

Fighting bid rigging in public procurement

Report on implementing the OECD Recommendation

2016

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

The 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement recommends to governments to strive for public procurement procedures that are designed to promote competition and reduce the risk of bid rigging. Bid rigging, i.e. agreements between bidders to eliminate competition in the procurement process, thereby raising prices, lowering quality and/or restricting supply, is a major risk to the effectiveness and integrity of public procurement and deprives the public sector of genuine opportunities to achieve value for money. For this reason, the fight against bid rigging has become one of the enforcement priorities of competition authorities around the world. The OECD, through its Competition Committee, developed the Recommendation to consolidate OECD good practices and recommend specific steps to render public procurement processes competitive and free from collusion.

The report shows that the Recommendation is widely used and is relevant for competition and public procurement entities alike. Experiences illustrate that the Recommendation has been instrumental in helping many competition authorities launch advocacy programmes and raise awareness of bid rigging risks, and has also supported the detection by procurement authorities of bid rigging cases. The Recommendation is often the basis on which national strategies on fighting bid rigging are based, helping public entities to design tenders that promote effective competition, and develop tools to detect bid rigging. The Recommendation has also provided the analytical framework for country-specific projects carried out by the OECD Secretariat in co-operation with national entities in Member and non-Member countries. These projects provided the opportunity to test the impact of applying the Recommendation in practice: more competitive procurements have enabled very significant cost savings. The report concludes that the Recommendation is relevant and continues to be a solid basis for better competition in procurement markets.

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1. Background

On 17 July 2012, the Council adopted the Recommendation of the Council on Fighting Bid Rigging in Public Procurement (the Recommendation - see Annex I) which calls on governments to strive for public procurement procedures that are designed to promote competition and reduce the risk of bid rigging. In the Recommendation, the Council instructed the Competition Committee to “...monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.” To help prepare the report, the Competition Committee’s Working Party 3 on Enforcement and International Co-operation (WP3) started a discussion on the implementation of the Recommendation at its meeting of 16 December 2014¹. In 2015, WP3 launched a short survey on implementation, relevant challenges and priorities, addressed to Members and Partners of the Competition Committee. Responses to the survey as well as Competition Committee’s past work, mentioned herein below, have contributed to the development of this report, which was first discussed in the meeting of WP3 of 15 June 2015². The report was approved by written procedure by WP3 on 9 October 2015. The Competition Committee discussed the report at its 124th meeting on 28 October 2015 and approved it for transmission to Council.

Bid rigging occurs when bidders agree among themselves to eliminate competition in the procurement process, thereby raising prices, lowering quality and/ or restricting supply. The fight against bid rigging has been identified by the Council as a competition enforcement priority since 1998, in the Recommendation of the Council concerning Effective Action against Hard Core Cartels (the 1998 Recommendation). The 1998 Recommendation defines a hard core cartel, which should be halted and deterred by national competition laws, as “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, **make rigged bids (collusive tenders)**, establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce” (emphasis added). Drawing on practices across more than 30 jurisdictions³, in 2009 the Competition Committee developed Guidelines for Fighting Bid

¹ OECD (2014) Summary record of the 120th Meeting of Working Party No. 3.

² OECD (2015) Summary record of the 121st Meeting of Working Party No. 3.

³ OECD (2014) Detecting Bid Rigging in Public Procurement, at <http://www.oecd.org/competition/cartels/42594486.pdf>.

Rigging in Public Procurement (the Guidelines – see Annex II) to assist Members and Partners to prevent, detect and sanction bid rigging in public procurement. The Guidelines provide hands-on advice and checklists⁴ on methods of designing public procurement procedures so as to reduce the risk of collusion between bidders, ways to detect collusive practices as they occur during the procurement process, and actions to keep the public procurement workforce equipped to help fight collusion.

Building on national experiences with the Guidelines as well as tools set up by countries to identify and combat bid rigging, the Recommendation was developed with a view to reflect and consolidate OECD good practices. Discussions in the framework of the Competition Committee as well as OECD competition and public procurement projects in countries fed into its development. The Recommendation recommends specific measures to render public procurement processes competitive and free from collusion. It identifies four main areas of action for Members and non-Members having adhered to the Recommendation (hereafter the “Adherents”):

1. Assess public procurement laws and practices and their impact on the likelihood of collusion between bidders. Also, take action to deter bid rigging at the front end of public procurement, designing procurement frameworks and individual tenders which favour competition and reduce the risk of collusion.
2. Ensure that all public procurement officials are aware of market structures, behaviour and bidding patterns that may indicate collusion, so that suspicious activities can be detected and investigated.
3. Encourage public procurement officials to follow the Guidelines, which are set out in an Annex to the Recommendation and form an integral part of it.
4. Develop tools to measure and monitor over time the impact of public procurement laws and regulations on competition.

In parallel to its work on fighting bid rigging, the OECD developed a far-reaching agenda on public procurement to support countries in using it as a governance tool to achieve efficiency, foster growth and accomplish public

⁴ The Guidelines include two checklists: A. Checklist for Designing the Procurement Process to Reduce Risks of Bid Rigging and B. Checklist for Detecting Bid Rigging in Public Procurement (See Annex II.A and II.B).

policy goals. As part of this agenda, the Council adopted on 18 February 2015 the Recommendation of the Council on Public Procurement, which highlights the importance of safeguarding the strategic role of public procurement through sound planning, design and delivery. Public procurement is one of the largest government spending activities and a means through which public services are delivered to citizens and policy goals -such as job creation, support to small and medium enterprises, environmental sustainability or innovation- are pursued. Public procurement represents approximately 13% of gross domestic product in OECD Members and 29% of general government expenditure. On average 63% of total general government procurement spending across OECD Members occurs at sub-national levels⁵. Bid rigging deprives the public sector of genuine opportunities to achieve value for money and is, as such, a major risk to the effectiveness and integrity of public procurement procedures. The financial crisis of the last few years has added to the awareness of the importance of competition in public procurement to achieve value for money and of the need to combat collusive practices which may raise prices or lower quality of public purchases.

In this context, the fight against bid rigging has become one of the priorities of competition authorities around the world. Bid rigging cases represent a significant share of cartel enforcement in many countries.⁶ The Recommendation helped inform and shape country actions. It is often mentioned explicitly in national materials and guidelines and published on national websites –usually those of competition authorities and occasionally public procurement ones. The Competition Committee and its delegates played a crucial role in the dissemination of the Recommendation within OECD Members and non-Members, as well as the consolidation of good practices

⁵ Public procurement at the state (regions) and local levels accounts on average for 63% of total procurement spending across OECD countries. In general, federal states report high level of sub-central government spending on procurement, as evidenced by Canada (87%) and Belgium (84%). Some unitary states also have high levels of sub-central government spending on procurement, e.g. countries such as Italy (78%), Finland (70%) and Japan (68%). See OECD (2015), *Government at a Glance 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/gov_glance-2015-en.

⁶ OECD, Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

through knowledge-sharing and benchmarking of country approaches and reforms in meetings and policy briefs.

This report was prepared by the OECD Secretariat on the basis of the WP3 meeting of 16 December 2014, delegates' presentations on their experiences with the Recommendation, and answers to the 2015 survey on the implementation of the Recommendation. Currently all OECD Members and Romania (which is an Associate in the Competition Committee⁷) are Adherents to the Recommendation. While Romania is the only non-Member which has adhered to the Recommendation, discussions in the Competition Committee have demonstrated a strong interest from other non-Members to implement the guidelines prescribed by the Recommendation, without a formal adherence to it. Accordingly, in addition to OECD Members and Romania, the survey was also sent to all the Participants in the Competition Committee. The report includes responses from a total of 30 authorities⁸, 20 of which are competition authorities and 10 are public procurement authorities⁹, across 21 OECD Members¹⁰. The 20 competition authorities include those of Colombia, Latvia, the Russian Federation, Peru and Ukraine, who responded in their capacity as Participants in the Competition Committee.

In addition, Competition Committee discussions, roundtables, fora and policy briefs related to bid rigging helped shape an understanding of implementation challenges and action areas and provided valuable examples of practical approaches to combat collusion. The report also benefits from OECD's

⁷ In accordance with the Participation Plan of the Competition Committee, adhering to the Recommendation is one of the conditions to become an Associate in the Committee.

⁸ Out of the 20 competition authorities which responded, 15 are from OECD Members (Australia, Austria, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Mexico, Slovak Republic, Sweden, Switzerland, United Kingdom and the United States) and 5 are Participants in the Competition Committee (Colombia, Latvia, the Russian Federation, Peru and Ukraine).

⁹ From Australia, Belgium, Czech Republic, Estonia, Greece, Hungary, Mexico, Norway, Poland, Turkey.

¹⁰ The total OECD Members (competition and public procurement authorities) who responded to the survey are: Australia, Austria, Belgium, Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Italy, Japan, Korea, Mexico, Norway, Poland, Slovak Republic, Sweden, Switzerland, Turkey, United Kingdom and the United States.

insights into the fight against bid rigging gained through country-specific projects carried out by the Secretariat in co-operation with national entities. These projects assess national public procurement rules and practices and provide recommendations on how they can be improved to reduce bid rigging in accordance with OECD good practices and the Recommendation. Between 2011 and 2015, four such projects were carried out in Mexico and one in Colombia, focused on specific procurement entities¹¹. In these projects, recommendations for policy reforms were complemented by targeted training on preventing and detecting collusion for public procurement officials, enabling them to develop expertise and skills which remain after the projects are over. In addition to advice and training, the projects served to raise awareness of policy makers and public procurement officials of the costs and risks of collusive practices. In parallel to the projects on combatting bid rigging, the OECD conducted public procurement peer reviews in the same countries (Colombia and Mexico)¹² and elsewhere, like in the United States, Greece and Korea¹³.

