywire, unkempt and chaotic procurement system in India, both at national and state levels, has resulted in improper utilization of the taxpayer's money, procurement of lower quality goods and in recent times, formed the basis for major scams in the country.

⁷ In fact, the Ministry of Micro, Small and Medium Enterprises (MSME) is in final stages of issuing a public procurement policy that is likely to make it mandatory for all ministries and public sector undertakings to procure 20% of their total annual purchase volume from the micro and small enterprises.

Features Of Public Procurement System In India:

The procurement system in India has the following features:

- **Centralized procurement by clubbing of demand.** The theory of centralized procurement led to the establishment of DGS&D, which made procurements on behalf of almost all Central Government ministries and departments. However, the problem is that too much centralization of procurement often leads to generation of very large demands, indifferent approach particularly towards quality, associated delays and unhealthy practices.
- **Provision for various modes of procurement** such as open tendering, limited tendering, rate contracts, purchases by purchase committee and purchase from market.
- **Checks and balances** to ensure that any stakeholder does not misuse the entire procurement system at any stage. However notwithstanding this, the public procurement system in our country has not proved to be as efficient to combat the evils of corruption, bid rigging etc.
- **Transparency** through adherence to rules / regulations and instructions issued by various departments of the Government such as CVC.

Government Guidelines On Procurements:

Detailed rules and instructions relating to procurement by the Central Government are contained in the following:

- General Financial Rules (GFR),
- Delegation of Financial Powers (DFPR), and
- Manual on Policies and Procedures for Purchase of Goods.

A revision of these rules is made from time to time. These rules have to be followed by all departments under the Central Government for any public procurement that is made by such departments.

However, major ministries such as Defence, Railways, Public Works, Central Purchase Organisation (Directorate General of Supplies and Disposal) etc. have their own purchase procedures. These procedures are also more or less based on the

guidelines contained in the GFR and DFPR. The basic guiding principles of public procurement, *interalia*, include the following:

- **Maximizing economy, efficiency and effectiveness in procurement:** This would mean purchasing of goods / services of required specifications for the intended purpose in a required time frame at the most economical price.
- **Fairness:** providing fair and equitable treatment to all prospective suppliers / bidders.
- **Competition among suppliers for supply of goods / services to be procured:** so that efficiency can be rewarded and procurement can be made at the most economical price.
- **Achieving transparency** in the procedures relating to procurement.

Importance Of The Procurement Manuals:

The procurement activity in Government has been characterized by significant developments in recent times.

- a) *First*, there has been tremendous increase in the volume of procurements being done by the government.
- b) *Second*, the procurement environment itself is in a flux, partly because of the influence of liberalization, privatization and globalization (LPG). While many items were being produced by different Government production departments/ PSUs etc., the Government is no longer a 'willing producer' in many areas and making the procurements from market. Also, the impact of information technology is also quite visible with many procurement procedure undergoing concurrent changes.
- c) *Third*, while there is no dearth of rules regulations guiding Government procurement, the same are not available as 'ready reckoner' when needed.⁸

As a result, many departments have started using procurement manuals for their use. These manuals have certain inherent benefits some of which are as under:

⁸<http://nadfm.nic.in/learning/Research%20Cell/Public%20Procurement%20%20problems%20and%20prospects.pdf>

- **Caters to the fastidious needs:** The documents of Government of India like GFR and DFPR are of a general nature and meant for all departments. Even though it is true that they lay down the basic structure for procurement mechanisms, however, they are not as extensive and, therefore, fail to satisfy the specific requirements of individual departments. Moreover, the Central Vigilance Commission (CVC) has been encouraging all ministries / departments to come out with their own procurement manuals.

As has been stated by the CVC, *'the cardinal principle of any public buying is to procure the materials / services of the specified quality, at the most competitive prices and, in a fair, just, and transparent manner. To achieve this end, it is essential to have uniform and well documented policy guidelines in the organization so that this vital activity is executed in a well-coordinated manner with least time and cost overruns... A codified purchase manual containing the detailed purchase procedures, guidelines and also proper delegation of powers, wherever required needs to be made by all the organizations so that there is systematic and uniform approach in the decision-making'*.⁹

- **Consolidation of all documents:** One of the most important benefits of manuals is the availability of all Government document and papers issued by the concerned ministry / department in one place. The overall structure of broad policy guidelines set by Ministry of Finance guidelines (such as GFR, DFPR) and CVC guidelines guide the framing of manuals. Moreover, even the prescribed formats are available for ready reference.
- **Updated frequently:** The manuals are updated from time and time in response to changes in external environment and feedback received from different stakeholders. For example, the now famous defence procurement procedure (DPP) and the defence procurement manual (DPM) have been updated from time to time, the latest being in 2011 and 2010 respectively.
- **Procedural simplicity:** Existing rules / regulations / orders are put into laymen terms along with clarifications, wherever warranted. The aim to have a

⁹Chief Technical Examiner's Organisation, CVC, *'Common irregularities / lapses observed in stores / purchase contracts and guidelines for improvement in the procurement system'*, <http://cvc.nic.in/vscvc/purguide.pdf>

simple procurement system easily understood by a common man.

- **No scope for ambiguities:** The possibility of multiple interpretations of the GFR / DFPR and other rules and regulations create a lot of confusion and lack of trust among the bidders. Manuals do not leave any space for such interpretations. For example, the DPM 2009 (as supplemented by 2010 edition) defines most terms and phrases that are used in day-to-day contract management in defence sector.

Major Concerns In The Procurement Regime In India:

The Indian procurement system has the following challenges and concerns:

- **Multiple procurement guidelines & procedures:** Unlike in the U.S. where the Federal Acquisition Regulation is the code governing public procurement of supplies and services, in India we have multiple procurement guidelines, which create confusion both for the procurers as well as the bidders. There is neither a single comprehensive public procurement standard to deal with public procurement policy. In the U.S, the procedures issued by the various other organizations are only supplementary to the Federal Acquisition Regulations. Office of the Federal Procurement Policy, which operates these regulations, is centrally responsible for all policy matters relating to public procurement. A committee consisting of the heads of the major procuring organizations heads this office. It is the need of the hour to have a similar procurement mechanism in India.
- **Absence of standard tender documents and contracts:** According to an estimate, more than 150 contract formats are being used by the public sector. Even for similar work different agencies use different tender documents in terms of prequalification criteria, process of selection, settlement of dispute, financial terms and conditions etc. Such variations in tender documents and contracts lead to confusion and complications among bidders.¹⁰
- **Over emphasis on procurement procedures and guidelines:** In India there is too much emphasis on strict adherence to the procurement policies without giving any thought to the objective and purpose of such policies. While

¹⁰ <http://sps.iitd.ac.in/PDF/SGP.pdf>

applying any policy, regard needs to be given to its effect, as to whether it is aiding in the promotion of competition, transparency and fairness in the procurement system, etc. This blind application of these procedures can at times lead to abuse of the procurement procedure by the bidders.

- **Absence of a Transparent Grievance Reprisal Mechanism:** In case of a grievance against an award of a contract, complaint can be lodged with the procuring agency. However, it leaves very little scope for transparency. In case where the procuring officials have participated in the manipulation of the outcome, chances are very low that the aggrieved bidder will get a fair hearing.¹¹
- **Unskilled manpower and lack of training:** In our nation, public procurement is treated, as an unskilled activity in spite of knowing the importance of its impact on the economy. Even the most critical and complex procurements are handled in a non-professional manner. Except for the Railways and the DGS&D, no other organization has created a specialized cadre for this purpose. There is need to recruit specialized staff for this purpose.
Also, India still doesn't have any dedicated institutional arrangement for training on procurement related issues, despite a huge chunk of tax payers' money going for public procurement. That results in poor quality of training since a large proportion of procurement training is done in-house in various departments of the Government. The international experience is totally different. The United States has, for example, a dedicated Defense Acquisition University¹² for training on defence related procurements.
- **Frequent updates of manuals:** The practice of frequently updating the policies and manuals without performing the impertinent task of informing the procurement officials of such changes can lead to a serious problem. In such situations the officials may at times act in variance with the existing guidelines, which could make the entire procurement process to be infructuous.
- **Ambiguity and lack of clarity in manuals:** The risk of manipulating the procurement process increases in cases where there is ambiguity in the

¹¹ *ibid*

¹² www.dau.mil

procurement manuals that can lead to multiple interpretations.

