SCF

Sofia Competition Forum

GUIDELINES FOR FIGHTING BID-RIGGING IN PUBLIC PROCUREMENT

BULGARIAN COMMISSION ON PROTECTION OF COMPETITION

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

GUIDELINES
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I. INTRODUCTION

§. 1. The objective of the present Guidelines is to outline the main competition problems that can be observed with regard to public procurement award procedures by throwing some light on the nature and characteristics of bid-rigging as a form of anticompetitive behavior, the potential factors that could lead to such behavior on the part of undertakings as well as the presence of certain circumstances that could serve as an indication for the presence of such illegal behavior[9].

§. 2. The Guidelines are targeted mainly at the contracting authorities of public procurement procedures as they have an immediate and key role in the process of selecting the most favorable bid for the state in terms of price and quality. It is because of this very role, and the responsibility related to it, that the contracting authorities are also directly affected by bid-rigging which leads to eliminating the mechanisms of effective competition, artificially increasing prices and lowering the quality and level of innovativeness of the offered goods and services, thus damaging the interest society has in receiving public services of good quality. The extremely harmful effect of bid-rigging on society has also been enhanced by the fact that public procurement is often related to the spending of a sufficient amount of public funding aimed at implementing projects of key importance for economic development such as the construction of highways and other types of road infrastructure, facilities in the energy sector, or projects in the field of social policy, healthcare, education, etc. That is why the vigilance of the contracting authorities of public procurement should be directed to fighting against bid-rigging. In their efforts they can always have the support of the national competition authority of the Republic of Bulgaria – the Commission on Protection of Competition (CPC).

[9] The Guidelines were adopted by the CPC decision № 570/20.05.2010

§. 3. The present Guidelines are also directed to raising the awareness of all persons involved in the process of awarding public procurement in the country, as well as of all citizens and economic subjects who are objectively interested in the effective spending of public funds through public procurement procedures. On the other hand, raising the awareness of the society would support the process of disclosing and counteracting such anticompetitive behavior on the part of the CPC by initiating specific proceedings for establishing potential infringements of the general prohibitions under Article 15 of the Law on Protection of Competition (LPC) and/ or Article 101 of the Treaty for the Functioning of the European Union (TFEU).

II. COMPETITION AS A PRINCIPLE IN PUBLIC PROCUREMENT

§. 4. The process of awarding public procurement procedures is related to the spending of public funds aimed at satisfying the economic needs of the contracting authorities. According to the Organization for Economic Cooperation and Development (OECD), between 15-20% of the GDP of a country worldwide are spent on purchasing goods and services in the public sector. Through its policy in the sphere of public procurement, the public sector could exert impact on the structure of the market, influence the competition among market participants and affect significantly the economic behavior of the participants in the respective public tenders.

§. 5. The awarding of public procurement rests on the economic principle of supply and demand which predetermines the bilateral nature of the relations between the authorities contracting the public procurement procedures and the participants in the relevant market. As a rule, the contracting authorities in public procurement rely on competition to ensure that their budgets will be spent in the most effective way. They

have interest in purchasing products of high quality at low prices because their resources are always limited unlike the needs that have to be satisfied. In the conditions of market economy the effective competition process is the one which could lead to lower prices or higher quality, or more innovations in offering goods or services in public procurement procedures.

§. 6. The participants in the bilateral market relation created in awarding public procurement procedures are the bidders, on the one hand, and the purchasers/ contracting authorities, on the other. In most of the cases the bidders are of trade capacity and implement "economic activity" on the relevant market as a result of which they are considered to be "undertakings" in the sense of competition law. On the other hand, the contracting authorities are state or local authorities or public organizations which take part in the citizen turnover through spending public funds or funds aimed at implementing activities which are of public interest. In view of the authoritative (administrative) nature of the acts and actions of the contracting authorities in the frame of public procurement procedures, their activity is characterized by "economic activity" as a result of which the contracting authorities are not "undertakings" in the sense of competition law.

§. 7. The ensuring of effective, loyal and free competition among the undertakings that take part in public procurement procedures has been regulated as a leading principle in applicable law. The law of the European Union (EU) with regard to public procurement procedures has been objectified in Directive 17/2004 and Directive 18/2004, the scope of which cover the public procurement procedures in the field of supplies, services and construction, on the one hand, and in the field of communal services (transport, telecommunications, energy and water services), on the other. The two directives regulate the following main principles in awarding public procurement procedures: equal

treatment, non-discrimination, effective competition and transparency.

§. 8. The directives related to the application of the institute of public procurement in the frame of the common European market have been transposed on the national level in the Public Procurement Act (PPA) and the Ordinance on Awarding Small Public Procurement (OASPP). In accordance with Article 2, para 1 of the PPA, public procurement is awarded following the procedures envisaged in this law in accordance with the following principles: publicity and transparency, free and loyal competition, equality and non-discrimination.

III. RESTRICTION OF COMPETITION IN THE AWARDING OF PUBLIC PROCUREMENT

§. 9. The potential restrictions of competition in awarding public procurement can be divided into two groups: *public* and *private*.

