

Intergovernmental Group of Experts on Competition Law and Policy

Geneva, 9-11 July 2012

Roundtable on

“Competition Policy and Public Procurement”

Written contribution by

Lithuania

The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

COMPETITION AND PUBLIC PROCUREMENT

Contribution by Lithuania to round-table consultations
for the 12th Session of the Intergovernmental Group of Experts on Competition Law and
Policy

- I. *How to ensure competition through the regulatory framework for public procurement and its application?*
- *How to ensure competition in public procurement through the institutional design of procurement systems? Can bid-rigging be better prevented/detected in centralised as opposed to decentralised procurement systems?*
 - *What type of procurement procedures are most suited in order to stimulate competition (public tenders, competitive negotiations, etc?)*
 - *How to design a public tender to promote competition in conciliation with other possible goals?*
 - *How does the interface between public procurement laws, competition laws and criminal laws impact on the prevention of anticompetitive behaviour in procurement procedures?*
 - *How to accommodate the needs of small and medium sized companies in public procurement systems, while stimulating competition?*
 - *To what extent do appeal procedures for frustrated bidders also help to protect competition in public procurement procedures?*

Public procurement is an important part of the economy. An effective public procurement policy is one of the key factors for continuous long-term economic growth, business competitiveness, best value public services to taxpayers etc.

In 2008 the Government of the Republic of Lithuania ('the Government') in its work programme envisaged an ambitious reform of the system of public procurement policies covering transparency and efficiency of public procurement, promotion of electronic procurement, procurement centralisation. Implementing the provisions of the Government's programme, in 2009 a Strategy for the Improvement and Development of the Lithuanian Public Procurement System for 2009-2013 has been adopted, as well as amendments of the Law on Public Procurement and other related legal acts.

In Lithuania the procurement policy is formed by the Ministry of Economy. Other ministries and institutions also take part in this process, as the procurement policy is closely linked to many other areas.

The functions of implementing public procurement policy are commissioned to the Public Procurement Office. This institution has the function to provide methodological assistance to the contracting organisations, to exercise prevention of infringements of the Law on Public Procurement, also to control how contracting authorities follow the requirements of this law.

The Public Procurement Office and the Competition Council share a common goal – to create conditions for contracting authorities to select the best deals through a competitive

contracting procedure, so that public funds are used rationally ensuring fair competition among the participants.

This goal is being implemented by both institutions in different ways – the Competition Council, in accordance with the Law on Competition, investigates possible anti-competitive agreements between bidders, while the Public Procurement Office supervises compliance with the procurement provisions of the Law on Public Procurement, including the requirement to comply with the procurement procedures of non-discrimination principle.

In practice, the Public Procurement Office examines cases where the contracting authorities, which are obliged to carry out a public procurement procedure for purchasing certain goods or services, contracts with a particular entity without organising a public tender. The Public Procurement Office also investigates cases where the contracting authority organises public procurement, but sets qualification requirements, which artificially restrict competition. The role of the Competition Council is as well to address the decisions adopted by the bodies of the public administration, that create circumstances able to limit competition, e. g. by requiring the municipality to sign a contract with a particular entity for goods or services, preferring it to other potential competitors.

However, sometimes, indeed, the issues of distinguishing the competences between these two institutions arise. In order to optimize the supervisory tasks of the authorities, both authorities have established a Competition and Market Surveillance Authorities Committee. Its 2010 action plan included issues such as the delimitation of competences between the Public Procurement Office and the Competition Council, and mutual exchange of information in implementing their supervisory functions etc. According to that, the Competition Council and the Public Procurement Office took actions to ensure transparency and genuine competition in public procurement. The authorities have agreed to separate the assessment of “in-house” contracts (the Public Procurement Office shall examine if contracts comply with requirements and criterions set in the Law on Procurement, whereas the Competition Council shall examine other issues, which fall within the scope of other laws). The authorities have also decided to initiate amendments of legal acts which regulate participation of the related entities in the same public procurement.

Whether centralised or decentralised procurement systems are more effective, an unambiguous answer cannot be made, since both centralisation and decentralisation of procurement process has some advantages. The advantages of centralised procurement system are:

- the contracting authority does not need special employee to carry out procurement;
- central contracting authority gains experience in procurement, which can help in avoiding mistakes in the process of implementation of procedures.
- fewer chances of corruption.
- reduction of the average duration of the procurement procedures.
- central purchasing organisation can concentrate on the good management of procurement process and gather more information about suppliers and prices.