¹¹ OECD (2011), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Report on IMSS' Procurement Regulations and Practices, at <http://www.oecd.org/daf/competition/abuse/49390114.pdf>; OECD (2012), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Procurement Legislation, Regulations and Practices in the State of Mexico, at http://www.oecd.org/daf/competition/GEM_Report_2012_English.pdf; OECD Competition Committee (2013), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Legislation, Regulations and Practices Relating to Procurement Undertaken by ISSSTE, at <http://www.oecd.org/daf/competition/MexicoISSSTEBidRiggingENG.pdf>; OECD Competition Committee (2014), Fighting Bid Rigging in Public Procurement in Colombia, A Secretariat Report on Colombian Procurement Laws and Practices, at http://www.oecd.org/daf/competition/Booklet_SIC%20Procurement%20Report_16X23_REV_web.pdf; OECD (2015), Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Compliance with OECD Standards of Procurement Legislation, Regulations and Practices in CFE, at <http://www.oecd.org/daf/competition/fighting-bid-rigging-mexico-cfe-report-2015.htm>. In general on OECD work on bid rigging, see <http://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm>.

¹² OECD (2013) Public Procurement Review of the Mexican Institute of Social Security, Enhancing Efficiency and Integrity for Better Health Care, DOI:10.1787/9789264197480-en; OECD (2013) Public Procurement Review of the State's Employees' Social Security and Social Services Institute in

Findings and recommendations were shared between the competition and public procurement OECD Secretariat teams, to make sure that conclusions were comprehensive and recommendations consistent.

In collecting and assessing information and data which fed into this report, there has been a particularly close co-operation between the Competition Committee and the Working Party of the Leading Practitioners on Public Procurement (LPP). The 2015 survey on the implementation of the Recommendation was shared with the LPP. In response, 10 public procurement delegates reported on the level of national dissemination of the Recommendation, commented on their awareness of matters covered by it, gave examples of challenges faced and successful and less successful collusion-fighting practices and indicated areas where the Competition Committee may consider focusing on in the future. To ensure alignment between OECD Recommendations on competition and public procurement, the Competition Committee provided substantial comments in the course of the elaboration of the Recommendation of the Council on Public Procurement, strengthening competition-related aspects of this Recommendation.

The report looks at actions taken by Members and Partners in the areas covered by the Recommendation and identifies challenges and good practices. It is structured as follows: actions to prevent bid rigging (section 2), measures to

Mexico, DOI:10.1787/9789264197305-en; OECD (2013) Annex B: Public Procurement in Colombia, in Colombia: Implementing Good Governance, DOI:10.1787/9789264202177-en.

¹³ OECD (2011), United States Federal Public Procurement: Technical Assessment For Peer Review, GOV/PGC/ETH(2011)1; OECD (2011), United States Federal Public Procurement: Overview of Key Issues for Peer Review, GOV/PGC/ETH(2011)2; OECD (2015), Becoming a Central Purchasing Body: Communication and Change management Strategies for an Effective Implementation. The Case of the Greek Secretariat General of Commerce (SGC) At the Ministry of Economic Development, GOV/PGC/ETH(2015)6; OECD (2015), Practical Guide for the Implementation of Framework Agreements for Goods and Services in Greece, GOV/PGC/ETH(2015)7; OECD (2015), Public Procurement Review of the Public Procurement Service, Korea, GOV/PGC/ETH(2015)2; OECD (2015), Public Procurement Review of the Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (ISSSTE), GOV/PGC/ETH(2015)3. In general on OECD work on public procurement and peer reviews, see <http://www.oecd.org/gov/ethics/public-procurement.htm>.

detect bid rigging (section 3), awareness-raising for public procurement officials (section 4). Section 5 of the report discusses issues that the Competition Committee and its Working Parties may include in their future work.

2. Actions to Prevent Bid Rigging

As a first step to increase competition and combat collusion in public procurement procedures, the Recommendation encourages Adherents to “*strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money*”. Various specific actions are recommended, including understanding the relevant market and potential suppliers, transparent and pro-competitive bidder participation requirements, tender specifications and contract award criteria, support to participation of smaller and, where possible, non-local suppliers, using e-procurement, sanctioning anticompetitive conduct and warning bidders of the existence and extent of such sanctions.

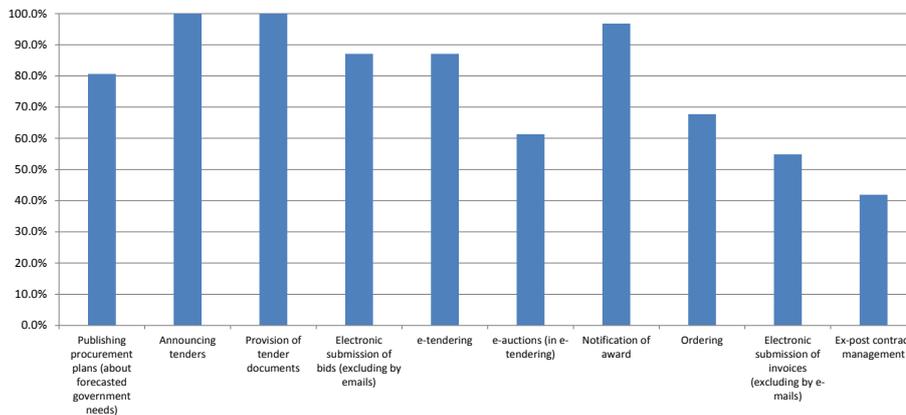
2.1 Actions to prevent bid rigging converge

Survey responses indicate that most respondents implement one way or another the specific actions put forward by the Recommendation to prevent bid rigging, in particular as regards pro-competitive tender design. Convergence on many of the actions has been facilitated by the fact that these are often also mandatory by application of national, European Union or international rules on public procurement.

As regards, in particular, the recommendation to use e-procurement¹⁴, data show that it is increasingly used by OECD Members, as per Graph 1 below. Graph 2 shows the main challenges that potential bidders however face in using e-procurement systems.

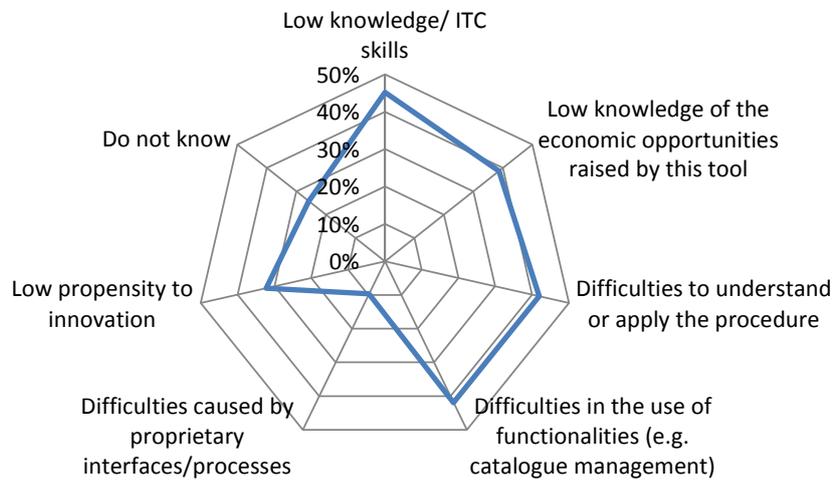
¹⁴ Point I(5) of the Recommendation provides that “...officials responsible for public procurement at all levels of government should (...) [s]trengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive...”

Graph 1. Functionalities of e-Procurement System



Source: 2014 OECD Survey on Public Procurement, based on replies by 31 Members. Czech Republic, Iceland and Israel did not respond.

Graph 2. Main challenges to the use of e-procurement systems faced by potential bidders/suppliers



Source: 2014 OECD Survey on Public Procurement, based on replies by 31 Members. Czech Republic, Iceland and Israel did not respond.

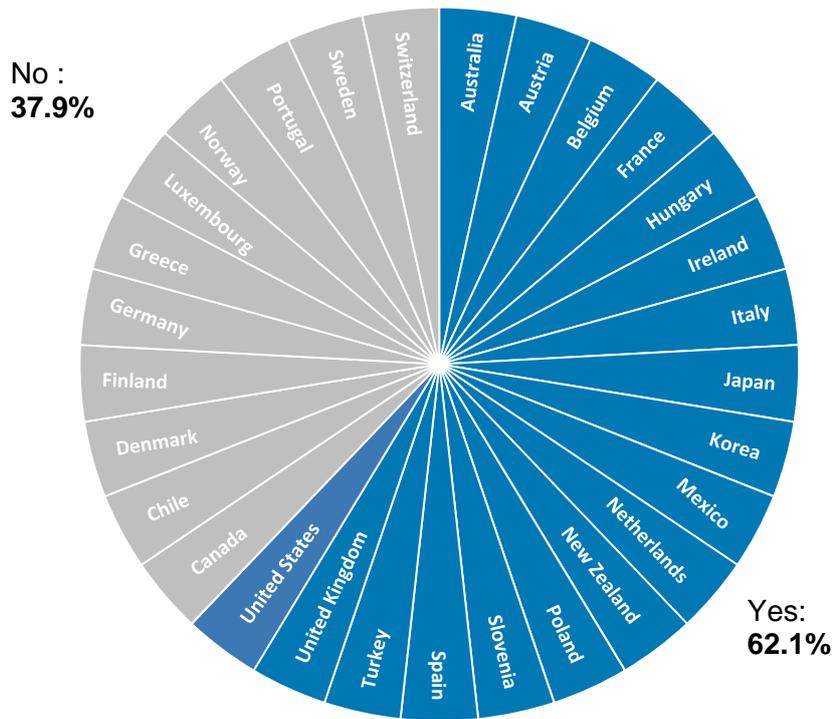
As encouraged by the Recommendation, countries also use functional requirements, which specify what the public purchasers would like to achieve in terms of outcomes, rather than how to do so through a specific product or method¹⁵. Functional requirements encourage flexibility and innovation and help take advantage of increasingly quick market and technology developments so as to achieve value for money. Specific, not performance-based, technical specifications may still be required in certain procurements for comparability purposes in cases of, for example, standardised goods or services.

The recommendation to open public procurement to smaller suppliers¹⁶ is also followed in many Members, through policies to adjust public procurement procedures in order to allow small and medium-sized enterprises (SMEs) to bid. Most Members measure the results of their policies and strategies to support SMEs (Graph 3).

¹⁵ Under point I(2) of the Recommendation, "...officials responsible for public procurement at all levels of government should (...) [p]romote competition by maximising participation of potential bidders by (...) ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products."