1. Public restrictions of competition

§. 10. The violation of the competition principle should be considered a public restriction of competition when it stems from acts, actions or omissions of the contracting authorities in public procurement procedures. Those acts, actions or omissions have been issued or realized in implementing the authoritative (administrative) competences of the contracting authorities and are most often manifested in the opening of public procurement procedures as well as in rating the participants and selecting the contractor.

§. 11. The public restrictions of competition can be implemented by the contracting authorities themselves through the introduction of discriminatory conditions and requirements to the

participants in opening a procedure, which narrow the circle of potential bidders and create unreasonable obstacles in front of the candidates while favoring a certain participant in the market. The principle of free and loyal competition could also be violated by enacting a decision for rating the participants in which a bidder which should have been eliminated by the contracting authority has been illegally admitted to the evaluation and rating stage.

§. 12. In the case of public restrictions of competition the establishment of a violation of the principle of free and loyal competition could serve as grounds for repealing the respective acts, actions or omissions of the contracting authorities in accordance with the control competences of the CPC further to Article 120 and the following articles of the Public Procurement Act (PPA).

2. Private restrictions of competition

§. 13. The private restrictions of competition cover the actions of the economic operators in the relevant market which could lead to prevention, restriction or distortion of competition in the process of awarding public procurement procedures. In this case bid-rigging is a form of horizontal anti-competitive conduct of undertakings as the rules of free and fair competition have been violated by the very participants in the procedures who happen to be competitors on the relevant market.

§. 14. The undertakings that take part in the public procurement procedures are interested in being awarded the procurement at conditions that are most favorable for them as in this way they could maximize the economic benefit they get once given the opportunity to implement the respective contract. As in the conditions of an effective competitive process there is an economic risk for the undertakings not to get the public procurement by being displaced by their real or potential

competitors on the market, the bidders are willing to participate in agreements among themselves for fixing the prices, quality or quantity of the procurement as well as to close the market for potential competitors or to boycott the participation of their real competitors. For achieving this objective they exchange among themselves sensitive market information and trade secrets, thus coordinating their behavior when participating in public procurement procedures. The forms of coordination among undertakings lead to anticompetitive bid-rigging as they distort the competitive process among the participants in them. Anticompetitive bid-rigging gives rise to considerable harms for the contracting authorities as their budget funds or funds for implementing activities of social importance are taken away from them, thus undermining the advantages of the competitive market.

§. 15. In establishing certain behavior of undertakings which could objectively lead to the prevention, restriction or distortion of competition in awarding public procurement, there are grounds for the CPC to hold these undertakings the legally responsible for committing an infringement of Article 15, para 1 of the LPS and/ or Article 101, para 1 of TFEU.

IV. THE NATURE OF BID-RIGGING

§. 16. Bid-rigging belongs to the group of *private* restrictions to competition and is always present when the bidders in a certain public procurement agree among themselves to offer higher prices or lower quality of the goods and services purchased under the public procurement procedure, or to allocate the public procurement among themselves thus preventing, restricting or distorting the competition during the awarding process. In every bid-rigging in the context of public procurement coordination or concerted practices can be observed among the participants with a view to predetermining the contracting authority’s choice of the winning bidder.

§. 17. Regardless of whether they aim at price fixing, procurement allocation, maintaining of previously agreed market shares, or distribution of geographic markets, all forms of public procurement bid-rigging are illegal and are sanctioned as infringements of competition law. Due to the extremely grave nature of the consequences of bid-rigging for the affected markets and for the society as a whole (overspending of the money of taxpayers and lowering of the quality of the goods and services) in a number of EU member-sates (the UK, Ireland, Germany, the Check Republic, etc.) bid-rigging is considered a crime and falls within the sphere of criminal law.

§. 18. Until the new Law on Protection of Competition (LPC)[10] was adopted, bid-rigging was not explicitly regulated as a type of infringement of the competition rules applicable in the country. Bid-rigging could be qualified as a form of prohibited behavior in the sense of Article 9, para 1 of the LPC (repealed), as a type of prohibited agreement or concerted practice among undertakings which is aimed at allocation of markets, suppliers or clients. The general prohibition under Article 9, para 1 of the LPC (repealed) could be applied to such type of behavior of the undertakings participating in public procurement procedures by analogy of the practice f the EC on applying Article 81, para 1 of the TEU with regard to bid-rigging.

§. 19. In accordance with the new LPC bid-rigging is regulated as one of the potential forms of *a cartel between undertakings.* In its legal definition of "cartel" has been defined as an agreement and/ or concerted practice between two or more undertakings – competitors on the relevant market, directed to restriction of competition through the fixing of prices or price conditions for purchasing or selling, allocation of production or sales quotas, including *rigging of tenders or competitions, or*

[10] Promulgated in the SG No 102, enforced on 2 December, 2008

public procurement procedures[11]. The agreements and concerted practices between undertakings are legal forms of profibited behavior in accordance with Article 15, ppara 1 of the LPC and/ or Article 101, para 1 of the TFEU, as a result of which bid rigging is considered a violation of the general prohibition as a type of *cartel*. The participants in the infringement may be sanctioned through pecuniary sanctions amounting to 10 % of their turnovers for the previous financial year[12].