These benefits of centralisation of procurement can be seen as a solution to the problems which the contracting authorities encounter in carrying out procurement in a decentralised manner. Problems in decentralised system can be identified as lack of competence in public procurement, high procurement costs, related to additional administrative costs etc.

Decentralised system, however, has some advantages, such as lower costs of coordination between the central purchasing department and the customer, faster solution of possible problems; a clear division of responsibility, also local buyers can be better equipped with the knowledge of the local market, making better use of market opportunities than in the case of centralisation.

In Lithuania, in 2003, Ministry of Finance of the Republic of Lithuania established Central Project Management Agency (CPMA), which is acting as Central Purchasing Body. Its mission is to effectively manage and implement programs and projects financed by the European Union, international institutions, state, and municipalities, to collect and disseminate the management experience of EU and state, municipalities and other entities, programs and projects, and ensure effective public procurement through the central contracting authority.

In 2008, the Government of the Republic of Lithuania gave the right to CPMA to exercise functions of a central purchasing organisation (CPO).

CPO is a contracting authority which:

- purchases goods, services and works for the contracting entities;
- organises purchasing procedures;
- signs framework agreements.

In CPMA the research is done to determine products that would benefit from centralised purchasing. Economic operators are selected and Framework agreements are signed to supply office stationery, computer equipment, fuel, mobile telecommunications and other products. Economic operators who have signed Framework agreements are allowed to place their product specifications into a specially developed e-catalogue. Contracting authorities are presented with this e-catalogue to place their orders for product specifications online.

With regard to the types of procurement procedures which can best stimulate competition, it should be mentioned, that the contracting authority has a particularly important role to play in organising a public tender. The authority has to choose a model for public tender, which would guarantee a possibility to obtain goods and services at the lowest possible price or, more generally, to achieve the best value for money. A situation where a contracting authority endeavours to meet the minimal formal requirements (for example, invites only the mandatory minimum number of participants) may indicate that an opportunity to purchase goods (services) at the most favourable price was not used. In this case, effective competition would be ensured if the greatest possible number of entities could submit their bids. Under the provisions of the Law on Public Procurement, organisation of the procurement procedures and the process of establishing a winner must comply with principles of equality, non-discrimination, mutual recognition, proportionality and transparency. The contracting authority must follow these principles not only when organising a particular public procurement procedure, but also when defining the rules for such procedures: e.g. increasing the mandatory number of suppliers or inviting a greater number of suppliers to submit proposals. Only fair competition can help to achieve the objective of public procurement, i.e. rational use of resources. Therefore, the contracting authority, through procurement, has to ensure not only compliance with the minimal requirements, but also perform other steps to get as much benefits of competition as possible. Consequently, this aspect of the procurement organisation depends on the contracting authority.

Moreover, a very important moment in public procurement sector is a possibility to impose sanctions on infringers, since these sanctions have a deterrent effect and may prevent future infringements. The Law on Competition indicates a variety of possible sanctions. The Competition Council usually imposes fines and prescribes an obligation to terminate illegal activity if it has not yet been terminated. However, there is an additional tool, which sits clearly on the border between the public procurement and competition law. That is the disqualification of an undertaking from participation in public tenders for up to 3 years if such undertaking has been previously found to have violated the Law on Competition (namely the prohibition of anti-competitive agreements). This sanction is an extremely deterrent tool, effect of which in many cases is possibly more intensive than economic sanctions imposed by the Competition Council. However, application of the disqualification rule as an optional sanction depends on contracting authority. Therefore, despite the obvious deterrent effect of this sanction and the discretion of the contracting authority to apply disqualification rule, the final effect of the sanction may have some ambiguity, i. e. as a result of disqualification the number of bidders, still participating in the particular public procurement may be substantially reduced. Consequently, the contracting authority would have less opportunity to choose the best bid.

Even though the disqualification rule is effective, it has some aspects that are still being discussed, such as the duration of the sanction and the nature of infringements to which the sanction applies. Businesses argue that three year period is a long time and a too severe sanction. Additionally, there is a discussion on whether the disqualification should only be applied in those cases where the participants of the tender were found to have concluded an agreement which had as its *object* the restriction of competition, since current rule applies regardless of the type of the anti-competitive agreement that has been concluded.

