

Practice area	Country	Firm	Title	Summary	Contact person
Competition Law	India	Luthra & Luthra	Public Procurement & Role of Competition Commission of India (CCI)	There is a mandate on the Public Procurement agency to invite bids and the process of bidding is often rigged. Bid rigging or collusive bidding are anti-competitive practices under the Competition Act, 2002 and an obligation is cast upon the Competition Commission of India (CCI) to eliminate such business conducts.	Rajiv K. Luthra rajiv@luthra.com

Author: G.R. Bhatia

1. PUBLIC PROCUREMENT & ITS SIGNIFICANCE

Competition in market seeks to achieve 'best value for money' for a customer-be it an ordinary consumer, a commercial buyer or a public procurement agency. The latter makes purchases of goods or avails of services for sovereign as well as non sovereign functions. Procurement by State may be for public distribution, own use or sometimes for commercial purpose. The purchase of goods or services by the government and its arms, in common parlance, is known as 'public procurement' (PP). The global statistics suggest that on an average, PP accounts for 15% of the GDP worldwide⁵ and in some countries it is even close to 20% of the their GDP. Since it accounts for large share of expenditure of the state or public institution, the PP has to be efficient and effective to avoid mismanagements and waste of tax payer's money or public funds which are already under strain.

2. INVITATION OF BIDS – A WIDELY USED SYSTEM FOR PROCUREMENT.

Invitation of bids is most widely used system adopted by the procurement agency to secure the most favourable prices and conditions. However, these objectives are negated if the bidders collude or act in concert. Such collusive bidding or bid rigging runs contrary to the very purpose of inviting tenders and being inherently anti-competitive have harmful .impact on state exchequer. The competition concerns arising out of public procurement are increasingly receiving serious attention globally especially after the OECD's Third Report on the Implementation

⁵ OECD's Directorate of Financial & Enterprise Affairs Committee document on 'Public Procurement & Role of Competition Authorities'.

of the 1998 Recommendations on Hard Core Cartels⁶ lists the fight against anticompetitive behaviour in auction and in procurement (so called bid rigging) amongst priorities and advises Member countries to pursue their fight against hard core cartels (*collusion*).

3. COLLUSIVE BIDDING

Collusive bidding, in layman language, means an agreement between persons or enterprises engaged in same or similar business to submit identical bids in respect of price and /or other terms and conditions. Such bidding is palpably anti-competitive as competitors have agreed not to compete on price or other terms and conditions and thus the procurement agency is deprived of the benefits of rivalry. The competition literature⁷ suggests that collusion is favoured when -

- (a) the industry is concentrated,
- (b) there are barriers to entry,
- (c) market transactions are transparent,
- (d) the players compete with each other repeatedly and
- (e) the existence of collusion is easy to conceal.

In an Enquiry before the erstwhile Monopolies & Restrictive Trade Practices Commission (MRTPC), the respondents were found to have quoted identical rates for various items in response to tenders floated by Salem Steel Plant, a unit of Steel Authority of India, even though the cost of production of the bidders varied. The MRTPC viewed that this raises presumption in favour of a collusion⁸ and the onus of disproving cartel stood shifted to the respondents.

The MRTPC also instituted a Restrictive Trade Practice Enquiry on an information/complaint by the Ministry of Health & Family Welfare, Government of India against 8 parties (including Hindustan Latex Ltd. – a Govt. of India enterprise) for allegedly submitting identical bids (both in respect of price/quantity) for supply of Copper-T, a family planning device. The MRTPC prima facie found to be a case of collusion amongst bidders. Pursuant to promulgation of the Competition (Amendments) Ordinance, 2009 on 14th Oct., 2009, the enquiry which was pending before the MRTPC will now be heard and disposed of by the Competition Appellate Tribunal in terms of the repealed provisions of the MRTP Act, 1969.

4. BID RIGGING⁹

⁶ Ibid.

⁷ OECD Document DAFFE/CLP (99)3/FINAL under the caption 'Competition Policy and Procurement Market'.

