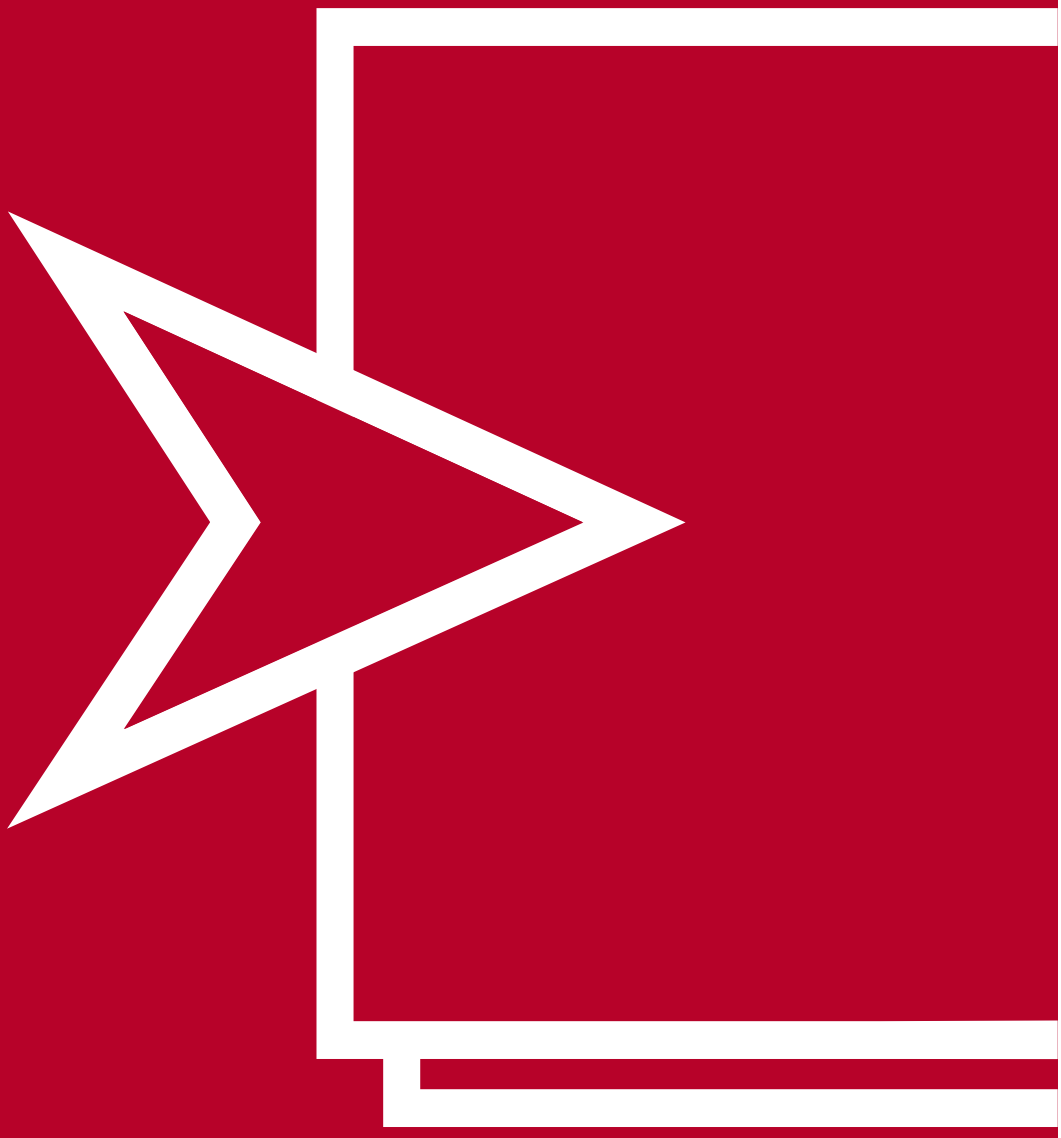
CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

Guide on public procurement and competition



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Presentation

In Spain, as in neighbouring countries, government procurement is of unquestionable economic importance. Through the recommendations included in this Guide on government procurement and competition, the CNC wishes to contribute to the fostering and promotion of effective competition in public procurement procedures for the benefit of the contracting authorities and citizens.

Safeguarding free competition is one of the guiding principles of the regulations on public sector procurement, and is present indirectly in the rest of the principles that inspire those rules, including free access to tenders, publicity and transparency of the procedures, non-discrimination and equal treatment of candidates. Hence the CNC's natural interest in undertaking an initiative aimed at enhancing the application of those principles along two lines: calling attention to those aspects of the public procurement process that may introduce unjustified restraints on competition, and anticipating possible collusive conducts of bidders in those processes, by the light of the categorisation of such behaviour as an infringement of competition law.

The recommendations made in this Guide have been developed with an eminently practically objective and pivot around that dual purpose.

With respect to the first, the Guide seeks to stress for the persons who participate in government procurement mechanisms and procedures the impact on competition that may arise from the decisions made by the procuring authorities in relation to the design, procedure and performance of the tendered contracts, and provide guidance on how to reduce or eliminate that impact. Certainly, when enacting the rules on government procurement, lawmakers have taken into account the respect for the principles of competition in order to reconcile them with other public interest goals, such as efficiency in the use of public funds, streamlining the management of government procurement procedures and control of government expenditure. But the rules on public procurement contemplate a large degree of discretionary authority by government officials when making the decisions that govern public tenders. It is in that discretionary realm where this Guide seeks to be of help, by providing an instrument for effective competition advocacy and promotion.

