



competition commission
south africa

A GUIDE ON PROMOTING **COMPETITION** **IN PUBLIC** **PROCUREMENT**

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DEFINITIONS

- **Act** means the Competition Act no. 89 of 1998 as amended.
- **Average avoidable cost** means the sum of all costs, including variable costs and product specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output.
- **Average variable cost** means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of the product.
- **Bid** means a written offer in response to an invitation for the procurement of goods or services through price quotations, bidding process or any other method prescribed by procurement legislation.
- **Commission** means the Competition Commission.
- **Constitution** means the Constitution of the Republic of South Africa, 1996.
- **Department** means (a) a national department listed in Schedule 1 to the Public Service Act of 1994; (b) a provincial department listed in Schedule 1 to the Public Service Act of 1994, in the case of the Office of a Premier, and in Schedule 2; (c) a national government component listed in Part A of Schedule 3 to the Public Service Act, 1994; and (d) a provincial government component listed in Part B of Schedule 3 to the Public Service Act, 1994.
- **Dominant firm** means a firm dominant in a market if - (a) it has at least 45% of the market; (b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or (c) it has less than 35% of that market but has market power.
- **Exclusionary act** means an act that impedes or prevents a firm from entering, participating in or expanding within a market.
- **Firm** means a person, partnership, trust, or company.
- **Historically disadvantaged individual** means one of a category of individuals who, before the Constitution of the Republic of South Africa came into operation, were disadvantaged by unfair discrimination based on race, gender or disability.
- **Horizontal relationship** means firms competing in the same level of the market in respect of substitutable goods and services.
- **Open framework agreement** means an agreement between a procuring public sector institution and one or more suppliers, the purpose of which is to establish the terms governing the award, such as the price and the quantity envisaged, and conditions under which procurement can be made to more than one supplier covering the same scope of work throughout the term of the contract.
- **Predatory prices** means prices for goods or services below the firm's average avoidable cost or average variable cost.
- **Procurement official** means an employee or authorised representative of a public sector institution involved in public procurement functions, such as procurement planning, contract award and contract administration.
- **Public procurement** means the purchase by public sector institutions of goods, services, or infrastructure.
- **Public sector institution** means a national or provincial government department, constitutional institution, a municipality, or a municipal entity, or a public entity listed in schedule 2 and 3 to the Public Finance Management Act.
- **Small and medium enterprise** means a firm as determined in the National Small Business Act No. 102 of 1996.
- **Supplier** means a person or firm delivering goods, services, or infrastructure.
- **Transversal Term Contract** means a centrally facilitated contract arranged by the National Treasury or provincial treasury, for goods or services that are required by one or more than one institution, as provided for in terms of the Chapter 16A of the Treasury regulations.
- **Vertical relationship** means the relationship between a firm and its suppliers, its customers or both.

ABOUT THIS GUIDE

The Commission is responsible to implement measures that develop public awareness of the provisions of the Act. In line with this objective, this publication contains guidance aimed at stakeholders involved in public procurement processes.

The purpose of this Guide is to support public procurement officials in South Africa, addressing some of the common concerns arising from anticompetitive public procurement and providing pro-competitive options that can be used to reflect best practice. It is intended to contribute to the promotion of effective competition in public procurement, advance the development of small and medium enterprises (SMEs) and for the benefit of public sector institutions and consumers. This publication is intended to support, but not to modify, laws and regulations of public procurement authorities. The concepts and solutions proposed in the Guide should be read with and considering the relevant laws and regulations.

Procurement officials, bid adjudicators as well as suppliers to procuring public sector institutions should read this guide to understand -

- a) competition issues that may arise in public procurement;
- b) how to design tenders that comply fully with the Competition Act; and
- c) how to detect and report anticompetitive conduct in the procurement process to the Commission.

The Guide is structured into four Chapters.

1. Chapter 1 introduces the Commission and the benefits for promoting competition in public procurement.
2. Chapter 2 covers competition issues that may arise in public procurement.
3. Chapter 3 sets forth principles for setting up a competitive public procurement process; and
4. Chapter 4 provides guidance on what to do when anticompetitive conduct is suspected.

CHAPTER 1

INTRODUCTION

1.1. Introduction to the Competition Commission

The Act establishes the Commission to investigate and evaluate restrictive business practices, abuse of a dominant position and merger control. In terms of section 2, the purpose of the Act is to:

- a) promote the efficiency, adaptability, and development of the economy,
- b) provide consumers with competitive prices and product choices,
- c) promote employment and advance the social and economic welfare of South Africans,
- d) expand opportunities for South Africans participating in world markets and recognise the role of foreign competition in South Africa,
- e) ensure that SMEs have an equitable opportunity to participate in the economy and
- f) promote a greater spread of ownership to increase the ownership stakes of historically disadvantaged individuals (HDIs).

1.2. Why is it important to promote competition in public procurement procedures?

For the purposes of this Guide, public procurement is the purchasing of goods and services by public sector institutions from the private sector. Public procurement accounted for about 11.9% of gross domestic product (GDP) in South Africa for 2020 according to the Organisation for Economic Co-operation and Development (OECD)¹ and therefore has a role to play in economic growth and improving the social welfare of consumers. Section 217 of the Constitution provides that the purchase of all goods and services by any organ of state must follow a system that is “fair, equitable, transparent, competitive and cost-effective”. Safeguarding competition is one of the guiding principles in public procurement and is indirectly present in the rest of the principles that inspire those rules, including free access to tenders, transparency of the procedures, and equal treatment of suppliers.

Competition in public procurement can result in the **best value** for money for the procuring public sector institution through **lower prices** and **higher quality and innovation** of the goods and services purchased and provided to the end-users of public services. Furthermore, it provides the procuring public sector institution with choice and thus bargaining power. Potential suppliers bidding against each other result in competitive prices and a larger pool of alternatives may result in increased quality and lower prices. Competition in public procurement can also result in inclusivity, through SME participation in the economy and job creation.

