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"Competition Policy and Public Procurement"

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Competition Policy and Public Procurement

1.0 Introduction

Competition policy for public procurement has been a pillar of the Competition Commission of Mauritius' (CCM) work since 2009, but was already engrained in the 2006 public procurement law for Mauritius which was passed before the proclamation of the Competition Act (2007).[1] This paper explains the extent of public procurement in Mauritius, the institutional structure for public procurement, the competition aspects of the public procurement law and the relevant parts of the Competition Act for public procurement. Finally, this report identifies work undertaken with public procurement authorities, work which is aimed at promoting a competitive procurement environment, identifying potentially anti-competitive procurements, and cooperating to identify instances in which anti-competitive procurements may have occurred.

The fundamental aim of public procurement is to obtain good value for the government via vigorous competitive bidding processes. Making competitive forces work is at the heart of procurement. Competitive public procurement systems will accrue benefits to the whole economy as public procurement often involves key infrastructure (highways, transport, electricity, etc.) that serve as an input for other industries. Effective public procurement avoids mismanagement and waste of public funds, ensuring that the supplier offering the lowest price or, more generally, the best "value for money" does the work. It is important that the procurement process is not affected by practices such as collusion, bid rigging, fraud and corruption.

2.0 Nature of public procurement in Mauritius

In Mauritius public procurement accounts for about Rs.29 billion annually (1.016 billion USD) or around 10% of GDP. The efficiency and effectiveness of the public procurement system has a significant impact on the quality of life of every citizen. Moreover the government, through public procurement, tries to achieve economic, environmental and social goals.

[1] The current Competition Act dates from 2007. However, a prior Competition Act (2003) was repealed in 2007. So there was a competition law in Mauritius at the time of the passage of the Public Procurement Act in 2006. The Competition Act 2007 was fully proclaimed in November 2009 at which time the Competition Commission of Mauritius obtained full powers under the law.

The following table gives an indication of the types and value of procurements undertaken in 2010.

Table 1: Procurement by Government for the year 2010

Procurement	
Category	**Spend (Rs.)**
Goods	4,325,483,746
Works	22,796,660,285
Consultancy	359,931,022
Other services	1,230,007,297
Total	**28,712,082,350**

Source: PPO, Annual Report, April 2011

Reported public procurement expenditures include those for local government. In Mauritius, local government spending is part of that national budget.

3.0 Institutional Structure of Public Procurement

The Public Procurement Act 2006 (PPA) and Procurement Regulations 2008 provide the basic principles and procedures applied to and regulating the public procurement of goods, public works, consultant services, and other services. They also provide for three institutions namely the Procurement Policy Office (PPO), the Central Procurement Board (CPB) and the Independent Review Panel (IRP) responsible for those matters.

The Act establishes the PPO as the independent procurement policy making and monitoring body and is the oversight and regulatory body for public procurement; the CPB is a body corporate responsible for the vetting of bidding documents and conduct of the bidding process of all contracts exceeding a prescribed amount, and the IRP as another independent institution, to review applications from unsatisfied bidders who have to, in the first place, address their challenge to the public body concerned.

The PPA is based on the UNCITRAL Model Law on Procurement, the COMESA Directive and the World Bank Procurement Guidelines. It seeks to achieve the common objectives of public procurement systems, namely:

- Maximise economy and efficiency in public procurement, and obtain best value for public expenditures;
- Promote economic development of the Republic of Mauritius, including capacity building in the field of public procurement;

- Promote competition and foster participation in public procurement proceedings of qualified suppliers, contractors and consultants;
- Provide equal access without discrimination to all eligible and qualified providers of goods, works and services and fair and equitable treatment of all bidders;
- Promote integrity, fairness, accountability and public confidence in the public procurement process; and
- Achieve transparency in the procedures, process and decisions relating to public procurement.

Bid rigging is a violation of the PPA. The following provisions of the Public Procurement Act 2006 refer to bid rigging:

Section 52 (3): "*A bidder shall not engage in collusion, before or after a bid submission, designed to allocate procurement contracts among bidders, establish bid prices at artificial non-competitive levels or otherwise deprive a public body of the benefit of free and open competition*."

Section 53 (1) (d): "The Policy Office may, under such conditions as may be prescribed, suspend or debar a potential bidder or supplier from participation in procurement on the following grounds - *misconduct relating to the submission of bids, including corruption, price fixing, a pattern of under-pricing bids, breach of confidentiality, misconduct relating to execution of procurement contracts, or any other misconduct relating to the responsibilities of the bidder or supplier".*

Accordingly, by virtue of Section 7(1) of the Public Procurement (Suspension and Debarment) Regulations 2008, the PPO "*may request from any source, information or evidence concerning possible grounds for suspension or debarment of a potential bidder or supplier".*

Further deterrents with regards to collusive practices in public procurement are detailed under the heading "**Corruption and Fraud**" in section "**Instruction to Bidders**" in the Standard Bidding Documents issued by the PPO pursuant to section 7(c) of the PPA. This highlights the policy of Government to ensure that public bodies as well as bidders observe the highest standard of ethics during the procurement and execution of contracts.

Thus, "***A public body shall reject a bid if the bidder offers, gives or agrees to give an inducement referred to in subsection (1) and promptly notify the rejection to the bidder concerned and to the Policy Office".*** Moreover, in the General Conditions of Contract, it is stipulated that ***"If the Purchaser determines that the Supplier has engaged in corrupt, fraudulent, collusive, coercive or obstructive practices, in competing for or in executing the Contract, then the Purchaser may, after giving 14 days' notice to the Supplier, terminate the Supplier's employment under the Contract and cancel the contract***."

