

Tool: Anti-collusion tender clause

Purpose

- To assist procurement practitioners detect suspect bid rigging in a timely manner.
- To communicate to suppliers that bid rigging is an unacceptable practice in public procurement.
- To support competition authorities to investigate suspected cases of bid rigging.

Public Procurement
Principle: **Integrity**

Procurement Stage:
Tendering

Audience: **Policy Maker,
Procuring Entity**

Description

Bid rigging occurs when suppliers/bidders agree among themselves to eliminate competition in the procurement process, thereby denying the public a fair price. Suppliers/bidders can eliminate competition in public procurement in many simple ways, for example:

- Cover bidding: a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer.
- Bid suppression or withdrawal: a competitor agrees not to bid or to withdraw a bid from consideration.
- Market sharing: a competitor agrees to submit bids only in certain geographic areas or only to certain public organisations.
- Bid rotation: competitors agree to take turns at winning business while monitoring their market shares to ensure they all have a predetermined slice of the pie.
- Non-conforming bids: competitors deliberately include terms and conditions they know will not be acceptable to the procuring authority.

Although the schemes used by firms to rig bids vary, they all have one thing in common: the suppliers/bidders agree to eliminate competition so that prices are higher and public organisations pay more.

Procurement practitioners should look for evidence of anti-competitive bid rigging agreements throughout the tender process. The checklist provides detailed information to help procurement practitioners identify anti-competitive practices during the bidding process. Designed to be used by specialists and non-specialists alike, the checklist highlights seven areas for active vigilance.

An anti-collusion tender clause may be included in the tender documents to warn suppliers/bidders that procuring authorities are aware of the risks of bid rigging and will take the necessary actions to prevent such behaviour. It complements **guidelines on detecting bid rigging in public tenders** by soliciting a guarantee from suppliers/bidders when submitting a bid that they have not engaged in bid rigging practices.

The clause should include:

- an explicit right of the procuring authority to report all suspected instances of bid rigging and share otherwise confidential tender information with the relevant competition authority;
- an explicit right of the procuring authority to receive information and approve any subcontractors; and
- an implicit guarantee that a bid has been developed independently and that no consultation, communication, contract, arrangement or understanding has been made between the supplier/bidder and any competitor

The clause may also include the obligation of the supplier/bidder to report if they, or any organisation or person associated with their tender, including directors and senior managers, have ever been subject to proceedings related to anti-competitive conduct domestically or overseas. This information should not, however, be used to automatically exclude any supplier/bidder from the tender process. Instead, it can be used to raise a “red flag” that may be taken into consideration in the evaluation.

Box: Anti-collusion tender clause

1. Facilitating reporting to the relevant competition authority

The procuring authority reserves the right, at its discretion, to report suspected collusive or anti-competitive conduct by bidders to the appropriate regulatory authority and to provide that authority with any relevant bidder information.

2. Disclosure of subcontracting

Suppliers/bidders must indicate if they intend any person (or organisation) who is not an employee to perform work on the services, and they must provide their details. The contract with the successful bidders will require the procuring authority’s prior written approval for any changes to these arrangements, and any further subcontracting.

3. Warranty

The supplier/bidder warrants that their tender has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor, other than:

- a. where certain joint venture arrangements exist between the bidder and a competitor;
- b. where the bidder and a competitor have an agreement that has been authorised by the relevant competition authority; and
- c. where the supplier/bidder has communicated with a competitor for the purpose of subcontracting a portion of the tender, and where the communication with that competitor is limited to the information required to facilitate that particular subcontract.

In such a situation the bidder agrees to fully disclose the full nature and extent of any agreements with competitors to the tendering body. In the event that no such disclosure is made, the bidder warrants that their bid has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor regarding:

- a. prices;
- b. methods, factors or formulas used to calculate prices;
- c. the intention or decision to submit, or not submit, a bid;
- d. the submission of a bid that is non-conforming;
- e. the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates; and
- f. the terms of the bid.

The supplier/bidder acknowledges that if the procuring authority accepts the supplier/bidder's offer and completes any contract the procuring authority will do so in reliance of this warranty.

4. Disclosure of prior anti-competitive conduct

Suppliers/bidders must indicate if they, or any corporation or person associated with their tender, including directors and senior management, are or have ever been subject to proceedings related to anti-competitive conduct domestically or overseas. The information must include:

- a. the names of the parties to the proceedings;
- b. the case number;
- c. the general nature of the proceedings; and
- d. the outcome or current status of the proceedings.

The procuring authority reserves the right, at its discretion, to exclude any supplier/bidder from the procurement process if the supplier/bidder, or any organisation or person, including directors or senior managers associated with their tender, have ever contravened the anti-competitive provisions of [the relevant competition laws] or equivalent laws overseas.

The procuring authority reserves the right, at its discretion, to exclude any supplier/bidder from the procurement process if full disclosure of any or all contraventions of the anti-competitive provisions of the [the relevant competition laws] equivalent laws overseas has not been made.

Source: Adapted from Australian Competition and Consumer Commission (2009), "[Cartels, Deterrence and Detection, A Guide for Government Procurement Officers, Commonwealth of Australia](#)".

Further Resources

OECD (2009), "[Guidelines for Fighting Bid Rigging](#)" (available in 15 languages).