Furthermore, the very dynamic of the administrative process, and of court decisions, have served to define the types of actions which are not wholly consistent with the rules regulating government procurement and should therefore be eliminated from public tendering processes. In setting out the ones most likely to harm competition, this Guide seeks to contribute to raising awareness of those practices and facilitating their eradication.

The CNC Guide does not pretend to be a substitute for the work of interpreting public procurement rules that is performed by other government agencies, in particular, by the Administrative Procurement Consultative Board as the specific consultative body of the General State Administration on administrative procurement

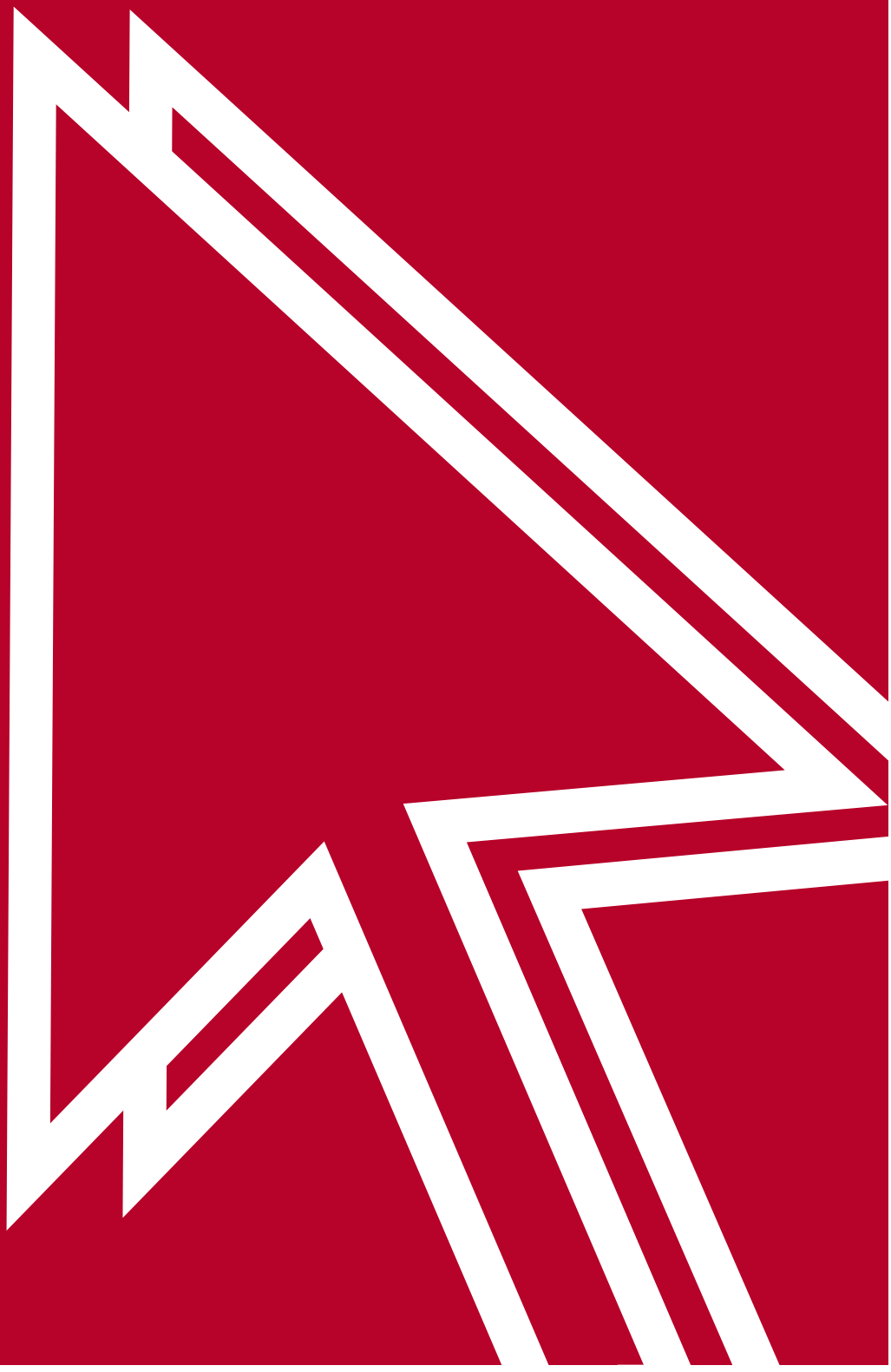
matters. Its recognised competence in this area, and its commentary and analysis, have been taken into account by the CNC in preparing this Guide.

In addition, in line with the work done by other competition authorities and international organisations such as the OECD, the Guide seeks to provide tools for detecting signs of anti-competitive conducts that may be pursued by companies that participate in government tenders to the detriment of the tendering authorities and, ultimately, of the citizens. Based on reliable international estimates, collusion in tenders can drive up the prices of goods and services contracted through such procedures by more than 20%.

