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Written contribution by

Sudan

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Competition and public procurement

DRAFT OUTLINE FOR UNCTAD SECRETARIAT BACKGROUND NOTE

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Prepared by:

**The Government of Sudan - Ministry of Finance and National Economy,
General Directorate for Public Procurement, Contracting and Disposal of Public Assets**

Introduction:

The objectives of the National Strategy Programme in the Republic of Sudan are to enhance the performance efficiency of government units and to keep abreast with domestic, regional and international changes. Fields of paramount importance are the adoption of free market policies, economic openness, transparency and competitive behaviour.

In the recent years, the size of public procurement has enlarged and became more diverse and complicated. Therefore, it has become imperative to draft a law that regulates the process of public procurement, which can be used as a guideline and assistance to the States in achieving the aforementioned goals, and to enable them enact their own laws for better guidance and control in those fields.

Till the beginning of 2010, public procurement had been regulated by the Financial and Accounting Procedures Manual of 1978 which was amended in 1995. And due to the deficiencies in procurement and contracting processes, the entrance of some international and regional institutions, and bilateral funding of development projects, it has become necessary to enact a comprehensive law that will regulate public procurement, contracting and disposal of assets. Hence, The Public Procurement, Contracting and Disposal of Public Assets Act ("the Act") was issued in 2010. Experiences of regional countries, such as Egypt, Saudi Arabia, Tanzania and Uganda have been considered in the drafting of the Act. Due consideration was also given to the studies and remarks made by the World Bank and the Common Market for Eastern and Southern Africa "COMESA".

The Act contains fifteen chapters and ninety articles, covering; the formation of a Directorate within the Ministry of Finance and National Economy to oversee the implementation of the provisions of the Act, public procurement methods and procedures, formation of procurement committees in the major Governmental units, prohibited actions, review and appeal procedures, ethical behaviour, offences, penalties, and a chapter regulating the disposal of public assets. In 2001, the Regulations explaining the Act and expanding on its articles were issued.

This paper discusses the subject of competition in public procurement from a broad outline, with reference to local aspects in some of its parts. It follows the guidelines provided in the UNCTAD draft outline entitled "Competition and Public Procurement".

1- How to ensure competition through the regulatory framework for public procurement and its application?

- 1- Competition as exists in developed countries is hard to achieve in countries of the third world. The number of potential suppliers and, hence, bidders is limited. Public procurement is generally a decentralized process, central interference comes only in the form of supervision and review for ensuring adherence with the Act and the Regulations.

The Act requires Governmental units to form procurement functions which are to execute and perform their duties in compliance with its articles and those of the Regulations. The Public Procurement, Contracting and Public Assets Disposal Directorate ("the Directorate") being the overseeing body. State governments may perform their procurements autonomously, but within the provisions of the Act and the Regulations.

It is inferred on supervisory bodies to implement systems which are intended to eradicate un-lawful behavior such as bid-rigging, price-fixing, collusion or other forms of anticompetitive activities.

Fraudulent collective behaviour is usually very difficult to discover, let alone prevent. But a fairly competitive transparent market, with low entry barriers and the availability of substitute products can be an effective means of preventing collusion and other forms of misconduct.

- 2- Public bidding or tendering is the most efficient and suitable way of public procurement. Choosing the most efficient supplier of goods or services at competitive prices could be possible. The openness and transparency of such procedures may also open business opportunities for new suppliers ensuring transparency and equal chances. Direct negotiation, although preferable in some instances, is still open to misconduct and fraudulent acts when performed by unscrupulous officials.
- 3- Public procurement is subject to transparency requirements and other regulatory and administrative procedures. It is quite clear that if those measures are to go too far in their limitations then an adverse effect will be the result. It is therefore important to design public tenders with anticompetitive conduct in mind. This will make the possibility of collusion and the formation of cartels more difficult. Of more importance is that procurement officials are aware of and alerted to the factors that indicate anticompetitive behaviour in order to be able to prevent them. Designing the most suitable bidding model is the first step in the attempt to prevent anticompetitive behaviour. Sealed-bid tenders are preferable to open tenders in the attempt to prevent collusion. Private negotiations with potential suppliers can reduce greatly that risk. Collusion may also be reduced by the

introduction of some degree of uncertainty, and secrecy, in the outcome of the procurement process by, e.g. using a weighting scheme for choosing the best bid. In some circumstances individual negotiations with a limited number of suppliers may yield the most favourable results.

- 4- Enforcement of competitive law and regulations reduces the risk of anticompetitive behavior. It is therefore very important that specific prohibitions be available in those laws and regulations to act as deterrents against that behaviour, making potential perpetrators aware beforehand that they will be subject to criminal laws. Firm application of the law and the resultant prosecution must be publicly advertised in order to add more confidence on the law-abiding parties and at the same time deterring those who may try to violate. Other measures can additionally be used to that effect, such as increased fines, increased incentives for whistle blowers ...etc.
- 5- Supporting SME access to public procurement opportunities may impact positively on competition and open the way for that portion of the economy to grow and prosper. SMEs face a number of barriers such as the lack of knowledge and awareness of opportunities, capacity issues and the perceived complexity of some procurement processes. A number of approaches can be introduced to ensure participation of SMEs in public procurement opportunities which focus on simplifying the procurement process and making it accessible to SMEs, including:
 - Dividing tenders into lots.
 - Encouraging collaboration and joint ventures between SMEs and between SMEs and larger entities.
 - Building capacity by ,e.g., helping to develop tender writing skills.
 - Proportionate selection criteria which allocate a particular share to SMEs.

