



ADVOCACY SERIES

3

Competition Act, 2002

PROVISIONS RELATING TO

Bid Rigging



Fair Competition
for Greater Good

भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA



VISION

To promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth.

MISSION 2020

Competition Commission of India aims to establish a robust competitive environment through

© proactive engagement with all stakeholders, including consumers, industry, government and international jurisdictions

© being a knowledge intensive organization with high competence levels

© professionalism, transparency, resolve and wisdom in enforcement.

DISCLAIMER

This quick guide is published as part of the Competition Advocacy and Awareness Programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009, and seek legal advice, wherever necessary.



INTRODUCTION

The Competition Act, 2002, (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

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.

Bid rigging or collusive bidding is one of the horizontal agreements that shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act.

WHAT IS BID RIGGING?

The explanation to sub-section (3) of 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 practice, 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 occur in various ways. Some of the most commonly adopted ways are:

- ✓ 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

- ✓ 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

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 most 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 are either 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.

SOME SUSPICIOUS BEHAVIOUR PATTERNS

Bid rigging can be difficult to detect. However, suspicions may be aroused by unusual bidding or something a bidder says or does. 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. Certain patterns in bids can give rise to

suspicion of collusion. Situations of suspicious behaviour 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 bid.
- 5) A party brings multiple bids to a bid opening and submits its bid after coming to know 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.

INQUIRY INTO BID RIGGING

In exercise of powers vested under Section 19 of the Act, the Commission may inquire into any alleged contravention under sub-section (3) of Section 3 of the Act that proscribes bid rigging.

The Commission, on being satisfied that there exists a prima facie case of bid rigging, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is also vested with powers of civil court besides powers to conduct 'search and seizure'.

Note: For the details of the procedures related to inquiry and investigations please refer to Regulation No. 2 of 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

POWERS OF THE COMMISSION

After the inquiry, the Commission may pass inter- alia any or all of the following orders under section 27 of the Act:

- 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.



PENALTY

The Commission may impose such penalty as it deems fit. The penalty can be up to 10% 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. In case the bid-rigging or collusive bidding agreement referred to in sub-section (3) of 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 3 times of its profit for each year of the continuance of such agreement or 10% of its 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.

Section 46 of the Act empowers the Commission to impose lesser penalty upon a party in a cartel if it makes true, full and vital disclosure leading to busting of the cartel.

However, during the investigation if it is found that the party has not complied with the condition on which lesser penalty was imposed or disclosure is not vital or false evidence has been furnished, the party may not receive the leniency.

Note: For the details of the conditions for lesser penalty please refer to Regulation No. 4 of 2009 dated August 13, 2009(also available on the CCI website www.cci.gov.in)

INTERIM ORDER



Under section 33 of the Act, , during the pendency of an inquiry into bid rigging, the Commission may temporarily restrain any party from carrying on the offending act until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems necessary.

Note: For the details of the procedures related to interim orders please refer to Regulation No. 2 of 2009 dated May 21, 2009 (also available on the CCI website www.cci.gov.in)

APPEALS

The Competition Appellate Tribunal (COMPAT) is established under Section 53A to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.

An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.



ORGANOGRAM

Chairperson

Member

Member

Member

Member

Member

Member

Maximum 7 Members (including Chairperson)

Economic Division

Combination Division

Anti-Trust Division

Legal Division

Investigation Division

Advocacy Division

Capacity Building Division

Secretariat

DG Office

Regulations

notified by the Competition Commission of India

- ▶ The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009; (No. 1 of 2009)
- ▶ The Competition Commission of India (General) Regulations, 2009; (No. 2 of 2009)
- ▶ The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009; (No. 3 of 2009)
- ▶ The Competition Commission of India (Lesser Penalty) Regulations, 2009; (No. 4 of 2009)
- ▶ The Competition Commission of India (Determination of Cost of Production) Regulations, 2009; (No. 5 of 2009)
- ▶ The Competition Commission of India (General) Amendment Regulations, 2009; (No. 6 of 2009)
- ▶ The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011; (No. 1 of 2011)
- ▶ The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011

Above regulations
are available at
www.cci.gov.in

Advocacy Booklets
by
Competition Commission of India



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