¹⁶ Under point I(2) of the Recommendation, "...officials responsible for public procurement at all levels of government should (...) [p]romote competition by maximising participation of potential bidders by (...) i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition (...) and iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract." Also, in point I(5) "[q]ualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders."

Graph 3. Measuring the results of policies/strategies to support SMEs



Source: OECD (2015), *Government at a Glance 2015*, OECD Publishing, Paris, http://dx.doi.org/10.1787/gov_glance-2015-en

In the above areas, a major factor driving convergence of laws and practices are the European Union Public Procurement Directives. Public Procurement Directive 2014/24/EU makes electronic submission of bids mandatory and explicitly recommends using functional requirements and encouraging participation by SMEs in public tenders (Box 1).

Box 1. Functional requirements and support to SMEs in public procurement in the European Union

The European Union Public Procurement Directive 2014/24/EU, adopted on 26 February 2014 (to be transposed into national law by 18 April 2016), sets forth principles and procedures which should be followed by suppliers and public authorities in the Member States of the European Union for the procurement of works, goods or services. The Directive is part of a wider European Union legislative package on public procurement and concessions, which seeks to improve public procurement efficiency and value for money, simplify rules and make them more flexible, reduce the administrative burden on public authorities and contractors, and stimulate greater competition across the European single market. The Recommendation was taken into account in developing this European Union public procurement package, and the Directive makes numerous references to the need to ensure competition and prevent distortions in the market.

The Directive recommends that technical specifications that express, as far as possible, functional and performance-related requirements should be used to promote innovation. The requirements should be sufficiently precise to allow suppliers to determine what the contract is for and contracting authorities to compare bids and award the contract. Also, to promote suppliers' creativity and make procurement more flexible, the Directive states that public authorities should, as often as possible, encourage variant bids, spelling out however in their procurement documents the minimum requirements that bids should meet.

In 2012, the European Commission ran a "TOP10 public consultation" to find out "*the top 10 most burdensome legislative acts for SMEs*". Of the 20 most burdensome pieces of legislation, procedures for the award of public contracts (public works, supply and service contracts) were sixth. Since there are more than 20 million SMEs in the European Union representing 99% of all businesses and they are drivers of economic growth, innovation, employment and social integration, the European Commission took action to ensure that policies and programmes foster their viability by easing administrative burdens and adapting rules to their needs. Against this background, the Directive seeks to make it easier for SMEs to participate in procurement procedures, by allowing bidding through a European Single Procurement Document based on self-declarations as regards the personal situation and legal standing of the bidder.

The Directive also encourages public procurement authorities to divide contracts into smaller or more specialised lots to make it easier for smaller firms to bid. Such division can be done on a quantitative basis adapting the size of the individual contracts to the capacity of SMEs, or on a qualitative basis between different trades or project phases to adapt the content of the individual contracts to the specialised sectors of SMEs. When a contract can be split into lots but a contracting authority decides not to, it must justify its decision. Finally, the Directive addresses overly demanding requirements for economic and financial capacity, which frequently rule SMEs out of bidding. It states that contracting authorities should not be allowed to require tenderers to have a minimum turnover disproportionate to the subject-matter of the contract; the minimum turnover requirement should not exceed twice the estimated contract value.

Sources: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC/, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>; European Commission (2013), Results of the public consultation on the TOP10 most burdensome legislative acts for SMEs", http://ec.europa.eu/enterprise/policies/sme/files/smes/top10report-final_en.pdf

Bid rigging is generally subject to the sanctions of hard core cartels, i.e. fines and in some countries imprisonment. As put forward in the Recommendation, public authorities communicate to bidders in advance these sanctions, to deter them from engaging in unlawful practices. For example, in Japan, contractors are requested to sign a statement under oath that they will pay a certain percentage of the amount of the contract as a compensation for damages in case they are found to be involved in bid rigging. Likewise, in Korea the amount of damages for bid rigging is predetermined and included as a clause in public contracts. Thus, bidders are aware of the large sums that they risk paying if they collude. Almost all Korean public corporations follow this system, which aims at preventing as well as punishing collusion. Spain's National Markets and Competition Commission issued reports on the Spanish draft laws transposing the 2014 EU Directives on Public Procurement¹⁷, in which it recommends that tender documents include a brief definition of anti-competitive practices in public procurement, together with a reference to the applicable legislation and the possible sanctions for non-compliance. In Australia, the use of anti-collusion tender clauses specifying sanctions for breaches of competition rules caused one tenderer to become an immunity applicant.

Members and Partners of the Competition Committee have also stepped up punishment for anti-competitive conduct. Cases where sanction thresholds are increased and instances of collusion in public procurement procedures are punished are growing¹⁸. For example, the 2012 amendment to the Irish Competition Act increased the maximum prison sentence that can be imposed on an individual for hard core cartel offences, including bid rigging, from five to ten years. The 2012 amendment also provides that a convicted party will have to pay the costs of the investigation and prosecution to the competition authority. The Korean Fair Trade Commission (KFTC) strengthened its investigation and sanction powers and, in March 2015, fined a dozen

¹⁷ Directive 2014/24/EU of 26 February 2014 on public procurement and Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors, both to be transposed by 18 April 2016.

¹⁸ Albert Sánchez Graells, Public procurement: An overview of EU and national case law, 29 May 2014, Bulletin e- Competitions Public procurement, Art. N° 40647, at <http://www.concurrences.com/Bulletin/Special-Issues/Public-procurement/Public-procurement-An-overview-of?lang=en>, accessed on 3 May 2015.

companies, including some of the country's largest constructors, 26 billion won (USD 21 million) for rigging bids on projects regarding the Saemangeum Seawall, the world's longest man-made dyke¹⁹. The Colombian Competition Authority (Superintendencia de Industria y Comercio -SIC) has increased enforcement actions since 2010 and is now handling approximately fifteen cases per year, as opposed to only three in previous years. In Poland, the president of the Office for Competition and Consumer Protection can impose fines up to 10% of the annual turnover of the supplier found to have participated in bid rigging. In the United States, Federal Acquisition Regulation 9.407-2(a)(2) permits the purchasing agency to suspend contractors suspected of a violation of "*Federal or State antitrust statutes relating to the submission of offers*" and states that an indictment for antitrust violations "*constitutes adequate evidence for suspension*".²⁰ Most Members and Partners of the Competition Committee have leniency programmes which grant immunity or reduce sanctions for suppliers who reveal bid-rigging conspiracies and participate in their investigation²¹. The Canadian Competition Act was amended to increase the liability associated with cartel offences in March 2009. The maximum penalty for price fixing increased from a term of imprisonment not exceeding five years to a term not exceeding fourteen years, and from fines not exceeding C\$10 million to fines not exceeding C\$25 million. In a similar vein, the maximum penalty for bid rigging increased from a term of imprisonment not exceeding five years to a term not exceeding fourteen years.

¹⁹ See <http://globalcompetitionreview.com/news/article/38102/kftc-punishes-bid-rigging>

²⁰ See <http://www.gpo.gov/fdsys/pkg/CFR-2004-title48-vol1/pdf/CFR-2004-title48-vol1-sec9-407-2.pdf>

²¹ Article 57 (4) (d) of the Public Procurement Directive 2014/24/EU of 26 February 2014 provides that European Union contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure suppliers for whom the contracting authority has sufficiently plausible indications to conclude that they have entered into agreements aimed at distorting competition. Leniency applicants may therefore risk being excluded from public procurement tenders. The Directive should be implemented by Member States by 18 April 2016. How article 57 (4) (d) will be implemented, and its impact on leniency programmes, would need to be considered.

2.2 *Challenges remain in the implementation of some recommendations*

Respondents to the 2015 survey on the implementation of the Recommendation noted that they may face challenges in reconciling aspects of the pre-tender dialogue with suppliers and the requirement to reduce the opportunities for bidders to meet. In this respect, the Recommendation advises public procurement officials to *“understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser, and the potential suppliers of these products and/or services”*. The Recommendation’s Guidelines, which recommend concrete steps to maximise competition in tenders in the Checklist for Designing the Procurement Process to Reduce the Risks of Bid Rigging, also advise, in step 1 of this Checklist, public procurement authorities to *“be informed before designing the tender process”* through, among others, collection of information on the relevant market, suppliers, prices and past tenders. This is aligned with the Recommendation of the Council on Public Procurement which provides that countries should *“engage in transparent and regular dialogues with suppliers and business associations to present public procurement objectives and to assure a correct understanding of markets. Effective communication should be conducted to provide potential vendors with a better understanding of the country’s needs, and government buyers with information to develop more realistic and effective tender specifications by better understanding market capabilities. Such interactions should be subject to due fairness, transparency and integrity safeguards, which vary depending on whether an active procurement process is ongoing”*.

Early engagement with potential suppliers is vital to understanding the key procurement issues before the tender process begins and can be critical to its success. Many OECD Members arrange meetings on future procurement plans between public procurement authorities and suppliers to, on the one hand, get information so as to design tenders which correspond to the market and, on the other, inform businesses of their procurement plans, with sufficient lead time to allow them to prepare their bid, find possible partners and develop innovative solutions. Some survey respondents pointed out that public procurement officials are, however, uncertain of the modalities of such pre-tender dialogue and extent of information to be exchanged in it, since physical consultations with suppliers may have the unintended effect of providing a meeting place for competitors, which, combined with detailed information on planned procurements, may facilitate collusion. The Swedish Competition Authority

has, for example, established a working group to examine issues of pre-tender dialogue and plans to issue written guidance for public procurement authorities based on the findings of this working group.

The recommendations put forward by the OECD in projects in Mexico and Colombia on fighting bid rigging²² encourage public procurement entities to carry out, and exchange with each other, market studies fulfilling minimum requirements and make sure that market information is complete and collected from different sources. At the same time, as provided in the Recommendation²³, face-to-face communication between public suppliers should be limited whenever feasible to minimise the risk of collusion. In this respect, the OECD Secretariat made specific recommendations that exchanges of information with bidders take place by electronic means only and no bid clarification meetings be held during tender procedures, while site visits, where suppliers may meet, should be limited to the absolute minimum. To prevent risks of collusion during market analysis, the Chilean central purchasing body ChileCompra, before launching the process for a framework agreement for goods and services, conducts the supplier consultation process online (box 2). Spain's National Markets and Competition Commission (CNMC) has issued reports on competition-related aspects of tender documents for centralised purchasing before the procurement process started, with the aim to promote competition *ex ante*. Additional good practices could be explored by the Competition Committee in the future.