⁸ In re Bengal Tools Limited and Ors.- Order dated 25.04.1986 in Restrictive Trade Practice Enquiry No. 120/1984.

⁹ Advocacy Booklet on Bid Rigging under the Competition Act, 2002 put in public domain by the Competition Commission of India-
www.competitioncommission.gov.in

Bid rigging may take many forms, but bid rigging conspiracies usually fall into one or more of the following categories:

- i). Bid Suppression: In bid suppression scheme, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw from previous bid so that the designated winning competitor's bid will be accepted.
- ii). Complementary bidding: It occurs when some competitors agree to submit bid 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.
- iii). Bid Rotation: In bid rotation schemes, all conspirators submit bids but take turns to be the lowest bidder. The terms of rotation may vary; for example, competitors may take turns on contracts according to the size.
- iv). Sub contracting : Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

While in collusive bidding, reduction in competition is imminent but in case of bid rigging, the prosecutor has to satisfy that bid rigging has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.¹⁰

5. BID RIGGING/COLLUSIVE BIDDING UNDER THE COMPETITION ACT, 2002.

5.1 The High Level Committee on Competition Policy & Competition Law (also known as Raghavan Committee) on which report the present Competition Act has been enacted, in para 4.3.7 observed as under :

In general, the 'rule of reason' test is required for establishing that an agreement is illegal. However for certain kinds of agreements the presumption is often that they cannot serve any useful or pro-competitive purpose and therefore do not need to be subject to the 'rule of reason' test. Amongst, the four categories of agreements including 'agreements regarding bids (collusive tendering), it recommended to be presumed to be anti-competitive'.

¹⁰ Explanation below proviso to sub-section (3) of Section 3 of the Competition Act, 2002

5.2 In line with the recommendation, Section 3(3) of the Competition Act, 2002 inter-alia envisages that any agreement between persons or enterprises engaged in identical business which directly or indirectly results in bid rigging or collusive bidding shall be presumed to have appreciable adverse effect on competition(AAEC). Meaning thereby that the aggrieved party or the prosecutor only need to prove the existence of bid rigging and not required to prove the harm caused and the responsibility of rebuttal of charge devolves on the defendants.

5.3 It may be appropriate to mention that under the MRTP Act, 1969, bid rigging or collusive bidding used to be a deemed restrictive trade practice in terms of of Section 33(1) thereof. However, the absence of power to impose penalty on the delinquent parties, lack of provision to grant leniency to a party which helps in busting the conspiracy by providing key information, the absence of civil court powers with the investigation agency, absence of enabling provisions to enter into MOUs with contemporary overseas authority to nab foreign parties and absence of explicit responsibility to create awareness about the need for and usefulness of having competition in market, were major handicaps in detecting and censuring bid rigging or collusive bidding conducts. Since, these bottlenecks have largely been taken care of in the Competition Act, it should be possible for the Competition Commission of India (CCI) to detect and punish the bid rigging or collusive bidding behaviour effectively.

6. BENIGN IMPACT OF FREE & FAIR BIDDING:

According to the Japanese Fair Trade Practice Commission (JFTC), the strict and proactive enforcement against bid rigging has not only served to maintain and promote fair and free competition in public procurement markets but following initiation of investigation in 22 cases, the contract prices has come down on an average by 18.6%.¹¹

As per media reports¹² the National Thermal Power Corporation (NTPC) got renewed its cover of insurance of its Rs. 75,000 crores assets but it has paid Rs. 62 crores as against Rs. 92 crores last year (31% less) as the four general insurance companies submitted competitive bids, namely, New India (Rs. 86 crores), United India (Rs. 76 crores), National Insurance (Rs. 101 crores) and Oriental Insurance (Rs. 62 crores). ONGC has managed to get 38% reduction in premia, Air India too bagged insurance cover at close to 40% discount in the premium. Thanks to private and public sector battling for business”

7. UNIQUENESS OF PUBLIC PROCUREMENT

¹¹ The JFTC's analysis is based on materials and other items that were submitted by the procurement agencies during investigations.