V. DISTINGUISHING BID-RIGGING FROM SOME PROHIBITED FORMS OF COOPERATION BETWEEN COMPETITIVE UNDERTAKINGS

§. 20. Bid-rigging should be distinguished from some non-prohibited forms of cooperation between competitive undertakings wich take part in public procurement procedures. Economic benefits may arise as a result of these forms of cooperation, whose beneficial effect for the market surpasses the potential anticompetitive effect achieved as a result of the coordinated behavior of competitors.

§. 21. Often times the undertakings enter into agreements for establishing a consortium or a *joint venture* and participate together in public procurement procedures with a view to achieving compliance with some of the requirements set by the contracting authority which, in most of the cases, are related to certain financial power, reliability or experience on the part of the bidders. The agreement for establishing a consortium or a *cooperative joint venture* between the undertakings which take part in a public procurement procedure, may be considered a prohibited agreement in the sense of the general prohibition under Article 15, para 1 of the LPC or Article 101, para 1 of the TFEU,

[11] See §. 1, para 5 of the Additional Provisions of the LPC
[12] See Article 100, para 1. 1 of the LPC

if it leads to permanent concerting or coordination of the behavior of the participants who are competitors on the relevant market. If the consortium has been established with the only aim to ensure the participation of the undertakings in the respective tender procedure, or if the joint venture does not implement permanently the functions of a *full-function joint venture*, a *non-cartel horizontal cooperation agreement* is considered to be in place which complies with competition law.

VI. FORMS OF BID-RIGGING

§. 22. Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers -frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

§. 23. Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting “cover” (higher) bids.

§. 24. The coordinated or concerted behavior of the participants in public procurement procedures could be manifested in various forms which makes the disclosing and investigating of this type of prohibited behavior by undertakings even more difficult. Without being exhaustive, the following most typical forms of bid-rigging could be pointed out:

1. „Cover bidding" takes the form of fake offers which are considered to be the most frequent way in which bid-rigging schemes are implemented. It occurs when the participants in the procedures agree to submit bids which include at least one of the following elements:

(1) competitor agrees to submit a bid that is higher than the bid of the designated winner[13],

(2) a competitor submits a bid that is known to be too high to be accepted, or

(3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Usually in a public procurement procedure, the participants in bid-rigging submit several "cover bids" as their aim is to create the impression of genuine competition among the participants in the procedure[14].

2. „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. In essence, bid

[13] See Decision of the EC 92/204/EEC of 5.02.1992 (IV/31.572 and 32.571 - Building and construction industry in the Netherlands) [1992] OJ L 92/1
[14] See Decision of the EC 73/109/EEC of 02.01.1973 (IV/26 918 - European sugar industry) [1973] OJ L140/17

suppression means that a company does not submit a bid for final consideration.

3. In **„bid rotation"** schemes conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder in a specific group of pubic procurement procedures, as for each specific procedure they agree in advance who is going to submit the winning bid and who is going to submit a "cover bid" [15]. The candidate whose turn it is to win the specific bid prepares the bids of the other candidates by offering to the purchaser conditions that could ensure it's going to be the winner. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company. Bid rotation could also be bases on criteria related to the characteristics of the purchaser, the geographic territory for implementing the bid, its subject, etc.

4. „Subcontracting agreements" are often part of anticompetitive bid-rigging in which the competitive undertakings agree not to bid or to submit a losing bid as a result of which they are appointed as subcontractors by the winning bidder. In some cases the bidder with the lowest price offer may agree to withdraw its offer in favor of the bidder rated after him in return of a profitable subcontracting contract through which in practice they manage to share the economic benefit gained illegally as a result of the higher final contracted price.

5. „Market allocations" is a form in which competitors agree not to compete for certain customers or in certain

[15] See Decision of CEO under case T-29/92 SPO v Commission [1995] ECR II-289

geographic areas[16]. 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 offered by a certain class of potential customers which are allocated to a specific firm to which the respective customer, geographic region, or bid has been allocated. In return, that competitor will not competitively bid to a designated group of customers allocated to other groups of customers or geographic regions.

§. 25. Despite the fact that the bidders or the participants in the public procurement procedure may agree to apply different forms of bid-rigging, they usually apply one or more of the above-mentioned typical techniques depending on the specific contracting authority or the type of procedure under which the specific public procurement will be awarded. These typical bid-rigging techniques are not mutually exclusive but complement one another with a view to achieving the final objective – predetermining the winning bidder. Thus the cover bids are most often used in relation to the strategy bid rotation and bid suppression is combined with market allocation. The awareness of these techniques, on its part, may support the employees acting on the part of the contracting authority to disclose and report in a timely manner the identified forms of bid-rigging.