²² Refer to footnote 11.

²³ Under point I(4) of the Recommendation, "...officials responsible for public procurement at all levels of government should (...) [d]esign the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies."

Box 2. Consultation with suppliers by the Chilean central purchasing body ChileCompra

Prior to issuing a tender, ChileCompra carries out an open consultation process with suppliers, which it announces on line at *www.mercadopublico.cl*. The consultation aims to obtain information about prices, the characteristics of the required goods or services, the time that bidders need to prepare, and any other information that might contribute to a successful tendering process.

ChileCompra has, in addition, an on-line forum with questions and answers for each tender in advance of deadlines for submitting bids. The forum is particularly practical for providers who are geographically distant from the capital city, where ChileCompra's offices are located, and need remote access to questions and answers. The forum ensures transparency and supports equitable treatment and fair competition.

Source: Based on presentations at the OECD workshop on Improving Public Procurement Practices in ISSSTE, Mexico City, 2-4 September 2014, by Marjorie Ramirez, former Head of Division of Framework Agreements at ChileCompra, the Chilean central purchasing body.

3. Measures to Detect Bid Rigging

3.1 *Detecting bid rigging through analysis of public procurement data*

Detection of bid rigging in public procurement is a significant part of the work of competition authorities. All competition authorities who responded to the survey on the implementation of the Recommendation reported that they rely on the Recommendation to detect bid rigging. Some rely on specific recommendations in conducting dawn raids and drafting requests for information. Several competition authorities also reported, in 2013²⁴ and again in the 2015, that they use screens to assess markets and identify behaviour that may indicate collusion in public procurement, as set forth in the Guidelines. Screens involve analysing the structural characteristics of a specific market or industry to check whether they make collusive strategies more likely and/ or examining bidders' behaviour and tender outcomes to assess whether the observed behaviour is more or less likely to be consistent with collusion or genuine competition. In the roundtable on *Ex officio Cartel Investigations and the Use of Screens to Detect Cartels* held in October 2013, the Competition

²⁴ OECD, Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

Committee debated the use of screens to detect cartels and explored a number of successful cases.²⁵

The development of screens that are focused, in particular, on bidders' behaviour (i.e. behavioural, not structural, screens) is facilitated by the increasing availability of reliable comprehensive data on public tenders, which allow competition authorities to develop different screening techniques, identify markers which may show collusion, and test them empirically. In designing screens, authorities have focused on patterns which might indicate collusive bidding, such as submission of identical bids, high correlation between bids, lack of correlation between the supplier's costs and the bid submitted, and significant differences between the winning and losing bid. Some competition authorities have further developed electronic screening programmes to detect bid rigging through monitoring bids and bidding patterns on a systematic basis. Such programmes are designed to quantify the probability of bid rigging using specific markers such as the rate of successful bids, bid price, number of failed bids, price increases, etc. For example, the Korean Fair Trade Commission has developed the Bid Rigging Indicator Analysis System (BRIAS) as part of its anti-cartel enforcement programme (Box 3).

Box 3. Korea's Bid Rigging Indicator Analysis System (BRIAS)

In 2006, the Korean Fair Trade Commission (KFTC) developed the Bid Rigging Indicator Analysis System (BRIAS) to help detect bid rigging. BRIAS is an automatic quantitative analysis IT system which analyses large amounts of online public procurement data and, based on indicators incorporated in it, quantifies the likelihood of bid rigging.

BRIAS collects online public procurement data concerning large scale contracts awarded by central and local administrations within 30 days of the contract award. Then, the system analyses the data and generates scores on the likelihood of bid rigging by assessing factors like tender method, number of bidders, number of successful bids, number of failed bids, bid prices above the estimated price, and price of winning bidder. Each of these factors is assigned a weighted value and all values are then added up. For instance, higher rates of successful bids and lower number of participating companies are indicative of a possibility of collusion. All bids are also screened according to search criteria like the name of the winner candidate, or bids with similar score.

²⁵ Ibid. Also, on reactive (generated by an event, such as a complaint or leniency application) and proactive methods (initiated by the competition authority) to detect bid rigging, see International Competition Network (2010), Anti-cartel Enforcement Manual, Chapter 4 - Cartel Case Initiation, at www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf.

The KFTC applied BRIAS first to tenders of the Public Procurement Service, the largest Korean central purchasing body, in 2006. In 2007, the system was extended to cover tenders of four major state-owned companies (the Korea Electric Power Corporation, the Korea Land and Housing Corporation, the Korea Expressway Corporation and the Korea Water Resources Corporation). In 2014, a total of 332 public procurement agencies were participating to BRIAS, including central administrative agencies, local governments and state-owned companies.

On average, BRIAS flags more than 80 cases per month for further analysis by the KFTC. Based on BRIAS indications, the KFTC opened a successful investigation on a bid-rigging conspiracy for the extension of a subway line; a cartel was found and fined 20 million USD. The KFTC also estimates that BRIAS dissuades companies from bid rigging schemes by signalling to the market that every public tender is screened.

Sources: OECD (2013), Policy Roundtables: *Ex officio cartel investigations and the use of screens to detect cartels*, at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>; response by the Korean Fair Trade Commission to the 2015 survey on the implementation of the Recommendation.

The Economic Studies Group of the Colombian competition authority (*Superintendencia de Industria y Comercio – SIC*) is developing a computer programme called ALCO to help public procurement officials detect behaviour that could give rise to bid-rigging investigations and flag it to SIC. The programme is based on the Recommendation and SIC's own information of competition-related concerns in public procurement in Colombia. It is currently at the stage of defining the right red flags as well as sources of public procurement data; it may be adjusted to interface with the newly introduced Colombian e-procurement system, SECOP II. The initiative to develop ALCO was taken following initial research by SIC which showed that public procurement officials, in particular in sub-central authorities, are not always aware of what may constitute bid rigging or how to identify it. The Economic Studies Department of the Peruvian competition authority (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, INDECOPI*) is also developing indicators for the detection of bid rigging in the procurement of liquid fuel between 2007 and 2013, based on economic criteria and data provided by the Peruvian Public Procurement Supervisory Body (*Organismo Supervisor de las Contrataciones del Estado -OSCE*). Chile's Competition Authority, Fiscalía Nacional Económica (FNE) also uses procurement data to perform screening exercises. FNE and the central purchasing body ChileCompra have a co-operation agreement that allows the FNE to monitor tenders through ChileCompra's database.

3.2 *Reliance on public procurement officials to detect bid rigging*

The best placed persons to detect signs of unlawful bidding arrangements are often the public procurement officials in charge of specific tenders, as they tend to have good knowledge of the relevant market sector and can observe patterns in bidding processes that could indicate collusive activity. Besides, public procurement officials interact with bidders directly and may be able to observe behaviour or notice statements which are not recorded in the documents submitted by the bidders, and may be outside the direct reach of the competition agency²⁶. Countries thus rely on public procurement officials to detect and report cases of collusion.

Respondents to the 2015 survey on the implementation of the Recommendation, as well as participants in fact-finding in OECD projects, have, however, pointed out that public procurement officials may be reluctant to report suspicious behaviour. Procurement officials are not evaluated on how many cartels they discover but on their ability to set up, conduct and complete bidding processes and ensure that public contracts are then concluded and performed appropriately. Adding detection of cartels to the procurement responsibilities requires time and effort, which public procurement officials may not be able, or willing, to spare. In addition, competition investigations on the basis of a suspicion that there is a cartel delays or may lead to cancellation of the whole tender process. The non-purchased items will then still have to be bought, thus creating extra work for the purchasers. Also, often the recognition and career benefits of detecting cartels go to the competition authority and its staff, while the reporting official is not rewarded for its reporting efforts in career development or recognition terms. Furthermore, the money that is being saved because of the dismantling of a cartel usually does not remain in the administration that helped discover the cartel, but is redistributed to the general administration's budget²⁷.

For all these reasons, public purchasers may lack incentives to monitor and report possible cartels. Several competition authorities (e.g., Latvia, Mexico,

²⁶ OECD, Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

²⁷ Alberto Heimler, Cartels In Public Procurement, *Journal of Competition Law & Economics*, 8(4), 849–862 doi:10.1093/joclec/nhs028. Downloaded from <http://jcle.oxfordjournals.org/> on March 31, 2015.

Poland, and Switzerland) reported that the main goal of procurement officials is to achieve their purchasing objectives in accordance with the procurement law and, therefore, detecting and reporting bid rigging can be seen as a burden that risks causing them to miss their procurement targets. Competition priorities may be better aligned with the goals of public procurement supervisory (not purchasing) authorities which consist in overseeing the effectiveness and legality of public spending. On this, the Office for Competition and Consumer Protection in Poland, UOKiK, reported that, while public procurement authorities may refrain from reporting suspicious behaviour while a procurement process is under way, they are willing to co-operate with the UOKiK after antitrust violations are detected by auditors or procurement supervisory authorities and enforcement actions are already contemplated.

In order to facilitate co-operation between public procurement and competition authorities, it has been suggested that the money saved from a cartel should at least in part remain with the administration that helped discover it.²⁸ Also, the Recommendation encourages Adherents to consider establishing adequate incentives for procurement officials to take actions to prevent and detect bid rigging, for example by including such prevention and detection in the professional duties of public procurement officials or by making successful detection of anticompetitive practices count for their career development²⁹. Survey respondents also noted the public procurement officials need support in building skills and knowledge, as some may be relatively junior and lack the necessary skills to detect bid rigging and know what action to take, if they suspect collusion.