¹² Based on news item which appeared in the Times of India of 22.06.2007 under the caption 'Competition pulls down general insurance premium'.

A buyer notwithstanding the fact whether it is private or public institution face same or similar anti competitive practices namely, collusive bidding, bid rigging or any abusive conduct when supplier happen to enjoy dominance in the market. However, a public purchaser is placed in more onerous position in comparison to a private buyer because of following uniqueness:

- (i) A private party can adopt purchasing strategy of its choice and thereby enjoy flexibility whereas a public agency is rule bound e.g. all procurements by the Ministries of the Central Government or corporations established under any Central Act, Government companies and local authorities owned and controlled by that Government are mandated by instructions issued by the Central Vigilance Commission (CVC) established under the Central Vigilance Commission Act, 2003. Similarly, each state is having State Vigilance Commission which exercise surveillance in respect procurements made by States and its bodies. Further, the Ministries and other agencies under the Central Government have to make purchases at DG S& D rate contracted goods from the suppliers.¹³ In nutshell, the private buyers are not subject to the same disciplines as the public buyers need to abide,
- (ii) PP process is constrained by regulatory requirements e.g. there is an obligation on the procurer to have transparency. Though it is aimed to eradicate corruption and favoritism but complete transparency makes conducive for suppliers to collude at least in future procurements. Thus, transparency is a double edged phenomenon : to make market more transparent involves cost and formal process which may end up in collusion,
- (iii) PP may also be used as a tool to address other public policy objectives e.g. states have a policy to procure wheat, sugarcane, cotton etc at an administered or support price. Central Government¹⁴ and State Governments have a policy of giving price and purchase preference to public sector enterprises or small sector¹⁵. Where procurement is used as a tool for the pursuit of some other policy objectives, the benefits needs to be weighed against the effects on competition.
- (iv) a public institution is generally either not in business or is invariably a monopolist/oligopolistic and as such it is often not serious or concerned of the price at which it is making procurements. The defence procurements are not subject to business. Likewise, railways and postal departments though render services for consideration but they enjoy monopoly. The incentives for cost efficiency are strong in an organization which is in highly competitive industry, the incentives for cost efficiency are weaker for industries in monopoly or oligopoly,

¹³DG S & D's Manual available on <http://www.dgsnd.gov.in>

¹⁴ Office Memorandum No. DPE/13(12)/2003-Fin dated 26th October, 2004 issued by the Department of Public Enterprises, Government of India

¹⁵ The Micro, Small & Medium Enterprises Development Act, 2006

weaker still for state owned monopolies and weakest of all in government departments.

Since these are bottlenecks in having efficient and effective procurement by public institutions, it will be appropriate for Agencies to review them in consultation with CCI, a specialized body in analyzing competition issues and should strive to minimize these bottlenecks.

8. CHOICE OF TENDER MODE

Floating tender or simple auction is most common method adopted in PP. Tendering may be either open or sealed one. Open tenders have the merit of certainty, transparency, less time consuming but allow prospective bidders to exchange sensitive information during the course of tender and thereby make it easier for them to arrive at collusive arrangement or understanding. On the other hand, the sealed bids create uncertainty in the minds of bidders which enables the PP to have best offer beside it has the merit of encouraging the small and weak bidder to participate.

Open tender mode is advisable when there are enough number of suppliers and sealed bids is considered better option when there are few suppliers in the market.

9. TENDER DESIGN- A SKILLFUL TASK

Beside choice of model, tender design substantially influence as to whether PP is pro or anti competitive. In evolving the tender design and structure, the following objectives need to be kept in mind by the procurement agency:-

- (i) the eligibility terms and conditions should not result in barrier to entry/participation. Specification which is aimed at excluding prospective bidders certainly reduces the number of participants. The key principles regarding pre-qualifications, based on various circulars/ manuals of the Central Vigilance Commission(CVC)¹⁶ are:-
 - (a) Pre-qualification (PQ) criteria is a yardstick to allow or disallow the firms to participate in the bid. The system cannot give considerable scope for malpractices, favoritism and corruption. The criteria specified should neither be very stringent nor very lax to restrict/facilitate the entry of bidders. The PQ criteria should be exhaustive yet specific and that there is fair competition.¹⁷

¹⁶ (OM No. 12-02-1-CTE-6 dated 17th Dec.,2002 of CTE's Organisation under the Central Vigilance Commission.