The intense enforcement actions carried out by competition authorities in countries in our economic environment against anti-competitive behaviour in government tenders should make us ponder the frequency with which such practices occur and the need for giving government authorities in our countries the means for detecting them. This will favour, moreover, fulfilment of what is stipulated in Additional Provision 27 of the Spanish Government Procurement Act 30/2007 of 30 October 2007 regarding the obligation of contracting authorities to collaborate with the Administrative Procurement Consultative Board in notifying the CNC of any evidence they uncover in the pursuit of their functions that may point to violations of competition law.

Luis Berenguer Fuster
President

1.
Introduction



Introduction

To whom is this Guide addressed?

This Guide is addressed to entities in the public sector that operate in the market as buyers of goods and services through public procurement procedures.

What is the purpose of the Guide?

The purpose is to foster competition in public procurement procedures on two fronts. First, the Guide offers guidance on how to avoid having the design, development and execution of public procurement procedures introduce unjustified constraints on competition, and, second, it provides guidelines that are in line with the recommendations of international organisations such as the OECD for preventing or avoiding bid rigging.

The Guide does not seek to make proposals for modifying the laws and regulations on public procurement, nor to lay down legal interpretative criteria for their application, but rather to make certain recommendations so that, of the variety of possibilities offered by those laws and regulations, the most pro-competitive options can be identified and selected. In any event, the content of this Guide should be understood without prejudice to the current or future assessments that the CNC may make in relation to those laws and regulations.

Why is it important that competition be taken into account in public procurement procedures?

Public procurement is of major importance in Spain: according to data from the EU, public procurement accounted for 14.9% of Spain's GDP in 2008. [1]Competition between bidders provides the means for ensuring that public entities, and ultimately society as a whole, obtain the benefit of the best offers in terms of price, quality and innovation of the goods and services eventually purchased. Deficient competition means government agencies will have to spend more for the goods and services they acquire and therefore increase the burden borne by the citizens. Promoting competition in this area is consistent with the principles that inform the rules on public procurement, namely: free access to tenders, publicity and transparency of the procedures, equal non-discriminatory treatment of candidates, the quest for efficient use of public funds by requiring prior definition of the needs to be satisfied, safeguarding free competition and selection of the best economic offer.

1. European Commission, Public Procurement Indicators 2008, Working Document published on 27 April 2010, available at:
http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2008_en.pdf

How can public entities help foster competition in public procurement?

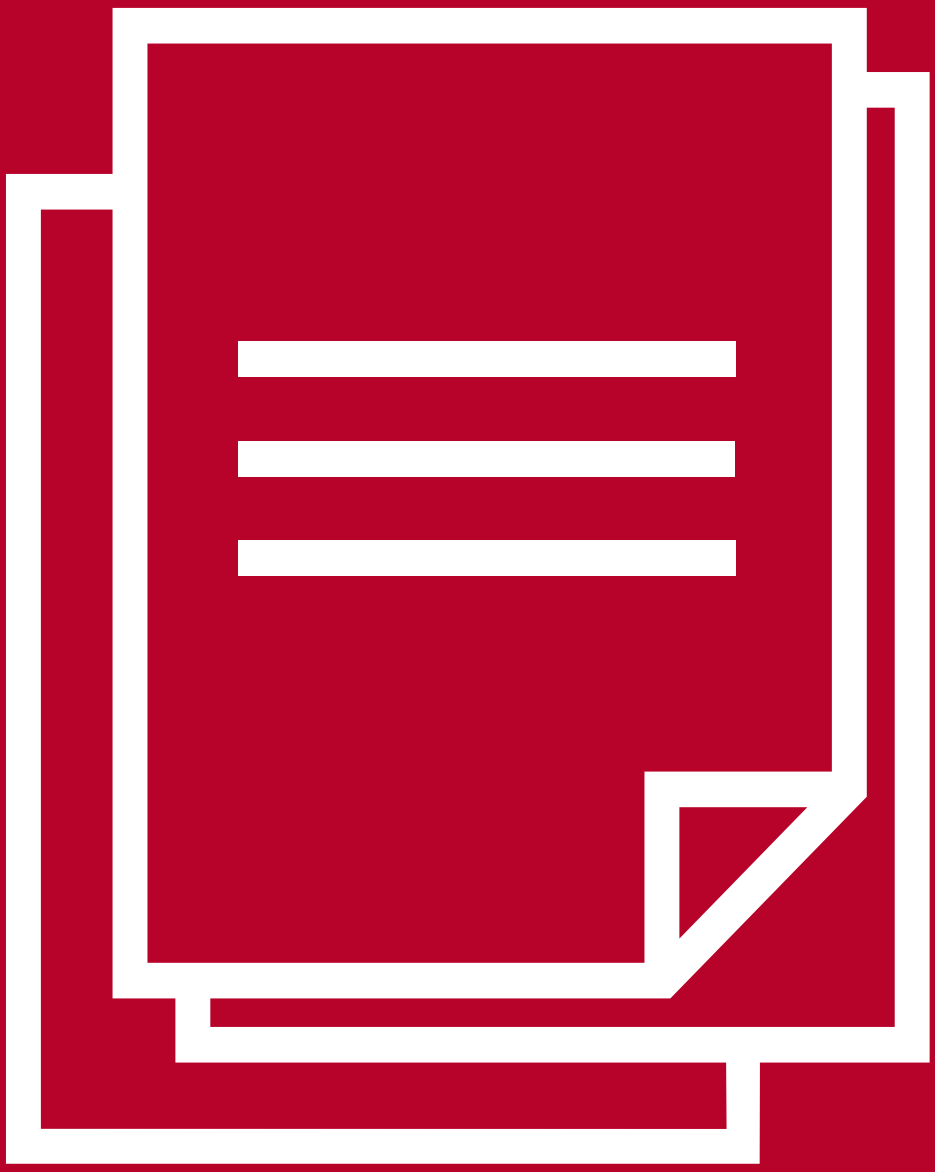
Basically, in two ways:

