



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WP3/WD(2010)67
For Official Use**

Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- Bulgaria --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03284507

1. In May 2010 the CPC, based on the significant experience of OECD countries, formulated its approach on the fight against collusive practices in Public Procurement in Bulgaria. The CPC's approach analyses the problems surrounding bid-rigging from different angles – lack of a sufficient level of awareness among contracting authorities and bidders on the competition offences that bid-rigging practices represent, lack of sufficient and systematized data on enforced or continuing collusive practices, lack of cooperation between the institutions involved in Public Procurement or having competences to fight unlawful practices occurring at the occasion of Public Procurement tender procedures.

2. As a first step, the CPC has adopted Guidelines on Fighting Bid-rigging in Public Procurement, accompanied by Checklist of Circumstances Indicating Possible Existence of Bid-rigging Practices. The Guidelines and Checklist have been elaborated using the experience and available similar instruments of OECD countries. The main goal that the CPC pursues with this act is to raise the awareness of contracting authorities as they are the immediate victims of such practices. From a competition policy perspective, Public Procurement officials are also best positioned to collect data and report potential bid-rigging practices to the CPC in order for the latter to be able to initiate proceedings. This is particularly important given the intrinsic difficulty of proving the existence of collusive practices as usually evidence is scarce. The CPC's efforts will be next concentrated on designing appropriate outreach activities in order to incentivize the use of the adopted documents by Public Procurement officials.

3. Given the particular position of the CPC as a quasi-judicial reviewing body of the contracting authorities' actions in Public Procurement procedures according to the Public Procurement Act, the commission is currently analyzing the legal possibility to use internally data gathered in the course of its Public Procurement proceedings that show potential existence of bid-rigging practices so as to enable the antitrust division to initiate proceedings aiming at establishing of infringements of antitrust rules. Such use of data collected in the course of proceedings under the Public Procurement Act for initiating proceedings under the Law on the Protection of Competition has raised so far certain concerns on its legality. A possible way to overcome this difficulty is for the CPC to propose the respective legislative amendments in order to allow the use of the data in question.

4. Furthermore, the CPC, acting according to its competences in Competition Advocacy, intends to review the Public Procurement Act and its Rules on Enforcement, with a special focus placed on identifying legal provisions that are likely to facilitate the occurrence of collusive practices. At this same occasion, the CPC, again following the example of OECD countries, has initially shared with the some members of the Bulgarian parliament and government its idea that further amendments of the Public procurement law are needed and these could include the introduction of Certificates of Independent Bid Determination (CIBDs) in Public Procurement tender procedures. In this respect, the commission proposes that CIBDs are made a requirement for participation in the tender. The use of CIBDs will aim at: (i) informing the participants on the nature of bid-rigging practices as offences under the Law on the Protection of Competition; (ii) preventing the occurrence of bid-rigging practices by envisaging negative consequences for participants who refuse to submit a CIBD or submit a false CIBD. In the commission's view, participants who refuse to submit a CIBD should be excluded from participation in the tender and, respectively, the criminal liability should be engaged for participants who submit a false CIBD. It is necessary to mention in this regard that, under the current criminal legislation in Bulgaria, submission of a false declaration to public authorities constitutes a specific criminal offense to which CIBDs may be referred. The idea of the commission is, in addition, to propose a special provision in the Public Procurement Act that links CIBDs with the outcome of possible proceedings before the CPC. In other words, where, with a decision of the CPC, which has entered into force, it has been established that an undertaking has already been imposed sanction for bid-rigging, it should be made possible for such an undertaking to be disqualified from a given tender even though the undertaking submits a CIBD for this tender.

5. Another possible instrument for prevention that could be used in combination with a CIBD may be found in a requirement of special guarantees (following here the example of Australia). Such a guarantee, certifying the truthfulness of the statements made in the CIBD, could be retained in case proceedings before the CPC for bid-rigging practices have been initiated against the undertaking that made the CIBD. It is also possible to envisage using the amount of the guarantee as a compensation for the damages caused as a result of an established collusive practice in which the undertaking participated. The commission is indeed in the view that such an instrument could represent a strong deterrent for tender participants for entering into bid-rigging practices or, should it be the case, to withdraw from such and report other participants. Reporting in this latter case of other colluding tender participants from a participant in a collusion practice is here additionally incentivized by the existing Cartel Leniency Program of the CPC.

6. Finally, the CPC is currently working on indentifying possible ways for cooperation and joint actions with other institutions which are involved or have competences in the field of fighting unlawful practices occurring at the occasion of Public Procurement tenders. Such institutions would mainly be the state financial control bodies and anti-corruption bodies. It is the commission's opinion that a close cooperation between these institutions having for a common focus offences occurring in the Public Procurement process would likely be the best way of tackling this particularly harmful for the society problem. This approach would be even more efficient given the fact that such offences, though of different legal nature, are very often part of a one single strategy for unlawful appropriation of public wealth. From an antitrust enforcement point of view, the main benefit of such cooperation and joint actions would be to provide sufficient evidences for the establishment of bid-rigging practices.