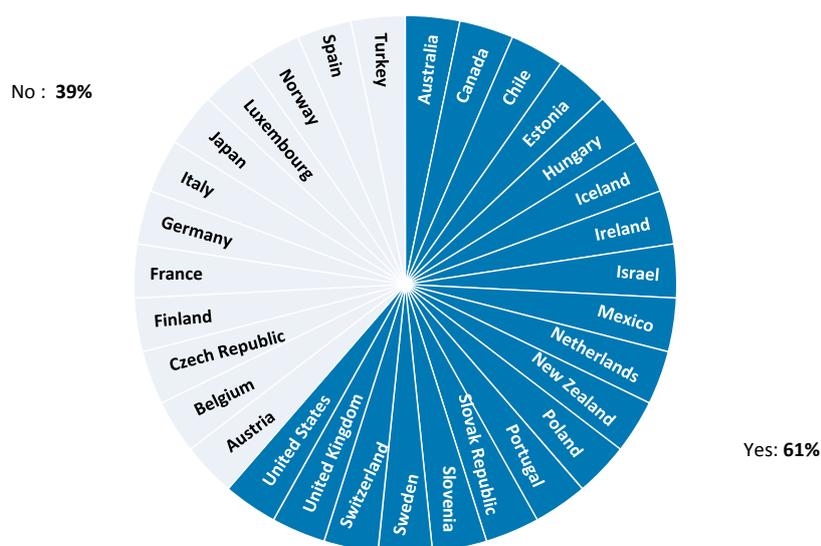
In this respect, OECD Members and Partners are increasingly paying attention to the need to build a public procurement professional workforce. Drawing on good practices from Members and Partners of the Public Governance Committee, the Recommendation of the Council on Public Procurement recommends that “*Adherents develop a procurement workforce with*

²⁸ Ibid.

²⁹ Under point II of the Recommendation, “[m]embers should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials”.

*the capacity to continually deliver value for money efficiently and effectively*³⁰, and that public procurement is recognised as a specific profession (Graph 4).

Graph 4. Recognition of procurement officials as a specific profession (2010)



Source: OECD (2013), *Government at a Glance 2013*, OECD Publishing, Paris, http://dx.doi.org/10.1787/gov_glance-2013-en.

³⁰ The Recommendation of the Council on Public Procurement mentions specific actions in point IX, namely that Adherents should: “i) [e]nsure that procurement officials meet high professional standards for knowledge, practical implementation and integrity by providing a dedicated and regularly updated set of tools, for example, sufficient staff in terms of numbers and skills, recognition of public procurement as a specific profession, certification and regular trainings, integrity standards for public procurement officials and the existence of a unit or team analysing public procurement information and monitoring the performance of the public procurement system; ii) [p]rovide attractive, competitive and merit-based career options for procurement officials through the provision of clear means of advancement, protection from political interference in the procurement process and the promotion of national and international good practices in career development to enhance the performance of the procurement workforce; iii) [p]romote collaborative approaches with knowledge centres such as universities, think tanks or policy centres to improve skills and competences of the procurement workforce (...)”.

To build public procurement professional knowledge and experience over time, many OECD Members have established central purchasing bodies that function as professional procurement hubs (Graph 5).

Graph 5. Factors that motivated the implementation of CPBs



Source: 2014 OECD Survey on Public Procurement, based on replies by 31 Members. Czech Republic, Iceland and Israel did not respond.

Central purchasing bodies can lead efforts in fighting collusion. For example, Ireland established the Office of Government Procurement (OGP) which started operations in 2014. OGP is responsible for procuring goods and services on behalf of the government and also leads procurement policy. The OGP is broken down in sectoral teams, who build up industry experience and can therefore improve procurement outcomes as well as identify unusual patterns of bid behaviour which may indicate collusion.

4. Awareness Raising for Public Procurement Officials

The Recommendation requests Adherents to “ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies”. This involves:

- a. producing materials on fraud and collusion to raise awareness of risks and patterns by public procurement officials;
- b. providing or supporting training programmes for public procurement officials at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns; and
- c. establishing a continuous relationship between competition and public procurement authorities so that, if measures to prevent collusion fail, the latter will report suspected collusion to the former (as well as to any other competent authority) and trust that competition authorities will help investigate and prosecute anti-competitive conduct.

The survey on the implementation of the Recommendation as well as OECD competition and public procurement projects show that the Recommendation is relied on for capacity-building activities and awareness events and, in general, advocacy purposes, and is frequently explicitly referred to in national training materials.

4.1 Awareness Raising Materials and Training Programmes

Most Members and Partners of the Competition Committee have developed guidelines and awareness materials, like brochures and newsletters, addressed to procurement officials to help them design tenders so as to avoid bid rigging as well as be able to identify and flag possible signs of collusive behaviour. Such guidelines and materials are aligned with, often draw on or explicitly refer to the Recommendation and its Guidelines, and thus reflect OECD good practices. They are generally made available on the competition authority’s website and occasionally on the procurement authority’s one and are distributed to public procurement officials. In addition to developing materials, almost all competition authorities which responded to the 2015 survey on the implementation of the Recommendation reported that they carry out training activities. Training usually covers forms of bid rigging, methods of prevention and detection and steps to be taken when bid rigging is suspected; in some cases,

recent cases and case law are presented. Box 4 provides some examples.³¹ However, only three out of ten public procurement delegates who responded to the survey on the implementation of the Recommendation were aware of, or relied on, the Recommendation; therefore, competition advocacy towards public procurement authorities may need to be evaluated and strengthened in this respect.

Box 4. Examples of guidelines and training on preventing and detecting bid rigging in public procurement

Chile's Competition Authority, Fiscalía Nacional Económica (FNE) issued guidelines and checklists for preventing and detecting bid rigging in public procurement in 2011. The guidelines include a very detailed, step-by-step recommendation chart on what should be done by public procurement officials when they encounter suspicious patterns in tendering. FNE has relied on the Guidelines to develop its own materials.

In Greece, the Hellenic Competition Commission (HCC) relied on the Recommendation to develop the *"Guide for Public Procurement Authorities: Detection and Prevention of Collusive Practices in Procurement Tenders"* in order to enhance the awareness by public officials of bidders' anticompetitive practices. This Guide is written in simple non-technical language and includes examples and references to case law, in order to assist procurement professionals, especially those without any prior knowledge of competition issues, to understand cartel behaviour in public tenders.

The Korean Fair Trade Commission (KFTC) has developed bid rigging guidelines for public procurement officials aligned with the Recommendation. KFTC trains procurement officials, in particular officials of the largest Korean central purchasing body, the Public Procurement Service, to identify suspicious behaviour in a timely manner and report it to the KFTC for investigation.

The Italian Competition Authority (ICA) developed a handbook ("vademecum") based on the Recommendation's Guidelines which gives tips and advice to public procurement officials to help them identify bid rigging. ICA reported that public procurement officials use the handbook, which has been disseminated to them and is posted on ICA's webpage, to detect collusion and alert ICA to it. Thanks to these efforts, at the end of 2014, ICA was carrying out 9 formal proceedings concerning bid rigging in public procurement.

The Latvian Competition Council's webpage includes a section on bid rigging with both national and the Recommendation's Guidelines. The Competition Council also provides information on how to act when there is suspicious behaviour which may

³¹ Numerous examples of materials on bid rigging like checklists, presentations and brochures can also be found on the International Competition Network's website at www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/procurement.aspx as well as Chapter 4- Cartel Case Initiation of the Anti-Cartel Enforcement Manual Chapter at www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf.

indicate collusion, for example whether to continue or discontinue the procurement process or how to engage in formal or informal consultations with Competition Council. It carries out regular training on detection of bid rigging both on a regional basis for all procurement authorities in a specific region as well as individually for big public entities carrying out procurements.

The Norwegian Competition Authority (NCA) issued in 2008 guidelines with a similar content to the Recommendation's Guidelines. In 2011, it developed a checklist on detecting bid rigging, which it marketed at numerous meetings with public buyers. The NCA has also published guidance on project agreements and consortium bidding. It regularly holds seminars and lectures on detecting bid rigging and distinguishing between law and unlawful consortium bidding, and co-operates with Difi (the Agency for Public Management and e-Government which provides guidance on public procurement).

The Office for Competition and Consumer Protection in Poland, UOKiK, has developed guidelines on bid rigging and a reporting form, which are targeted at procurement officials and contracting entities and draw on the Guidelines. Both documents are available on UOKiK's website, along with additional public campaign materials, like films, videos, news articles and radio broadcasts. In order to reach out to procurement officials, the President of UOKiK, has established a network for competition grouping UOKiK, the Public Procurement Office, the Central Anti-Corruption Bureau, the Internal Security Agency, the Prosecution Services and the police. In the framework of this network UOKiK provides trainings on bid-rigging for public officials, municipalities and other partners. UOKiK also reaches out to stakeholders at various conferences and other events. In 2014, UOKiK participated in a conference on the practical aspects of public procurement organised by the Public Procurement Office where it presented its insights concerning bid rigging practices. UOKiK has also contributed to legislative works leading to the amendment of the Public Procurement Law, as well as to the drafting of the upcoming guidelines of the Prime Minister regarding recognition, prevention and detection of threats to trade, especially bid-rigging practices, detrimental to public interests like state safety or entrepreneurs' and consumers' interests.

For Spain's National Markets and Competition Commission (CNMC) public procurement is a priority, according to the 2015 CNMC Action Plan. CNMC has engaged in advocacy in many different ways in recent years. It published a *Guide to Public Procurement and Competition* in 2011 (the Guide) and a report on the application of that Guide to public procurement in the public health sector in 2013. The Guide is intended to help contracting authorities choose the most competitive options when designing procurement processes, on the one hand, and recognize signs of bid rigging among suppliers, on the other hand. CNMC also issued in 2013 a report on in-house procurement which included recommendations to use this mechanism in the least restrictive to competition way possible. Furthermore, CNMC issued an "*Analysis of public procurement in Spain: Opportunities for improvement from the competition perspective*" which presents a set of actions to be developed by the CNMC, including training programmes for contracting authorities on the detection of anticompetitive practices in public procurement and oversight of the transposition in Spain of the 2014 EU Directives on Public Procurement (Directive 2014/24/EU of 26 February 2014 on public procurement, and Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors –both to be transposed by 18 April 2016). CNMC has reinforced communication with contracting authorities and oversight bodies. For instance, CNMC is working on the implementation of

a screening tool for *ex ante* and *ex post* review of public procurement. Also, a new public procurement and competition guide and brochure with checklists to better design tender procedures and detect bid rigging will be issued in 2016.