II. Prevention, detection and prosecution of bid-rigging

- *Prevention: How to effectively reduce potential bidders' incentives to collude? Since this is one of the aims of procurers, what are the more effective ways for competition authorities to support it? Should competition authorities be involved in the design of procurement processes and procedures?*
- *Detection: What are the respective roles and responsibilities of both procurement agents and competition authorities? What are the main coordination issues and potential conflicts? Should the detection of a competition infringement trigger the halt of an actual procurement process or should it be dealt with afterwards? What successful experiences can be shared from authorities at different stages of institutional development?*
- *Prosecution: How prosecution actions (public prosecutors/competition authorities/other) articulate in different legal/institutional frameworks? Does this depend on the scope of action of competition authorities in the areas of prevention and detection?*

Public procurement is the process of purchasing goods or services by the public sector, the aim of which is to secure the best value for public money. The primary objective of an effective procurement policy is the promotion of efficiency. A purchasing body takes a huge responsibility in designing the procurement process. It should take steps to promote more effective competition, such as avoiding unnecessary restrictions that may reduce the number

of qualified bidders, reducing the preparation costs etc. Only in this way a more effective and honest public procurement process can be achieved.

The competitive process can lead to lower prices or better quality only when companies genuinely compete. That is, when they set their terms and conditions honestly and independently. Collusion between firms that are bidding in a public procurement allows them to avoid pressures of competition, with the result that the purchasing authority gets less for its money, or pays more for what it gets.

One of the ways to achieve an effective competition, is that the undertakings willing to participate in a public procurement first have to submit a Declaration of Supplier's Honesty (a. k. a. Certificate of Independent Bid Determination), whereby they indicate whether their participation in a particular procurement is independent. Also if one or a few related (associated) undertakings participate in the same procurement they have to declare that their bids are independent and that the undertakings should be considered as competitors. This declaration should help to avoid possible bid rigging at the earliest stage of a public procurement, since the bidders have to declare their independency, and the purchasing body is able to see the number of bidders, participating and genuinely competing in a particular public procurement.

Regarding the involvement of competition authorities in the design of procurement process, it should be noted that the contracting authority has most interest in getting best quality of goods or services, thus achieving better value for money. The purchasing authority should make efforts in every particular case to design the best (most suitable) model of public procurement, since this authority is best placed to assess the particular market. . In the stage of designing a public procurement the Competition Council can help by explaining and advising on what principles are most important to pay attention to, what is to be avoided when preparing a public procurement, in what way a greater number of suppliers (bidders) can be achieved etc.

As to the detection of bid-rigging, the Competition Council acknowledges, that bid rigging agreements can be very difficult to detect as they are typically negotiated secretly, therefore the Competition Council puts emphasis on strengthening its role in detecting such anticompetitive actions. The Competition Council has published a checklist of signs which can help procurement agencies to detect bid rigging in a public procurement process. In the checklist the Competition Council noted certain warning signs in particular stages of the public procurement. For example, the checklist indicates favourable conditions for bid rigging (e. g. homogenous products or services, products with few or no close substitutes, goods without significant technological advances, small number of suppliers etc.), so that the purchasing authority could pay more attention to such conditions when choosing the best model of public procurement. Moreover, the Competition Council has also indicated circumstances to take into account at the stage of submission of the bids, as well as tools helping to detect bid rigging when analysing the submitted documents. The checklist is also aimed at helping the contracting authorities by highlighting some important issues in pricing, suspicious statements and behaviour of bidders, that could be relevant in order to reveal instances of bid rigging.

Since 2003 the Competition Council has investigated around 10 cases of horizontal prohibited agreements in public procurement. One of the latest cases was a prohibited agreement in public procurement for vehicle sale and lease services for police departments.

The Competition Council initiated the case based on a suspicion of cooperation between competing companies in preparation of commercial tenders for the public procurement of vehicle lease services and vehicles. Three companies were usually participating in these tenders. Interestingly, only one company was actually providing vehicle lease services, other two were only submitting bids upon request of the first company.

On the basis of the material collected during the investigation the Competition Council concluded that companies, while being competitors, had formed a prohibited agreement since they were concerting their actions to submit commercial offers, including tender prices, and designating the winner of the tender in advance.

Regarding the prosecution in public procurement in general, according to the Law on Competition a variety of possible sanctions for infringers in public procurement can be applied. The Competition Council usually imposes fines and prescribes an obligation to terminate illegal activity if it has not yet been finalized. Such sanction as disqualification from participating in public procurement tenders up to three years is an optional sanction and depends on contracting authority. To note again, sanctions for infringers play an important role, since these sanctions have a deterrent effect. Therefore an effective model of sanctioning with a strong preventive role may reduce future infringements in public procurement sector.