



सत्यमेव जयते



भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

ADVOCACY BOOKLET

BID RIGGING

UNDER THE COMPETITION ACT, 2002



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INTRODUCTION

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, (the Act) prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Any such agreement is void.

An agreement may be horizontal i.e. between enterprises, persons, associations, etc. engaged in identical or similar trade of goods or provision of services, or it may be vertical i.e. amongst enterprises or persons at different stages or levels of the production chain in different markets.

The Act evaluates anti-competitive agreements based either on presumptive rule approach or on 'rule of reason' approach.

Four types of horizontal agreements among enterprises, persons, associations, etc. engaged in identical or similar trade of goods or services, including cartels, shall be presumed to have appreciable adverse effect on competition and shall be void. These four types of horizontal agreements are enumerated in the Act [section 3, sub-section (3)] as follows:

- a) directly or indirectly determines purchase or sale of prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;



- c) shares the market or source of production or provision of services by way of allocation of geographical area or market, or type of goods or services, or number of customers in the market or any other similar way;
- d) directly or indirectly results in bid rigging or collusive bidding.

Bid rigging or collusive bidding is, thus, one of the four horizontal agreements that shall be presumed to have appreciable adverse effect on competition.

WHAT IS BID RIGGING?

The Explanation to section 3, sub-section (3) of the Act defines "bid rigging" as "any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

BID RIGGING IS ANTI-COMPETITIVE

Bidding, as a procedure, is intended to enable the procurement of goods or services on the most favourable terms and conditions. Invitation of bids is resorted to both by Government (and Government



entities) and private bodies (companies, corporations, etc.). But the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti-competitive.

Collusive bidding or bid rigging may be of different kinds, namely, agreements to submit identical bids, agreements as to who shall submit the lowest bid, agreements for the submission of cover bids (voluntarily inflated bids), agreements not to bid against each other, agreements on common norms to calculate prices or terms of bids, agreements to squeeze out outside bidders, agreements designating bid winners in advance on a rotational basis, or on a geographical or customer allocation basis. Any agreement as to the bids which any of the parties may offer at an auction for the sale of goods or any agreement through which any party agrees to abstain from bidding for any auction for the sale of goods, which eliminates or distorts competition will be captured by section 3, sub section 3, clause (d) of the Act.

Inherent in some of these agreements, is a compensation system to the unsuccessful bidders by dividing a certain percentage of profits of successful bidders.

If bid rigging takes place in Government tenders, it is likely to have severe adverse effects on its purchases and on public spending.

Bid rigging or collusive bidding is treated with severity in the law. The presumptive approach reflects the severe treatment.



FORMS OF BID RIGGING

Bid rigging may take many forms, but bid rigging conspiracies usually fall into one or more of the following categories:

Bid Suppression

In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

Complementary Bidding

Complementary bidding (also known as 'cover' or 'courtesy' bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.



Bid Rotation

In bid rotation schemes, all conspirators submit bids but take turns to be the lowest bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator. A strict bid rotation pattern defies the law of chance and suggests that collusion is taking place.

Subcontracting

Subcontracting arrangements are often part of a bid rigging scheme. Competitors, who agree not to bid or to submit a losing bid, frequently receive subcontracts or supply contracts in exchange from the successful bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Almost all forms of bid rigging schemes have one thing in common: an agreement among some or all of the bidders, which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.



BID PATTERNS

Bid rigging can be difficult to detect. Collusive agreements are usually reached in secrecy with only the participants privy to the scheme of conspiracy. However, suspicions may be aroused by unusual bidding or something a bidder says or does. Certain patterns of bidding would seem to be at odds with a competitive market and suggest the possibility of collusion.

An agreement (in collusion) not to respond to an invitation to tender until after discussions with other persons invited to tender, is also a bid rigging offence.

SUSPICIOUS BEHAVIOR

Certain patterns in bids can give rise to suspicion of collusion. Situations of suspicious behavior include the following (illustrative and not exhaustive):

- 1) The bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate that the designated bid winner has prepared all other bids (of the losers).
- 2) Bid documents contain the same corrections and alterations indicating last minute changes.
- 3) A bidder seeks a bid package for himself/herself and also for the competitor.
- 4) A bidder submits his/her bid and also the competitor's.



- 5) A party brings multiple bids to a bid opening and submits its bid after coming to know as to who else is bidding.
- 6) A bidder makes a statement indicating advance knowledge of the offers of the competitors.
- 7) A bidder makes a statement that a bid is a 'complementary', 'token' or 'cover' bid.
- 8) A bidder makes a statement that the bidders have discussed prices and reached an understanding.

COMMISSION'S POWERS

The Commission has the power to pass *inter alia* any or all of the following orders (section 27):

- 1) direct the parties to discontinue and not to re-enter such agreement;
- 2) direct the enterprise concerned to modify the agreement;
- 3) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
- 4) pass such other orders or issue such directions as it may deem fit.
- 5) In addition, the Commission can impose such penalty as it may deem fit. The penalty can be up to ten percent of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.



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In case the bid-rigging or collusive bidding agreement referred to in section 3 sub-section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its total turnover for each year of the continuance of such agreement, whichever is higher.

The penalty can therefore be severe, and result in heavy financial and other cost on the erring party.

It would follow that if any anti-competitive agreement, including agreement for bid rigging or collusive bidding, is entered into by an association, such as a trade association, such association could also be liable to be proceeded against under the provisions of the Act, and it could be subject to any of the orders under section 27 mentioned above, including the imposition the penalty.



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