¹⁷ O.M No. 12-02-1-CTE-6 dated 7th May, 2004 of CTE's Organisation under the Central Vigilance Commission

- (b) PQ criteria, performance criteria and evaluation criteria are required to be incorporated in the bid documents in clear and unambiguous terms as these criterion are very important to evaluate bids in a transparent manner. Whenever required, the departments/organization should follow two-bid system, i.e. technical bid and price bid. The price bids should be opened only of those vendors who are technically qualified by the department/organization.
- (c) It is for the organization to take appropriate decisions keeping the guidelines in view. However, in case a Department wants to take action in deviation or modification of the guidelines, to suit the requirements, it is for them to do so by recording the reasons and obtaining the approval of the competent authority for the same.

In the case of Traco Cables Limited, the MRTPC held that it is the domain of the procurement agency to lay down the eligibility conditions for bidding. The Irish Competition Authority¹⁸ acknowledges that it is not in a position to adjudicate on the merits of particular minimum requirements for participating in the tendering process but merely highlights the broader policy by envisaging that-

'as a matter of policy, tendering bodies should be mindful of proportionality in setting the minimum requirements for tendering but when tendering requirements unnecessarily reduce competition, value for money for the contracting authority is reduced.'

Similar principle has been propounded by the Courts in India. 'A court needs to intervene only when it comes to the conclusion that there is overwhelming public interest in entertaining the petition. Where decision has been taken bonafide and the choice has been exercised on legitimate consideration and not arbitrarily, there is no reason why court should entertain petition under Article 226'¹⁹.

CVC's directions²⁰ also envisage as under:

"The Commission would reiterate that whatever prequalification, evaluation/ exclusion criteria etc which the organization wants to adopt should be made explicit at the time of inviting tenders so that basic concept of transparency and interests of equity and fairness are satisfied. The acceptance/rejection of any bid should not be arbitrary but on justified grounds as per the laid down specifications,

¹⁸ Contribution by Ireland in OECD document No.DAF/COMP/WP3/WD(2007)34 under the caption "Public Procurement – The Role of Competition Authorities in Promoting Competition".

¹⁹ (CA No 4892 of 1998 decided on 09-12-98 in the matter of Raunaq International Limited vs. I.V.R. Construction Ltd & Ors. –Manu/SC/0770/1998).

²⁰ CVC 's OM No. 33/7/03 (98/ORD/1) dated 9th July, 2003.

evaluation/exclusion criteria leaving no room for complaints as after all, the bidders spend a lot of time and energy besides financial cost initially in preparing the bids and , thereafter in following up with the organization for submitting various clarifications and presentations."

Thus, the case law including the view of competition authorities and the instructions of CVC do give liberty to the procurement agency to determine the specifications and eligibility criteria, however, in determining so there should be 'malice towards none' and the simple rule is 'do not restrain those who can bid'.

- (ii) The entire tender process should aim at reducing transparency and restrain free flow of information which is sensitive from competition perspective. A high degree of transparency facilitate collusion as economics says "do not advertise who won and what the bids were, transparency can only help collusion". It is advisable to keep the identities of bidders undisclosed. Adoption of electronic mode of filing bid is preferred rather than requiring the bidder to submit the bid in person at a designated time and place

For monitoring bidding markets to detect possible collusive conduct, Korea and Brazil²¹ have evolved a unique centralized system and the procurement process is electronic.