VII. BID-RIGGING FACTORS

§. 26. The factors that help support coordination or collusion of the behavior of undertakings participating in public procurement procedures are related mostly to the characteristics of the *competitive structure of the relevant market* – the market of goods or services purchased through public procurement. Bid-

[16] See Decision of the EC 1999/60/EC of 21.10.1998 (IV/35.691/E-4 - Pre-Insulated Pipe Cartel) [1999] OJ L 24/1

rigging can be observed in every economic sector or branch but there are markets in which it is manifested more explicitly due to the characteristics of the respective product or the structure of the market. Such favorable conditions that help support collusion can be observed in the cases of:

1. Small number of companies. The fewer the number of sellers on the respective market which provide the respective good or service, the easier it is for them to reach an agreement on how to rig bids.

2. 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.

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

4. Market conditions. The 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. In addition to that, in the conditions of economic crisis when the sources of corporate financing are very restricted or very expensive, the public funds spent by the contracting authorities turn out to be a very attractive (cheap) financial source for the participants in the relevant market, which increases the risk of bid-rigging aimed at illegally gaining funds from the private sector.

5. 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. In the frame of associations of undertakings it is easy to exchange sensitive trading information that is required for implementing the bid-rigging agreements. In addition, the specific activity of the associations of undertakings would facilitate the implementation of specific sanctions with regard to the participants in the market which deviate from the implementation of bid-rigging agreements.

6. Repetitive bidding. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him.

7. Identical or simple products. 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 bid-rigging.

8. Level of innovation on the relevant market. When there are few, if any, innovative 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. At the same time the little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time

VIII. MEASURES FOR FIGHTING AGAINST BID-RIGGING

§. 27. The need for fighting against all forms of anticompetitive bid-rigging stems from the considerably harmful effect of this type of agreements and concerted practices between undertakings. Bid-rigginge leads to an increase in the prices of the respective goods and services which is to the detriment of consumers while at the same time considerably restricting the stimuli for the participating undertakings for investments and innovations in the process of production and delivery of these goods or services. All this leads to reducing the effectiveness of the respective economic activity, on the one hand, and to ineffective spending of budget funds, on the other. What is more, the lack of effective competition in awarding public procurement puts additional burden on tax payers by making them pay higher public costs and leads to reducing the quality of the public functions of the public procurement contracting authorities.

§. 28. Fighting against bid-rigging in public procurement is a priority both for the EC and for the national competition authorities in the EU which are continuously improving their capacity in this field. In its capacity of a national competition authority in the country, the CPC can counteract bid-rigging by exercising its competences under proceedings for establishing infringements of Article 15, para 1 of the LPC and/ or Article 101 of TFEU. A significant difficulty in front of the national competition authority is the collection of sufficient data for the

presence of concerted actions on the part of the bidders which have as an aim or a result bid-rigging in public procurement. That's why the contracting authorities which are the immediate victim of bid-rigging need to take measures for counteracting bid-rigging. What is more, active cooperation between the contracting authority and the competition agency needs to be established with a view to collecting sufficient factual data which could be used as evidence for infringing competition law.

1. Measures on the part of the contracting authorities

§. 29. First of all, the fight against bid-rigging, as a form of prohibited behavior of undertakings, should be carried out by the contracting authorities. In order to reduce the risk of bid-rigging the contracting authorities should open and organize bids in a way which impedes the coordination and collusion among bidders. The contracting authorities could take the following measures in this direction:

(1) Research the relevant markets (characteristics, recent trends) as well as their participants before opening a bid. This could be done by collecting information about the potential participants in the procedure as well as about the potential pretended competitors who could submit a bid;

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

(3) Provide information about the prices of the potential suppliers as well as about the prices of the required or alternative products offered in the neighboring geographic areas;

(4) Collect information about past tenders for the same or similar products or services;

(5) Ensure a sufficient number of reliable participants in the public procurement procedure with a view to increasing the effectiveness of public bids and minimizing the risks of bid-rigging. In this relation the contracting authorities could:

- ✓ avoid unnecessary restrictions that may unreasonably restrict competition, are discriminatory, pose unreasonable obstacles to participation, and favor specific undertakings;
- ✓ request guarantees from bidders as a condition for bidding or non-execution the size of which is proportionate to the aim of the guarantee; requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process;
- ✓ allow undertakings that implement economic activity in other geographic regions or countries to participate in the procedure;
- ✓ create conditions for smaller firms to take part in the procedure thus providing opportunities for submitting offers under different lots of the bid;
- ✓ reduce the costs of undertakings for preparing and submitting bids and participating in the tender through:

    - o simplifying the administration of procedures by using the same forms, requesting the same information, etc.;
    - o uniting several public procurements into one tender procedure;
    - o ensuring sufficient time for preparing and submitting offers on the part of undertakings;

- using, whenever possible, electronic tender systems;

- ✓ provide opportunities for submitting bids for different lots of the same public procurement contract – especially in big public procurement procedures which could be attractive to and suitable for implementation or delivery by small or medium-sized enterprises;
- ✓ show flexibility with regard to the requirement for receiving a minimum number of bids; in case of receiving a smaller number of bids, it would be more suitable for the extent to which the smaller number could lead to competitive bids to be assessed, rather than automatically organizing a new procedure which could lead to the same result; the same result would indicate that the competition in the relevant market is limited by a bid-rigging agreement;
- ✓ the tender documentation should contain clear requirements as special attention is paid to the technical specifications of the procurement with a view to ensuring that they are unambiguous as well as easy to understand and implement;
- ✓ draft the technical specifications of the procurement by putting emphasis on its aims, rather than describing the way in which it should be implemented; in this sense, a specific description of the products or services should be avoided and emphasis should be put on the functional requirements they need to meet;