- **Procurement postings not linked to qualifications:** Unlike many countries, procurement postings in India are not linked to functional qualifications. So many a times, the procurement officers / managers are often at variance with their job requirements and therefore do not stand upto expectations.
- **Frequent transfers of officials:** The bureaucratic system in India does not allow for an official to be posted in the same department for a substantial period of time so that he may pick up the type of work. As a result, incumbents face frequent transfers due to which they cannot do complete justice to their professional expectations. An example would be, the delegation of financial powers in the Ministry of Defence has been supplemented by posting of dedicated IFAs at all levels. However, the dedicated IFA may return to the Defence Accounts Department to work in audit, payment or even pension. This tendency discourages job specialization in the department with a result that the dedicated IFA may still think / behave as auditor / paymaster.
- **Lack of avenues knowledge building:** Procurement officials at all levels do not take interest in keeping themselves updated about the procurement policies and procedures. Neither is there in place any avenues or incentives for people who keep themselves updated. This leads to a situation where sometimes an official might not be aware of the procurement policies of his department.
- **No centralized data sharing facility:** Whether it is decision-making, crisis management, operational issues, negotiations or training and capacity building exercises, the availability of updated data induces elements of rationality and objectivity into decisions that are likely to be effective and sustainable. In the organized sectors such as Government, the role of data sharing cannot be undermined since it brings a lot of uniformity and cost-effectiveness into the hitherto vast and complex bureaucratic organisation.
- **Absence of a central authority for framing policies for public procurement:** In India at the present time, there is no central authority that is exclusively responsible for defining and ensuring compliance with the procurement policies of the departments. The powers to frame regulations and make arrangements for procurement are bestowed to the particular Ministries or Departments. In cases, where such a Ministry or Department does not have

the necessary expertise, the procurement is routed through DGS&D.

- **No authority to regulate and ensure compliance with procurement policies:** There are many agencies regulating public procurements. The Government of India has framed rules for procurement of goods and services and contract management. Bodies like the Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG), the Central Bureau of Investigation also play an important role in the governance of public procurements but that role is, at best, only ex-post facto. These agencies or authorities come into play only after an alleged irregularity or malpractice has taken place and therefore, there is lack of a framework and machinery to attack and abolish such practices from their roots.

Furthermore, the Competition Commission of India (CCI) also has an important role in the regulation of public procurement. CCI does not have the mandate to investigate into alleged corrupt practices done with a view to give undue benefit to some bidder. CCI can only, intervene in cases where such calamitous practice has caused or is likely to cause an appreciable adverse effect on competition in India (AAEC). So, where corruption and anti-competitive practices get intertwined in a procurement process, multiple agencies may get involved in the investigation, in accordance with their own respective mandates, which may (though not always) result in a turf war of sorts, depending on how the mandate is interpreted by the concerned authority or agency.¹³

- **Lack of an exclusive law dealing with public procurement:** The absence of an exclusive public procurement law leads to inconsistency in the contractual conditions and the obligations arising from the same. However, it is apposite to mention here that a Public Procurement Bill has been framed and is pending approval by the Legislature. The enactment of this law would herald a new era for public procurement system in India.
- **Unfair and discriminatory conditions in tenders:** In certain cases, the government procurers impose unfair conditions in the tenders floated, which curtails a significant portion of the contractors to participate in tender process thereby resulting in denial of market access, which (in cases where the

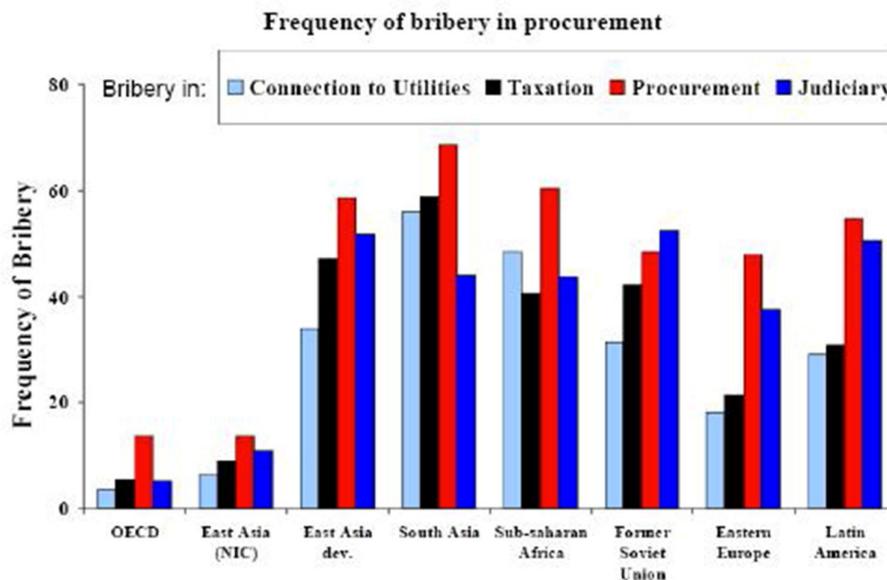
¹³ http://indialawjournal.com/volume4/issue_4/article_3.html

procuring department is a dominant undertaking) is in itself an anti-competitive conduct under Section 4(2)(c) of the Competition Act, 2002.

- Corruption:** The malignant problem of corruption exists at every stage of the procurement process and at times, the very demand for a good or service is artificially created by unscrupulous persons so as to benefit private parties; confidentiality of bids are abused; specifications are added or tweaked at the last moment before submission, to favour a particular bidder, after awarding the contract, corrupt officials may accept contractor's unjustified requests for increment of costs, thus benefiting the contractor and causing a loss to the Government.

In a research article titled '*Study on Government Procurement*' by Devika Malhotra, an IIT Delhi student, the author notes the following fact:

Such practices of bribery are very frequent in almost every part of the world. In one of the World Bank studies, frequency of bribery has been reported in public procurement from 117 countries across the world. The highest frequency is seen in South Asia and the lowest in OECD and East Asian countries. The bar chart below shows the frequency of bribery in public procurement.¹⁴



Source: Kaufmann, World Bank (2006), based on Executive Opinion Survey 2005 of the World Economic Forum covering 117 countries. Question posed to the firm was: In your industry, how commonly firms make undocumented extra payments or bribes connected with permits / utilities / taxation / awarding of public contracts / judiciary?

¹⁴ <http://sps.iitd.ac.in/PDF/SGP.pdf>

CHAPTER - III

BID RIGGING IN PUBLIC PROCUREMENT

Public Procurement And Competition Concerns:

Competition and procurement law and policy both derive from the fundamental principle that, in the long term, competitive markets produce benefits to the economy and to society as a whole. However, despite this common aim of the two sets of rules, there is surprisingly little discussion of their relationship. This is, perhaps, partly because of the uncertainty surrounding the application of the competition rules to public sector bodies.¹⁵

Public procurement is generally carried out through competitive bidding or tendering process with the objective of achieving maximum economic efficiency by getting the best value for taxpayer's money. Any anticompetitive practices in a procurement process, such as collusion, bid rigging, or corruption, could lead to artificially raise prices and consequently adversely impact public expenditure and the precious national resources. Ensuring effective functioning of public procurement markets is also part of good governance and necessitates the following inter-related challenges:

- a) Ensuring integrity in the procurement process which focuses on preventing corruption on the part of public officials; and
- b) Promoting effective competition among suppliers which focuses on preventing collusion among potential bidders.

