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TENDER
SUBMISSION



The Competition Authority
An tÚdarás Iomparáid

The Detection and Prevention of Collusive Tendering

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Introduction

About the Competition Authority

You are in charge of procurement in a Government Department or other public body. You've just completed a procurement exercise for a public building project like a school or hospital, or for the supply of parts or raw materials. You breathe a sigh of relief because you have a winning tender and the whole exercise went smoothly. Or did it?

Did you get the nagging feeling that something wasn't quite "right" about some aspect of the process? On reflection, did the tenders seem very alike to you? Unreasonably so? Or did you notice a peculiar pattern emerging, compared to previous tender exercises?

If so, you may have been the victim of bid-rigging or collusive tendering, which is illegal under the Competition Act and carries heavy penalties on conviction.

Anyone who is on a procurement team should be aware of these dangers, and this booklet is intended to help you spot some tell-tale signs, as well as practical advice on what you can do to prevent bid-rigging, as well as what to do if you suspect that it has happened.

It is important that the full benefits of the competitive process are realised in public projects in order to ensure value for money and the highest quality of public services. As a procurer you are already influencing the nature of competition in the market for your project, be it national, regional or local, by the actions you are taking – from the preparation of the initial business case through to providing feedback to suppliers on their delivery performance. This booklet details some of the common signs of collusive tendering and provides information on steps that can be taken to mitigate them.

The Competition Authority's mission is "to ensure that competition works well for consumers and the Irish economy."

The Competition Authority is the national agency responsible for enforcing Irish and European competition law. These laws prohibit anti-competitive agreements and the abuse of a dominant position by firms.

Competition promotes the welfare of consumers. It protects the competitive process, so that markets work for the benefit of consumers. Effective competition directly benefits consumers, as firms try to win consumers' business through lower prices, improved quality and greater choice.

Where there is evidence of businesses engaging in anti-competitive practices – through price-fixing cartels or monopolists abusing their dominant position – the Authority can intervene.

The Competition Authority can also block mergers between businesses that would substantially lessen competition and harm consumers.

The Competition Authority also identifies public restrictions on competition and advises the Government about the implications for competition of proposed legislation or regulations.



Benefits of competition

Cartels and collusive tendering

Competition benefits everyone: consumers, businesses and the economy as a whole.

Competition has many benefits:

- It increases choice – by stimulating a broader range of products and services
- It ensures value for money – by ensuring firms compete on price and quality
- It stimulates innovation and productivity – by motivating firms to create new products and reduce costs in order to win customers
- It supports economic growth – by promoting choice, value, innovation and productivity.

These benefits arise because competition encourages businesses to strive harder to win customers. Consumers benefit from having a choice of providers competing for their custom by offering better prices and better quality. When consumers benefit from competition, then the economy does too.

As an individual working in procurement, it is essential that you promote competition, to ensure that your organisation receives these benefits. Indeed, encouraging competition at the procurement stage will provide you with the better value, superior products and services, and greater choice.

Cartels are the most serious form of anti-competitive behaviour.

So going after cartels is the Competition Authority's top priority.

Cartels are the most serious form of anti-competitive behaviour. They are illegal, and typically involve secretive and collusive behaviour among firms which would otherwise compete with each other. If they are found guilty, participants may be heavily fined and/or imprisoned.

"Cartels... cause a transfer of consumers' money to themselves..."

They are offensive and abhorrent... They are in every sense anti-social".

Mr Justice William M. McKechnie, 23rd March 2009

Those involved in cartels may engage in the following:

- Bid-rigging/collusive tendering: Collusive tendering involves competitors illegally agreeing on who will win a tender.
- Price fixing: Competitors illegally agree the price for, or discounts on, goods or services.
- Market sharing: Competitors illegally agree on which locations each of them can or cannot operate in, or customers to whom they can or cannot sell. They also divide locations and/or customers up among competitors.
- Limiting production: Competitors illegally agree to control the amount of goods or services provided in order to ensure prices remain high.



Collusive tendering

Bid rigging, or collusive tendering, is a serious form of anti-competitive behaviour.

Collusive tendering involves competitors agreeing on who will win a tender. It occurs when two or more firms agree not to bid against one another for a tender or contract. This means that the winning tender price will be too high.