§. 30. The effectiveness of the measures that contracting authorities take to fight against bid-rigging in public procurement depends not only on the adopted bidding model (type of the

procedure), the content of the tender documentation, and the way of formulating the requirements to the bidders, but also on the whole process of planning and implementing the respective procedure. That's why the transparency requirements that have been adopted as obligatory with a view to fighting against corruption should at one and the same time be formulated by the contracting authority in a balanced way in order to avoid an unfavorable effect, i.e. encouraging bid-rigging by disseminating more information than what is required by the law. In this relation, the contracting authorities *may* adopt the following measures:

(1) Keep the procedures confidential by not announcing the number and identity of the bidders;

(2) Prevent potential meetings or contacts between the candidates in relation to their participation in the public procurement award procedure;

(3) Avoid the announcement of sensitive trading information when announcing the results of a given procedure as it could lead to conditions for forming bid-rigging schemes;

(4) Use the expertise of external consultants for formulating the requirements, the technical specifications and evaluation criteria by avoiding experts who have worked on labor or service contracts with any of the bidders or with associations of undertakings in which the bidders are members;

(5) The tender documentation should contain a requirement for bidders to submit „a declaration for the autonomy of the bid" (the declaration obliges the bidders to reveal all significant facts with regard to the communications they have had with competitors in relation to their participation in the procedure, as well as to declare that they have been informed that the

concerted preparation of bids is a form of bid-rigging that prohibited by competition law);

(6) The bidders should be required to declare their intention to use subcontractors in implementing the offer;

(7) The tender documentation should contain explanations about the unfavorable consequences for the bidders in case they take part in bid-rigging (eliminating the bidder from the procedure in the cases prescribed by the law; imposing of fines and pecuniary sanctions by the CPC that amount to 10 % of the turnover of undertakings for the previous financial year; submitting a claim on the part of the contracting authority for indemnity of damages done as a result of an infringement of competition law; holding the bidders responsible under the criminal law for submitting declarations with false content);

(8) Enhanced vigilance on the part of the contracting authorities in case of participation in the procedure of undertakings which have already been sanctioned by a competition authority (in the country or in any other EU member state) for bid-rigging.

§. 31. For the purpose of preventing bid-rigging in public procurement award procedures, it has to be guaranteed that the requirements to the bidders, the technical specifications and criteria for evaluating bids have been set by the contracting authority in a way which does not unreasonably prevent the conscientious participants in the procedure from exerting effective competitive pressure on their competitors. In order to achieve the above mentioned objective, the contracting authorities could undertake the following measures:

(1) avoid any form of preferential or favoring attitude to certain bidders, including the well-established or traditional participants in the relevant market;

(2) ensure the anonymity of bidders in the course of the procedure as a tool for neutralizing the image advantages of established or traditional participants in the relevant market;

(3) observe strict confidentiality with regard to the participation of certain undertakings in the procedure and keep confidential the content of their bids or the communication between the contracting authority and any of the bidders;

(4) introduce training programs for the members of the public procurement committees on the issue of bid-rigging with the help of the competition authority or external legal consultants.

(5) ensure the active communication between the contracting authorities and the CPC and make sure that alerts are submitted to the CPC in case of suspicion of anticompetitive behavior of undertakings participating in public procurement award procedures.

2. Measures on the part of the CPC

§. 32. In view of the competence the CPC possesses for disclosing and sanctioning cartels between undertakings, it could efficiently counteract bid-rigging in public procurement. As the process of disclosing cartels and collecting and analyzing bid-rigging is characterized by a high level of complexity, the assistance provided by the contracting authorities is extremely important to the effective anti cartel practice of the CPC. The contracting authorities could considerably support the competition authority by enhancing their vigilance with regard to the indicators of alleged bid-rigging and by providing to the CPC in a

timely manner the data they have collected. This data could be used as evidence for initiating purposeful antitrust proceedings in front of the CPC directed to disclosing and sanctioning cartel agreements between undertakings. Extremely efficient in this respect is the competence entrusted to the CPC for carrying out ad-hoc on-site inspections at the offices of the undertakings that may have participated in a cartel.

§. 33. The constant monitoring of the relevant markets the CPC carries out in terms of sector inquiries provides an opportunity both for identifying certain market characteristics that may give rise to suspicion of bid-rigging and for tracking the undertakings which happen to win public procurement procedures on a regular basis. In this way the concerted or coordinated behavior of undertakings participating in the relevant market could be disclosed. In this relation, the information collected in the public procurement register administered by the Public Procurement Agency (PPA) could turn out to be very useful.