Procuring public sector institutions can promote competition in public procurement in two ways. First: by developing procurement procedures that reduce any unjustified restrictions of competition in their design or their execution. Second, by helping to detect, prevent and report potential anticompetitive conduct between bidders in the procurement process. The sections that follow offer guidance on both fronts.

¹ OECD statistics accessible at Government at a Glance - 2017 edition: Public procurement (oecd.org) last accessed on 28 July 2021

CHAPTER 2

COMPETITION ISSUES THAT MAY ARISE IN PUBLIC PROCUREMENT

Competition issues that may arise in public procurement and warning signs for detection

The competition concerns that may arise in public procurement include:

- Collusive tendering/bid rigging (including cover quoting, losers' fee, bid suppression/rotation)
- Market allocation
- Cross directorships and cross shareholding
- Collusive conduct by spouses or family members
- Economic interest groupings and joint ventures
- Excessive pricing
- Predatory pricing
- Exclusionary bid specifications
- Exclusionary contracting models such as transversal contracts.

This section provides a brief definition of each contravention and an explanation of why it is prohibited in terms of the Act. This is followed by a guide to procurement officials on how to identify or detect each contravention.

2.1. Collusive tendering / bid rigging

Collusive tendering also known as bid rigging, occurs when firms that are expected to compete with one another, including potential competitors, agree amongst themselves to coordinate their bids and eliminate competition in the procurement process. The Act prohibits competing firms from engaging in bid rigging because bid rigging enables them not to compete and to act like monopolies and exploit consumers, such as public sector institutions, by increasing the price at which they provide goods or services and reducing the quality of their output. Bid rigging is particularly harmful in public procurement as it creates the impression of competition whilst there is actually no competition between the bids. In turn, this inflates prices and erodes funds that should be used to deliver better goods and services to members of the public. Section 4(1)(b)(iii) of the Act prohibits collusive tendering.

Below is a list of the most common strategies that may be adopted by colluding bidders in public procurement processes:

2.1.1. Cover quoting

Cover quoting is one strategy that the Commission has uncovered in its bid rigging investigations. Under this strategy, potential competitors secretly agree on the designated winner of the tender beforehand and on the prices that competitors will submit. The designated winner will then submit what appears to be the lowest price to the public sector institution that requires the specified goods or services compared to all its competitors. To give the appearance of genuine competition, the other “competing” firms will submit prices that are too high compared to the price that is submitted by the designated winner or submit unacceptable conditions to be eliminated by the public sector institution.

CASE STUDY 1: Cover quoting in cleaning services

On 30 January 2018, the South African Social Security Agency (SASSA) submitted a complaint to the Commission alleging that two corporate cleaning companies, namely firm Q and firm G, entered into an agreement to fix prices and tender collectively when responding to a 2016 tender issued by SASSA for the provision of cleaning, sanitation, gardening and car wash services to all SASSA's offices in the Northwest Province. At the time of submitting the bids, firm Q was the incumbent service provider to SASSA in the Northwest Province.

The Commission found that firm Q and firm G had a common shareholder and that they engaged in discussions and exchanged information with each other regarding the tender. In particular, the investigation revealed that firm Q provided a cover price to firm G to submit a non-competitive bid to SASSA.

A cover price is a price that a firm desiring to win a tender provides to another firm that does not. The firm that is provided with a cover price would bid for the tender at a higher price than the cover price, ensuring that it would fail in its bid and hopefully the bid of the firm that provided the cover price would succeed. In line with the agreement, firm G submitted a higher bid to enable firm Q to win the tender. In addition, the bid documents for both companies had been completed by the same person and both companies' contingency plans were the same and were prepared by the same person.

In 2020, the Competition Tribunal confirmed a consent agreement whereby firms Q and G admitted that they colluded in the 2016 SASSA tender in contravention of section 4(1)(b)(iii) of the Competition Act. In terms of the consent agreement entered with the Commission, Firm Q paid an administrative penalty (a fine) totaling R250 305.27 and firm G agreed to pay an administrative penalty of R40 300.59. The firms agreed to implement a competition compliance programme.

2.1.2. Bid suppression

Bid suppression occurs when competitors agree not to participate in a tender process by either not submitting their bid documents or withdrawing their bids to allow the designated winner to be nominated as the winning bidder.

2.1.3. Bid rotation

Bid rotation occurs when competitors agree to take turns of being the designated winner. This strategy is frequently employed by using either cover quoting where the designated winner will submit the lowest bid compared to other competitors or bid suppression where competitors do not submit their bids for the tender.



CASE STUDY 2: Bid Rotation in the construction industry

On 10 February 2009, the Commission initiated a complaint against various construction companies into conduct relating to the construction of FIFA 2010 World Cup stadia in South Africa.

The Commission had devised a policy known as the

Corporate Leniency Policy (CLP), which is geared towards encouraging those involved in cartels to disclose the prohibited conduct to the Commission. Those who approach the Commission with the necessary information that would result in institution of proceedings against a cartel will not be subjected to prosecution in relation to their involvement in or with the alleged cartel. They are initially granted conditional immunity, which is made final when conditions set out in the CLP have been met.

A construction company sought to take advantage of the Commission's CLP by providing information in respect of conduct known as "bid rotation" or "arranged jobs."

The case involved an agreed roster among six (6) construction firms, in terms of which those participating in the arrangement, agreed in advance for a certain period, or with respect to a certain cluster of projects, who would be allocated which project. Each project subject to the arrangement entailed a pecking order and agreed bids, down to the amounts of the bids, to be submitted by each party in the pecking order. A "policeman" firm would determine the bid price.

This type of collusive tendering takes the form of competitors arranging with each other the bids that would be put in, but the parties would pre-arrange who the winning bidder would be and pre-agree the prices submitted in the respective tenders. This form of conduct may or may not include elements of cover pricing and loser's fees.

The Commission's investigation found that the conduct amounted to price-fixing, market allocation and collusive tendering in contravention of sections 4(1)(b)(i), 4(1)(b)(iii) and 4(1)(b)(iii) of the Act.