All of the possible ways of easing the process to allow SMEs to participate should not compromise quality and satisfactory performance.

- 6- Appeal procedures are meant to assure the aggrieved parties that their rights are respected by the law, and that they have the right to take legal action if necessary. Chapters Twelve and Thirteen of the Act provide for instances where its articles apply, and also the penalties which will be imposed on the violating parties.

No specific cases could be cited here as the Act and the related Regulations are relatively recent. But it is expected that as the public and suppliers become aware of the provisions meant to protect their rights, then their application will come to life.

2- Prevention, detection and prosecution of bid-rigging

1- Prevention

The public expects to receive the best of goods and services at the lowest prices through free and open competitive bidding. The competitive process only works, however, when competitors set prices honestly and independently, a goal which will not be achieved if competitors collude to fix prices or bid-rig. Those anticompetitive behaviours are illegal and are subject to criminal prosecution by the Act.

The basic schemes involved in most bid-rigging conspiracies include:

Bid Suppression: Where one or more competitors agree not to bid, or withdraw a previously submitted bid, to allow a particular bidder to win.

Complementary Bidding: Co-conspirators submit token bids which are intentionally high or which intentionally fail to meet a precondition of the bid in order to lose a contract, opening the way for an agreed party to win.

Bid Rotation: In bid rotation, all co-conspirators submit bids, but by agreement, take turns being the low bidder on a series of contracts.

Customer or Market Allocation: In this scheme, those involved agree to divide up customers or geographic areas.

Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.

There are some procedures which can discourage anticompetitive behaviour:

- Expand the list of bidders to make it more difficult for bidders to collude. As the number of bidders increases, the probability of successful collusive bidding decreases.
- All procurement employees should be familiar with the indicators of bid rigging, price fixing, and other types of collusion.
- Maintain procurement records, e.g., bid lists, abstracts, and awards. When collusion is suspected, it is necessary to review the procurement history of a product to determine whether a pattern of bid allocation or rotation is present.
- Procurement officials should ask questions. If the prices or bids submitted seem unreasonable, then the suppliers are to explain and justify them. Reasonable explanations may be given or suspicions may be heightened by unreasonable answers.
- Knowledge and understanding of the dynamics of the markets are also important. A knowledgeable buyer may correctly suspect collusion from market behaviour that may not arouse suspicions in an uninformed buyer.

Procurement officials should report suspicions of anticompetitive behaviour. Such observations may add to information already available which may indicate a more widespread problem.

2- Detection

Bid rigging, price fixing and other collusion can be very difficult to detect. That type of scheme is meant to be secret, with only the parties involved having knowledge. However, suspicions may be aroused by unusual bidding or pricing patterns, or some other signs the procurement officer may observe.

In order to help to spot instances of possible collusion, a number of countries have developed check lists which may be used by procurement officials. The indicators are simply to alert the officials that further investigation is required to determine whether collusion exists. They include:

- The same suppliers submit bids and each company seems to take a turn being the successful bidder.
- Some bid prices are much higher than published price lists.
- Fewer than normal number of competitors bid.
- Bid prices drop whenever a new infrequent bidder participates.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.
- Prices remain identical for long periods of time.
- Price increases do not appear to be supported by increased costs.
- Vendors are charging higher prices to local customers than to distant customers. This may indicate that local prices are fixed.
- The proposals or bid forms submitted by different vendors contain irregularities or similar handwriting, typeface or stationery. This may indicate that the designated low bidder may have prepared some or all of the losing vendors' bids.
- Bid or price documents contain physical alterations indicating last minute price changes.
- A company requests a bid package for itself and a competitor, or submits both.
- A company submits a bid when it is incapable of successfully performing the contract.
- A company brings multiple bids to a bid opening and submits its bid only after determining, or trying to determine, who else is bidding.

Another possible way of detecting and preventing bid rigging in public procurement is to monitor constantly the bidding activities and perform quantitative analyses on the bid data. This could ensure the identification of sectors where violations or anticompetitive activities are more likely, and hence take the necessary steps to prevent their occurrence.

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

collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question.

3- Prosecution

Prosecution requires close working relationships between public procurement officials, government investigators and law enforcing authorities. It is important to educate procurement officials and government investigators about what conduct constitutes violation. If they do not clearly understand what constitutes violation, they will not know what to look for and report to the authorities.

It is also important to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations, citing specific examples of actual cases.

All those parties should work together as a team to deter anticompetitive behavior through successful prosecutions, increased vigilance and better designed public procurement programs.

Chapter eleven of the Act details the situations which may lead to criminal proceedings against a violating party.