The effectiveness of public procurement and its ability to contribute towards maximizing economic efficiency is dependent upon the existence of competition in two respects. One of them has been expressly recognised for a long time by public procurement regulations, which have tried to foster *competition within the specific tender*. Public procurement rules protect and promote competition in this narrow sense as a means to achieve value for money and to ensure the legitimacy of purchasing decisions. From this perspective, competition is seen as a means to allow

¹⁵ Catriona Munro, 'Competition law and public procurement: two sides of the same coin?', Public Procurement Law Review, 2006, 6, at p. 352

the public purchaser to obtain the benefits of competitive pressure among participating bidders, as well as a key instrument to deter favoritism and other corrupt practices and deviations of power. However, a subtler and stronger dependence of public procurement on *competition in the market* exists, but it is implicit and has generally been overlooked by most public procurement studies. *In order to attain value for money and to work as a proper tool for the public sector, public procurement activities need to take place in competitive markets.* The existence of competitive intensity in the market is usually taken for granted, or simply disregarded, in public procurement studies. In general terms, this approach is correct in that public procurement is not specifically designed to prevent distortions of competition between undertakings. However, *issues regarding competition in the market are not alien to public procurement*, and need to receive further attention and a stronger emphasis. Hence, the opportunity and interest of this special issue on the enforcement of competition law in the public procurement setting can hardly be overstated.¹⁶

The Problem Of Bid Rigging:

One of the most common and popular mechanisms of public procurement is the system of tenders. Competitive public procurements could result in the selection of the most competitive seller to the buyer (the Government) ensuring maximum savings for the latter and, consequently, the taxpayer. However, the unfortunate truth is that public procurements are not always competitive. One of the more common maladies afflicting public procurements is 'bid rigging' or 'collusive bidding'. Some of the so-called competing firms would coordinate with each other, in some form or the other, with an objective to affect the outcome of the tendering process in a manner conducive to them.

What Is Bid Rigging and Collusive Bidding?

Collusion can be thought of as any conduct adopted by a group of firms that aims at reproducing or approximating the market outcome induced by a single, dominant

¹⁶ Albert Sánchez Graells, 'Public Procurement: An overview of EU and national case law, e-Competitions', N° 40647, www.concurrences.com Available at: <http://ssrn.com/abstract=1968371>

firm.¹⁷

Generally understood, collusive bidding covers corrupt practices as well as other facets of bid rigging. However, in India the scenario is different, collusive bidding is not defined and it may be taken as an alternate to bid rigging. In the absence of a clear definition of bid rigging, the scope of application of section 3 of the Competition Act, 2002 has been limited.¹⁸

Bid rigging occurs when bidders agree among themselves to eliminate competition in the procurement process, thereby denying the public a fair price. Bidders can eliminate competition in public procurement in many simple ways, for example:

- A competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer.
- A competitor agrees not to bid or to withdraw a bid from consideration.
- A competitor agrees to submit bids only in certain geographic areas or only to certain public organizations.

Although the schemes used by firms to rig bids vary, they all have one thing in common ó the bidders agree to eliminate competition so that prices are higher and the government pays more.¹⁹

It is illegal to seek to fix the outcome of a bid or tender process where businesses are invited to submit offers to win a proposed contract. Bid rigging can take many forms. There may be direct liaison between competitors in relation to each bid. Any exchange of information between competitors about the price or terms and conditions, which they are planning to offer, is likely to be highly risky in competition law terms. Bid rigging can also take the form of prior agreement about the percentage or value of contracts that each competitor will win each year. Bid rigging can also reflect wider cartel arrangements between the parties, such as price fixing or market sharing.

Dishonest involvement in bid rigging is a criminal offence in the UK. Where a business is unable to bid independently, a joint bid with a competitor can be legal.

¹⁷ Albano et al 2006 *Preventing Collusion in Procurement: a Primer*

¹⁸ *Supra* footnote 10.

¹⁹ <http://www.oecd.org/competition/cartels/42594486.pdf>

However, this will normally have to be an openly joint bid and legal advice should be sought in advance of entering into any such arrangement.²⁰

Types Of Bid Rigging:

The Competition Commission of India, that has been striving to address the competition concerns in the public procurements, has studied the issue in detail and identified following types of techniques through which bids can be rigged:

- **Collusive bidding:** Collusive bidding can take form of an agreement among firms to divide the market, set prices, or limit production. It can involve wage fixing, kickbacks, or misrepresenting the independence of the relationship between the colluding parties.
- **Bid rotation:** In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e. lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary.
- **Cover bidding:** Cover (also called complementary, courtesy, token or symbolic) bidding occurs when individuals or firms agree to submit bids that involve at least one of the following:
 - a) A competitor agrees to submit a bid that is higher than the bid of the designated winner,
 - b) A competitor submits a bid that is known to be too high to be accepted, or
 - c) A competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser.
- **Bid suppression:** Bid suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted.
- **Market allocation:** Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts

²⁰www.ashurst.com/doc.aspx?id_Resource=5270

offered by a certain class of potential customers, which are allocated to a specific firm²¹.

Market/ Industry, Product And Service Characteristics That Help Support Collusion:

The OECD Guidelines For Fighting Bid Rigging in Public Procurement provide that although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Some of such characteristics are:

- **Small number of companies.** Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- **Little or no entry.** When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid rigging efforts.
- **Market conditions.** Significant changes in demand or supply conditions tend to 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.
- **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, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- **Repetitive bidding.** Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate

²¹ *'Public procurement: achieving best value through competition'*, <http://www.cci.gov.in/menu/backgNote091212.pdf>

contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.

- **Identical or simple products or services.** When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- **Few if any substitutes.** When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- **Little or no technological change.** Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.
- **Standardized products.** The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service.²²

²² http://www.justice.gov/atr/public/guidelines/disaster_primer.htm; OECD: Guidelines for fighting Bid-rigging in Public Procurement. Available at: <http://www.oecd.org/dataoecd/27/19/42851044.pdf>

CHAPTER – IV

BID RIGGING & COMPETITION LAW

Bid Rigging under Section 3(3) of the Competition Act:

Section 3 of the Competition Act, 2002 deals with anti-competitive agreements. Sub-section (1) of Section 3 prohibits an enterprise or person or their association from entering into any agreement which causes or which is likely to cause appreciable adverse effect on competition within India.

Sub-section (2) of Section 3 declares such agreements, which are entered into in contravention of sub-section (1) to be void.

The relevant portion of sub-section (3) of Section 3, which explicitly covers and expressly bars bid rigging, is reproduced below:

“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—

...

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition”

The Explanation to Section 3(3) defines bid rigging as follows:

“For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.”

Therefore, under the Competition Act, 2002 an agreement among persons or

enterprises engaged in identical or similar production 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 within India and therefore would be void under the ambit of the Act. Agreements among competitors to rig bids or allocate customers are such per se unreasonable restraints of trade and illegal.²³

The U.S. Supreme Court in the case of in *United States v. Socony-Vacuum Oil Co.*²⁴, concluded that certain types of conduct, including price-fixing, are so patently anticompetitive that they violate the Act without proof of unreasonableness in each case and accordingly held that “*under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.*”

Bid Rigging--A Price-Fixing Cartel Or A Separate Competition Law Infringement:

In bid rigging generally the enterprises agree on the prices to be quoted or engage in bid rotation or bid suppression, and thus, bid rigging is not very different from a horizontal price-fixing agreement. Hence, in a majority of the cases, bid rigging deals with fixation of the price²⁵, market sharing²⁶ or a mixture of both. Hence, in the beginning of the anti trust regime in the United States the phenomenon was considered as a form of price fixing²⁷.

Similarly, in the European Union, the European Commission in the *Pre-Insulated pipe* case considers bid rigging as an aspect of the cartel rather than a type of restrictive behaviour.

According to the Commission the cartel consisted of a price-fixing and market-

²³*United States of America, Plaintiff-Appellee, v. Koppers Company, Inc.*, Defendant-Appellant, 652 F.2d 290, 1981-1 Trade Cases P 64,134 at p.293

²⁴310 U.S. at 223, 60 S.Ct. at 844, 84 L.Ed. 1129 (1940)

²⁵*United States v Portsmouth Paving Corp*, 694 F. 2d 312 (4th Cir. 1982).