2.1.4. Losers' fee

Losers' fee is also known as tender fee or compensation fee and it entails an agreement by bidders to add a certain agreed amount of money over their respective bid prices. The amount of money added does not in any way relate to the costs of providing services or the costs of the goods themselves, but it is an amount which the bidders agree that whoever wins the tender should pay the losing bidders to cover their costs of bidding for the tender. It is usually disguised as the costs for plant hire or management fee



CASE STUDY 3: Losers' fee payments in the construction industry

A construction company sought to take advantage of the Commission's corporate leniency policy by providing information in respect of conduct known as "Loser's fees." The business of the construction company (leniency applicant) in which the practice occurred is building and housing, but it can also be adopted by bidders in other sectors.

The practice is an agreement in terms of which each party tendering for the specific contract should include an agreed upon fee (losers' fee) in the tender price, which fee would be allocated to the wasted costs of unsuccessful bidder(s). The winner was expected to pay this fee to the losing bidder(s). This was compensation for bidders who did not win.

During the process of putting their bids together and calculating the bid price, four bidders agreed to a losers' fee of R150 000 each, and the leniency applicant therefore added an extra cost of R450 000 on its tender price. The other four bidders priced very high, to allow the leniency applicant to win the bid. The allegations were supported by email correspondence between the bidders.

The Commission's investigation found that the conduct relating to losers' fee amounted to price-fixing. It is a contravention of section 4(1)(b)(i) of the Act and could also comprise a form of collusive tendering, in terms of section 4(1)(b)(iii) of the Act.

If a specific group of bidders are unable to explain costs in relation to their bid prices, and the costs do not in any way relate to the cost of providing services or goods in relation to the tender, the procurement official should report it to the Commission for further investigation.

2.2. Cross directorships and cross shareholding in competing firms

Section 4(2) of the Act contains a presumption for the existence of an agreement to engage in restrictive horizontal practices between two or more firms if, (a) any one of those firms owns a significant interest in the other, or they have at least one director in common,

and (b) any combination of those firms engage in that restrictive horizontal practice. Cross-shareholding or cross directorship results in firms that are supposed to be competing, having common shareholder(s) or director(s). The existence of common shareholders or directors create conditions that make it easy for the firms to collude when bidding for tenders.

2.3. Collusive conduct by spouses and family members

Bid rigging conduct involving firms owned by spouses and family members constitutes bid rigging. The Commission will treat this kind of case on a case-by-case basis considering the strength of the evidence.



CASE STUDY 4: Collusive tendering by spouses or family members

In 2015 the National Treasury issued tenders on behalf of the Department of Health for the supply of dental instruments and consumables and related items to the State. During the tender evaluation process National Treasury discovered that there were common members in the ownership of three Respondents that submitted bids and the matter was initiated for investigation by the Commission on 28 September 2016. During the investigation, it transpired that firms CDA and XCT were 100% owned by Mrs W who also had a 50% interest in CDC. CDC was jointly owned by husband and wife, Mr and Mrs W. This resulted in all the three firms having a common shareholder, and operating as contemplated in section 4(2) of the Act.

In addition, the Respondents, being firms in a horizontal relationship, engaged in a concerted practice to divide markets by allocating specific types of goods and tendered collusively in respect of the tenders in contravention of section 4(1)(b)(ii) and (iii) of the Act. The Respondents agreed not to submit competing tenders for the same line items when responding to the tenders. CDA submitted tenders for dental laboratory products, CDC submitted tenders for dental surgery products and XCT submitted tender for false teeth which also fall within dental laboratory products. XCT did not submit a bid in respect of one of the tenders. The Commission, however, decided to non-refer the case

2.4. Economic interest groupings and joint ventures

Participating in tenders in the form of joint ventures (JVs) or economic interest groupings (EIGs) can have positive competition effects, as it makes it easier for smaller businesses to pool resources to participate and obtain the funding needed for the required investments. Such alliances, however, can also be a guise for a cartel and promote collusion and therefore warrant special attention. Procurement officials should be particularly vigilant about joint bids.

2.5. Excessive pricing

Another potential contravention of the Act that may occur in public procurement is when the procuring public sector institution is charged an excessive price by the bidder, which bears no relation to the goods or services that are rendered. The only condition for the contravention is that the bidder must be a dominant firm in the relevant market as defined in section 7 of the Act.

Section 8(1)(a) of the Act prohibits excessive pricing by dominant firms in their respective markets since this conduct is exploitative and is frequently used to obtain abnormal monetary gains from consumers without any improvement in the quality of the good or service that is provided.

Concerning public procurement, dominant firms are likely to engage in this conduct when there is a limited number of alternative suppliers for the required goods or services. Dominant firms can also charge consumers or procuring public sector institutions exploitative prices in emergencies such as the occurrence of a natural disaster or a pandemic to take advantage of temporary scarcity that is created in the market for the required goods or services.

2.6. Predatory pricing

Predatory pricing (also referred to as predation) is another exclusionary conduct that is prohibited under section 8(1)(d)(iv) of the Act. Predatory pricing occurs when a dominant firm deliberately reduces prices to loss-making levels in the short term to induce the exit of its competitors from (or deter new firms from entering) the market. The dominant firm will then, following the exit of its competitors from the market, charge higher prices to customers.

There are two scenarios where predatory pricing may occur in public procurement. In the first scenario, predatory pricing can be adopted by a dominant firm that sells complementary products. In this regard, the dominant firm will sell one product at a cheap price and

the other at a high price to compensate for the loss. These types of cases should be referred to the Commission for further investigation. The second scenario occurs when a dominant firm bids at a price that is very low to eliminate competitors. Once competitors are eliminated, the dominant firm increases its price in the later years to recoup its initial losses.

Predatory strategies may be used by a dominant firm to win the tender at a price that makes it unreasonable for smaller firms to compete. The Act prohibits predatory pricing as it may be used to eliminate competitors with the aim of exploiting consumers or public sector institutions in the long run.