The Korean electronic procurement system and centralized monitoring of procurement outcomes
<p>Korea has recently introduced a mandatory electronic system, called 'KONEPS'. Korean electronic system is a web based system which processes electronically the entire procurement process (including registration, bidding, contract, inspection and payment) and it provides related information on a real time basis. According to latest report, over 90% of public tenders in Korea are conducted electronically and the system has significantly increased participation to public tenders and has significantly improved transparency in procurement administration, eliminating all instances of corruption. In addition, the system has reportedly boosted efficiency in the procurement, increasing the number of transactions and significantly reducing the transaction costs.</p> <p>Procurement through electronic mode has succeeded in data generation which enables KFTC to screen for bid rigging. The screening programme called 'BRIAS' – Bid Rigging Indicator Analysis system has been introduced by the KFTC in 2006 and the system automatically carries out statistical and empirical analysis for the likelihood of collusive bidding based on the information on bidding for public projects of the state, local governments and the</p>

²¹ Extract of background note to OECD unclassified document DAF/COM(2007)34.

government financed institutions.

The Brazilian electronic procurement system

The Brazilian Federal Government has also set up a government e-procurement system, called COMPRASNET. The system is a web-based on line procurement system used by all Federal Government units. It is a system whereunder the public procuring organisation registers the procurement needs. The system then automatically informs registered suppliers by e-mail and the supplier may download the bidding documents. For goods classified as commodities, the whole process may be done on line, using a price quoting system. For larger procurement, a reverse auction procedure is used. In the reverse auction the bids are submitted on line and each supplier can reduce its bid price during the auction and the one offering the lowest price at a pre-agreed end time for the auction will be awarded the contract.

Auctions and prices are open for inspection by the public, and auction results are posted immediately. The system therefore enables better and more transparent procurement, as well as reducing the length of the process. For example, a normal procurement process takes more than two months. The on-line reverse auction may be completed in less than 15 working days. The use of on line procurement has also increased the participation of small businesses in government tenders. In terms of effect on rivalry, it is estimated that the system brought an estimated average 20% reduction of final price for goods and services acquired through reverse auction and price quoting.

Though the CVC²² do require wide publicity of tenders through newspapers, trade journals besides requiring complete bid documents along with application form to be published on the web-site of the procurement agency. Similar prescription is mandated by the States.²³ but it seems we need to consider and if found feasible and useful, adopt in phased manner the system in vogue overseas so that both procurement agency and the Competition Commission can undertake continuous analysis of the data generated so as to facilitate detection and punishment of cases involving bid rigging or collusive bidding.

²² Office Order Nos 98/ORR/1 dated 18th Dec., 2003, 9th Feb., 2004 and 11th Feb., 2004.

²³ The Tamil Nadu Transparency in Tenders Act, 1998 and the Karnataka Transparency in Public Procurements Act,, 1999.

- (iii) Reducing , the frequency of procurement opportunities - holding tenders at short intervals heighten the possibility of collusion and accordingly, fewer and larger tenders are desirable Contract aggregation can be thought of. Aggregation refers to the bundling of requirements into fewer, large contracts and resultantly less frequency of tendering. This, however, results in exclusion of small bidders as only big bidders can submit bids for large contracts.
- (iv) A flexibility of joint bidding should be given only when the size of the bid is believed to be big and that it will enable the smaller firms to participate and thereby become rival to big bidder. Joint bidding ought not be allowed.

The Bundeskartellamt decision of 16th Nov. 2004 prohibited Joint Participation by Rethmann and Tonsmeier in GfA Kothen²⁴

Rethmann, Tonsmeier and the public-owned GfA Kothen were active in various local disposal markets, especially in the market for the collection and transport of residual waste, waste paper and other types of waste. In a tender to privatize GfA Kothen, Rethmann and Tonsmeier submitted a joint bid. In November, 2004, the Bundeskartellamt prohibited the joint participation of Rethmann and Tonsmeier in GfA Kothen. Both the formation of a bidding syndicate by Rethmann and Tonsmeier and the formation of a joint venture constituted illegal anti-competitive agreements within the meaning of the ban on cartels. As a result of the formation of the bidding syndicate only one joint bid was submitted in the tender to privatize GfA Kothen instead of two independent bids. Rethmann, the second-largest German waste disposal company, and Tonsmeier, a well-established medium-sized enterprise, would both have been able to submit an independent bid. According to the Bundeskartellamt's evaluation Rethmann and Tonsmeier would also have coordinated their competitive behaviour in the relevant geographic market after the merger as a consequence of the formation of the cooperative joint venture. Furthermore, the merger would have strengthened a dominant oligopoly in the markets for the collection and transport of residual waste and waster paper in a geographic area of approx. 100 km surrounding the District of Kothen.