- By developing procurement procedures that do not introduce any unjustified restrictions of competition in their design or their execution or in the subsequent performance of the contract.
- By helping to prevent and combat potential unlawful collusion between bidders in the procurement process, that is, the type of fraudulent manipulation of the tender system known as bid rigging.

The sections that follow offer guidelines for actions on both of these fronts.

2.

Conclusion, design, development and performance of public contracts



CONCLUSION, DESIGN, DEVELOPMENT AND PERFORMANCE OF PUBLIC CONTRACTS

When can the selection of mechanisms other than public contracts be anti-competitive?

Adequate competition between bidders will bring better price and quality results for the contracting authority and hence for the public interest. Public authorities must ensure such competition exists:

- By enforcing the rules on public procurement, whether at the general level, in accordance with the Spanish Public Procurement Act 30/2007 of 30 October 2007 (hereinafter, the LCSP for the Ley de Contratos del Sector Público), or in specific areas or industries.
- Within the different possibilities available under those rules, by adopting the most pro-competition alternatives, or the least anti-competitive ones. In this regard, certain practices are recommended in public procurement which, though not mandatory for the contracting authorities, do contribute to fostering competition in tenders.

In this dual focus, we have taken into account the interpretation of public procurement law made by Spanish and European Community courts and by the State Administrative Procurement Consultative Board (Junta Consultiva de Contratación Administrativa or JCCA), as well as the reports, recommendations and circulars of that Consultative Board in its work as specific consultative body for the national government on public procurement matters.

Public authorities face decisions of this type over the course of the following phases, which are discussed more fully further below:

- In the decision as to whether or not to conclude the contract.
- If the contract is to be concluded, in selecting the most pro-competitive procedure.
- In the design of the terms of the tendering process and contract.
- During the carrying out of the public tender.
- During the performance of the contract.

The pro-competition principles for public procurement can also be applied in other spheres involving access by individuals to public goods (for example, the use of the public domain).

Both the LCSP and the LPCSE define the situations in which public entities are required to apply the rules on public procurement, ensuring submission to the principles of publicity, competition, transparency, confidentiality, equal treatment, non-discrimination and the safeguarding of free competition.

There are, however, alternative arrangements to contracts that allow public administrations to obtain goods and services that may be acquired eluding those principles:

1. Agreements (Convenios). Leaving aside cases in which two public administrations interact, according to the LCSP agreements can only be used for carrying out actions that do not fall within the

scope of that Act or of the special rules on public procurement. In dubious cases, from the standpoint of competition it is preferable that a contract be used, because an agreement does not allow the possibility of a competitive procedure, whereas a contract normally does. It should be taken into account that in order for an agreement to be concluded, the parties to the agreement must have the same purposes, and must jointly participate in the result obtained, whereas in a contract the parties enter into a relationship of obligations based on reciprocal consideration.

THE PRECISE CONTENT OF THE ACTIVITY AS DEFINING ELEMENT OF THE AGREEMENT

On considering the possibility of an administrative body signing an agreement with a non-profit organisation to sponsor the holding of an international forum on Spanish foreign policy issues, the Administrative Procurement Consultative Board stated that to determine whether the appropriate mechanism is an agreement instead of a private contract it is not sufficient to verify that the general formula used to define the object of the activity to be carried is not captured by the contract objects established in the laws on public procurement, but that instead attention must be paid to the precise concrete content of that activity, taking into account all of its defining elements.

Source: Report 70/90 of 11 April, 2000, Administrative Procurement Consultative Board.

AGREEMENTS FOR THE PROMOTION OF FOOD PRODUCTS

Certain public administrations have been using agreements as instruments for formalising their relations with a food distribution company for the purpose of having that company carry out a campaign for quality regional food products. Given its object, the relationship should have been carried on through an administrative services contract, a more pro-competitive option.

2. Own resources and technical services. The LCSP provides that public entities may be considered own resources or technical services of the administrations for which they perform the essential portion of their activity, when those authorities also exert a control over the public entities comparable to that which they hold over their own services. Both requirements have been fleshed out by EU case-law precedents. In these cases, the administration may satisfy its demand for goods and services by opting to directly assign their provision to the entity considered an own resource, or by making a contract with another entity.

Given the broad terms with which the LCSP formulates the aforesaid requirements, assignments of this kind can become an instrument for avoiding competition in situations where competition might help ensure satisfactory provision of the goods and services in question at a lower price. Therefore, in order to avoid overuse of the recourse to own resources and minimise this risk, the following recommendations are made:

- Make a preliminary assessment as to the extent to which the goods or services are provided by the market, both when it comes to creating a new own resource or when assigning management tasks to already existing ones. Such assignments are to be avoided where the goods and services in question can be provided in the market to the same extent at lower prices as a result of competitive procedures.