§. 34. With a view to disclosing bid-rigging, the CPC should analyze all the sources it receives information from in order to establish the presence of similar arrangements between participants in public procurement procedures. In this context, the materials gathered in the course of the proceedings in front of the CPC with regard to appealing acts, actions or omissions of contracting authorities under Article 120 and the following articles of the Public Procurement Act, could be used as well. To the extent to which the CPC is given the authority under the LPC and the PPA to issue decisions on the basis of the facts it has established, it could use the evidence collected in the course of proceedings under the PPA as grounds for initiating proceedings on its own initiative for establishing potential infringements of the general prohibitions under Article 15, para 1 of the LPC and/ or Article 101 of the TFEU.

IX. INDICATORS FOR PRESENCE OF BID-RIGGING

§. 35. The existence of bid-rigging is always accompanied by the presence of certain indicators which create suspicion that the relevant undertakings take part in anti-competitive bid-rigging arrangements. Outlining the most characteristic indicators could be useful with a view to counteracting bid-rigging as it can help the contracting authorities take measures for preventing the attempts for bid-rigging while at the same time facilitate the CPC to disclosing and sanction the infringers of competition law in a timely manner.

§. 36. With a view to illustrating the indicators, the CPC has drafted ***A List of the circumstances the presence of which condition suspicion of bid-rigging.*** The indicators included in the List, and the examples illustrating them, do not exhaust all the circumstances that could give rise to suspicion of bid-rigging. Their objective is to direct the attention of the contracting authorities to those circumstances so that they could be in the condition to counteract such practices effectively and in a timely manner, as well as to help the contacting authorities in assessing when a potential bid-rigging should be reported to the CPC. The circumstances have been grouped in accordance with the main aspects of each public procurement procedure: (1) bids; (2) proposed trading conditions; (3) evaluation of costs and price formation; (4) relations between the participants in the procedure; (5) suspicious patterns in participating in consecutive procedures:

1. Bids

§. 37. In the case of bid-rigging often times bids are submitted by a smaller number of bidders than usual, or expected, or bids are submitted by bidders who are publicly known to be unable to implement the respective procurement (pretended

competitors). With a view to implementing the agreement for bid-rigging, usually all undertakings that take part in the cartel buy the tender documentation from the contracting authority but only a small number of them submit bids. In most of the cases, the undertakings that submit cover bids either do not request the technical specifications of the purchased object from the contracting authority, or their bids do not include data that should usually be provided. Often times the cover bids are submitted by the same bidder who represents the other participants in the prohibited agreement in front of the contracting authority.

§. 38. It is a common the bids of the participants in bid-rigging agreements to be prepared by one and the same person, or to be prepared jointly. In comparing such bids certain similarities could be observed such as for example the same language mistakes or some stylistic similarities (the use if identical terminology, identical mistakes in the calculations, identical crossing outs or changes of certain figures, identical handwriting when the tender documentation should be completed in handwriting). If the documents are submitted electronically, the properties of the respective document indicate that the documents of different bidders have been viewed and/ or edited by the same persons or that edits of the documents (especially of process or calculations) have been made on the same dates. In practice, no matter how careful the participants in bid-rigging are, they make mistakes during the tenders and more particularly in the course of completing the tender documentation. Due to the fact that such bidders have eliminated the competition among themselves and have concerted their actions, they could be expected to make the same or similar mistakes.

2. Proposed trading conditions

§. 39. With a view to covering bid-rigging often times a striking difference can be observed in the price offer of the bidder

who offered the lowest price and the price offers of the other bidders, as it is very typical for one of the bidders to submit a price offer that is considerably lower or considerably higher compared to the prices that the same bidder has offered before to the same contracting authority under similar projects, without any change of the economic factors that may determine such a difference. On the other hand, however, the concerted behavior of the participants in bid-rigging may be manifested in submitting very similar price offers or in offering prices which differ form one another with the same margin observed in the course of the participation of the respective undertakings in other similar procedures organized by the same contracting authority.

§. 40. If for a relatively long period of time the market prices of the products purchased under similar public procurement procedures remain relatively stable and unchanged, this is an indication that a non-market level of these prices has been maintained manipulatively. The same conclusion could also be drawn if a new participant in the market submits a bid under a given procedure with the traditional bidders submitting price offers which are drastically lower compared to the offers they used to submit for similar projects. What is more, suspicions could arise of the non-market price behavior of the bidders if those who implement their activity in the geographic region of the contracting authority submit price offers which are higher than the offers of the bidders operating in more remote regions.

3. Cost evaluation and price formation

§. 41. With a view to counteracting bid-rigging the contracting authority may calculate in advance, even approximately, the size of the fair, cost-oriented price offers which could be received for the object being purchased. If the lowest submitted bid is considerably higher than the cost price (on the basis of the costs) calculated by the experts and the consultants

of the contracting authority, this is the first indication for bid-rigging achieved by means of submitting an unreasonably low price offer. If, in addition to that circumstance, it has been established that some of the participants have not calculated the cost price and the cost they offer to the contracting authority, this should give rise to reasonable suspicion of bid-rigging with respect to that very procedure.