- (v) The privilege to form consortium should exist only when procurement agency is of the view that each firm in the consortium does not have economic, financial and technical strength to supply at its own the needed products. Allowing consortium to bid should be prerogative of the procurement agency. The consortium may be pro-competitive under certain circumstances, e.g. the Mumbai Trans Harbour 22 kms. Link that aims to cut travel time between Mumbai and Navi Mumbai on the mainland by more than an hour, has recently been cleared

²⁴ Full text is available at <http://www.bundeskartellamt.de>

and awarded for Rs 6000 crores in favour of consortium led by ADAG group and Hyundai Group of South Korea.

- (vi) Sub contracting should neither be permitted nor it should be allowed to happen after the award as it has potential likelihood of bid rigging. Alexander B in her book "Mechanism for rent transfer: Subcontracting among military aircraft manufacturers" notes that winning bidders in auction of prime defence contracts often award subcontracts to competing bidders and she concludes that the sub-contracts are "vehicles for dividing the spoils of collusive bidding".
- (vii) Credible reserve price is yet another safety measure which reduces the possibilities of collusion.

10. CHECK LIST²⁵ OF SUSPICIOUS BEHAVIOUR/ STATEMENTS OF COLLUSION:

Certain pattern of conduct suggest the possibility of collusion, namely –

- When some bids are much higher than published price lists, previous bids by the same firms;
- In case fewer than normal competitors submit bids;
- the same supplier has been the winning bidder over a period of time;
- there is an inexplicably huge margin between the winning bid and all other bids;
- there is an apparent pattern of low bids regularly recurring;
- a company appears to be bidding substantially higher on some bids than on some bids than on other bids, with no logical cost differences to account for the difference;
- two or more competitors have a "silent" joint venture even though at least one of them could have bid for the work alone;
- a successful bidder repeatedly subcontracts work to competitors that submitted higher bids on the same projects;

²⁵ Compiled on the basis of Check List evolved in US, Slovak Republic, Sweden and the Advocacy booklet on Bid Rigging by the Competition Commission of India (CCI).

- a bidder submits an offer, which is not capable of being performed;
- the bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate that the designated bid winner has prepared all other bids (of the losers) The other irregularities could be use of identical forms or stationery, suggesting that competitors have copied, discussed or planned one another's bids or proposals or the bid documents contain the same corrections and alterations indicating last minute changes.. If the bids are obtained by mail, there are similarities of postmark or postal metering machine marks;
- A bidder seeks a bid package for itself and also for the competitor;
- a bidder appears in person to present his bid and also submits the bid (or bond) of a competitor;
- competitors regularly socialize, hold meetings or otherwise get together in the vicinity or procurement offices shortly before bid filing deadlines;
- competitors meet as a group with procurement personnel to discuss or review terms of bid proposals;
- bid prices appear to drop whenever a new or infrequent bidder submits a bid;
- competitors exchange price information among themselves. When this occurs in markets with only a few sellers, it is potentially anticompetitive.
- firms that ship their product short distances to the buyer charge the same price as those that ship long distances. This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of transportation;
- competitors are charging higher prices to local customers than to distant customers.