- Assess the degree to which the assignment may lead to the provision of goods and services being subcontracted by the own resource to other enterprises. Although this possibility is recognised in the LCSP, which envisages the extension of certain aspects of public procurement rules to such subcontracting arrangements, from the standpoint of competition and efficient allocation of public resources it would be preferable in these situations not to opt for assignment and call a tender instead.

Except for the decision as to whether or not to create the own resource, which is of a different nature, all of these recommendations may either be adopted directly by the contracting authorities, or those authorities may be instructed to apply them by the competent government bodies in the form of general instructions

MODERNISING THE JUSTICE ADMINISTRATION

A management assignment was recently made to the subsidiary of an administrative own resource dedicated to the development of technological engineering solutions in the agriculture, forestry, rural development, environment and marine areas. The assignment involved developing and managing certain telephone and online attention services of the Justice Administration. These services can be provided satisfactorily by the market without the need for a direct assignment to that subsidiary.

Once it has been decided to enter into a contract, how do we select the most pro-competitive procurement procedure?

In theory, the most pro-competitive procedure is the open tender, in which all companies that have the required capacity and quality are eligible, as this is the approach that is the most respectful of the principle of equal treatment. To choose any other procedure, the contracting authorities must carefully weight the impact their decision

The public procurer's freedom to choose a given procurement procedure is conditional on fulfilment of the requirements associated with each of those procedures under the laws on public procurement. In other cases, however, the rules apply certain procedures to be used without establishing any requirements. The contracting authorities must be mindful that the procedure they choose may determine the conditions of competition for the tender.

The recommendations that follow are intended to make it easier for contracting authorities to make decisions that have due regard to the implications the adoption of the different procurement procedures have for competition. They also aim to minimise the competition impact that may be generated by any one procedure in particular, once its application has been decided.

In theory, the most pro-competitive procedure is the **open tender**, in which all companies that have the required capacity and quality are eligible, as this is the approach that is the most respectful of the principle of equal treatment. To choose any other procedure, the contracting authorities must carefully weight the impact their decision will have on competition, even where those alternative

1. In the **restricted tender** the only companies that can submit bids are those which apply to do so and are selected on the basis of their quality, as measured by objective and justified criteria. This is considered an ordinary procedure under the LCSP. When it is used, and even though its essence is to limit the number of bidders to the highest quality ones, when deciding the number of companies to invite to participate, an evaluation should be conducted of the competition impact of that decision, avoiding unnecessary restrictions on eligibility for the tender. The limit need not automatically be set at the legal minimum of five companies, and when that minimum is applied, its use should be adequately justified.

2. In the **negotiated procedure**, the contract is awarded to the bidder selected by the contracting office after consulting and negotiating the terms of the contract with one or more candidates. Except in those cases where it is required that the tender call be publicised, the general rule is that the administration must directly contact the candidates that it believes meet the capacity and quality requirements, and negotiate the technical and economic questions of the contract with each of them.

The **negotiated procedure** is considered extraordinary and can only be used in the circumstances that the Act clearly specifies. Even where its use is permissible, the fewer safeguards for competition that it entails counsel that it only be applied sparingly, particularly in the following cases provided for by the rules on public procurement:

■ **Voided tenders**. When in the open or restricted tender procedures, no bids are presented or none of the bids submitted are adequate, there will be no award. Before then initiating a negotiated procedure it may be advisable to consider the possibility of continuing with the original procedure with certain modifications intended to open it up to a sufficient number of operators. This option may be appropriate when there is enough time to organise it without the risk that the time constraints of the various stages of the process will hinder normal execution of the budget. For example, in contracts where technical and professional quality must be evidenced by a rating of the candidate contractors, the LCSP allows non-application of the requirement for submitting a rating if no bids were submitted in the original tender, or in certain other special circumstances.

■ **Supervening circumstances**. An argument that is frequently wielded is that there are unforeseen circumstances that justify using a negotiated procedure. This is employed in many cases where the circumstances were actually foreseeable. This option should only be reserved for cases that are genuinely exceptional and unforeseeable, taking into account that there is also the possibility of pursuing the ordinary procedure with urgency, which of its own cuts the time frame in half.

In any event, to eliminate the risk of distortion of competition in these procedures:

■ After the initial selection of candidates, the possibility of participating in the procedure should be opened to enterprises that were not initially invited to take part but request to do so later.

■ It would be advisable for the different public administrations to develop operating protocols that identify the criteria used for selecting candidates.

■ In order to ensure equal treatment of all bidders that negotiate with the administration, those protocols should develop the negotiating procedure, as well as the aspects covered by the negotiation and its exact timing.

3. In the **competitive dialogue** —another of the extraordinary procedures whose use the Act makes subject to the fulfilment of certain conditions— the public entity leads an exchange of opinions with the selected candidates, upon prior request from the latter, in order to develop solutions that satisfy their requirements. This procedure, similar to the negotiated procedure, is reserved for contracts that are particularly complex, such as construction of sophisticated infrastructure, and its use is mandatory in the case of public-private collaboration contracts. Competition in this procedure should be promoted by being more flexible as to the number of companies invited to participate. Whenever possible, that number should be higher than the legal minimum of three in order to guarantee effective competition.

