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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from Peru --

12-13 April 2016, Mexico City, Mexico

The attached document from Peru is circulated under Session III of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum 12-13 April 2016, Mexico City, Mexico

Session III: Promoting effective competition in public procurement

Part 2. The use of screens to prevent and detect bid rigging in public procurement

-- CONTRIBUTION FROM PERU --

1. INDECOPI (the National Institute for the Defence of Competition and the Protection of Intellectual Property) maintains a constant watch over various markets, with particular emphasis on bidding in public procurement processes. As a result of those efforts, the Commission for the Defence of Free Competition (hereinafter the Commission) of INDECOPI has investigated and punished cases of collusion in bidding for public procurement in the health sector, specifically in the market for medical oxygen and haemodialysis services.¹
2. In addition, INDECOPI has been making efforts to implement systems for monitoring various markets in the economy, with a view to strengthening its supervision activities and in this way to reinforce the mechanisms for discouraging anticompetitive conduct. Those systems have proven particularly useful in the investigation of conduct prejudicial to competition.
3. When it comes to bidding for public procurement, INDECOPI² is developing a monitoring system which, based on the information generated in those procurement processes, will make it possible to identify cases that present indications of possible anticompetitive practices and could therefore require closer scrutiny by the Commission.
4. The proposed monitoring system will be based on an analysis of a set of indicators for detecting patterns in the conduct of agents that are inconsistent with a competitive environment. The indicators must

¹ By means of Resolution 051-2010/CLC-INDECOPI (first administrative instance), confirmed by Resolution 1167-2013/SDC-INDECOPI (second administrative instance), penalties were imposed on three companies producing medical oxygen. For its part, Resolution 019-2016/CLC-INDECOPI (first administrative instance) imposed penalties on 30 haemodialysis centres.

² The Economic Studies Branch and the Technical Secretariat of the Commission on Free Competition of INDECOPI are working on a proposal.

make it possible to differentiate between procurement processes where bidders compete effectively, submitting independent tenders, and those processes where tenders reflect collusion among bidders. In a noncompetitive environment, moreover, it must be expected that economic proposals will not correspond to the costs that each bidder would face.³

5. The indicators can be based, among other aspects, on the number of bids presented, the winning bids, the level and variation of bidders' economic proposals, the correlation between bidders' proposals, reserve or fictitious bids (for example, those above the benchmark value),. The following are examples of such indicators:

Indicator	Description
$\left(\frac{\text{Bids submitted}_{ib}}{\text{Benchmark value}_i} - 1 \right) \% > 10\%$	When a competitor consistently submits bids higher than the benchmark value for the process ^{2/} , it can in this case expect that its bid will not be accepted, providing possible evidence of cover bidding. Where <i>b</i> refers to the bidder, and <i>i</i> refers to the bids.
$\frac{\text{Numbers of tenders awarded with high prices}_b}{\text{Numbers of tenders awarded}_b}$	More than 0.5 would indicate a high proportion of cases where the bidder has won the process with a bid at or above the benchmark value, providing possible evidence of bid suppression. Where <i>b</i> refers to the bidder.
$\frac{\text{Numbers of tenders awarded}_b}{\text{Number of calls for tenders}_i} \cong \frac{1}{b_i}$	If the percentage of tenders awarded among the bidders is close to the inverse ratio of bidders participating in tendering for a given product, there is possible evidence of bid rotation. Where <i>b</i> refers to the bidder, and <i>i</i> refers to the biddings.
$\frac{\text{Numbers of tenders awarded}_b}{\text{Number of calls for tenders, per region}}$	More than 0.5 would indicate a high proportion of cases where a bidder has won a contract in a given region, while if the proportion in other regions is less than 0.5, there is possible evidence of market allocation. Where <i>b</i> refers to the bidder.

Prepared by: The Economic Studies Branch.

