

Competition Law – BID RIGGING FACTSHEET (May 2019)

Legal principle: In order to ensure that tenders submitted in the context of public procurement comply with the conditions of genuine and serious competition, any coordination between competitors prior to the submission of tenders constitutes an anti-competitive agreement.

All contracts are concerned (public works, supply, provision of services) whether the tender process is open or restricted, including over-the-counter contracts, public service delegations or contracts concluded under purchase orders.

The most common example is coordination on the price level before the submission of tenders, however a mere exchange of information is illegal since it is likely to reduce the tenders' autonomy and mislead the public purchaser.

In particular, the public purchaser will be misled when:

- companies initially cooperate an exchange information with the aim to subcontracting (or co-contracting) but finally decide to submit separate bids,
- companies submit falsely competitive separate bids (cover bids),
- undertakings belonging to the same group submit separate bids having previously exchanged their contents,
- or when a package bid is in fact the result of a prior partition of the markets or lots.

In the absence of blatant evidence of the agreement, the Competition Authority's investigation department proceeds, as a general rule, by establishing a body of serious, precise and corroborating evidence, but not always. The peculiarity of public procurement agreements is the low level of evidence that has been used in some cases. In such extreme cases, it could almost result in a shift of the burden of proof: the investigative services bring a set of "inconclusive" facts, but which will ultimately be held against the defendant to the extent that the company is not able to provide another plausible explanation.

This is an important element to be taken into account for bidding companies who must be particularly vigilant.

In case of a suspected bid rigging arrangement, the public purchaser must refrain from any communication (to the media or to the bidding companies) of his intention to refer the matter to the Competition Authority. Such a communication will discourage the Authority's investigation department from conducting a dawn raid because of the reduced likelihood of finding any evidence of the cartel. In such case a rejection decision is more likely (see Decision of the Authority No 19-D-06 of 19 April 2019 on public works contracts for the extension of the Bordeaux tramway).