Predatory pricing is fostered by the bias that is adopted towards the lowest cost bids. Public sector institutions can mitigate the risks associated with predation in public procurement by ensuring that bids have been properly costed independently by the public sector institution.

CASE STUDY 5:
Predatory pricing conduct in public procurement

Firm AFH was involved in the construction and selling of low-cost housing. It used independent contractors for its ceilings and partitions work. It decided to stop allocating contracts for ceilings and partitions to firm GM and to allocate it to other service providers. Firm GM then approached firm SPC, and it promised them work. Firm GM then gave firm SPC quotes to submit to firm AFH. Firm GM simultaneously submitted quotes with lesser prices even though firm AFH had informed it that it will no longer be allocating work to it. Firm SPC alleged that it did not know firm GM would also submit quotes. Firm AFH filed a complaint with the Commission on 15 March 2010, alleging bid rigging.

The Commission is concerned with the practice that is adopted by bidders who submit extremely low quotations for projects such as low-cost housing. The price that these bidders quote in some instances have no relation to the services rendered. The bidder will then abandon the project without any recourse to the public sector institution.

CHAPTER 3

A PRACTICAL GUIDE ON HOW TO IDENTIFY ANTI-COMPETITIVE CONDUCT

3.1. How to identify bid rigging

Procurement officials can identify bid rigging by analysing the prices of the bids to determine the price patterns between the winning bids and other bids that were submitted by competing firms. Patterns should be examined carefully if one or more of the following are detected:

- Similarities in prices,
- Prices submitted by competing bidders for each line item or product or service, with an equal or same price difference;
- Prices submitted by competing bidders for each line item or product or service, with an equal percentage difference between each price;
- Identical price increases by bidders not explained by higher costs;
- Bidding at prices above the maximum award budget. The bidders may have reached an agreement for the tender to be declared void for lack of qualified bids and force the procuring entity to increase the maximum budget.

Procurement officials should evaluate if there is a pattern in the winning bid that suggests bid rigging. Collusion can also be detected through other technical characteristics across different bids, such as common mistakes, similar contact details and the same supporting documents as well as similarities in terms of the conditions of the provided goods or services.

3.2. How to identify cross shareholdings and cross directorships

Procurement officials should identify if there are any cross shareholdings and common directors in the bids submitted by competitors. This can be identified from Companies and Intellectual Property Commission (CIPC) certificates submitted by the bidders when they tender. The CIPC certificate is proof of registration of the firm with the Registrar of Companies in South Africa, and it contains

the names of owners and directors of the firm and their respective shareholding.

Where cross shareholdings or cross directorships is evident, procurement officials should report it to the Commission to further investigate the potential for coordination of strategies in the tender. In addition to the above, procurement officials should pay attention to the Standard Bidding Document (SBD) forms and Municipal Bidding Documents (MBD).

3.3. Signs that Economic Interest Groupings (EIGs) or Joint Ventures (JVs) may involve anticompetitive conduct

- ✓ Where some of the EIG or JV members have the requisite capacity to have participated in the tender separately.
- ✓ Simultaneous participation by firms from the same group in a tender, for example, where one firm in the group participates individually and another does so through a JV or EIG.
- ✓ The firms in the JV or EIG together account for a large part of the business in the public or private sector.
- ✓ A JV or EIG with a large combined market share rejects participation in the group by other firms that cannot form an independent competitive JV or EIG to take part in the tender.
- ✓ If firms that previously tried to participate in the tender under a JV or EIG but were not allowed to do so eventually take part individually, they may maintain the intention of coordinating their efforts.
- ✓ The firms participate separately in the tender and then subcontract performance to an EIG to which they all belong. This arrangement could reflect the existence of a market-sharing arrangement to ensure that they perform the contract jointly regardless of who wins the bid.

3.4. How to identify excessive pricing

Procurement officials can identify excessive pricing practices by comparing the bid prices with the prices that were charged by other bidders in earlier periods for similar goods or services or evaluating the prices which they are charged in related markets.

3.5. How to identify predatory pricing

Public sector institutions must do a debriefing or monitor projects that are not completed by bidders to ascertain the cause and why projects remain incomplete.

3.6. A caution about indicators of anticompetitive conduct in public procurement

The indicators of possible anticompetitive conduct in public procurement described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours that may indicate anticompetitive conduct. They should not however be taken as proof that firms are engaging in anticompetitive conduct. The indicators provide information that can help procurement officials to decide when a more in-depth investigation is warranted. The indicators should be considered in conjunction with the evidence available to the procurement official.

CHAPTER 4

SETTING UP A COMPETITIVE PROCUREMENT PROCESS

Important aspects to consider in promoting competition in public procurement include inclusive bid specification requirements, flexible qualification criteria, deterring anticompetitive behaviour, the extent of transparency and types of contracts or contracting. This section will take procurement officials through the 'dos and don'ts' in preparing a procurement procedure.

4. THE PRE-CONTRACT STAGES

4.1. Analyse the market

The procuring public sector institution should conduct a market analysis when planning a procurement procedure. A preliminary market analysis will assist to collect information on the market structure, the range of products and services available in the market that would suit the requirements of the procuring public sector institution and potential suppliers' capabilities. The information can be used by procurement officials as input to define innovation, environmental and social objectives that can be achieved through the procurement, realistic and unbiased procurement requirements, the appropriate tender method, analyse and evaluate submissions from bidders and better determine the outcome and risks.

The OECD has developed a standard template for a market study report.² It provides good practice for procuring public sector institutions to document and file information collected and analysed by procurement officials during the pre-tendering phase of the procurement process. It sets out the type of information to be collected, including past tenders for the same or similar products, market developments or trends that may affect competition for the tender (such as the capacity of the market to deliver, recent price changes and possible alternative products) or that may make collusion more likely (such as a small number of suppliers, standardised products, little or no entry of competitors in the market).