Framework agreements may favour coordination between the operators party to the agreement when negotiating their contracts with the administration under the agreement

4. Urgent processing. According to the LCSP, this is only justified in the presence of an urgent necessity that cannot be delayed or if the award must be expedited for reasons of public interest. The main consequence is that the component time frames of the ordinary procedure are cut in half. In certain steps, like the submission of bids, the shortening of the time frame can impact competition negatively by hindering access to the market. Therefore, given that the criterion for allowing use of the urgent procedure is overly vague, it should only be applied where there is a rigorous justification of the reasons for the urgency, giving consideration to the possibility of maintaining the ordinary time frame for key steps like the presentation of bids.

5. Framework agreements and dynamic contracting systems. These form part of the mechanisms available for technical rationalisation of the contracting process between the administration and contractors when the contractual relations extend over a relatively long time period during which a continuous provision of services is expected. The goal is to achieve stability in the contract terms and conditions. Unlike the dynamic systems, which are designed for purchases of current goods, in which any interested supplier who meets the requirements may participate once accepted, framework agreements, once defined do not allow the inclusion of new enterprises during the life of the agreement. Thus, a company that is not included in the framework agreement will not be included in the specific contracts made under that agreement. For this reason, use of this mechanism may be associated with the creation of entry barriers to operators not party to the agreements. The LCSP itself therefore stipulates that framework agreements may be made provided they are not used abusively or in a manner that hinders, restricts or distorts competition. Also, as will be discussed in greater detail in the section of this Guide on the risks of collusion, framework agreements may favour coordination between the operators party to the agreement when negotiating their contracts with the administration under the agreement.

In order to flesh out the aforesaid requirement of the LCSP, the following should be kept in mind when using framework agreements:

- A strict and rigorous justification must be carried out of the following elements:
  - The reasons why this procedure is being used.
  - The duration of the agreement.
  - Any possible extension of the maximum term of the agreement, which, though established in principle at four years, may be prolonged in exceptional circumstances.
- When all or part of the subject matter of a contract under a framework agreement is voided for lack of qualified bidders, or if the number of companies included in a framework agreement is

too small, it may be advisable to chose another procedure that provides sufficient assurances of competition and publicity, for example, an open tender or a negotiated procedure with publicity.

■ When establishing the term of the specific contracts signed toward the end of the term of a framework agreement, it should be kept in mind that a lengthy term will de facto extend the effects of the framework agreement beyond or even well beyond the duration initially established.

How should the tender contract terms be designed so that free competition is favoured?

The tender contract terms and, in particular, the technical specifications, are the documents that determine a potential bidder's eligibility to participate, as well as the key variables on which the bidders will compete. Consequently, public procurers should strive to design them in a manner that ensures the principles of equal treatment and non-discrimination of bidders, as well as the best possible conditions of competition. Similarly, when contracts that have already been made in the past are put out to tender again, the contracting authorities should not just automatically apply the previous tender terms to the new tender, and instead analyse whether their content should be updated or revised to ensure that they are sufficiently pro-competition.

The most significant aspects of tender terms from the standpoint of competition are:

A. ELIGIBILITY TO BID

1. Quality requirements and classification of bidders. The creditworthiness (economic-financial quality) and technical-professional quality of the bidder should tie in with and be proportionate to the subject matter. Technical and professional quality should be evidenced by means of ad hoc documents, or, in the case of works and service contracts worth more than a certain threshold value, by the requirement that the bidders be rated and classified in a given group, subgroup and category.

The specific classification or quality requirements stipulated by the public entity must be justified by reason of the subject matter of the contract, as otherwise excessive classification can heighten entry barriers significantly. The requirements will serve as maximum and minimums at the same time, that is, only enterprises that meet them can participate in the bidding and all enterprises that meet them will be entitled to do so. In addition, it is advisable that contracting authorities in one and the same administration should apply similar quality requirements for contracts that are substantially similar to one another, so as to avoid unjustifiable differences in the treatment of different companies.

EXPERIENCE AS CRITERION

A public administration called a bid for English and French classes for its employees and for preparatory courses for the internal promotion tests of certain corps and ranks. The technical requirements for selecting the teachers distinguished between experience acquired in previous educational contracts with public administrations and experience "of a similar nature" obtained with private companies, and required the demonstration of more experience for candidates who had not previously contracted with the public sector. This disparate treatment does not seem to be justified if the subject matter of the contract is language classes.

INDIVIDUAL SOLVENCY REQUIREMENT FOR COMPANIES BIDDING AS PART OF A JOINT VENTURE

A public company called an open tender to contract engineering services for a technological project to refurbish a building. The terms of the tender accepted the possibility of bids by temporary joint ventures, but did not allow the individual solvency of each member company of the venture to be accumulated for purposes of meeting the minimum solvency requirement, such that the complete solvency of each and every member was required.
Source: CNC Decision to file Case S/0727/10, CENTRO INTERNACIONAL DE CULTURA CONTEMPORÁNEA, S.A.