Harm caused by collusive tendering

Collusive tendering deprives consumers of the benefits of competition, enabling businesses to earn higher profits for less effort.

Collusive tendering generally means that you, as a procurer, pay more for goods and services than you would in a truly competitive situation. It also means that you receive poorer quality goods and services as tendering parties don't have an incentive to provide quality services. Firms involved in collusive tendering also have less incentive to be efficient and innovative, and this ultimately raises the cost of doing business in the entire economy.

Experience in other countries indicates that collusive tendering or bid-rigging on public sector contracts is common. For example, in 2007 the European Commission issued €992 million in fines for bid-rigging on lift and escalator contracts across four countries. The cartel was found to be operating in Belgium, Germany, Luxembourg and the Netherlands between 1985 and 2004.

Collusive tendering in public sector procurement is particularly harmful to society as it diverts funds that could be used to provide other worthwhile services to the public. For example, if firms have colluded on a tender to build a school, the cost of that school will be higher than necessary.

Types of collusive tendering

Common forms of collusive tendering include bid suppression, complementary or cover bidding and bid rotation.

Bid suppression

In 'bid suppression' or 'bid limiting' schemes, one or several competitors, who would otherwise be expected to tender for a contract, refrain from tendering or withdraw a previously submitted tender, so that a competitor's tender will be accepted instead.

Complementary bidding

'Complementary' or 'cover' bidding (also known as 'protective' or 'shadow' bidding) occurs when competitors submit token tenders that are too high to be accepted. Such tenders are not intended to be accepted, but are merely designed to give the appearance of genuine tendering. This enables another competitor's tender to be accepted when the contracting authority requires a minimum number of bidders.

Bid rotation

In 'bid rotation', all vendors participating in the scheme submit tenders, but by agreement take turns being the lowest bidder. Competitors may also take turns on contracts according to the size of the contract. Rotation schemes need to be sophisticated to avoid detection and to ensure that, over time, the participants each receive their agreed share of the value of contracts.

Warning signs of collusive tendering

Contracting organisations should watch out for circumstances that would not be expected in a normal competitive tendering situation.

Contracting parties are well placed to notice when firms may be acting anti-competitively. For buyers concerned that their organisation may be the victim of collusive tendering, the essential things to watch out for are circumstances that would not be expected in a normal competitive tendering situation. Obviously, what is 'normal' will vary with the product, service or the project involved. Suspicions may be aroused by unusual bid or pricing patterns. In addition, while colluding parties try to keep their arrangements secret, occasional slips in behaviour or certain statements may suggest the possibility of collusion.

Warning signs involving bid/tender patterns

- Some tenders are much higher than published price lists, previous tenders by the same firms, or properly prepared client cost estimates.
- There are geographic allocation patterns; for example firms are submitting tenders but never win in a particular area.
- Fewer competitors than normal submit tenders or a likely bidder fails to submit a bid.
- There is an apparent pattern of low tenders regularly recurring, for example the same contractor has been the low bidder and awarded the contract on successive occasions.
- A successful bidder repeatedly subcontracts work to companies that submitted higher tenders on the same projects.
- Bids contain less detail than expected.
- Tender prices appear to drop whenever a new or infrequent bidder submits a tender.
- The winning bidder does not accept the contract and subsequently is subcontracted work by the new winning contractor.

Warning signs involving pricing

- There is an unexplained large difference between the winning tender and all other tenders. Or, a certain company appears to be bidding substantially higher on some tenders than on others, with no logical cost differences to account for the difference.
- Competitors exchange price information among themselves. Note that such exchanges may take quite subtle forms, such as public discussions of the "right", "fair" or "reasonable" price.
- Competitors submit identical tenders or frequently change prices at about the same time and to the same extent.
- Local competitors are bidding higher prices for local delivery than for delivery to points farther away. This may indicate price fixing because the distant sellers would probably charge more for an item to account for the extra transportation cost.
- Sudden price increases or changes in price, discounts or rebates.

Warning signs involving suspicious behaviour

- There are irregularities in the physical appearance of the proposal, for example identical calculation or spelling errors. Also, there may be irregularities in the submission of tenders. For example, the use of identical stationery. These might suggest that competitors have copied, discussed, or planned one another's tenders or proposals.
- Two or more competitors file a "joint tender," even though at least one of the competitors could have bid on its own.
- A bidder appears in person to present his tender and also submits the tender of a competitor.
- Competitors regularly socialise or appear to hold meetings, or otherwise get together shortly before the deadline for submitting tenders.
- Competitors meet as a group with the contracting parties to discuss or review terms of tender proposals. This may facilitate subtle exchanges of pricing information.