²⁶*United States v Ashland-Warren Inc*, 537 F. Supp. 433 (1982) and *United States v Azzarelli Construction Co and John F. Azzarelli*, 612 F. 2d 292 (1979).

²⁷*United States v Heffernan* 43 F.3d 1144 at 1147 (7th Cir.1994).

sharing agreement, while bid rigging:

“Apart from the inherently very serious nature of any market-sharing or price-fixing agreement, (was) one of the factors which were relevant to the Commission's assessment of the gravity of the infringement.”²⁸

However, in the latter years both in the US as well as the EU, bid rigging got recognised as a separate form of restrictive behaviour, which today, is considered to be *per se* illegal.

In the Indian Competition Act also, the intentional use of the phrase by the Legislature in Section 3(3) “(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition” clearly depicts that under the Indian Competition regime also, activities pertaining to bid rigging and collusive bidding are *per se* illegal.

Burden Of Proof In Case Of Bid Rigging:

In order to establish bid rigging or collusive bidding, the Prosecution has to show that an agreement exists among the alleged enterprises or persons to engage in bid rigging. The existence of an agreement is a pre-requisite condition for an offence to fall under the purview of Section 3. However, the Defence has the burden to rebut the presumption imposed by the Statute against such an agreement for rigging bids.

Evidence To Show Existence of Agreement to Rig Bids:

The primary problem that exists in cases of bid rigging is the absence of adequate evidence to establish that the enterprises have entered into an agreement to rig bids. In majority of cases, there is a complete lack of any direct evidence, so the Commission while deciding any bid rigging case, has to rely solely on circumstantial evidence in order to establish ‘meeting of minds’ between the enterprises to rig bids. The Commission has also held that in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute

²⁸Decision 1999/60 (*Pre-Insulated Pipe Cartel*) [1999] OJ L24/1 at para 165(a).

evidence of the existence of an agreement.²⁹

The U.S. Court of Appeals, Eighth Circuit, has also held that “*As to the specific element of agreement “the agreement may be established by circumstantial evidence, as conspiracies seldom lend themselves to proof by direct evidence”*. Evidence in prosecution for conspiracy to suppress competition in violation of the Sherman Act was sufficient to sustain conviction; there was substantial evidence from which jury could reasonably have inferred defendants' intent to agree and intent to carry out unlawful objectives of market allocation, price-fixing, and bid rigging.”³⁰

Also, in another case, the Court held that in cases involving behavior such as bid rigging, which has been classified by courts as a per se violation, the Sherman Act will be read as simply saying: “An agreement among competitors to rig bids is illegal.”³¹

The relevant facts, which can constitute circumstantial evidence in such cases, are, similar quotation of prices, similar/almost similar typographical errors, any prior meeting between the enterprises where discussion related to prices occurred, etc.

Some warning signs to detect bid rigging can be as follows:

From the Point of Physical evidence

Different companies submitting bids:

- With the same handwriting
- In the same envelope
- With the same mathematical or spelling errors
- With the same last minute corrections (e.g. correction fluid)
- From the same fax number

²⁹*Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v. M/s Orissa Concrete and Allied Industries Ltd. & Ors.*, Ref. Case No. 05 of 2011

³⁰*United States of America, Appellee, v. Misle Bus & Equipment Company, Appellant; United States of America, Appellee, v. Darrell Bennett, Appellant; United States of America, Appellee, v. Julius Misle, Appellant*, 967 F.2d 1227, 1992-1 Trade Cases P 69,879, 36 Fed. R. Evid. Serv. 214

³¹*United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979).

- Internal documents ómemos, circulars, etc.
- E-mails
- Presentations
- Board papers
- Agendas and personal diaries
- Phone records
- Expense accounts
- Competitorsødocuments³²

From the Point of Bids

- Always the same winner / lowest bidder
- Pattern of winner rotation
- Irrationally few and/or unsubstantiated bids
 - Illogical bid refusals
 - Local supplier refusals
 - Bids without normal detail or required documentation
- Last minute withdrawals (without explanation)
- Winner withdrawals
- Repeated sub-contracting to unsuccessful bidders
- Joint bidding³³

From the point of Pricing

- Bid prices are same/very similar
- Bids in excess of comparable bids by the same companies in other areas
- Constantly high, unchanged price level compared to
 - Other geographical areas
 - Price in public markets
 - Other procurement processes

³² Paku Khan, Director of Competition Law, Amarchand Mangaldas *-Bid-rigging: Practical approaches to detection* IAS Officersø Competition Law Appreciation Course September 8, 2011. Available at: http://www.iica.in/images/IAS_Competition_Law_Appreciation.pdf

³³ Dimitris Loukas, Greek Competition Commission, *-Cartel Enforcement Public Procurement & Bid Rigging*, Beijing June 2011. Available at: <http://www.euchinacomp.org/attachments/article/81/3.PPT-LOUKAS-Bid%20Rigging.pdf>

- Collective price changes or identical increases
- Sudden price drop on arrival of new bidder
- Large difference between winning bid and other bids

Bidder Behaviour

- Bidders are seen meeting shortly before or after bids are submitted
- Companies appear to have split the contract by each bidding low on some parts and inexplicably high on others
- Opportunities to meet, socialize / interaction in trade associations
- Relationships between bidders
- Winning bidder subcontracting to losing bidder

Cases On Bid Rigging:

A. India:

Some of the cases decided by the Commission along with the factors which, proved the existence of bid rigging in such cases, are discussed below:

S.NO	CASE	FACTORS WHICH ESTABLISHED AGREEMENT FOR BID RIGGING
1	Re: LPG Cylinder Manufacturers Suo Moto Case	Identical price quotations
2	Foundation for Common Cause & People Awareness v. PES Installations Pvt. Ltd. & Ors. + Gulshan Verma v. UOI & Ors.	Commonality of mistakes in the tender forms
3	Re: Aluminium Phosphide Tablets Manufacturers Suo Moto Case	<ul style="list-style-type: none"> • Identical bid price • Common entry in premises of FCI before submission of bids

4	Coal India Limited v. GOCL Hyderabad & Ors.	<ul style="list-style-type: none"> • Collective boycott of e-auction • Identical prices • Controlling the supply of explosives
5	Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v. M/s Orissa Concrete and Allied Industries Ltd. & Ors.	<ul style="list-style-type: none"> • Identical rates • Division of quantity • Similar handwriting • Format of covering letter • Tender fee payment • Past conduct

B. European Union:

If we trace the history of Competition Law in the EU since its inception in 1962³⁴, we would only come along a very few cases dealing with bid rigging in government procurements³⁵. Two of the important cases are discussed below:

- The *SPO* case usually comes to the surface while discussing bid rigging under the EU competition enforcement. This case is important and known because of two reasons. The first being the scale of the infringements and the second, the open nature of the infringement.

In this case, the SPO, the association of 28 regional construction associations since 1963 had drawn up rules and regulations providing for institutionalized regulation of prices and competition and was empowered to impose penalties on contractors affiliated to its member organisations if they breached their

³⁴ Competition enforcement initiated with the entry into force of Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204 replaced by the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

³⁵ Marsela Maci, 'Bid rigging in the EU public-procurement markets: some history and developments' European Competition Law Review, 2011, 32(8), at p. 406-413

obligations under those rules. The Commission was of the opinion that the SPO rules provided a platform for exchanging price sensitive information and was aiding in fixation of selling prices and thus was increasing bid prices.

The Commission intervention not only changed the course of competition law in the Netherlands, but it also, in the latter years, became the reason for uncovering of other bid rigging agreements in the industry sector.