2. . Requiring a specific legal structure. There is a prohibition of making eligibility for a tender conditional on candidates having a given legal form, for example, a type of commercial company, joint association, non-profit organisation or association of public utility, etc., because this could prevent participation by operators who do not meet such requirement but are nonetheless capable of offering the required service satisfactorily. Similarly, the administrative requirement that bidders participate in a temporary joint venture constrains the decision making capacity of companies and, as will be explained in the section on collusion in public tenders, may unnecessarily heighten the risk of anti-competitive coordination of conduct by the members. The above is without prejudice to the possibility that, as is provided by the regulations, the entity selected may be required to adopt a certain legal form, once it has been awarded the contract, if such transformation is necessary for proper performance of the contract.

THE LEGAL FORM OF THE CONTRACTOR

In relation to contracts for medical assistance and other similar services, the JCCA analysed tender terms that described the performance of that service as the contract subject matter, and stipulated that participation was only open to bidders with the legal form of a "joint association of medical services for businesses". This represents an unnecessary constraint on competition, as it rules out bids from other candidates organised with a different legal form but that are nonetheless capable of demonstrating their credit quality and capacity to perform that function.
Source: Report of the JCCA 6/97 of 20 March 1997.

3. Territorial discrimination. There is a prohibition of any provisions that can give rise to differentiated treatment on the basis of nationality, language, domicile or territory of the selected bidder, albeit indirect differences, such as a preference for experience tied to a give geographical area, or the requirement that the selected tenderer have facilities located in the territory of reference.

TERRITORIAL CRITERIA

In May 2009, in a tender called in relation to information and communications technology for a user support service, a Spanish authority required that the company be physically located in the region where that administration was based. Unless the service cannot be provided online, it does not appear to make sense to require that the company be based in the region in question and not in any other region or even in any other EU Member State. If the objective is to reduce the mean response time in the event of equipment failures, the requirement could be designed less restrictively in terms of competition, for example, by scoring the candidates giving more points to those who offer the service with the shortest response time.

In 1991, in a tender to award a construction project for a sports pavilion, the contracting authority only allowed projects to be presented by architects who were members of the professional association of architects of the region of reference, and not from any other part of Spain. The former Competition Tribunal ruled that this condition was contrary to the Spanish Competition Act.

4. Unnecessary or excessive technical and economic requirements. In relation to the goods covered by the contract, there is a prohibition, subject to certain exceptions provided for in the law, on any reference to types, brands or technical specifications as eligibility conditions for the tender. Requirements that entail a disproportionate economic burden should also be avoided, such as obligations to contract civil liability insurance in amounts that are excessive in relation to the subject matter of the contract.

EXCESSIVE REQUIREMENTS

In a public tender called for installing a cabling system, it was required that the cable to be installed come from a specific manufacturer. According to the LCSP, specifying a brand can only be done on an exceptional basis and solely for the purpose of giving a more comprehensible description of the contract, and must in no event preclude other products that can be considered equivalents.

DISPROPORTIONATE TECHNICAL RESOURCES

In relation to the establishment (design, production and assembly) of an interpretive centre, a technical requirement was established that the company have a team composed of a historian, a specialist in local affairs and another in special display systems, an architect, a graphic designer, an archaeologist, a museum expert, a designer of audiovisual systems and a lighting technician. The requirement that a bidder have such a complex team may stand as an insurmountable barrier to entry for companies that are nonetheless capable of performing the activity satisfactorily.

5. Requirement of quality certifications. The LCSP allows the requirement that bidders must conform to certain quality assurance standards. According to that law, public administrations that decide to require quality certificates in their tender terms must accept the certification issued by any certification entity accredited by the Entidad Nacional de Acreditación (Spanish Accreditation Entity), or by any of the accreditation agencies with which the latter has mutual recognition arrangements. In addition, the terms must make no mention of any specific certification entity. The LCSP also stipulates that requiring a specific quality certification to demonstrate a bidder's solvency must stand as a mere accreditation alternative and not imply the exclusion of the possibility of accreditation by other means.

B. AWARD CRITERIA

There is a prohibition on unduly favouring already established companies or those that have been working in the sector, for example, by assigning an excessive weighting to parameters that may promote discrimination in favour of those operators

The provisions of the LCSP require that the criteria for evaluating bids bear relation to the subject matter of the contract, must be objective, and should be included, along with their weighting, in the terms of the tender. When designing these criteria, special attention should be paid to the following aspects:

a) Assurance of equal treatment and non-discrimination of bidders

There is a prohibition on unduly favouring already established companies or those that have been working in the sector, for example, by assigning an excessive weighting to parameters that may promote discrimination in favour of those operators.

1. **Evaluation of experience**. The LCSP and the relevant case-law precedents and legal thinkers clearly establish that quality is the element that measures a company's suitability, while evaluation criteria should measure the characteristics of the bid. Consequently, the bidder's experience cannot be considered as a scoring parameter for purposes of being awarded the tender. It should therefore be understood that all companies that demonstrate the requisite creditworthiness and quality are equally capable of performing the contract and, consequently the award should be made on the basis of other criteria.

CONFUSION BETWEEN QUALITY AND AWARD CRITERIA

In public works tenders organised by different administrations, the award criteria include experience in executing similar works, the possession of ISO 14001 certification and investments in socio-cultural projects in the city where the works are located. The first two criteria qualify the capacity and quality of the bidder and must therefore not be used as award criteria. Furthermore, the third criterion does not bear a direct relation with the purpose of the contract and should therefore not be taken into account as an award criterion (Art 134 LCSP).