CERTAIN STATEMENTS GIVE RISE TO SUSPICION OF COLLUSION:

Sometimes statements made by marketing representatives of suppliers suggest that price fixing or bid-rigging is occurring. Examples are:

- references to "association price schedule", "industry price schedules", "industry suggested prices", "industry wide" 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";
- references to "industry self-regulation" etc., such as justifications for price or terms "because they conform to the industry's guidelines" or "standards";
- statements indicating that the representative's company has been meeting with its competitors for whatever reason or that the bidders have discussed the prices and reached an understanding;
- statements that the representative's 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's salesman should not be making a particular proposal or should not be calling on a particular customer;
- a statement to the effect that it is a complementary, token or cover bid and/or it is particular vendor's "turn" to receive a particular job or contract; and
- A statement indicating advance knowledge of the offers of the competitors..

It be noted that the above pattern of conducts or statements are only illustrative and not exhaustive. Even though above hints may indicate collusion but not necessarily a prosecutable anti trust conspiracy.. It is, therefore, necessary to analyze the gathered information and eventually gain more evidence in order to arrive at prima facie opinion that there is a case for further enquiry/investigation into alleged collusion.

11. ALTERNATIVE BIDDING STRATEGIES;

The alternative instruments to reduce the risk of collusion adopted ²⁶ are:

- (a) using randomized weighing criteria-. The EU public procurement system allows to award contract on the basis of the economically most advantageous tender. Hence, procurement agency may define the criteria that it intends to apply to the award as well as the weight they will give to each in the evaluation. However, the system has the limitation of disguised discrimination,
- (b) opening bidding to more suppliers- this largely depends upon how the purchaser defines the market. It further depends as to whether the

²⁶ As adopted in European Union

option to bid is confined to domestic parties or foreign parties are also allowed to bid. Government Procurement Agreement (GPA) seeks to broaden the number of suppliers. Incidentally, India has not so far signed the GPA and thereby it is not mandatory for the public procurement agency to extend the invitation to overseas bidders,

- (c) involving competition authorities in the bidding process- it involves both awareness measure as well as enforcement measures,
- (d) negotiating versus bidding-this seems to be based on the idea that in tender procedures the purchaser would be unable to control the behaviour of the would be suppliers while in negotiations the purchaser would maintain a lot more control over such behaviour. The EU directives do give choice to the contracting party to negotiate the terms of the contract so that the purchaser can act as free economic operator but recourse to this procedure is allowed only in certain exceptional cases. The CVC's directions²⁷ in this respect are:

'there should not be any negotiations. Negotiations if at all shall be an exception and only in the case of proprietary items or in case of items with limited source of supply. Negotiations shall be held with L-1 only. Counter offers tantamount to negotiations and should be treated at par with negotiation'.

Negotiations can be recommended in exceptional circumstances only after due application of mind and recording valid, logical reasons, justifying negotiation. In case of inability to obtain the desired results by way of reduction of rates and negotiations prove infructuous, satisfactory explanations are required to be recorded by the Committee who recommended the negotiations.

- (e) using electronic public procurement processes-The EC has launched a programme known by the acronym SIMAP²⁸ which provides information about procurement both as regards opportunities and as regards the rules applicable,.
- (f) a high degree of professionalism among purchasers can significantly improve the environment in which public procurement takes place. Competition is facilitated by the way the purchasers define rules of the game and the market and thus training on best practices is an important instrument to reduce collusion,.

²⁷ Office Order No 68/10/05 dated 25.10.2005 of the Central Vigilance Commission, Government of India.

²⁸ Simap's homepage can be visited at <http://simap.eu.int>

- (g) In US, a bidder is required to give a Certificate²⁹ of Independent Price Determination. In this certificate the offeror certifies that the prices have been arrived at independently and will not be knowingly disclosed by the offeror and that no attempt has been made or will be made to induce any other concern to submit or not to submit an offer for the purpose of restricting competition. This makes prosecution easier as prosecutor has only to prove a fact of false certificate; and
- (h) Compliance programme³⁰ can be yet another alternative to reduce the risk of collusion. Under the compliance programme, senior management is educated about the collusion and the deterrent penalties and to have all employees involved in sales with the Government to sign a statement saying that they have read the law and will comply with it and the whistle blowers are protected against employer's retaliation.