4.2. Identify conflict of interest

In a public procurement procedure, a conflict of interest covers any situation where staff members of the procuring public sector institution involved in the procurement procedure and who may influence its outcome have, directly or indirectly, a financial, economic, or other personal interest in any of the responding bidders' businesses, which might be perceived as compromising their impartiality and independence. This applies to the people in charge of the procedure, and anyone involved in the evaluation phases and anyone submitting a bid. At the start of the public procurement process, procuring public sector institutions should determine whether there are any possible conflicts of interest and take appropriate measures to remedy them. This will assist to ensure equal treatment for all involved in the process.

Best practice to avoid conflicts of interest in public procurement

At the start of the procurement process, anyone involved in the evaluation and decision making of the procurement should sign a declaration of absence of conflict of interest. The declaration should contain a statement that the person will report any conflict of interest as soon as it is detected to their superior within the procuring entity and will withdraw from further participation in the procurement process. Anyone with a potential conflict of interest should not play a role in the procurement.

Bidders should be asked to declare any conflict of interest when submitting their bids. On the 21 July 2010, the National Treasury issued a Practice Note in terms of Section 76 of the Public Finance Management Act on Prohibited Practices including a Certificate of Independent Bid Determination (CIBD). It is a certificate issued as an assurance and declaration by bidders that they have prepared and submitted their bids independently of any other competing bidder. It also provides for penalties for collusive tendering or bid rigging. The CIBD must be issued by bidders as part of the standard bid documentation.

² OECD template-market-study-report.pdf (oecd.org) last accessed on 18 July 2021.



Procurement officials should refer to National Treasury regulations to resolve conflict of interest. Bidders' failure to sign or declare disclosures as required by the CIBD is not a competition issue and should not be reported to the Commission. The framework issued by National Treasury provides for suitable recourse and penalties.

4.3. The design of public contracts

The most important document in the procurement procedure is the technical specifications document. The purpose of the technical specifications is to set out to the market a full description of the needs of the procuring public sector institution, and thus to enable bidders to propose a solution to meet those needs. The technical specifications may include general background information about the contract, a description of the subject matter, selection and award criteria, duration of the contract and details of the specific scope of work required from the procuring public sector institution.

How the technical specifications are written affects the number and type of suppliers that will participate and, therefore, affects the success of the selection process. Procuring public sector institutions should implement best practices to avoid characteristics in the design of the specifications that can favour collusion, and instead favour principles for the equal treatment of bidders.

CASE STUDY 6: Exclusionary bid technical specifications

On 26 April 2017, the Commission received a complaint from firm CRT against firm BSP (the Respondent) regarding alleged collusion or corruption between government agencies and the Respondent. In its complaint, firm CRT alleged that government departments; state owned companies and municipalities had required in the bid technical specifications that service providers who are bidding for tenders to supply lighting solutions specifically supply them with BSP branded lighting solutions, which is the Respondent's brand. In its investigation, the Commission found that the conduct by the procurement officials may have the effect of excluding other competitors in the lighting solutions market. The Commission resolved the matter through advocacy. The National Treasury undertook to issue out a circular to procuring public sector institutions instructing them to insist that descriptions and specifications in all

tenders and request for quotations be limited only to the specifications of the product and not specify or include brands.

Specifying a brand can only be done on an exceptional basis and solely for the purpose of giving a more comprehensive description of the contract and must not preclude other products that can be considered equivalents. Procuring public sector institutions should not set technical specifications for supply of equipment by specifying a particular brand without allowing for an 'equivalent' or by using tailor-made specifications that either intentionally or unintentionally favour suppliers. Specifying brand names may limit the number of firms that will be able to supply the equipment. The words 'or equivalent' should be used in all cases where reference to a particular brand is unavoidable

CASE STUDY 7: Exclusionary bid technical specifications

In 2019 National Treasury issued a tender RT 46-2019 for the service, repair and maintenance of the government fleet of vehicles. It sought a supplier to provide a garage card that could be used to process a range of financial transactions for fuel, repairs, toll fees, maintenance, spares, car hire and other vehicle-related expenses. The technical specification was that for a service provider to be able to tender, it must be a member of the identified professional associations, being the Banking Association of South Africa and the Payment Association of South Africa. On 5 November 2019 a meeting was conveyed with Commission representatives and senior representatives of the Fleet Management and Transversal Contracting Division of National Treasury to review the technical specifications of the bid, including the professional association membership requirement. The Commission's recommendation to remove this requirement was accepted. Service providers were nevertheless required to register with the South African Reserve Bank.

The Commission recognises the role that professional associations have in protecting the interests of their members and the aim to appoint suitably accredited suppliers. However, this practice has the effect of excluding those suppliers who may be qualified to provide the service but do not belong to a professional association. The Commission recommends that

procuring public sector institutions consider alternative qualifying criteria it can utilise to review suppliers, such as reference to compliance with national legislation and industry regulations, rather than membership to industry associations. It is part of the rationale of public procurement to create opportunities for new entrants and remove such entry barriers.

Best practice for the design of inclusive bid technical specifications and award criteria

Technical specifications should:

1. be easily understood by bidders;
2. have clearly defined, achievable and measurable inputs and outcomes;
3. avoid unnecessary restrictions that may reduce the number of qualified bidders;
4. describe the subject matter in a clear and neutral form without any kind of exclusionary references to certain brand names or firms, trademarks, patents or specific origin, nationality, language or territory which limit competition. If this cannot be avoided for objective reasons, procuring public sector institutions should always add the words 'or equivalent;' so that the salient characteristics of the product sought can be fairly assessed by the market and substitute products identified. For example, in relation to IT procurement, requiring the inclusion of "or equivalent" when specifying standards such as quality management systems procuring public sector institutions must wherever possible use common specifications when specifying microprocessors for desktops, laptops, servers or workstations;
5. not require a license or membership by any specific certification entity or professional association and not imply the exclusion of the possibility of accreditation by other means; unless the accreditation or certification is required by law or for providing services in the market.
6. consider accessibility criteria for SMEs and businesses owned by HDIs.
7. be transparent in the contract award criteria and the system of attributing points to the criteria, such as points awarded to bidders based on their bid price and B-BBEE status level.