- ***Pre-Insulated Pipe or Gas Insulated Switchgear***, another important case decided by the European Commission involved complex European-wide cartel where the parties to the cartel engaged in cover bidding and bid rotation. The participants basically divided the relevant market on the basis of a quota system and mutually undertook not to interfere into one another's allocated territories. In these cartels, public and private markets were divided nationally whereby public tenders were allocated to a particular "favorite" domestic company.³⁶ When there was more than one bidding company active on the national market the prices that the "favorite" had to quote in the tendering procedure were decided among them while the other producers had the task of submitting higher offers to "protect" the "favorite".
- In the last EU case on bid rigging, ***Elevators and Escalators***³⁷, the four major suppliers of these products in the European Union divided several national markets among themselves. Their local subsidiaries would submit bids in accordance with centrally allocated quotas.

C. United States:

- ***United States of America, Plaintiff-Appellee, v. Koppers Company, Inc., Defendant-Appellant***³⁸

The Court of Appeals upheld the decision of the United States District Court for the District of Connecticut. The District Court had held the defendant guilty for bid rigging on the basis of the facts that the defendant had made a proposal and thereby, entered into an agreement with another competitor to

³⁶Decision 1999/60 (*Pre-Insulated Pipe Cartel*) [1999] OJ L24/1 paras 32, 71, 77, 98, 99, 148.

³⁷Decision (*COMP/E-1/38.823--Elevators and Escalators*) [2008] OJ C75/19 paras 49-53.

³⁸ 652 F.2d 290, 1981-1 Trade Cases P 64,134.

divide the state between them so that the latter would be the low bidder in the western part of Connecticut, where its activities were concentrated, and the defendant would be the low bidder in the eastern part, where its storage facility and distribution point were located. The Agreement envisaged sharing of plant side price and estimated application cost. Since the two firms were based at opposite ends of the state, the use of a common base price and application cost would have the effect of making each company the low bidder in its half of the state, because of the increasing transportation costs each would incur as they bid on deliveries further and further from home. The companies would, however, continue to submit bids in all 169 Connecticut towns and all four maintenance districts, which would give the impression that they were in direct competition for the state's business even though they would know in advance which of their bids would be successful.

- *United States of America, Appellee, v. Misle Bus & Equipment Company, Appellant; United States of America, Appellee, v. Darrell Bennett, Appellant and United States of America, Appellee, v. Julius Misle, Appellant, 967 F.2d 1227, 1992-1 Trade Cases P 69,879, 36 Fed. R. Evid. Serv. 214*

The Court of Appeals affirmed the decision of the United States District Court for the District of Nebraska. The District Court held the defendants guilty for bid rigging on the basis of testimony of government's witnesses about an ongoing arrangement—the so-called "program" in which a group of bus distributors met on a regular basis, at least once a year in the fall from as early as 1962 until 1986, to agree upon bus and bus body prices that would be used in submitting contract bids to various school districts. In some instances, these witnesses described specific school district allocations that were made and specific events that took place in carrying out the program agreements.

Inquiry by Commission into Bid Rigging:

The Commission may inquire into any alleged bid rigging under Section 19(1) of the Competition Act. Section 16 of the Competition Act provides for appointment of a DG for the purpose of assisting the Commission in conducting inquiries into the alleged contravention of the provisions of the Act and for performing such other

functions as may be provided by the Act. Section 41 provides that when so directed by the Commission, the DG would assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

Powers of the Commission, under the Act, are:

- Privy to all powers of a civil court
- Power to search and seize i.e. conduct *õdawn raidsö*
- Power to summon and examine persons under oath
- Power to call upon any experts
- Power to require the discovery and production of documentary evidence
- Power to grant interim relief
- Power to impose penalties, pass orders and directions
- Statutory authority can make references under Section 21(1)

Possible Remedies In Cases of Bid Rigging:

In a case where it has been proved that bid rigging has occurred, the Commission can pass the following orders under Section 27:

- Direct any enterprise or association of enterprises or person or association of persons engaged in bid rigging to discontinue and not to re-enter such agreement;
- Impose such penalty, as it may deem fit, which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements. Provided that in case any agreement referred to in section 3 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 ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher;
- Direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

- 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;
- Pass such other order or issue such directions as it may deem fit.³⁹

³⁹ Section 27 of the Competition Act, 2002

CHAPTER – V

PUBLIC PROCUREMENT BILL, 2012 AND BID RIGGING

The GoM on Corruption appointed Committee on Public Procurement (CoPP) which recommended *inter alia* enactment of Public Procurement Act to be supplemented by Rules. GoM referred the CoPP report to CoS. CoS recommended enacting a law which should contain broad principles and ensure that concerns regarding flexibility are addressed. GoM decided that Recommendations of CoPP be accepted in principle and recommendations of CoS be accepted. Process of enactment of law be initiated immediately. The Public Procurement Bill, 2012 introduced in Lok Sabha on 14.05.2012. The Bill is based on broad principles and envisages a set of detailed rules, guidelines and model documents and builds on national and international experience and best practices, as appropriate for the needs of the Government of India.

Objectives:

The primary objective of the Bill is to regulate procurement with the objective of:

- “ Ensuring transparency, accountability and probity in the procurement process
- “ Fair and equitable treatment of bidders
- “ Promoting competition
- “ Enhancing efficiency and economy
- “ Safeguarding integrity in the procurement process and
- “ Enhancing public confidence in public procurement

Features of the Bill:

The Bill *inter alia* seeks to

- codify the basic norms governing public procurement and requires the procuring entities and their officials to comply with the norms;
- “ lay down a code of integrity to be followed by the procurement entity and the bidders;
- “ lay down the general principles to be followed during the procurement process and the conditions for use of, and brief procedures for, various methods of

- procurement;
- “ provide adequate flexibility to take into account diversity of needs of procuring entities, description of subject matters of procurement and methods of procurement;
 - “ provide for greater transparency and accountability through a Central Public Procurement Portal to be set up by the Central Government;
 - “ provide for a grievance redressal system;
 - “ enable building of expertise in procurement matters through professional standards, suitable training and certification;
 - “ make provisions for offences and penalties relating to public procurement and for debarment of bidders.
 - “ The procuring entity shall first determine the need for the procurement and estimate the cost of the procurement based on certain specified matters. It may publish information regarding planned procurements.
 - “ The CPO may maintain a panel of registered bidders to help identify reliable bidders for certain class of procurements.
 - “ The procuring entity may make modifications to the bidding document or issue clarifications before the last date of submission of bids. It may allot extension of time for submitting the bids if the clarifications need to be taken into account while submitting the bids.

Applicability of the Public Procurement Bill:

The Bill applies to procurements made by-

- Ministry or Department of the Central Government or a unit thereof or its attached or subordinate office.
- Central Public Sector Enterprise or Undertaking
- Companies in which more than 50% of paid-up share capital is held by Central Govt. and/ or companies in which Central Govt. holds more than 50% of paid-up share capital
- Constitutional Bodies whose expenditure met from CFI
- Bodies established or constituted under an Act of Parliament; or owned or controlled by the Central Govt.

- Any other entity which the Central Government may, by notification, specify to be a procuring entity, being an entity that receives substantial financial assistance from Central Govt.

Exemptions Under the Bill:

- “ Any procurement, the estimated cost or value of which is less than fifty lakhruppees or such higher value as the Central Government may, by notification, specify, for different classes or categories of procurements or procuring
- “ Emergency procurement necessary for the management of any disaster, as defined in clause (d) of section 2 of the Disaster Management Act, 2005
- “ Procurement for the purposes of national security or on strategic considerations that the Central Government may, by general or special order, specify. However, rules consistent with basic norms of the Bill may be made for such cases.
- “ The Central Government may:

permit the procuring entities to carry out procurement, financed under the assistance from the multilateral development banks, bilateral development agencies, or foreign governments or pursuant to an inter-governmental agreement, in accordance with the procurement procedures stipulated in terms of such assistance or agreement if they are in consonance with the basic norms specified in the Bill.