§. 42. The fact that some of the bidders have hired the same consultants to prepare their price offers and evaluate the cost price of the respective good or service they would offer to the contracting authority could also be interpreted as an indication of bid-rigging. Such a suspicion would be more sufficiently grounded if in the course of the tender procedure it is established that when communicating with the contracting authority some of the bidders have come to know elements of the price offers of their competitors only because they used the same consultants for evaluating price cost and price formation.

4. Relations between the participants in the tender procedure

§. 43. For bid-rigging to exist, the participants in the tender procedure need to have the opportunity to communicate among one another and to reach an agreement or concert their actions. Once they get to know who the other bidders are, the undertakings seeking to enter into an agreement or to concert their actions with the aim of bid-rigging need to find a place where they could meet. Such communication may in practice be carried out on the phone, by e-mail, fax or through regular mail. The experience gained by competition authorities shows that the participants in cartels consider the “face-to-face” meetings to be the safest as they do not leave any evidence. In most of the cases such meetings are being implemented at or on the occasion of meetings or other forums organized by branch organizations or associations of

undertakings. By rule, such meetings are carried out before the respective tender procedure is announced.

§. 44. The implementation of bid-rigging requires actual and frequent communication between the candidates. The contracting authorities can hear rumors or find evidence which suggests the presence of exchange of information between the participants in the procedure such as: information with regard to the price formation of another candidate according to which this candidate is not expected to submit the lowest price offer, or cases in which a candidate submits an offer which provides a comparative analysis or a comparison with the price formation practice that are "common for that particular economic branch". The presence of communication between the participants may be suspected on the part of the contracting authority if, for example, a bidder purchases tender documentation or submits an offer on behalf of another candidate, or if in its correspondence with the contracting authority the bidder hints on the fact that he possesses confidential information which could be obtained only through his contact with another bidder.

§. 45. In certain cases the bidders may try to share the economic benefit they have gained as a result of bid-rigging. This is highly likely in the cases of public procurement contracts of high value. There is suspicion of bid-rigging if the bid winner refuses to sign a public procurement contract with the contracting authority and later appears as a subcontractor of another bidder in the same public procurement procedure. On the other hand, the bid winner could carry out direct payment to other bidders in the procedure, or could subcontract a significant part of the tender to other participants. Such subcontracting, however, needs to be distinguished from the cases of winning a tender by undertakings which participated in it as a consortium, or through establishing a joint undertaking, which is a form for cooperation between

undertakings aimed at achieving a common objective that is not prohibited by the law.

5. Suspicious patterns with regard to participating in consecutive procedures

§. 46. Some of the bid-rigging schemes designed by the undertakings could be manifested or observed as a pattern, only after a number of public procurement award procedures have been carried out. For example, patterns could be observed when consecutive tenders are won by one and the same bidders. It is possible, in observing consecutive tenders, one winning bidder to stand out in relation to certain types and sizes of tenders, or it could also be noticed that certain bidders always win in certain geographic regions. Other patterns in consecutive procedures can be established when a given participant never wins a tender but keeps participating, or when given participants rarely take part in a tender but when they do, they are always the winning bidders. In observing the characteristics of the offers of the same participants it could be established that for certain tenders such participants submit comparatively high price offers while others unreasonably submit comparatively low price offers.

§. 47. In analyzing the presence of suspicious patterns in participating in similar public procurement procedures, some unusual characteristics of the price offers could be outlined as well – e.g. all offers are unusually high, or the offered discounts are unusually low. Similar are the cases when the offers under a given public procurement procedure are different from those in previous procedures, without a change of the economic factors which could justify such difference, or the size of the price offers of the traditional participants changes drastically when an offer is submitted by a new participant in the market.

X. CONCLUSION

§. 48. The current Guidelines were adopted by CPC Decision No. 570/20.05.2010 and reflect the understanding of the CPC as to the approaches that could be adopted to counteracting bid-rigging in public procurement. The Guidelines and the List attached to them have been designed on the basis of the current practice of the CPC in applying the competition rules applicable in the country. The Guidelines for fighting bid-rigging in public procurement designed within the Competition Committee of the OECD have also been taken into account as well as the best practices in this field in other countries, including EU member-states.

LIST OF CIRCUMSTANCES

THE PRESENCE OF WHICH DETERMINES SUSPICIONS OF BID-RIGGING

The current list was adopted by COC Decision No 570/20.05.2010 and comprises an inseparable part of the **Guidelines for fighting bid-rigging in public procurement award procedures.**

The circumstances provided below need to be checked in each specific case of carrying out a tender procedure for the delivery of certain goods or services. The presence of one or more of these circumstances could give rise only to suspicion of bid-rigging on the part of the undertakings taking part in the procedure. This suspicion may be considered sufficient for initiating a proceeding in front of the CPC for establishing an infringement of Article 15, para 1 of the LPC and/ or Article 101 of the TFEU manifested in the form of a prohibited agreement or a concerted practice (a cartel) between the participants in a public procurement award procedure.

The presence of the circumstances described in the List should not, on its own, be regarded as evidence for actual bid-rigging. For many of the described indicators and sample situations there might be a reasonable explanation which is in no way related to the engagement of the respective undertaking in bid-rigging. Regardless of that, the presence of such or similar indicators has to do with further investigation, especially when certain patterns are repeated over time. In this sense, it is very important for the contracting authorities to collect and summarize such data. What is more, in the presence of serious suspicions of potential bid-rigging on the part of the contracting authorities

based on these or similar indicators, a signal should be submitted to the CPC.