8. assess the degree to which the contract can be divided into lots and assignments of tender services subcontracted to multiple enterprises; including SMEs;
9. not automatically apply the previous tender terms to a new tender, and instead analyse whether the content should be updated or revised to ensure that they are sufficiently pro-competitive;
10. avoid using transversal term contracts as they may foreclose new entrants and SMEs, and should only be used when absolutely necessary, such as when the efficiency benefits outweigh the competition effects;
11. Ensure the contract period is reasonable and not too long (meaning the period from the signature of the contract until the acceptance of the final products or deliverables). Generally, 5 years or less should be acceptable to allow for a rotation of awards that will open opportunities to potential bidders within a shorter period. Should a longer period be considered, this should be justified by the investments made and opportunities created for supporting SMEs.

4.4. Making SME participation in public contracts easier

Effective competition can be enhanced if enough credible bidders can respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials avoid lengthy contract periods, establish participation requirements that do not unreasonably limit competition or devise ways to incentivise smaller firms to participate even if they cannot bid for the entire contract. The contracting model should ensure that the tender achieves a broad allocation of work to multiple suppliers and inclusion in public procurement.

4.4.1. The contracting model

4.4.1.1. The restricted tender

In a restricted tender, the only bidders that can submit bids are those who apply to do so and are selected based on their quality of service, as measured by objective and justified criteria. The restricted procedure is generally used where there is a high degree of competition (several potential bidders) in the market, such as for cleaning, IT equipment or furniture, and the procuring public sector institution wishes to draw up a shortlist. In these situations, public sector institutions should ensure that they set the criteria in such a way that promotes competition. This can happen in the manner in which the functionality criteria and thresholds are set, for example, or in the mandatory criteria determined.

4.4.1.2. The negotiated tender

In a negotiated procedure, the contract is awarded to the bidder selected by the procuring public sector institution after consulting and negotiating the terms of the contract with one or more bidders. It can disrupt collusion between bidders if the public sector institution combines the negotiations with an initial bidding process. This is because the combination of processes provides an opportunity for the bidders to undercut their rivals' prices during the negotiation and may provide the public sector institution with an opportunity to assess the willingness of the bidders to negotiate on the price. The negotiated procedure is considered extraordinary and should only be used in limited circumstances, such as when the procuring public sector institution requires tailor-made goods or specific characteristics of goods and services that are not readily available in the market.

CASE STUDY 8: Example of a competitive procurement procedure with negotiation

In 2019 National Treasury issued a tender NT012-2019 for a contract to supply an X-ray machine. Four tenders were submitted and evaluated, but all four tenders included minor variations of the technical specifications, none of which are permitted. The procuring entity decided to initiate a competitive procedure with negotiation, inviting the four operators that had submitted the original tenders to participate in the negotiations. The procuring entity negotiated with all the bidders using the tender that they initially submitted. The aim of the negotiations was to adapt the submitted tenders to the requirements that National Treasury set out in the contract notice and specifications to obtain regular and acceptable tenders.

4.4.1.3. Transversal term contracts

Transversal term contracts facilitate the procurement of goods and services required by more than one government institution provided that the arrangement of such contracts is cost-effective and in the national interest. Transversal term contracts may foreclose new entrants and SMEs and may entrench the dominance of firms that receive the award. This is because the opportunity to receive bids for

goods or services ordinarily procured by each government institution and the participation of multiple bidders in separate procurement processes may be reduced. Therefore, transversal term contracts should only be used when necessary, such as when the efficiency benefits outweigh the competition effects.

CASE STUDY 9: Example of a transversal term contract

In 2019 National Treasury issued a tender RT46-2019 for the supply of vehicles, and related service and maintenance services to national and provincial government departments. A transversal term contract of five years was awarded to a single bidder, who was further contracted to Standard Bank. The rationale was to secure scale benefits in the form of a discount based on the volume of the vehicles purchased and reduce public expenditure. It was also easier to manage performance of the contract, as National Treasury would only need to deal with one firm.

The Commission engaged with National Treasury in November 2019 to recommend that no one bidder is awarded the entire contract for all categories of vehicles and equipment required across all territories. To promote competition, it is best practice to award the tender to multiple suppliers across each category of good or service required and across territories and government departments.

4.4.1.4. Open framework agreements

Open framework agreements are entered into with one or more bidders for the supply of goods and services. The first step of the procedure is to invite bidders to present bids against the procuring public sector institution's technical specifications. The procuring public sector institution selects one or more suppliers to be parties to the framework agreement. It then places orders with the selected suppliers as its needs arise, with or without a second round of procurement. All firms, including SMEs, that have the required capacity and quality of goods and services are eligible and can join the bidding at any point in time. This is the approach that is the most supportive of the principle of equal treatment. The benefits of open frameworks include a larger pool of suppliers, enhancing

bargaining power, inclusivity, lower prices and better quality of goods and services for consumers.

Whenever possible, procuring public sector institutions should allow bids on certain lots within the contract, rather than bids on the whole contract only. For example, identifying areas in larger contracts in the tender that would be attractive and appropriate for SMEs to provide their services and gain experience. Suppliers to whom work is allocated can be required to use smaller businesses as subcontractors to provide them with experience. To choose any other procedure than open bids, a procuring public sector institution should carefully weigh the impact their decision will have on competition, avoiding unnecessary restrictions on eligibility for the tender.

4.4.2. Limiting the contract period

The procuring public sector institution must establish the required duration of the contract, which is the period from the signature of the contract until the acceptance of the final products or deliverables. Determining the ideal duration of a contract is crucial for ensuring an adequate level of competition in public tenders. Generally, five years or less should be acceptable to allow for a rotation of awards. Excessively long contract periods pose entry barriers for new suppliers to enter the market during the life of the contract. Overly short durations, on the other hand, may hinder the achievement of a return on the capital outlays needed to perform the service, which can deter firms from bidding and thus grant an advantage to the incumbents who do not have to make such investments. To reduce these risks, the contract term should be based on objective parameters directly related to the time it takes to pay off the investments required for performing the contract or acquiring the contract related assets and should not endure for lengthy periods. For example, commuter bus services are subsidised through bus contracts. The Commission found lengthy periods for bus service contracts in the Public Passenger Transport Market Inquiry. The contracts were meant to be effective for a period of one to three years. However, these contracts have been in existence for over 21 years.

