

Fighting bid rigging: Competition Authority's advocacy initiative in public procurement

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Introduction

The Fighting Bid Rigging in Public Procurement campaign is a highlight of the Competition Authority's recent advocacy initiatives. It was launched in June 2016 and recently reached the milestone of 1,000 participants. The campaign is intended to raise awareness among the state bodies that regularly award public contracts of the most common issues concerning bid rigging in public procurement. It also advises on how to detect illegal practices in the context of public tenders and design tender programmes in a way that inhibits potential collusive tendering.

Bid rigging in Portugal

Collusive behaviour between competitors in the context of a public tender is considered one of the most serious violations of Portuguese and EU competition law and has been severely punished by the Competition Authority. Collusive behaviour compromises the efficient allocation of public resources, producing less favourable conditions for the state and therefore generating less innovation, reduced quality and higher prices. It ultimately harms the economy, consumers and taxpayers.

Certain economic sectors and activities are more propitious to bid rigging, such as those characterised by regularity and predictability concerning contractual procedures or those which have few operators, homogeneous products or structural or other links between market operators. The most frequent examples of collusion in public procurement include arrangements in which competitors decide the winner alternately and other bidders strategically withdraw from the tender or submit higher or less attractive bids so that the arranged winner (often selected on a rotational basis by the colluding companies) can be awarded the contract.

The Competition Authority has previously investigated bid-rigging conduct in public procurement in several sectors, including education, health and firefighting, and its record in this regard has evolved over the past decade.

In 2005 the authority fined five pharmaceutical companies over €3 million for bid rigging in a public tender launched by the Hospital of Coimbra and subsequently imposed additional fines on the same companies for rigging 36 other public tenders that took place in 22 different hospitals. Both decisions were annulled on appeal, as the courts found that the authority had violated the defendants' defence rights. However, the decisions were later reissued by the authority and were, after further appeals, partially confirmed by the courts, although with significantly reduced fines.

In 2007 the authority fined two companies €310,000 for forming a consortium which was the only bidder for a public contract for the provision of helicopter services to fight forest fires (in previous years, each company had submitted a separate bid). However, the Lisbon Commerce Court decision

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ruled that the authority had not adduced sufficient evidence to demonstrate anti-competitive object and effects and reversed the decision.

In December 2009 the Competition Authority imposed fines totalling €14.7 million on five companies for allegedly operating a price-fixing cartel in the operation and management of catering services at canteens, refectories and corporate restaurants, in a case which marked the first application of the leniency statute and the first time that board members and managers were fined in addition to their infringing companies. Annulled on appeal for procedural reasons, the decision was reissued by the authority, but appealed again and lapsed due to the statute of limitations.

In 2011 two industrial cleaning companies were fined over €315,000 for colluding in 16 public tenders. The decision was confirmed on appeal.

In 2015 the authority fined five pre-fabricated equipment suppliers over €830,000 for price fixing and market sharing in public tenders launched between 2009 and 2010 by state-owned school infrastructure company Parque Escolar. All defendants cooperated with the authority under the leniency statute and subsequently obtained further reductions under the settlement programme.

Anti-bid-rigging campaign

In order to alert and inform adjudicating bodies involved in public procurement procedures, the Competition Authority has held several sessions throughout the country in which its staff have explained how to detect and prevent bid rigging, as well as ways to cooperate with the authority's investigation and enforcement of such practices.

Checklist for identifying collusion

The authority has provided the following practical checklist detailing the main signs of potential collusive behaviour that public authorities should be alert to:

- As regards bid submissions:
 - the number of bids is less than usual;
 - bids are withdrawn unexpectedly;
 - regular bidders fail to submit a proposal;
 - bids are submitted jointly when they could have been presented individually; or
 - bids share suspect similarities, such as the same errors, missing information, specific wording, formatting, last minute corrections, letterhead, contact information, postal registration stamps or physical submission time or, in the case of online submissions, the same IP address.
- Commercial terms and bidder statements include:
 - high prices relative to the cost estimate of the awarding authority;
 - different bids with identical prices;
 - uniform price increases;
 - price decreases when a non-regular bidder appears;
 - non-explicable price differences between bids;
 - significant fluctuations in the prices submitted by the same company in different bids;
 - preference or exclusivity for a certain geographical area or clients; or
 - references to competing bids, guidelines or sectoral associations.
- Bid results display suspect patterns of rotation or geographic distribution between winning bids.
- As regards bidder behaviour:
 - the winning bidder repeatedly subcontracts other bidders;
 - the winning bidder withdraws and is subsequently subcontracted by the selected bidder;
 - certain bidders do not request a quote from a usual or go-to supplier; or
 - several bidders hire the same consultant when preparing the bid.

Guidelines for designing public tenders

The Competition Authority also recently issued guidance to public authorities concerning the design of public tenders with a view to mitigating the risk of collusive behaviour. In particular, the authority recommends:

- incentivising the participation of bidders by avoiding unnecessary requirements that restrict participation (eg, certifications, financial guarantees or the minimal dimension of bidders);
- publicising adequately in order to reach national and international bidders;
- dividing contracts into several lots (as long as such division does not facilitate market partitioning);
- reducing bid submission costs (eg, simplifying and aggregating procedures, maintaining updated records of approved and certified bidders, establishing appropriate deadlines for bid submission and using online procedures);
- setting clear requirements and reducing the predictability of tenders – requirements should be clear and objective, regular tenders (as regards timing, value or number of contracts) should be avoided and public authorities should consider organising tenders jointly with other contracting authorities;
- human resource training and the scrutiny of tender information, such as:
 - implementing continuing training programmes for staff;
 - collecting information regarding past tenders;
 - reviewing periodically historical bids for certain products and services;
 - comparing lists of interested companies in the tender and lists of actual bidders;
 - conducting interviews with bidders that have withdrawn or have a pattern of presenting losing bids;
 - promoting an easy communication channel for companies to report their concerns regarding competitors' behaviours; and
 - incentivising staff to report suspected behaviour to the Competition Authority;
- defining evaluation and selection criteria that promote competition by:
 - considering carefully any non-price-related criteria (if used, they should be clearly and objectively specified);
 - not valuing prior performance without justification; and
 - reviewing the impact of selection criteria in the context of competition in the tender and future bids; and
- mitigating opportunities for communication between competitors:
 - any contacts between the awarding authority and bidders should be carried out individually;
 - the anonymity of proposals should be promoted;
 - the information made available by the awarding authority should be carefully considered;
 - advisers should be clear of conflicts of interest and subject to confidentiality obligations, subcontracting should be previously disclosed by bidders and references to the consequences to competition law violations should be included in the tender documents.

Comment

The Fighting Bid Rigging Campaign, which is ongoing, represents a significant investment by the Competition Authority in training the public authorities that award public contracts on the prevention and prosecution of collusive behaviour. Useful materials have been made available to public bodies on a dedicated webpage in order to assist staff in the design of more competition-efficient tenders and the identification of possible collusive behaviour.

Recent statements by the Competition Authority suggest that several investigations into suspected bid rigging have already been initiated further to the campaign. While it is yet unclear whether these will be translated into further fining decisions, companies participating in public tenders in Portugal should be aware that the authority considers collusion in public procurement an enforcement priority and will continue to subject this area to close scrutiny.

It is therefore advisable that companies operating in public procurement markets and their advisers, including external consultants, develop and maintain effective competition compliance programmes in order to mitigate any risk of collusive behaviour and seek specialised competition advice notably when planning joint bids, attending meetings where other competitors are present or selecting a consultant who may be working for other competitors.

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