The circumstances have been grouped in accordance with the main aspect of each tender procedure (A) bids; (B) trading conditions; (C) cost evaluation and price formation; (D) relations between the bidders: (E) suspicious patterns with regard to participating in consecutive procedures.

(A) Bids:

1. Fewer undertakings than usual or expected have submitted bids; or a bidder who is publicly known to be unable to implement the respective tender has submitted a bid.

2. Only a small number of the undertakings which bought the tender documentation have submitted bids.

3. One or several of the undertakings which have submitted bids haven't requested from the contracting authority the technical specifications of the object of the procurement, or their bids do not contain data which should normally be presented;

4. On the day set for opening comparing the bids, only one or several of the bidders are present.

5. Some bids look similar, they have been printed on a similar type of paper, consist of identical sections, headings and subheadings, use similar template or font, contain identical stylistic or grammatical mistakes, or exhibit stylistic similarities.

6. Identical mistakes have been made in calculating the price offers, the same places in the texts of the offers have been crossed-out, or identical terminology has been used in preparing the price offers.

7. One of the bidders (or their representative) submits a bid individually and at the same time submits a bid on behalf of another bidder.

8. When submitted electronically the documents of the different bidders, contain edits made by the same people, or edits made at one and the same time.

(B) Trading conditions:

9. An unreasonably big difference could be observed in the price offers of the bidder who proposed the lowest price and the other bidders in the procedure.

10. In analyzing the price offers of the different bidders both unreasonably high and unreasonably low prices can be observed.

11. One of the bidders submits a price offer which is considerably lower or considerably higher than the prices offered by the same bidders before under similar projects of the same contracting authority.

12. Different bidders submit very similar price offers or the prices they offer are different from one another by the same margin that has been observed as part of their participation in other procedures of the same contracting authority.

13. The price offers submitted for a given public procurement procedure are different from the prices offered under a previous procedure of the same contracting authority, without any change of the economic factors that could determine such difference.

14. A new participant in the market submits a bid and at the same time the traditional participants reduce their price offers drastically compared to the offers they have submitted before for similar projects of the same or other contracting authorities.

15. The market prices of the products purchased under similar public procurement procedures are stable and do not change over a comparatively long period of time.

16. The bidders who implement their activities in the geographic region of the contracting authority submit price offers which are higher than the offers of the bidder which operate in more remote regions

17. Some of the bidders pose such trading conditions, implementation deadlines or other conditions, which obviously do not comply with the main requirements of contracting authority under the specific tender

18. A given bidder justifies in front of the contracting authority the size of its price offer, basing it on prices of the respective products that correspond to the "standards for the respective economic branch or market".

(C) Cost evaluation and price formation The lowest price offer is considerably higher than the value of the cost price (on the basis of the costs) calculated by the experts and consultants of the contracting authority.

20. Some of the bidders have recruited the same consultants for preparing their price offers and the evaluation of the cost price of the respective good or service.

21. After opening the offers it is established that some of the participants have not calculated the cost price and the price that they offer to the contracting authority.

22. It is established that during the tender procedure and in their contacts with the contracting authority some of the bidders are familiar with elements of the price offers of their competitors.

(D) Relations between the bidders:

23. There is evidence that some of the bidders have met for some reason or have communicated with one another, especially in the days before the deadline for submitting the bids.

24. The bidders have signed agreements among themselves, on the strength of which they will implement the procurement as subcontractors to each other, or the winning bidder enters into such agreements with some of the other bidders after the procedure has been completed.

25. The winning bidder subcontracts part of the procurement to other bidders or market participants which have not taken part in the procedure.

26. There is evidence revealing that a payment has been made on the part of the winning bidder to other bidders or market participants which have not participated in the procedure.

27. The winning bidder refuses to sign the public procurement contract and after that it becomes clear that it is a subcontractor of another bidder in the same public procurement procedure.

28. A given bidder makes a formal or informal statement in front of the contracting authority that he does not expect to be the winning bidder, or makes it clear that he possesses confidential trading information which he could have obtained only as a result of an agreement he has with another bidder.

(E) Suspicious patterns with regard to participating in consecutive procedures:

29. A rotation can be observed of the same undertakings which win a certain group of tenders without there being any relevant legal, economic or technical reasons for that.

30. Certain bidders regularly win public procurements and procedures of a certain type and size, organized by certain contracting authorities, or in certain geographic regions despite the fact that there exists real and potential competition.

31. Certain undertakings always or often participate in procedures but never win whereas other undertakings rarely take part in procedures but when they do, they necessarily are the winning bidders.

32. A given bidder always submits the lowest offers, or always submits the highest possible price offer.

33. In monitoring the bids of the same bidder it has been established that for some tenders he submits comparatively high offers while for other tenders he submits comparative low bids for the same product.

34. Several bidders withdraw their bid without a relevant reason for that.

CONTENTS

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