Statements that may suggest bid-rigging

Sometimes statements suggest that bid-rigging is present.

Examples include:

- Any reference to “association price schedules”, “industry price schedules”, “industry suggested prices”, “industry-wide pricing” or “market-wide pricing”...
- Justification for the price or terms offered, “because they follow industry pricing or terms” or “follow (a named competitor’s) pricing or terms”.
- Any reference to “industry self-regulation”, such as justification for price or terms “because they conform to the industry’s guidelines” or “standards”.
- Any reference to the fact that a company has been meeting with its competitors.

Statements that suggest market allocation

Statements may also suggest the existence of agreements among competitors to divide territories or customers; for example:

- Statements to the effect that the company “does not sell in that area,” or that “only a particular firm sells in that area,” or “deals with that business.”
- Statements to the effect that a competitor should not be making a particular proposal to you, or should not be calling on you.
- Statements to the effect that it is a particular company’s “turn” to receive a job or contract.

Further information on best practice for procurement is available from:

The National Public Procurement Policy Unit (NPPPU) at <http://www.etenders.gov.ie>

Preventing collusive tendering

Contracting parties can assist the Competition Authority, not only by playing an active role in the detection of collusive tendering, but also by taking positive steps to stimulate competition and prevent collusive behaviour.

By establishing certain procurement procedures, public bodies can discourage anti-competitive activity. Such procedures include:

Expanding the list of bidders

It is more difficult for a large group of competitors to collude than for a small group. To reduce the ability of conspirators to co-ordinate illegal activities, buyers should solicit as many bids as possible. Soliciting numerous suppliers will not necessarily prevent a conspiracy, but it can reduce the effectiveness of a conspiracy by providing a larger competitive base. While there is no magic number of bidders above which collusion does not occur, international experience suggests that collusion is more likely to arise where there are 10 or fewer competitors.

Choosing between equal tenders

Not all identical tenders are the result of collusion. However, contracting organisations should not inadvertently encourage equal tenders by giving identical bidders an equal or reasonable share of the buyer's business. From a bidder's point of view, it may be better to share business equally with other suppliers at significantly higher prices than to have an uncertain share of the business at lower competitive prices. So, where tenders are equal, contracting parties should consider re-tendering the contract, or find some way to award the tender to one of the tied bidders.

Keeping the process secret

To help prevent competitors from knowing who to contact amongst potential competitors, the identity of proposed bidders should not be disclosed. You should also consider not disclosing an estimate so that bidders do not have an incentive to use that estimate as the floor for their tenders.

Penalties for breaches

Educating staff and keeping records

A contracting organisation should consider adopting the following measures as a matter of policy:

- Ensure procurement and contract personnel, auditors and investigators understand the different forms of collusion, such as bid-rigging and market allocation. Provide instruction on how to detect collusion. Stress the importance and benefits of preventing and detecting collusion.
- Keep procurement records, for example, bid lists, abstracts, awards, etc., and have them readily available. Looking at a single contract is not enough. Records of previous bids are required in order to determine if a pattern of allocation or rotation is present. Data collection forms should be used, with the raw information subsequently compiled. Where feasible, such data should be stored in a computer. This makes routine analysis simple and keeps you aware of patterns. It may also be prudent to advise the bidders that you conduct this type of analysis periodically. Request and record an abstract of all tenders, not just the winning tender.
- Suspected collusion, after an audit etc, should be communicated to the Competition Authority. The Competition Authority will determine if additional facts are needed.
- Encourage informal contact between your personnel and the Competition Authority whenever a potential collusive tendering situation is encountered.

"Breaches of the Competition Act are potentially criminal."

The Competition Authority can decide to pursue specific breaches as criminal offences or as civil infringements, or to pursue them by less formal means.

- A business, on conviction on indictment (before a judge and jury) may be fined an amount not exceeding €4 million or 10% of the business turnover, whichever is greater.
- An individual found guilty of an offence may be fined an amount not exceeding €4 million or 10% of their individual turnover, whichever is greater. They may also receive a term of imprisonment not exceeding five years.