Fixing Responsibility & Code of Integrity For the Procuring Agency

A unique feature of the Bill is the fixing of accountability for the procurers and also laying down a code of conduct for such agencies and departments. This is a positive step taken by the legislature, which would go a long way in combating the problem of corruption in procurement tenders. In relation to a public procurement, the procuring entity to have the responsibility and accountability to :

- ensure efficiency, economy and transparency;
- provide fair and equitable treatment to bidders;

- promote competition;
- ensure that the price of the successful bid is reasonable and consistent with the quality required; and
- evolve mechanisms to prevent corrupt practices.

Also, the Bill stipulates that no official of a procuring entity or a bidder shall act in contravention of code of integrity. The Code of Integrity (Section 11) to include provisions for prohibition of:

- making offer, solicitation or acceptance of bribe, reward or gift or any material benefit, either directly or indirectly, in exchange for an unfair advantage in the procurement process or to otherwise influence the procurement process;
- any omission, or misrepresentation that may mislead or attempt to mislead so that financial or other benefit may be obtained or an obligation avoided;
- any collusion, bid rigging or anti-competitive behaviour that may impair the transparency, fairness and the progress of the procurement process;
- improper use of information provided by the procuring entity to the bidder with an intent to gain unfair advantage in the procurement process or for personal gain;
- any financial or business transactions between the bidder and any official of the procuring entity;
- any coercion or any threat to impair or harm, directly or indirectly, any party or its property to influence the procurement process;
- obstruction of any investigation or auditing of a procurement process;
- disclosure of conflict of interest;
- disclosure by the bidder of any previous transgressions in respect of above prohibitions.

Criteria For Evaluation And Exclusion Of Procurement Bids:

The CPO shall not limit participation of bidders or discriminate against or amongst bidders except for the protection of public order and morality, animal or plant life, intellectual, national security. The central government may make procurement mandatory from certain bidders only on the grounds of promotion of domestic

industry, socio economic policy, or other considerations in public interest.

The evaluation criteria of the procurement bids shall include among other factors:

- The price;
- Cost of operating, maintaining, and repairing the goods;
- Time for delivery and completion;
- Terms of payment and guarantee; and
- Qualities such as reliability, and functional competence.

The Bill provides for exclusion of a bid if the procuring entity determines:

- That the bidder is not qualified;
- Bid contains false information;
- Conflict of interest involved;
- A bribe or gratification given by a bidder; etc.⁴⁰

Grievance Redressal Under the Bill:

- The Bill envisages a three-tier Grievance Redressal Mechanism
- Review by procuring entity
- Consideration by independent Procurement Redressal Committee
 - Three members headed by retired High Court Judge to meet when required
 - Purpose is to make recommendations

However, these independent committees are barred from exercising its jurisdiction over certain issues (such as any provisions limiting participation of bidders, or cancellation of a procurement process as per the terms of the Bill). As a deterrent, penalties of up to Rs. 20,00,000 (or 5% of the procurement value, whichever is higher) can be imposed for any intentionally vexatious, frivolous or malicious

⁴⁰ <http://www.prsindia.org/billtrack/the-public-procurement-bill-2012-2310/>

complaints before these redressal committees.⁴¹

- Courts

Also, a very important aspect of the Bill is that it provides for professional standards, training and certification for officials handling procurement.

Offences Penalties And Debarments:

The Bill provides for the following possible penal action, which can be imposed for any alleged contravention:

Punishments for Procuring Agencies and Officials

- “ Punishment for taking gratification or valuable thing in respect of public procurement on par with Prevention of Corruption Act.
- “ Punishment for interference with procurement process ó imprisonment upto 5 years and fine of Rs. 5,00,000 or upto 10% of value of procurement.
- “ Previous sanction necessary for prosecution of public servants in line with Prevention of Corruption Act.

Punishment for bidders and other competitors

- “ Abetment of offences under the Act punishable with punishment for the offence.
- “ Central Govt shall debar a bidder for upto 3 years on conviction for offences under Prevention of Corruption Act and certain other offences.
- “ Procuring entity may debar a bidder for upto 2 years ó
 - For breach of code of integrity
 - For withdrawing from procurement process or failing to enter into procurement contract after being declared a successful bidder
 - If entire performance security forfeited for breach of contractHowever, in tune with the principles of natural justice, the Bill

⁴¹ <http://barandbench.com/content/viewpoint-overview-draft-public-procurement-bill-2012#.Uab0hetMby8>

provides for reasonable opportunity to be given to bidder to represent, prior to debarment

- Punishment for vexatious complaints ó fine upto 5% of value of procurement

Public Procurement Bill, 2012 and Competition Law:

The Public Procurement Bill would go a long way in strengthening the Competition enforcement regime in the Country as it entails many provisions specially designed to counter the anti-competitive concerns in procurement process. Certain such features are as follows:

- “ The long title of the Public Procurement Bill, 2012 envisages ‘Promoting competition’ as one of the objectives.
- “ **Clause 5:** Procuring entities made responsible and accountable under clause 5 (Basic norms of public procurement) to ensure transparency, promote competition.
- “ **Clause 6(2):** The Code of Integrity for procuring entities and bidders prohibits any collusion, bid rigging or anti-competitive behaviour that may impair the transparency, fairness and the progress of the procurement process.
- “ **Clause 45:** prescribes penalty for those who engage in any form of bid-rigging, collusive bidding or anti-competitive behavior - imprisonment for a term up to five years and fine up to 10% of the assessed value of procurement.
- “ **Clause 30:** ‘Open competitive bidding’ to be the preferred method of procurement. For choosing any other method of procurement, reasons and circumstances thereof would need to be recorded
- “ **Clause 38:** Mandates setting up and maintaining of a Central Public Procurement Portal accessible to the public for posting and exhibiting matters relating to public procurement. The portal shall provide access to the following information, namely:
 - Pre-qualification document, bidder registration document, bidding document including any modification or clarification thereto.

- List of bidders that presented bids including for pre-qualification or bidder registration, and of those bidders which were pre-qualified and registered.
- List of bidders excluded from the bid process.
- Details of successful bids, their prices and bidders.
- Names and particulars of bidders who have been debarred by the Central Government or a procuring entity together with the name of the procuring entity, cause for the debarment action and the period of debarment.

The Long title of the Public Procurement Bill, 2012 is in consonance with the Preamble of the Competition Act, 2002 in so far as both have the objective of promoting competition in the market. Therefore, The Public Procurement Bill, 2012 and the Competition Act, 2002 would supplement and complement each other in maximizing competition in public procurement by addressing structural and behavioral issues in the procurement process respectively.

Lacunae in the Bill:

The Bill been found lacking on two counts-

- **Establishment of an independent regulatory authority:** The constitution of such an authority would go a long way in maintaining an oversight on compliance of the Act and the rules made thereunder, in addition to discharging the quasi-judicial functions of settling disputes. The Authority would also advise the Government on diverse matters relating to public procurement. The setting up of an independent regulator is also considered essential to investigate any complaint relating to procurement and direct the relevant procuring entity to take necessary action.
- **Establishment of a Department of Procurement Policy under the Ministry of Finance:** The establishment of a separate Department of Procurement Policy is considered necessary to exercise the powers to promote probity, transparency, quality and competition in procurement. Such a department could prescribe the procurement rules applicable to all procuring entities. Besides, it could institute best practices, professionalize the public

procurement function, arrange for capacity building, create and maintain the overarching public procurement portal.⁴²

⁴²*Supra* footnote 10.

CHAPTER – VI

OECD GUIDELINES ON BID RIGGING

On 17 July 2012, the OECD Council adopted a *Recommendation on Fighting Bid Rigging in Public Procurement* that calls for governments to assess their public procurement laws and to promote more effective procurement and reduce the risk of bid rigging in the cases of public procurements by the government departments. The OECD had also adopted in 2009 *Guidelines For Fighting Bid Rigging In Public Procurement* and these 2012 Guidelines are a way forward to the former ones.

Drawing on the experience of more than 30 jurisdictions, the *OECD Guidelines for Fighting Bid Rigging in Public Procurement* assist procurement officials to detect bid rigging.