Thus, alternative instruments to reduce the risk of collusion are ever evolving and further it is largely dependent on the specific market attributes and therefore 'one size fits all approach' is not possible. However, broad alternative needs to be fine tuned with the specific attributes of each procurement market.

12. ROLE OF COMPETITION COMMISSION OF INDIA:

12.1 Two pronged approach is inevitable to make PP free from the virus of collusion –one by launching " Public Procurement Outreach & Training Programmes" which may encompass educating public procurement officials and functionaries who have responsibility to oversee the PP , the extent of harm caused due to collusion or rigging, how to detect and what information/document has evidentiary value, the techniques which they may adopt to make liable the colluding bidders, developing working relationship between procurement agency, surveillance body, the investigating/prosecuting officials and the CCI and to encourage procurement officials to report violations by co-workers. In turn the procurement officials often provide the key evidence that results in a successful bid rigging prosecution. The ultimate goal of the outreach & training programme is to work as a team to detect and punish bid rigging through effective prosecution, increased vigilance and better designed public procurement programmes.

12.2 The CCI can reduce the risk of bid rigging by evolving a mechanism to monitor the procurement markets, focusing on those sectors in which the risk of collusion is higher. Preventive measures based on lessons learnt should be adopted and this would include for instance sharing of information on collusion with contracting entities in order to facilitate for them the conducting of sound public procurement procedures.

12.3 The CCI should undertake extensive advocacy programmes to sensitize the legislatures and policy planners to evolve and adopt policies and measures which

²⁹ Document of US delegation and incorporated in OECD's document DAF/COMP/WP3/WD(2007)43

³⁰ As adopted in the United States

promote free and fair competition ,in public procurement e.g. the need to create national markets instead of fragmented markets(narrow markets breeds collusion-this malady will be substantially tamed with the implementation of proposed GST in 2010), competitive neutrality between public, private and small scale sector (abolish any discriminatory policy especially in grant of subsidies and purchase price preference to public sector undertakings), fiscal policy should not distort market, denouncing policies which restrains the entry/exit or use of essential facilities..

12.4 CCI needs to take up advocacy extensively with those who have to interpret the law i.e. those who will hear appeal or those who will be involved either in execution of the order passed or to look into complaints of disobedience of the orders passed by it. Making aware of the harm caused by collusion to these authorities is expected to yield results.

12.5 In public procurement, to begin with, as an awareness process, the CCI may advise Public Agencies to insert a warning label saying "*collusion would lead you to fine*" in all documents relating to procurement.

12.6 Advocacy is meaningful only when it is supported by stern enforcement against bid rigging and collusive bidding. The Act confers power on CCI to initiate enquiry in respect of suspected collusion on receipt of an information from any person, consumer or their association or trade association or on a reference from Central/State Government/ Statutory Authority or upon its own knowledge or information (*suo motu*). On being convinced *prima facie*, the CCI is mandated to refer the matter to its investigation arm viz. the Director General and thereafter proceed as per law. Where after enquiry, the CCI finds that there has been collusion, it has *inter alia* power to censure the delinquent parties by passing a 'Cease & Desist' order beside may impose a penalty on each party 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. The CCI is also armed with a residuary power, namely to pass such other order as it may deem fit which may include suspension to participate in the bids for a specified time or to permanently debar the colluding bidder (black list).

12.7 The substantive provisions including those relating to enquiries into alleged collusion have been made effective from 20th May, 2009 and the CCI has since commenced its enforcement *inter-alia* in cases where there is suspicion of bids rigged or colluded. A time has therefore come for the aggrieved public procurement agencies to take advantage by reporting the cases of such coloured and blurred bids to CCI and have redress of their grievance. At the same time, the CCI needs to gear itself to take swift, timely and effective enforcement measures to detect and punish delinquent persons/enterprises so that there is clear and loud message that there shall be zero tolerance to such anti competitive business conducts and colluding or rigging in bids are things of past in India.

For further information on this topic please contact G.R. Bhatia at gbhatia@luthra.com or Legalink 's contact Rajiv K. Luthra at rajiv@luthra.com.