Also, on conviction of a cartel offence, a company director will, under Irish company law, automatically face disqualification from acting as a director for five years.

The severity of the penalties available to the court reflects the serious nature of cartel behaviour. It is Competition Authority policy to pursue such behaviour criminally, to seek to send a file to the DPP and to recommend criminal prosecution.

Under Irish law, any undertaking involved in a cartel is guilty of a criminal offence, as is any director or manager who consented to or authorised the cartel. Any individual or business that assists the cartel is committing a criminal offence.

What can you do if you suspect collusive tendering?

"The Competition Authority needs the help of buyers of goods and services."

Cartel arrangements are usually made secretly and can be difficult to detect. Watch out for the warning signs detailed in this booklet. Keep a note of what you observe.

Contact the Competition Authority and report suspected anti-competitive behaviour. Please include as much information as possible.

You can report anti-competitive behaviour via:

- "Complaint" forms on our website: www.tca.ie
- Email: complaints@tca.ie
- Phone: 1890 220 224 (international: +353-1-8045400)
- Fax: +353-1-8045401
- Writing to: The Competition Authority, Parnell House, 14 Parnell Square, Dublin 1.

Gathering and preserving evidence

In the event of a criminal prosecution, guilt must be proven "beyond reasonable doubt". To assist the Competition Authority in its investigation, it is vital that all available evidence is gathered and preserved as soon as you suspect a cartel.

Evidence may be in many forms. Letters informing you of price changes, notes of telephone conversations, records of meetings, may all provide an essential link in the evidence chain.

Any documents should be preserved in their original state. You should retain the document as you received it and not make any additional notes or marks on it. No matter how insignificant it may appear at the time, carefully record and document everything. Even minor details may be crucial.

Make notes at every stage. Include details of conversations with representatives of the firms allegedly involved together with details of times, dates and the location where such conversations took place. You can never make too many notes but it is very easy to make too few.

Confidentiality

What will the Competition Authority do?

Any information you give the Competition Authority is treated as confidential.

It is the Competition Authority's policy not to:

- talk about individual investigations,
- reveal who the person who has complained is during an investigation,
- give the names of organisations or people being investigated, or
- give information to the media.

The Competition Authority asks that you do the same.

However, the Competition Authority may be obliged to disclose confidential information where it is required to do so by law.

This may happen when:

- Disclosure is for the purpose of the administration and enforcement of Competition Law,
- Disclosure is necessary for the prevention of the commission of a criminal offence,
- Disclosure is made in the course of legal proceedings.

You should not indicate to those suspected of involvement in anti-competitive activities that you have made, or intend to make, a complaint to the Competition Authority. This will only serve to alert a cartel or dominant business, possibly resulting in the removal of evidence.

Members of the public, employees, individual businesses, trade organisations, public representatives, Government Departments and public agencies are all invited to report suspected anti-competitive behaviour in relation to procurement to the Competition Authority.

As a first step, the Competition Authority will check that the issue of concern can be dealt with under competition law. Where the issue is within the Competition Authority's remit, it may be resolved quite quickly without the need for legal action. Some issues require a more detailed evaluation in order to assess their significance. A few cases proceed all the way to court. Every effort is made to complete investigations as quickly as possible.

The Competition Authority has a screening system to focus our resources on the larger cases while making sure that we deal with the rest quickly but fairly. In all matters, the Competition Authority's focus is to protect the competitive process throughout the economy for the benefit of the public.



Can the Competition Authority give advice or comment on investigations?

We cannot represent anyone in the same way that a solicitor does.

Neither do we:

- give legal advice - this is the role of the legal profession,
- comment publicly on whether or not we are investigating a particular alleged anti-competitive behaviour, or
- comment on the progress of any investigation.

More information

More information on the Competition Authority is available on our website: www.tca.ie

To contact us

- Email: info@tca.ie
- Phone: 1890 220 224 (international: + 353 1 8045400)
- Fax: + 353 1 8045401
- Write to: The Competition Authority, Parnell House, 14 Parnell Square, Dublin 1.

Disclaimer

This booklet does not give legal advice. Individuals should refer to the competition legislation and obtain independent legal advice when questions of law arise or if a particular situation causes concern.