Under these provisions, the term '**collusive practice**' is defined as "*an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party*". In this context, 'parties' refers to participants in the procurement process attempting to establish bid prices at artificial, non-competitive levels; 'another party' refers to a public official acting in relation to the procurement process or contract execution, and 'public official' includes the purchaser's staff and employees of other organizations taking or reviewing procurement decisions.

4.0 COMPETITION LAW WITH RESPECT TO PUBLIC PROCUREMENT

Procurement law is not the only law that can be applied to bid rigging. Collusive agreements create a cartel which is a consortium of independent organisations formed secretly to limit competition by manipulating the production and distribution of a product or service.

Such agreements are prohibited by the Competition Act (2007), under Section 41 (see Annex).

The Competition Act prohibits bid rigging and renders any bid rigging agreement void. The existence of agreements between bidders which predetermines the outcome of a tender process amounts to bid rigging. Common forms of bid rigging such as bid suppression, complementary bidding, bid rotation and market division fall under section 42(1)(a) (see Annex).

Bid rigging may also take the form of other anti-competitive practices such as agreement to raise, lower, or maintain prices, agreement not to negotiate on price, agreement to limit discounts / rebates, agreement on price formulas or guidelines and any other agreements in relation to other terms of the contract. Such agreements are prohibited as they set to determine the terms and conditions on which bids will be made at the very outset of the bid process. These are essentially examples that may fall under section 42(1) (b) (See Annex).

In certain aspects of public procurement, the CCM and the PPO have overlapping powers. This is because collusion among bidders or between a bidder and a public official, which is prohibited under sections 52 (3) and 53 (1) of the Public Procurement Act (2006) may also infringe the Competition Act (2007).

Up to the time of writing, no bid rigging or cartel investigation has been made public.

Under section 52 of the Competition Act, the CCM has wide-ranging investigation powers.

- The CCM can compel the production of documents and other information from bidders, compel attendance at interview, and administer oaths and – in some circumstances and after applying for a warrant – raid premises and seize evidence.
- The CCM may, in relation to a finding of bid rigging, in addition to, or instead of giving a direction, make an order imposing a financial penalty where businesses have been found to participate intentionally or negligently in the bid rigging.
- The financial penalty shall not exceed 10 per cent of the turnover of the enterprise in Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years.

5.0 PROMOTING COMPETITIVE PUBLIC PROCUREMENT

The CCM places a high priority on fighting bid rigging in public procurement. It also faces the challenge of being a new authority operating with no prior enforcement experience in bid rigging. At this point, no cases have been brought to the Commission or to the Courts,

respectively, of violations of the Competition Act (2007) or of the Public Procurement Act (2006) with respect to collusion.

We have focused on preparing the terrain for future cases, ensuring that businesses understand the law, providing public officials with enough knowledge to report suspicious behaviour and preparing for co-operation and information gathering with procurement bodies. Our initiatives in this area have included workshops, cooperation agreements, and training of public procurement officials. We will shortly issue guidelines for enhancing competition in public procurement jointly with the PPO.

5.1 Workshops

In order to provide business people with an understanding of the new competition law, the CCM has organised and participated in workshops with the business community on many occasions, as well as more particularly a workshop organised with the PPO on Bid Rigging (2010), a joint PPO-CCM workshop in Rodrigues (2010) focusing on bid rigging, and workshops with the Construction Industry (2010), the Building and Civil Engineering Contractors Association (2011), and speaking to the Pan-Commonwealth Public Procurement Conference (2011).

5.2 Memorandum of Understanding

In 2011, the CCM entered into a Memorandum of Understanding (MOU) with the PPO. This MOU provides for cooperation between the institutions and sharing of information as appropriate. It provides a framework for regular communication between designated contact points in each organisation.

5.3 Training of Public Procurement Officials

In 2011, the CCM delivered a lecture on anti-competitive behaviours in public procurement to a group of public procurement officers in the context of the Certification Programme in Public Procurement conducted by the PPO in collaboration with the University of Technology, Mauritius. The purpose is to educate these officers, who are the first lines of defence against bid rigging, on anticompetitive behaviours in public procurement.

5.4 Guidelines

In a couple of months, the CCM will issue Guidelines on Enhancing Competition in Public Procurement jointly with the PPO. These guidelines will explain the PPA and Competition Act (2007) with an emphasis on the legal prohibitions of bid rigging. They will also provide examples of the sorts of behaviour that are illegal, possible signs of bid rigging, and guidance for designing tenders to prevent bid rigging.

6.0 Conclusion

In conclusion, while Mauritius has not yet had any public cases concerning bid rigging, the CCM has laid solid foundations for future work in this area. The procurement law and the competition law are well drafted for prosecuting bid rigging, the business community has had numerous opportunities to learn about and understand the law and the CCM is closely engaged with procurement authorities to identify potential cases and, when appropriate, investigate them.

ANNEX. MOST RELEVANT PROVISIONS OF COMPETITION ACT (2007)

41. Horizontal agreements

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if –

> (a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;
>
> (b) it has the object or effect of, in any way -
>
> > (i) fixing the selling or purchase prices of the goods or services;
> >
> > (ii) sharing markets or sources of the supply of the goods or services; or
> >
> > (iii) restricting the supply of the goods or services to, or the acquisition of themfrom, any person; and
>
> (c) significantly prevents, restricts or distorts competition.

(2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

42. Bid Rigging

(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if one party to the agreement –

> (a) Agrees not to submit a bid or tender in response to an invitation for bids or tenders; or
>
> (b) Agrees upon the price, terms or conditions of a bid or tender to be submitted in response to such a call or request.

(2) Subject to subsection (3), any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

(3) This section shall not apply to an agreement the terms of which are made known to the person making the invitation for bids or tenders at, or before, the time when any bid or tender is made by a party to the agreement.