4.4.3. Use of Subcontracting for entry

The technical specifications may require the successful bidder to subcontract a minimum percentage, for example, 30%, of the value of the contract to an SME or businesses owned by HDIs. Subcontracting allows the supplier greater flexibility and diversity of organisational options, which can help cut costs and increase inclusion in the procurement process. For example, specifications for the 30% weight can include the winning bidder's demonstration for the

promotion of a new entrant, providing business support to the new entrant or existing SMEs, through the subsidisation of capital, facilities, tools, equipment, and training.

However, collusive tendering can arise where the selected bidder repeatedly subcontracts part of the contract to other firms that were not selected in the relevant tender. For the above reasons, when evaluating what scope to give for possible subcontracting of work, or when deciding to require the supplier to subcontract, the procuring public sector institution must evaluate if the market circumstances allow for the goal of participation by SMEs and HDIs in the public contracts to be achieved without a significant reduction of competition in the tendering process. It is useful to have the notice of the call for tender indicate that bidders must state in their bids whether they intend to use subcontractors, the name of such possible subcontractors, and include requirements for bidders to demonstrate subcontracting with SMEs and HDIs. In certain cases, consideration can be given to the possibility of having the terms of the tender prohibit subcontracting parts of the contract to the same firms that participated in the tender, except with the express authorisation of the procuring entity. This can minimise the risk of coordinated bids.

4.4.4. Dividing the public contract into lots

Procuring public sector institutions are encouraged to divide contracts into lots to make it easier for SMEs to participate in public procurement procedures. Dividing a contract into lots increases competition because it is a means to get a wider range of bidders to participate by going to the market with more and smaller contracts. Although division into lots should not be made mandatory for all public contracts, it should be considered when developing the technical specifications of the contract. For instance, in very high-value contracts competition can only be achieved by splitting the contract, since only a small number of suppliers would be able to offer all the goods or services requested.

CASE STUDY 10: Dividing a public contract into lots

In 2020 National Treasury issued a tender RT46-2020 for the appointment of contractors that supply vehicle fleet management services (such as fuel cards, tracking and maintenance services) to the state. The tender allowed for the award of contracts to fifty (50) contractors in the categories of service and scope

of work it required. For example, the supply of fleet data integration, fuel, oil and toll cards, maintenance and repairs, tracking and vehicle monitoring systems, driver vehicle control and management systems. The tender also allowed for sub-contracting within the lots to SMEs.

The technical specifications should explicitly state that no one bidder who bids across various categories will be awarded the entire contract (all the categories). To promote competition, it is best practice to award the tender to a minimum of 2 or more different suppliers across the totality of the lots.

4.5. Transparency of the tender

Transparency, through the publication of public tenders online or in other media, evaluation procedures, procurement plans and tender awards and reasons, can increase confidence in the procurement process. The use of public platforms to transmit information on public tenders expands the pool of potential bidders. Transparency can also increase accountability and ensure that proper procedure is followed in public procurement.

However, procurement transparency requirements should be complied with in a balanced manner, in order not to facilitate collusion by disseminating commercially sensitive information between competing bidders. Some considerations to keep in mind are implementing processes for the provision of information at the request of the bidders and the restriction of the data provided if their disclosure is likely to prevent and lessen competition. In cases where the procuring entity contemplates the possibility of holding meetings with the bidders as a group before the tender procedure, it should ensure that no commercially sensitive information is shared with the competing bidders. The procuring public sector institution must therefore evaluate the content of its communications on a case-by-case basis and avoid providing information that may in the future be used for coordinated bidding by competitors.

4.6. Professional Training

Professional training of officials within procuring public sector institutions is important to strengthen awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, constantly monitoring bidding activities, and performing analysis on bid data. This helps procuring public sector institutions to identify problematic situations. Bid rigging may not be

evident from the results of a single tender. Often a collusive agreement is only revealed in the results from several tenders over some time.

Best practice for professional training of procurement officials

1. Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the Competition Commission.
2. Set up a database or use an electronic bidding system to record and store information about the characteristics of past tenders (e.g., the product purchased, each participant's bid and the identity of the winning bid).
3. Link the information stored electronically to national, provincial and local databases. Setting up and maintaining the database is a tool for detecting the existence of suspicious behaviour patterns that may persist over long periods of time.
4. Periodically review the history of tenders for products or services to discern suspicious patterns, especially in industries susceptible to collusion. Such analysis is effective for preventing collusive arrangements in public tendering procedures.
5. Adopt a policy to review selected tenders periodically. Undertake comparison checks between lists of firms that have submitted an expression of interest and firms that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
6. Establish internal procedures and a complaint mechanism that encourage or require officials to report suspicious statements or behaviour to the procuring public sector institution and to the Competition Commission.
7. Establish cooperative relationships with the Competition Commission (e.g., set up a mechanism for communication, listing information to be provided when procurement officials report the anticompetitive conduct).

SUMMARY OF PUBLIC PROCUREMENT DOS AND DON'TS

To DO or NOT to do? Here is a summary of some of the important things that you, as a procuring public sector institution or procurement official, need to be aware of as you engage in public procurement.