The Swedish Competition Authority (SCA), in addition to a brochure and a checklist on fighting bid rigging, has developed a web-based interactive guidance for companies wishing to collaborate in procurement. It aims to help suppliers, in particular small and medium-sized enterprises who may not have experience in procurement, to self-assess whether they can bid together and under which conditions, through a series of frequently asked questions and answers. The advantage of the questions and answers format is that it is user-friendly and allows firms to get acquainted with the rules, at least at a basic level, in only a few minutes.

Source: OECD, Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>; responses to the 2015 OECD survey on the implementation of the Recommendation of the Council on Fighting Bid Rigging on Public Procurement [See Annex I].

To add to the impact of advocacy efforts, comprehensive awareness campaigns are conducted for example in the United Kingdom (UK) and Australia (Box 5).

Box 5. Public awareness campaigns

The Australian Competition and Consumer Commission (ACCC) has developed materials and put in place a comprehensive awareness campaign, including outreach activities on the unlawfulness of bid rigging in public procurement. The ACCC has developed and distributed to potential tenderers a guide entitled “*Cartel Conduct - How it affects you and your business*” to alert them to the consequences of engaging in cartel conduct. The ACCC also released a short fictional film entitled “*The Marker*” that dramatises the effects that involvement in a cartel can have on individuals and business. The film shows how cartel activity can ruin relationships, careers, reputations and long term financial security, and may ultimately land guilty parties in jail. The ACCC has sent *The Marker* to chief executive officers at 300 of Australia’s largest companies, advising them to show it to employees at all levels of their business. The ACCC also undertakes public advocacy in advance of particular major public procurement projects.

The UK’s Competition and Markets Authority (CMA) has conducted an awareness-raising campaign which has included a series of talks for public and private sector procurers in Scotland, Wales, England and Northern Ireland aimed at explaining how to mitigate and identify bid rigging and the CMA’s approach to enforcing the laws against bid rigging. In addition, a 60 second guide to bid-rigging was published on the CMA website including the ten most important things procurers should watch out for to spot signs of bid-rigging. The guide draws on the Recommendation’s Guidelines.

Source: Proceedings of the meeting of 16 December 2014 of the Competition Committee’s Working Party 3 on Enforcement and International Co-operation; responses to the 2015 OECD survey on the implementation of the Recommendation of the Council on Fighting Bid Rigging on Public Procurement [Annex I].

The Mexican Federal Economic Competition Commission (Comisión Federal de Competencia Económica, COFECE) has, as part of its advisory role, guided the State of Nuevo León in drafting and enacting its new public procurement law, which now includes many of the provisions of the Recommendation.

4.2 Relationship between Competition and Public Procurement Authorities

Crossovers in the work of competition and public procurement authorities in the area of fighting bid rigging are established. Indicia of bid rigging detected by public procurement officials in the course of tender procedures can lead to cartel investigations by competition authorities, while competition enforcement in the area of public procurement leads to cleaner, healthier competition for contracts. The Recommendation encourages Adherents to foster a continuous relationship between competition and public procurement authorities. Many Members and Partners follow this recommendation, as examples in Box 6 show.

Box 6. Examples of agreements and joint actions between competition and public procurement authorities

The Australian Competition and Consumer Commission (ACCC) has undertaken extensive anti-bid-rigging advocacy with national and State governments, anti-corruption agencies, and procurement bodies. It has also engaged with procurers and suppliers in the context of major public procurement projects. The ACCC is continuing its efforts to facilitate reporting of suspected cartel conduct, and to increase the level of participation from all procurement officials. The ACCC considers that these efforts have already been productive.

Canada's Competition Bureau (the Bureau) has set as a priority reaching out to public procurement organisations at all levels of government. The Bureau provides trainings on fighting bid rigging to employees of Public Works and Government Services Canada (PWGSC), the principal procurement agency of the Canadian Federal government. These presentations aim to provide PWGSC's procurement officials with the knowledge necessary to detect, deter and report bid rigging to the Bureau, and include information on, among other things, the bid-rigging provisions in the law, the common forms of bid rigging, the characteristics that make an industry more susceptible to bid rigging, the warning signs for possible bid rigging, and the techniques that can be used to prevent bid rigging. Over the years, the Bureau and PWGSC have worked together to address the challenges posed by bid rigging. Pursuant to this relationship, PWGSC refers bid-rigging complaints and cases to the Bureau for investigation, and the Bureau provides annual training to PWGSC staff on bid-rigging prevention. The two authorities have also entered into a Memorandum of Understanding aiming to strengthen the prevention, detection, reporting and investigation of possible cartel activity, including bid rigging, for procurement processes and real property transactions that fall under the responsibility of PWGSC. This agreement is the first of its kind for the Bureau. In it, the two authorities

agree to share information and collaborate in the areas of enforcement, education and awareness. Both organisations benefit from sharing in each other's expertise and knowledge. They also collaborate in training and awareness programs to educate other relevant stakeholders on how to detect and prevent cartel activity.

The Colombian Competition Authority (Superintendencia de Industria y Comercio - SIC) and the Colombian national procurement agency Colombia Compra Eficiente have established a strong working relationship involving exchanges of information and consultations to facilitate early detection of collusion, on the basis of recommendations made by the OECD in its assessment of public procurement in Colombia against the Recommendation.* The two agencies are in the process of concluding a co-operation agreement to formalise their partnership.

The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) and the Hungarian Public Procurement Authority put in place a co-operation agreement in December 2012, to enhance the efficiency of the fight against bid rigging. The agreement covers expert meetings, transparency of procurement data and awareness-raising tools on suspicious collusive schemes. Also, since 2012, the GVH has a webpage dedicated to collusion in public procurement with concrete examples and dos and don'ts for suppliers.

The Italian Competition Authority (ICA) co-operates closely with Consip, the central purchasing body for procurement of goods and services for the Italian public administration, to optimise the design of tenders and fight bid rigging. In 2014, the ICA also signed a Memorandum of Understanding with ANAC, the national anti-corruption authority, which provides that the two authorities should co-operate and exchange information and that ANAC should publish on its website the ICA's *Vademecum* on bid rigging and promote its implementation by procurement bodies.

In Japan, each procurement agency designates liaison officers to provide information to the Japan Fair Trade Commission (JFTC) on possible violations of the Antimonopoly Act in bids for public works. The purpose for appointing such officers is to promote co-operation with the JFTC and make sure that suspicious tendering behaviour or indications are reported to the JFTC. Also, JFTC organises training for public procurement officials at both central and local government levels.

The Antimonopoly Office of the Slovak Republic has concluded memoranda of co-operation with the Office of Public Procurement and the Supreme Audit Office to enhance co-operation and the exchange of information. It also increased advocacy towards municipalities.

In Spain, the advice of the National Markets and Competition Commission (CNMC) can be requested when new regulation, tender documents, or action may affect competition. In this regard, the CNMC has issued 16 reports in 2014 and 2015, where tender specifications for the procurement of goods and services (like fuels, telecommunications or cleaning services) were analysed and recommendations for pro-competitive changes were made. The Spanish government has recently centralised the procurement of certain goods and services. The CNMC has welcomed the initiative as it may facilitate the achievement of efficiencies and better prices for the public administration. It however takes the view that these efficiencies should not limit competition, equal treatment and transparency and thus stresses the importance of pro-competitive design of procurement specifications. The CNMC has issued two reports on the draft laws on, first, public sector contracts and, second, procurement procedures in

the water, energy, transport and postal services sectors, which will transpose in Spain the 2014 EU Directives on Public Procurement.

The Swedish Competition Authority (SCA) is responsible for the enforcement of both competition and procurement law. To combine its supervisory tasks in these two areas, it creates valuable synergies through sharing knowledge and experience among staff. This strengthens SCA's ability to handle cases that affect the two areas, such as bid-rigging cartels and other forms of unfair co-operation which impede competition.

The Antitrust Division of the United States (U.S.) Department of Justice (the Division) has for many years conducted outreach and training programmes for public procurement officials and investigators. These programmes help develop a good working relationship between Division officials who have the expertise of investigating and prosecuting bid rigging and public procurement officials who are well placed to detect bid rigging. Division officials advise which patterns and types of behaviour public procurement officials should look for to detect bid rigging and public procurement officials provide evidence which can lead to cartel investigations. In the experience of the Division, these joint efforts have led to the decrease of bid rigging over the last twenty to thirty years. Source: OECD, Policy Roundtables: Ex officio cartel investigations and the use of screens to detect cartels, at www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf; Global Forum on Competition, Fighting Corruption and Promoting Competition, Summary of Discussion, DAF/COMP/GF(2014)13/FINAL as well as written submissions by countries in this Global Forum on Competition, at www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm; responses to the 2015 survey on the implementation of the Recommendation.

* OECD Competition Committee (2014), Fighting Bid Rigging in Public Procurement in Colombia, A Secretariat Report on Colombian Procurement Laws and Practices, at www.oecd.org/daf/competition/Booklet_SIC%20Procurement%20Report_16X23_REV_web.pdf. See Recommendation 1 in Annex 6 -Recommendations Addressed to the SIC: "the [National Public Procurement Agency] NPPA and the SIC should develop a formal partnership that entails regular and ongoing communications. The two organisations should be jointly involved with: studying procurement issues with competition implications; championing the process to implement pro-competitive changes in procurement procedures; and, organising training and education activities".

5. Future work

5.1 *Define and test communication channels between competition and public procurement authorities*

As mentioned in section 4.2, competition and public procurement authorities co-operate through trainings, exchange of information and reporting and access to each other's data. Countries like Korea have, in addition, started exchanges of staff between the competition and procurement authorities to deepen their co-operation and share information. Also, as a general rule, public procurement officials have a legal obligation to report cases involving collusion to the competition authority. The Spanish Competition Authority (CNMC) is in contact with the State Contracting Platform (Plataforma de Contratación del

Sector Público) to exchange public procurement information and data. This co-operation will enable CNMC to develop a screening software (for *ex ante* and *ex post* evaluation of public procurement) and develop reports and studies on good practices in this area.