The Guidelines help to identify:

- Markets in which bid rigging is more likely to occur so that special precautions can be taken
- Methods that maximize the number of bids
- Best practices for tender specifications, requirements and award criteria
- Procedures that inhibit communication among bidders
- Suspicious pricing patterns, statements, documents and behaviour by firms, that procurement agents can use to detect bid rigging

The Guidelines provide the most comprehensive strategy available today for the design of tenders to hinder bid rigging and for the detection of bid rigging during the tender process. They can be applied in a decentralized manner across government at both national and local levels. The Guidelines can be used by public officials with no specialized economics or competition policy training.⁴³

In the words of Mr. Mariana Tavares de Araujo, Head of the Secretariat of Economic Law of the Ministry of Justice, Brazil:

⁴³<http://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm>

“The Guidelines are an extremely useful tool for detecting bid rigging. Procurement agencies find them easy-to-use and tips from agencies have helped us uncover many bid-rigging schemes. They are an invaluable resource.”⁴⁴

OECD Guidelines For Detecting Bid Rigging In Public Procurement:

The OECD Guidelines⁴⁵ include a *Checklist for Detecting Bid Rigging in Public Procurement*, which provides detailed information to help procurement officials identify anti-competitive practices during the bidding process. The Checklist highlights following areas for active vigilance:

1. Look for markets that are more susceptible to bid rigging.

The presence of certain factors increases the chances of bid rigging. Small number of bidders, homogeneity of products/ services, high entry barriers, etc. are some of such factors.

2. Look for opportunities that the bidders have to communicate with each other.

Bidders need to know and communicate with each other to reach an agreement for bid rigging. Such an agreement can be formed over telephone, email, fax or letter, however, many bid-riggers believe that they are less likely to leave evidence of their communications if they have face-to-face meetings. These meetings occur most often at, or in association with, trade association meetings, or other professional or social events. They are also likely to occur prior to the opening of the tender process.

3. Look for indications that the bidders have communicated with each other.

In Bid rigging repeated communications takes place between the bidders. Procurement officials may hear or come across statements indicating that information may have been shared, such as a bidder having knowledge of another bidder's pricing, or not expecting to be the low bidder, or perhaps when a bidder refers to "industry" or "standard" practices or prices.

4. Look for any relationships among the bidders after the successful bid is announced.

⁴⁴ OECD: Detecting Bid Rigging in Public Procurement. Available at: <http://www.oecd.org/competition/cartels/42594486.pdf>

⁴⁵*ibid.*

The relationship among bidders both prior to and after the bid has to be scrutinized. An example, which would give an indication of bid rigging, would be sharing of profits accrued.

5. Look for suspicious bidding patterns.

There can be various patterns and the detection would depend upon case to case. For example, there may be a pattern that the same bidder always wins bids of a certain type or size, or that some bidders only bid in particular geographic areas, etc.

6. Look for unusual behaviour.

For example, if the winner does not accept the, or withdraws before the award was made. Submitting a bid without normal detail or required documentation, etc.

7. Look for similarities in the documents submitted by different bidders.

In a case of bid rigging generally a single person prepares all the bids. Alternatively, a number of people may work on the bids, but they may work closely with each other. Many similarities may be noticed such as similar mistakes, identical formatting, etc.

OECD Checklist For Designing The Procurement Process To Reduce Risks Of Bid Rigging:

The OECD provides a list of comprehensively laid down checklist, which can go a long way to prevent manipulation of procurement processes by bid rigging. There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

- Be informed before designing the tender process
- Design the tender process to maximize the potential participation of genuinely competing bidders
- Define your requirements clearly and avoid predictability
- Design the tender process to effectively reduce communication among bidders
- Carefully choose your criteria for evaluating and awarding the tender
- Raise awareness among your staff about the risks of bid rigging in

procurement⁴⁶

*Tender design can play an important role in preventing bid rigging, whilst at the same time increasing the likelihood of detection. Procurers are, therefore, key players in this effort. The OECD Guidelines aim to consolidate current best practice in this area and the OFT hopes they will become an essential part of every procurer's toolkit.*⁴⁷

*These Guidelines are an excellent benchmarking tool and a good resource for use by procurement agencies when designing tendering processes. Following the Guidelines will help ensure that tendering processes result in competitive outcomes and that taxpayer money is spent efficiently.*⁴⁸

Steps Procurement Officials Should Take If Bid Rigging Is Suspected:

In cases where bid rigging is detected, a number of steps can be taken by procurement officials to uncover it. Such steps are:

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

⁴⁶ OECD: Guidelines for fighting Bid-rigging in Public Procurement. Available at:

<http://www.oecd.org/dataoecd/27/19/42851044.pdf>

⁴⁷ John Fingleton, Chief Executive of the Office of Fair Trading, United Kingdom OECD: Designing tenders to reduce Bid-rigging. Available at:

<http://www.oecd.org/dataoecd/36/40/42594504.pdf>

⁴⁸ Melanie L. Aitken, Interim Commissioner of Competition, Canada, OECD: Designing tenders to reduce Bid-rigging. Available at:

<http://www.oecd.org/dataoecd/36/40/42594504.pdf>

appropriate to proceed with the tender offer.⁴⁹

⁴⁹OECD: Designing tenders to reduce Bid-rigging. Available at:
<http://www.oecd.org/dataoecd/36/40/42594504.pdf>

CHAPTER – VII

CONCLUSION & SUGGESTIONS

The Public Procurement system in India suffers from various problems, prominent among which, is the nefarious practice of bid rigging. Even though the Legislature of the country has taken a positive step by drafting the Public Procurement Bill, the truth remains that it still is a Bill and has yet not become a binding law.

Furthermore, the existing procurement regime in India suffers from many serious problems, some of which are enumerated below:

- The main problem lies in the fact that there is no Public Procurement Policy or Public Procurement law in India. Even though the States of Tamil Nadu and Karnataka have enacted procurement laws but they are not comprehensive enough to combat the problem.
- Another problem is the existence of multiple procurement procedures. A review of procurement systems and procedures being followed across ministries and organizations has revealed that some of the practices are at odd with the GFR. However such violations do not attract penal action since GFR is not backed by law. GFR cannot be a substitute for a comprehensive law in this area.⁵⁰
- Under the relevant provisions of the Act, when a firm indulges in anti competitive conduct, such as bid rigging with the public officials, the Competition Commission lacks the enforcement powers / provisions against public officials involved.⁵¹ Such situations should not exist in the market once an effective competition regime is in place.
- The most Competition Commission can do is opt for vigorous advocacy and convince States or Central Government to review the legislations causing anticompetitive impact on the market.

Besides these, various other problems exist in public procurement in India, which

⁵⁰*Supra* footnote 10

⁵¹ Case No. 15/2010, *Jupiter Gaming Solutions Pvt. Ltd. v. Government of Goa and others*, Competition Commission of India

have been discussed in the paper. Therefore, there is an urgent need to take some preventive and reformative actions in order to curb the inappropriate wastage of taxpayer's money through bid rigging and other corrupt practices.

Some of the measures, which can be adopted in this regard, are discussed below:

- Bringing uniformity and standardization in the tendering procedure, tender documents and the rights and obligations of the procurers and the contractors under the same.
- To have an Institutional Framework for public procurement, as envisaged under the Public Procurement Bill, 2012.
- Conducting training and imparting specialized knowledge about procurement procedures to the officials concerned,
- Have clearly defined criteria for evaluation and exclusion of bids.
- Cooperation, information and experience sharing among all the Government Departments involved in procurement.

Some other measures, which can be taken specifically to target the problem of bid rigging, are:

- Educating and increasing awareness through Competition Advocacy, among the Government Departments, Agencies and Officials involved in procurements, about the practice of bid rigging and its extreme harmful impacts on the economy of the nation.
- Creating transparency in the procurement process by informing the losing bidders about the factors in their bids which lead to them losing the bid, the details of the winning bids, etc.
- Formation of tenders in tune with the *OECD Guidelines on Designing Tenders to Reduce Bid Rigging* would also further the objective of preventing this practice.
- Guiding the procuring agencies to take strict actions against the enterprises involved in bid rigging such as suspending them, for a specified period, from participating in future bids, etc.
- In cases, where the procuring officials are involved in bid rigging along with

the enterprises, recommending on taking stringent action in line with the Prevention of Corruption Act.