Dos



Don'ts

1. Internal procedures to identify warning signs for detecting anticompetitive conduct	
<ul style="list-style-type: none"> • Anyone involved in the evaluation and decision making of the procurement process should sign a declaration of absence of conflict of interest. Anyone with a potential conflict of interest should not play a role in the procurement. • Bidders must sign a Certificate of Independent Bid Determination (CIBD). • Report suspected price fixing, market allocation, excessive pricing, predatory pricing, foreclosure, and exclusionary conduct to the Commission. • Report cross-shareholdings and common directors in bids submitted by competitors to the Commission to further investigate the potential for coordination of strategies in the tender. • Procurement officials should be concerned about joint bids by firms that have been investigated or fined by the Competition Authorities for collusion. • Consider the signs for anticompetitive conduct involving joint ventures and economic interest groups and report the conduct to the Commission. 	<ul style="list-style-type: none"> • Do not report failures of bidders to sign a CIBD or to declare their interests to the Commission. Refer to the remedies set out in the Practice Note in terms of Section 76 of the Public Finance Management Act.
2. A competitive public procurement procedure	
<ul style="list-style-type: none"> • Conduct a market analysis when planning a procurement procedure. • Evaluate whether the technical bid specifications should be updated or revised to ensure that they are sufficiently pro-competitive and enable entry and participation of SMEs. • When choosing a contracting model (such as a restricted or negotiated tender, open bid or transversal term contract), weigh the impact of the decision on competition (including increasing opportunities for multiple bidders to participate). Be transparent on the contract award criteria and the system of awarding points to bidders, such as the points awarded to bidders based on the bid price and B-BBEE level status. • Whenever possible, allow bids on certain lots within the contract, rather than bids on the whole contract only. • Suppliers to whom work is allocated can be required to use smaller businesses as subcontractors to provide them with experience. 	<ul style="list-style-type: none"> • Do not use in technical specifications exclusionary references to brand names, firms, trademarks, patents or specific origins, nationality, language, or territory. • Do not require a licence or membership by a specific certification entity or professional association without objective consideration of equivalent membership or certification except where such licence or membership is mandatory as a result of a statutory requirement. • Do not apply previous tender terms to a new tender without updating them for competitive outcomes. • Do not impose lengthy contract periods of more than 5 years. Generally 5 years or less should be acceptable to allow for a rotation of awards that will open opportunities to potential bidders within a shorter period. Should a longer period be considered, this should be justified by the investments made and opportunities created for supporting SMEs.



Dos



Don'ts

3. Transparency and collection of information

- Be transparent through the publication of public tenders on public forums (e.g., online), publication of evaluation procedures and awards.
 - Systematically collect and store information from past tenders, saving the data on the winning bids, the price and other award conditions and all relevant information regarding the bidders who participated in the tenders. This allows suspicious patterns, trends, and indicators to be identified and monitored.
 - Link the information stored electronically to national, provincial, and local databases, to aid monitoring of suspicious bid and pricing patterns
- **Do not share commercially sensitive information with potential bidders, as they can use the information to collude in the procurement process.**

4. Best practice for professional training of procurement officials

- **Implement a regular training program on bid rigging and cartel detection.**

5. Complaint's handling

- **Establish internal** procedures and a complaint handling mechanism that will encourage or require officials to report suspicious statements or behaviour to the procurement entity.
- Clarify concerns with the firms or individuals involved before submitting a complaint to the Commission.
- Establish a mechanism to refer suspected anticompetitive conduct to the Commission once examined internally.
- Ensure all relevant information is provided to the Commission.

CHAPTER 5

WHAT TO DO WHEN YOU SUSPECT ANTICOMPETITIVE CONDUCT

5.1. Steps procurement officials should take if anticompetitive conduct is suspected

There are several steps procurement officials should take to help uncover anticompetitive conduct and stop it:

1. Have a working understanding of the law on collusive tendering and the forms of anticompetitive conduct that can arise in public procurement.
2. Identify the warning signs for detecting it in public procurement.
3. Discuss and clarify suspicions or concerns with the individuals involved before submitting a complaint to the Commission.
4. Make a record of all relevant conduct and statements so that detailed information can be provided on all circumstances that would appear to bear out those suspicions.
5. Keep a detailed record of all bid documents, suspicious behaviour and statements including dates, who was involved, who was present and what precisely occurred or was said.
6. After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.
7. If anticompetitive conduct is detected, report it to the Commission.

5.2. How to report complaints to the Commission

If you become aware of any potentially anticompetitive conduct that may contravene the Act or have queries about this Guide, you can contact the Commission via email at ccsa@compcom.co.za and provide a description of the issues. The Commission will require the following information if you submit a complaint:

1. A completed Form CC1. The prescribed Form CC1 is available on the Commission's website at www.compcom.co.za.
2. Provide a written submission setting out, in detail, the cause for the complaint, how it arose, the parties

involved, relevant dates and any other relevant information.

3. The name of the parties complained of.
4. Company searches displaying the owners or directors of the parties complained of.
5. Details about the subject matter of the tender.
6. The name of the party that was awarded the tender.
7. Copies of the bid documents submitted by the parties complained of.
8. Details about parties that were disqualified and on what grounds.
9. Contact details for the complainant, i.e., postal address, fax number or email address.

5.3. Who can complain?

Any person may provide information concerning an allegation of anticompetitive conduct and does not have to be directly affected by it. This includes, but is not limited to, an authorised representative of the procuring public sector institution (such as the Chief Financial Officer, procurement official or other representatives), a bidding firm (represented by the Chief Executive Officer or other representatives), and members of the public.

5.4. What happens after you lodge a complaint with the Commission?

When a complaint is received, an investigator will contact the person who lodged the complaint to make preliminary enquiries and assess if the complaint raises competition concerns. Then the investigator will collect all relevant information to investigate potential contraventions of the Act, conduct research and analysis to arrive at an appropriate conclusion. After investigating, the Commission will either:

1. Refer the matter to the Competition Tribunal for prosecution and adjudication.
2. Enter into a consent agreement or undertaking with the parties; or

3. Non-refer and close the matter where there is no or insufficient evidence of anticompetitive conduct.

5.5. Penalties

Firms that are found to have contravened the Act could face:

1. A fine of up to 10% of annual turnover for the first offence and up to 25% of annual turnover for a repeat offence.
2. Directors and managers can be found guilty of a criminal offence and face fines of up to R500 000 or up to 10 years imprisonment.





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