What seems to be missing in some Members and Partners is a well-defined mechanism to ensure a constant flow of information and a good regular working-level relationship between competition and public procurement authorities. Survey responses show that it is sometimes unclear for officials under which conditions the two authorities can or should communicate, the possibility of informal contacts, and what can be expected, such as whether information about bid rigging suspicions will be taken up and acted upon by the relevant authority. Indicatively, in OECD public procurement peer review projects in OECD Members like Greece and Mexico, public purchasers raised questions on whether informing competition authorities of suspicions of bid rigging requires them to provide full evidence, and noted that they tend not to report suspicious behaviour when they have no proof. Some public procurement officials also reported that they did not alert the competition authorities to possible bid rigging as they were unaware of the ways of reaching out to competition authorities, in particular as regards informal verbal communication, for example via telephone. They were also concerned that their personal involvement would be required in case investigations were opened.

Easy and known communication channels between competition authorities and public purchasers may encourage reporting of bid-rigging suspicions, as will clarifications on the level of proof and personal involvement required of the reporting official. In country-specific projects, the OECD consistently recommends putting in place formal co-operation agreements between the competition and procurement authorities setting clear communication channels (including eventually an anonymous reporting hotline) and introducing whistle-blowing mechanisms guaranteeing that officials who report indicia of collusion are not exposed to retaliation³². Future work by the Competition Committee could involve guidance on ways to foster further co-operation between competition and public procurement authorities like formal and informal communication channels, protection of reporting officials, clarifications on what reporting of suspicious activity involves and what can be expected. Actions like

³² See footnote 11.

joint trainings and investigations, access to each other's databases and exchanges of staff could also be further explored³³.

5.2 *Strengthen co-operation between competition and anticorruption authorities*

The most common intersection of corruption and anticompetitive conduct occurs in government procurement when bid rigging can be combined with or facilitated by bribery of public officials or unlawful kickbacks.³⁴ Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect³⁵. Corruption is a big barrier to competition, discouraging genuine competitors from bidding for a contract in cases where they are apprehensive of unfair competition or are unwilling, or unable, to pay bribes. For these reasons, fighting corruption is increasingly part of OECD Members' and non-Members' agenda to promote competition in public procurement. The awareness that fair competition and public sector integrity go hand in hand is raising interest; thus, ways to improve the effectiveness of co-operation between competition and anticorruption authorities are explored.

³³ The International Competition Network's Cartel Working Group published a chapter of the ICN Anti-Cartel Enforcement Manual entitled "*Relationships between Competition Agencies and Public Procurement Bodies*" that suggests practical tools for building constructive relationships between competition agencies and public procurement bodies; see <http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf>

³⁴ Global Forum on Competition, Fighting Corruption and Promoting Competition, Contribution from the United States [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2014\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)19&docLanguage=En).

³⁵ See OECD (2010) Policy Roundtables: Corruption and Collusion in Public Procurement, at <http://www.oecd.org/competition/cartels/46235884.pdf>; OECD Competition Committee (2011), Competition and Procurement, Key Findings, at www.oecd.org/regreform/sectors/competitionandprocurement-2011.htm; Latin American Competition Forum (2012), Session III Improving Effective Public Procurement: Fighting Collusion and Corruption, Background Note, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2012\)15&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2012)15&docLanguage=En). The reports include real life cases where corruption and collusion were found to coexist.

The OECD has been examining the relation between collusion and corruption, the co-operation between agencies enforcing competition and anti-corruption policies, as well as knowledge and evidence sharing practices, since 2010³⁶. The Global Forum on Competition of 27-28 February 2014 dedicated a session on *Fighting Corruption and Promoting Competition* to the relationship between competition and corruption, the ability of antitrust enforcement to tackle corruption, the role of competition authorities in fighting corruption, and the allocation of tasks between competition and anticorruption authorities³⁷. Participants in the Global Forum pointed out that businesses are generally more willing to invest where there is increased transparency and accountability, as they can better predict factors that may affect their return on investment and work towards minimising risks. Businesses are also unwilling to take the legal risk involved in dealing with corrupt authorities as they increasingly need to comply with national and international commitments against bribery and corruption. Several participants argued for a role of competition authorities in the fight against corruption, so that responsibilities, resources and tools are better allocated between public authorities.

Several Members and Partners have taken action in strengthening partnerships between competition and anti-corruption authorities (Box 7).

Box 7. Joint actions against corruption and bid rigging in public procurement

The Canadian Competition Bureau has partnerships with several Canadian police forces. It works in particular with the white-collar crime investigation police units, as they may come across evidence of cartel activity in the course of their investigations, which can be used by the Bureau to pursue cartel investigations. Police forces have also provided support to the Bureau in the execution of searches, in particular ensuring the safety and security of Bureau officers and helping with the search and seizure of records. As part of its efforts to strengthen ties with the police forces, the Bureau has placed a number of officers within police units, so that such Bureau and police officers work directly together on common investigations, share good practices and investigative techniques and understand each other's mandates, tasks and areas in which they can co-operate. The Bureau has also conducted joint investigations with the members of the Permanent Anti-corruption Unit (UPAC) in the province of Quebec, to probe into alleged corruption and collusion in municipal tenders in the construction sector. Bureau investigators were deployed in the UPAC to co-run investigations. The experience was very positive, and

³⁶ Ibid.

³⁷ OECD (2014) Global Forum on Competition, Fighting Corruption and Promoting Competition, Summary of Discussion, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)13/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)13/FINAL&doclanguage=en).

found to be a successful and efficient use of resources. The Bureau is continuing its co-operation with UPAC in other investigations.

The Mexican Competition Commission (Comisión Federal de Competencia Económica, COFECE) collaborated with the Ministry of Public Administration, which is in charge of overseeing public procurement including for cases of corruption, to provide joint advice to the Ministry of Health in procurement procedures for vaccines and medicines to reduce the risks of corruption and collusion. In addition, COFECE's staff are trained on public procurement law to be better able to detect corruption, while Ministry of Public Administration staff are trained on competition and prevention, detection and reporting bid rigging in public procurement.

In Poland, the Central Anti-Corruption Bureau developed in 2010 recommendations on anti-corrupt practices in public procurement procedures. The aim of recommendations is to support the heads of procurement authorities. They include descriptions and patterns of corrupt practices, including bid rigging and methods to prevent them. Between 2008 and 2011 the Central Anti-Corruption Bureau together with the Foreign Intelligence Agency controlled contracts exceeding 20 million zlotys for possible bid rigging. In 2012 and 2013, the Office for Competition and Consumer Protection, UOKiK, signed co-operation agreements regarding information exchange with the Chief Prosecutor's Office and the Internal Security Agency. In 2013, UOKiK co-organised with the Central Anti-Corruption Bureau and the Public Procurement Office an international conference to commemorate the United Nations' International Anti-Corruption Day, to discuss the role of public administration institutions in identifying public procurement irregularities.

In Sweden, through its work in relation to competition and procurement law enforcement, the Swedish Competition Authority (SCA) observes links to corruption when handling cases for example concerning anti-competitive agreements or co-operation between companies as well as illegal direct awards of contracts. SCA has been working with the Swedish national anticorruption unit, in order to combat collusive practices and help maintain well-functioning markets.

The Antitrust Division of the United States (U.S.) Department of Justice (the Division) investigates and prosecutes antitrust violations. When such violations are combined with corruption, the Division works with other enforcement entities. In fact, the U.S. Attorney's Manual, 7-1.100 notes that there may be "*mutual benefits to be derived in situations where a United States Attorney's office and the Antitrust Division can coordinate the prosecution and disposition of criminal matters that involve both antitrust offenses and other offenses*". Also, the Federal Bureau of Investigation (FBI) assists the Division through its International Corruption Unit (ICU) which, in addition to antitrust offenses, supervises investigation of allegations of corruption of U.S. public officials and fraud against the U.S. Government. The reason for grouping these activities under the ICU is that investigations in one of these areas can lead to intelligence on another.

In Latvia, the majority of cartel cases dealt by the Competition Council are bid-rigging cases, which the Council investigated based on information received by the anticorruption authority. Breaches of competition law are handled by the Competition Council while corruption issues are dealt with by the anticorruption authority. The two authorities work together through formal communications (for example, when the anticorruption authority officially reports a possible case to the Competition Council via a formal application) as well as informal, employee-level contacts. The Competition Council envisages conducting joint

trainings for competition and anticorruption officials as well as joint investigations.

The Russian Federal Antimonopoly Service works with the Ministry of Internal Affairs, the General Prosecutor's Office and the Investigative Committee of the Russian Federation in different ways, including information exchange, joint investigations, dawn raids, on the basis of bilateral and multilateral agreements.

Source: Global Forum on Competition, Fighting Corruption and Promoting Competition, Summary of Discussion, [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)13/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)13/FINAL&doclanguage=en).

The interaction between collusion and corruption in public procurement makes it important that competition and anticorruption authorities support each other's efforts, and work together to share information and tasks to better protect public procurement integrity and outcomes. Future work by the Competition Committee could collect good practices on co-operation between competition and anticorruption authorities, as well as on skills and conditions that anticorruption authorities may need to be able to optimise the fight against bid rigging, such as the range of professional skills, investigative methods, and type of resources like specialised software. Future work could also include good practices and recommendations for the development of comprehensive strategies to fight corruption and collusion in public procurement.

5.3 *Develop mechanisms to measure and monitor over time the impact of public procurement laws and practices on competition*

The Recommendation asks Adherents to “develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations”.

In 2011 the Mexican Institute for Competitiveness (Instituto Mexicano para la Competitividad, IMCO) developed 41 indicators to assess the quality of the public procurement legislation in Mexico's 32 states³⁸ on the basis of the Recommendation's Guidelines and with the support of the Mexican Competition Authority. The 41 indicators serve to a) reveal the current status of the public procurement legislation in each state, b) identify areas for improvement, c) define a strategy for improvement, d) compare regional systems and form the basis for an exchange of good practices and expertise, and e) monitor progress over time in each state, in terms of the capacity of the

³⁸ Instituto Mexicano para la Competitividad, Competition in public procurement: evaluation of quality of the state regulations in Mexico (Competencia en las compras públicas: Evaluación de la calidad de la normatividad estatal en México), September 2011, at www.imco.org.mx.

public procurement legislation to foster competition. Based on the outcomes of the evaluation, IMCO recommended improvements to the procurement legislation and practices of the states of Guerrero and Zacatecas.