6. An important component of the monitoring system is to have the necessary information for calculating the indicators. This requires systematising the information from public procurement processes in databases that can be reliably managed, and that will facilitate the processing and regular updating of information. A significant volume of information from public bidding processes is compiled and held by the Government Procurement Oversight Agency (*Organismo Supervisor de Contrataciones del Estado*, OSCE). Consequently, in 2013 INDECOPI and the OSCE signed a cooperation agreement under which both institutions would share information and pursue joint training activities in their respective areas of expertise. At the present time, work on systematising information from public bidding processes is being coordinated with the OSCE.

7. As part of implementing the monitoring system, there are plans to have the OSCE systematise the information and assess the performance of the indicators. To this end, it has been decided to apply that assessment to government procurement processes concerning insurance and liquid fuels, conducted between 2007 and 2015.⁴

³ According to the OECD, collusive practices commonly used in tendering processes are: cover bids, bid suppression, bid rotation, and market allocation.

⁴ We are currently working with the OSCE to systematise information from the processes referred to.

8. It should be noted that developing tools of this kind is quite a challenge for the competition authorities since, on one hand, the level of precision must be high so as to avoid false positives or false negatives⁵, and on the other hand, the information must be thoroughly detailed for continuous application over time. However, we agree with the OECD Secretariat that structural and behavioural approaches can be regarded as complementary tools that are highly useful for detecting cartels. In this respect, INDECOPI expects to have both types of tools for analysing the outcome of public bidding processes conducted by the various entities of government.

9. In addition, INDECOPI agrees with the OECD that another measure to permit more effective detection of anticompetitive conduct would be to prepare a manual to combat bid rigging and promote competition in public procurement (public procurement manual). Such a manual can expand the scope of monitoring of collusive practices in the context of public procurement by providing information to the tendering entities on those patterns that point to collusive behaviour. It must be recognised that public entities may have more information than the competition agency on the characteristics of the product (good or service), the market, the bidders, etc.⁶ In this way, the public procurement manual would enhance the probability that anticompetitive conduct will be detected and punished.

10. In this respect, INDECOPI is preparing a public procurement manual with the purpose of ensuring that government bodies (tendering entities) will understand the principal factors that facilitate horizontal collusion. The manual will also contain recommendations for the design of bidding processes that encourage competitive rivalry among bidders, and elements that may indicate collusive practices (based on the behaviour of bidders in procurement processes), and it will stress the importance of the leniency programme in the context of public procurement. In preparing the manual, INDECOPI is considering best international practices⁷, as well as the current legal framework, as recently amended by the Government Procurement Law.⁸

11. The development and implementation of the monitoring system is part of a series of efforts that INDECOPI has made in recent years to boost the probability of detecting and punishing anticompetitive conduct, thereby reinforcing the dissuasive nature of the system. Another important effort of INDECOPI in this area is the leniency programme, launched in 2012, which has yielded satisfactory results. To date, INDECOPI has received five applications for leniency associated with six economic sectors, in which the applicants have provided important evidence for pursuing cases.

12. On this point, we believe that monitoring systems should be regarded as complementary tools to other programmes, such as leniency, in order to enhance the efficiency of efforts to enforce the rules of free competition, and to discourage anticompetitive conduct more effectively. Indeed, to the extent that monitoring systems can serve as tools for identifying cases of collusion, the probability of detection and punishment will increase, and this will encourage businesses involved in bid rigging to enter the leniency programme in order to avoid a penalty. Thus, we view monitoring systems as tools that can contribute to the success of leniency programmes.

⁵ A false positive occurs when the system indicates that a certain condition has been fulfilled, but in fact it has not been fulfilled, and a false negative refers to the contrary case. For example, a false positive would exist if it were erroneously deemed that a certain procurement process was rigged, while a false negative would arise when collusion exists but is not identified.

⁶ OECD (2013). *Ex officio cartel investigations and the use of screens to detect cartels*, DAF/COMP(2013)27, pages 36-37.

⁷ The manual is being designed to reflect the objectives of the OECD Guidelines for Fighting Bid Rigging in Public Procurement, as well as those of other institutions.

⁸ The legal framework for government procurement was amended by Law 30225, the State Procurement Law, published in the Official Gazette on 11 July 2014, and its Regulations, approved by Supreme Decree 350-2012-EF published in the Official Gazette on 10 December 2015.