- In every case where there is even the slightest suspicion of bid rigging, evaluating the existing factors in accordance with the *OECD Guidelines For Fighting Bid Rigging In Public Procurement*. The procurers should not wait for bid rigging to occur to take action.

*Bid rigging increases costs and lowers quality for public purchasers and ultimately for taxpayers. Competition authorities are committed to stamping it out by taking robust and targeted enforcement actions. The OECD Guidelines provide a useful checklist aimed at increasing the likelihood of detection, whilst at the same time reducing the opportunities for bid rigging to flourish.*⁵²

- Ensuring that the procuring agencies do not impose such unnecessary technical specifications, which could prevent a portion of the contractors from submitting bids and thereby creating a favourable situation for other bidders to rig bids.
- While successful bidders are expected to perform as per targets/specifications in terms of cost, quality and timeline for execution, additional financial incentives for better performance vis-a-vis timeline, cost, etc. are awarded by some countries under their government procurement rules. Such provisions may be considered for incentivizing efficiency and enhancing consumer welfare.⁵³
- More generally, enforcement agencies such as Competition Commission of India should identify and advocate for the removal of any public procurement rules or procedures that facilitate or foster collusion or corruption.

To conclude I would like to mention that seriously taking pro-active action against bid rigging can substantially help to combat this pernicious problem and thereby benefit the nation's economy by considerably reducing wastage of taxpayer's money. The competition enforcement regime in India can take cue from Japan's experience where

⁵²John Fingleton, Chief Executive of the Office of Fair Trading, United Kingdom, OECD: Detecting Bid Rigging in Public Procurement. Available at: <http://www.oecd.org/competition/cartels/42594486.pdf>

⁵³ http://www.cuts-international.org/pdf/CUTS-Comments_on_The_Public_Procurement_Bill_2012.pdf

Strict and proactive enforcement against bid rigging has promoted fair and free competition in Japanese public procurement markets. This has saved significant public resources and reduced contract prices by nearly 20 per cent in some cases as a result of restoring competition.⁵⁴

⁵⁴ Kazuhiko Takeshima, Chairman of the Japanese Fair Trade Commission, OECD: Designing tenders to reduce Bid-rigging. Available at:
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ANNEXURE : Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For

An Antitrust Primer

This primer briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion.

Introduction ⁽¹⁾

American consumers have the right to expect the benefits of free and open competition – the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice.

In recent years, the Antitrust Division has successfully prosecuted regional, national, and international conspiracies affecting construction, agricultural products, manufacturing, service industries, consumer products, and many other sectors of our economy. Many of these prosecutions resulted from information uncovered by members of the general public who reported the information to the Antitrust Division. Working together, we can continue the effort to protect and promote free and open competition in the marketplaces of America.

This primer contains an overview of the federal antitrust laws and the penalties that may be imposed for their violation. It briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive collusion so that you might better identify and report suspicious activity.

Federal Antitrust Enforcement

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice.

Violation of the Sherman Act is a felony punishable by a fine of up to \$10 million for corporations, and a fine of up to \$350,000 or 3 years imprisonment (or both) for individuals, if the offense was committed before June 22, 2004. If the offense was committed on or after June 22, 2004, the maximum Sherman Act fine is \$100 million for corporations and \$1 million for individuals, and the maximum Sherman Act jail sentence is 10 years. Under some circumstances, the maximum potential fine may be increased above the Sherman Act maximums to twice the gain or loss involved. In addition, collusion among competitors may constitute violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes, all of which the Antitrust Division prosecutes.

In addition to receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

Forms of Collusion

Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes. Each of these forms of collusion may be prosecuted criminally if they occurred, at least in part, within the past five years. Proving such a crime does not require us to show that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries.

Under the law, price-fixing and bid-rigging schemes are per se violations of the Sherman Act. This means that where such a collusive scheme has been established, it cannot be justified under the law by arguments or evidence that, for example, the agreed-upon prices were reasonable, the agreement was necessary to prevent or eliminate price cutting or ruinous competition, or the conspirators were merely trying to make sure that each got a fair share of the market.

Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to:

- Establish or adhere to price discounts.
- Hold prices firm.
- Eliminate or reduce discounts.
- Adopt a standard formula for computing prices.
- Maintain certain price differentials between different types, sizes, or quantities of products.
- Adhere to a minimum fee or price schedule.
- Fix credit terms.
- Not advertise prices.

In many cases, participants in a price-fixing conspiracy also establish some type of policing mechanism to make sure that everyone adheres to the agreement.

Bid Rigging

Bid rigging is the way that conspiring competitors effectively raise prices where purchasers often federal, state, or local governments acquire goods or services by soliciting competing bids.

Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy.

Bid rigging also takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression: In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding: Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

Bid Rotation: In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. A strict bid rotation pattern defies the law of chance and suggests collusion is taking place.

Subcontracting: Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Almost all forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.

Market Division

Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves. For example, one competitor will be allowed to sell to, or bid on contracts let by, certain customers or types of customers. In return, he or she will not sell to, or bid on contracts let by, customers allocated to the other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

Detecting Bid Rigging, Price Fixing, And Other Types Of Collusion

Bid rigging, price fixing, and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. However, suspicions may be aroused by unusual bidding or pricing patterns or something a vendor says or does.

Bid or Price Patterns

Certain patterns of bidding or pricing conduct seem at odds with a competitive market and suggest the possibility of collusion:

Bids

- The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids.
- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- Fewer than the normal number of competitors submit bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and subsequently is subcontracted work by the new winning contractor.

Prices

- Identical prices may indicate a price-fixing conspiracy, especially when:

- Prices stay identical for long periods of time.
- Prices previously were different.
- Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts historically were given.
- Vendors are charging higher prices to local customers than to distant customers. This may indicate local prices are fixed.

Suspicious Statements or Behavior

While vendors who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. In addition, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. Be alert for the following situations, each of which has triggered a successful criminal antitrust prosecution:

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendor's bid.
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes.
- A company requests a bid package for itself and a competitor or submits both its and another's bids.
- A company submits a bid when it is incapable of successfully performing the contract (likely a complementary bid).
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding.
- A bidder or salesperson makes:
 - Any reference to industry-wide or association price schedules.
 - Any statement indicating advance (non-public) knowledge of competitors' pricing.
 - Statements to the effect that a particular customer or contract "belongs" to a certain vendor.
 - Statements that a bid was a "courtesy," "complementary," "token," or "cover" bid.
 - Any statement indicating that vendors have discussed prices among themselves or have reached an understanding about prices.

A Caution About Indicators of Collusion

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a company submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question.

Conditions Favorable To Collusion

While collusion can occur in almost any industry, it is more likely to occur in some industries than in others. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion.

- Collusion is more likely to occur if there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.

- The probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured.
- The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service.
- Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.
- Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.
- Bidders who congregate in the same building or town to submit their bids have an easy opportunity for last-minute communications.

What You Can Do

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years. These conspiracies are by their nature secret and difficult to detect. The Antitrust Division needs your help in uncovering them and bringing them to our attention.

If you think you have a possible violation or just want more information about what we do, contact the Citizen Complaint Center of the Antitrust Division:

E-mail: antitrust.complaints@usdoj.gov

Phone: 1-888-647-3258 (toll-free in the U.S. and Canada) or 1-202-307-2040

Address:

Citizen Complaint Center
Antitrust Division, U.S. Dept. of Justice
950 Pennsylvania Ave. NW, Suite 3322
Washington, DC 20530

FOOTNOTES

1. This Primer provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigation prerogatives of the Department of Justice.