The Competition Committee could include in its future work the development of indicators to measure and monitor over time the impact of public procurement laws on competition. Such indicators could include measurement of how rules are applied in practice, since survey respondents reported that many challenges are met at implementation, in cases where technical, workforce or budgetary capacity to advocate and enforce competition is limited.

6. Key findings

Findings show that the Recommendation is relied on, is still relevant and does not need to be revised. In particular:

- Countries follow most provisions in the Recommendation. In particular awareness-raising initiatives on the risks of collusion, training materials and checklists for public procurement officials and uses of public procurement data to detect collusion seem well aligned with the Recommendation and often draw on or incorporate it as set forth in section 4.1 of the report.
- Some delegates reported some challenges notably related to the frequency and quality of co-operation between public procurement and competition authorities. The lack of appropriate incentives for public procurement officials to actively seek such co-operation was noted as a significant obstacle.
- Adherents should continue to strengthen the areas in which compliance may be the lowest, through, for example, the adoption of tools to measure and monitor the impact of public procurement laws and regulations on competition.
- A next round of monitoring of the implementation of the Recommendation could include an in-depth stock-taking of country measures to monitor the level and quality of compliance with the Recommendation at central and sub-central levels of government, as respondents did not report having a central mechanism for monitoring implementation by all levels of government.
- The Competition Committee will conduct the next monitoring of the implementation of the Recommendation as appropriate.

7. Future work

Future work could explore issues such as:

- collusion risks arising in pre-tender market research activities, as well as initiatives to train the private sector, including small and medium-sized enterprises, on competition risks in public procurement;
- good practices in proactive advocacy and co-operation methods among authorities involved or concerned by the fight against bid-rigging, including competition, public procurement and anticorruption authorities, as well as audit institutions;
- improving the incentives for procurement officials to take an active interest in combatting bid-rigging, and reducing divergent incentives.

ANNEX I**RECOMMENDATION OF THE COUNCIL ON FIGHTING BID RIGGING IN PUBLIC PROCUREMENT**

As Approved by Council on 17 July 2012
[C(2012)115 - C(2012)115/CORR1 and C/M(2012)9, [item 137](#)]

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels, which invites “Member countries [to] ensure that their competition laws effectively halt and deter hard core cartels”, which include “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices [or] make rigged bids (collusive tenders)” [C(98)35/FINAL];

HAVING REGARD to the Recommendation of the Council on Enhancing Integrity in Public Procurement, which lists collusion among the “integrity violations” in the field of public procurement and recognises that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayers’ money [C(2008)105];

HAVING REGARD in particular to Principle 1 (Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers) and Principle 7 (Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly) of the Council Recommendation on Enhancing Integrity in Public Procurement;

HAVING REGARD to the Third Report on the Implementation of the Council Recommendation concerning Effective Action Against Hard Core Cartels, which lists the fight against anticompetitive behaviour in auctions and in procurement among the enforcement priorities that Members should pursue in their fight against hard core cartels [[C\(2005\)159](#)];

RECOGNISING that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

RECOGNISING that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, “value for money” to the benefit of end consumers, users of public services and taxpayers;

RECOGNISING that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers;

RECOGNISING that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition;

RECOGNISING that rules that unduly restrict competition often can be revised in a way that promotes market competition while still achieving public policy objectives; and

RECOGNISING the efforts to disseminate the Guidelines on Fighting Bid Rigging in Public Procurement adopted by the Competition Committee in 2009 [DAF/COMP(2009)1/FINAL];

NOTING that a number of OECD Members have developed tools to detect and limit bid rigging in public procurement tenders;

On the proposal of the Competition Committee:

-
- I. RECOMMENDS that Members assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money.**

To this effect, officials responsible for public procurement at all levels of government should:

1. Understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser, and the potential suppliers of these products and/or services.
2. Promote competition by maximising participation of potential bidders by:
 - i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition;
 - ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products;
 - iii) allowing firms from other countries or from other regions within the country in question to participate, where appropriate; and
 - iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract.
3. Design the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies.
4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a

continuing interest in bidding on future projects. Qualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders.

5. Strengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive, and to store information about public procurement opportunities in order to allow appropriate analysis of bidding behaviour and of bid data.
6. Require all bidders to sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.
7. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, suspension from participating in public tenders for a certain period of time, sanctions for signing an untruthful Certificate of Independent Bid Determination, and liability for damages to the procuring agency. Sanctions should ensure sufficient deterrence, taking into account the country's leniency policy, if applicable.

II. RECOMMENDS that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.

In particular, Members should encourage competition authorities to:

1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;
2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and

3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Members should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials.

III. RECOMMENDS that Members encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part.

IV. RECOMMENDS that Members develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

V. INVITES Members to disseminate this Recommendation widely within their governments and agencies.

VI. INVITES non-Members to adhere to this Recommendation and to implement it.

VII. INSTRUCTS the Competition Committee to:

- i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;
- ii) promote this Recommendation with other relevant committees and bodies of the OECD; and
- iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

ANNEX II

**GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC
PROCUREMENT**

[DAF/COMP(2009)1/FINAL]

1. Introduction

Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organisations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement¹. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD Member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

¹. In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, *Bribery in Procurement, Methods, Actors and Counter-Measures*, 2007.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting “cover” (higher) bids².

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- **Cover bidding.** Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.
- **Bid suppression.** Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner’s bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.
- **Bid rotation.** In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest

². In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for subcontracting works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

- **Market allocation.** Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. **Industry, product and service characteristics that help support collusion**

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- **Small number of companies.** Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids.
- **Little or no entry.** When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

- **Market conditions.** Significant changes in demand or supply conditions tend to destabilise ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.
- **Industry associations.** Industry associations³ can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.
- **Repetitive bidding.** Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.
- **Identical or simple products or services.** When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.
- **Few if any substitutes.** When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.
- **Little or no technological change.** Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

3. Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

A. CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE RISKS OF BID RIGGING

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best “value for money”. Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.
- Determine whether the market in which you will purchase has characteristics that make collusion more likely¹.
- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B² procurement.
- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.

1. See “Industry, product and service characteristics that help support collusion” above.

2. Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

- Collect information about past tenders for the same or similar products.
- Co-ordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.
- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to 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 reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.
- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.
- Reduce constraints on foreign participation in procurement whenever possible.
- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

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- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:
 - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.)³.
 - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.
 - By keeping official lists of approved contractors or certification by official certification bodies.
 - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.
 - By using an electronic bidding system, if available.
 - Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only⁴. For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.
 - Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.
 - Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

³. Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

⁴. Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the ‘splitting contracts’ technique could provide an opportunity to conspirators to better allocate contracts.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.
- Use performance specifications and state what is actually required, rather than providing a product description.
- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require bidders to quote per unit. This rate can then be applied once quantities are known.
- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.
- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.
- Work together with other public sector procurers and run joint procurement.
- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.
- Limit as much as possible communications between bidders during the tender process⁵. Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.
- Carefully consider what information is disclosed to bidders at the time of the public bid opening.
- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.
- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.
- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of

⁵. For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

procurement may include negotiated tenders⁶ and framework agreements⁷.

- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.
- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.
- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.
- Do not disclose or unnecessarily limit the number of bidders in the bidding process.
- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination⁸.

6. In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

7. In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

8. A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.
- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.
- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the procuring agency to seek damages, and any sanctions under the competition law.
- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated⁹.
- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.

⁹. Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to co-ordinate their bid.
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.
- Do not favour incumbents¹⁰. Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.
- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.
- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.
- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.
- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.
- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information

¹⁰. The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.
- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).
- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion¹¹.
- Adopt a policy to review selected tenders periodically.
- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.
- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.
- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.
- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.
- Inform yourself about your country's leniency policy¹², if applicable, and review your policy on suspension from qualification to bid, where

¹¹. See "Industry, product and service characteristics that help support collusion" above.

there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.

- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.
- Establish co-operative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

^{12.} Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its involvement in particular cartel activities, including bid rigging schemes, and agrees to co-operate with the competition authority's investigation.

B. CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Subcontracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.
- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.
- The winning bidder repeatedly subcontracts work to unsuccessful bidders.
- The winning bidder does not accept the contract and is later found to be a subcontractor.
- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.
- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.
- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.
- Bids from different companies contain identical miscalculations.
- Bids from different companies contain a significant number of identical estimates of the cost of certain items.
- The packaging from different companies has similar postmarks or post metering machine marks.
- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.
- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.
- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be co-ordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme.

A common practice in cover pricing schemes is for the provider of the cover price to add 10% or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.
- Anticipated discounts or rebates disappear unexpectedly.
- Identical pricing can raise concerns especially when one of the following is true:
 - Suppliers' prices were the same for a long period of time,
 - Suppliers' prices were previously different from one another,
 - Suppliers increased price and it is not justified by increased costs, or
 - Suppliers eliminated discounts, especially in a market where discounts were historically given.
- A large difference between the price of a winning bid and other bids.
- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.
- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.
- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.
- Similar transportation costs are specified by local and non-local companies.
- Only one bidder contacts wholesalers for pricing information prior to a bid submission.
- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or co-ordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.
- Statements that bidders justify their prices by looking at “industry suggested prices”, “standard market prices” or “industry price schedules”.
- Statements indicating that certain firms do not sell in a particular area or to particular customers.
- Statements indicating that an area or customer “belongs to” another supplier.
- Statements indicating advance non-public knowledge of competitors’ pricing or bid details or foreknowledge of a firm’s success or failure in a competition for which the results have yet to be published.
- Statements indicating that a supplier submitted a courtesy, complimentary, token, symbolic or cover bid.
- Use of the same terminology by various suppliers when explaining price increases.
- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.
- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.
- Suppliers regularly socialise together or appear to hold regular meetings.
- A company requests a bid package for itself and a competitor.
- A company submits both its own and a competitor's bid and bidding documents.
- A bid is submitted by a company that is incapable of successfully completing the contract.
- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.
- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.
- Do not discuss your concerns with suspected participants.
- Keep all documents, including bid documents, correspondence, envelopes, etc.
- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.
- Contact the relevant competition authority in your jurisdiction.
- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

Fighting bid rigging in public procurement:
Report on implementing the OECD Recommendation

www.oecd.org/daf/competition