2. **Evaluation of the satisfactory performance of other contracts**. Although the LCSP does not allow public contracts to be awarded to companies that have defaulted on special conditions of the contract, the degree of satisfaction with the performance of the contract cannot be used for purposes of awarding the contract inasmuch as this would contribute to discriminating against new entrants. If the intention is to reward proper performance of previous contracts, or minimise the risk of inadequate provision of the service, this should be done through other mechanisms that do not imply advantages in future tenders.

3. **Rights of first refusal and redemption**. A right of first refusal gives the current contractor advantages, for example, by giving, merely due to its status as current contractor, a greater weighting for its bid if it receives a similar score to that of other competitors. The right of redemption, in turn, allows the beneficiary to be subrogated to the position of the selected tenderer and to replace it in the contract. The advantage this gives the current holder of the contract lessens the competitive tension between it and other competitors, to the detriment of the competitiveness of the bids and hence of the winning bid. Therefore, as a general rule, both rights should be avoided.

INTERCITY BUS SERVICE CONCESSIONS

At times, rights of first refusal and redemption for the benefit of a concessionaire do not refer to the tenders that may be called once the current concession expires, but to the award of other services that may be provided "parallel" to that concession. This is the case, for example, of the rights of first refusal established for the holder of the concession for regular intercity bus passenger transportation services in relation to special types of transportation, like school buses. Tying the two makes it difficult for operators who do not hold bus concessions to enter the market for providing those special services.

The method used for evaluating bids should also allow the existence of a sufficiently broad margin for competition in each of the basic elements

b) Adequate weighting of the basic variables

The elements taken into account when scoring bids, as well as the weighting given to each within the overall evaluation, should reflect the importance and priority of the basic competitive elements. The method used for evaluating bids should also allow the existence of a sufficiently broad margin for competition in each of the basic elements. The following practices hinder achievement of that dual objective.

4. **Inappropriate weighting of the different scoring criteria; the price variable in particular**. When establishing the weightings for each of the criteria, adequate attention must be given to their suitability and relevance to the end objective. In general, save for some exceptional cases, the price offered should be given a fundamental weight in the evaluation of each bid, as this is the objective and economically quantifiable criterion that normally best indicates the level of efficiency of the bidders. Although in contracts for management of public services, where the "customer" is the citizenry, importance must also be given to other variables that are important to the end consumer, such as the quality of the service offered, their assessment should not significantly diminish the priority that should be given to the price or fee offered.

5. **Inadequate reflection of the impact of the offered price or fee on the designated base budget of the project**. The points attributed to the price or fee of the various bids must be proportionate to the reduction of the basic budget permitted by each, in order not to vitiate the impact of this parameter when deciding the contract award. For example, if the maximum point score for this factor is not give to the lowest price or fee offered, but to the one whose price or fee level is closest to the arithmetic mean of the bids presented, this foregoes the opportunity to obtain more aggressive offers, while heightening the risk of alignment of the bids at a level above the competitive price.

INEFFICIENT EVALUATION OF THE PRICE VARIABLE

In a consulting contract for the drafting of a technical study for road construction, the tender terms stipulated that more points would be awarded to the economic offers that came closest to the arithmetic mean of all of the bids accepted. This was the subject of a reasoned opinion issued by the European Commission to the Kingdom of Spain, that considered this practice to be contrary to Europe procurement directives as it led to more expensive offers being scored higher than lower priced ones.

6. **Establishment of limits on prices, fees and other basic characteristics of the service**. Such limits are generally introduced in an attempt to avoid "reckless" bidding, that is, bids that are abnormal or disproportionate in relation to the price payable for the service or to other characteristics of the object of the contract.

The use of these mechanisms may contribute, however, to a lessening of the incentive for companies to offer better conditions, because it is sufficient to offer a given price, known ex ante, in order to obtain the maximum score for a specific element. This anti-competitive effect is aggravated if the limit does not allow sufficient room for improvement in relation to the base price or budget. For these reasons, it is preferable that the criterion for defining the reckless nature of bids be established in such way as does not affect the bidders' incentive to compete, with abnormal or disproportionate bids being weeded out by mechanisms not involving the scoring of the bid.

INADEQUATE CAPS ON OBJECTIVE ELEMENTS OF ASSESSMENT AND WEIGHTINGS: INTERCITY BUS SERVICES

The renewal of certain tenders for regular passenger bus transportation services is governed by specific common principles regarding the scorable elements and the weighting and evaluation of those elements.

The terms of these tenders have established caps on the improvements in the fee and frequency parameters, which prevents bidders from scoring higher for surpassing those caps, that is, the range for improvement that could be attained in the absence of such limits is rapidly exhausted.

The tender terms also establish a weighting for the price (15% of the total) and of the number of dispatches (8% of the total) that are clearly low in relation to other criteria.

INADEQUATE EVALUATION OF THE ECONOMIC OFFER

The general terms and conditions for contracting works, services and supplies of a public entity establish, amongst the possible award criteria for the tender, the contract price, assigning a weighting of 100 points to the lowest priced bid. Each of the other offers is given a minimum of 30 points, even the highest priced. This across-the-board increase of 30 points in the price weighting envisaged in the general contracting conditions, not only diminishes the real weighting of the economically most efficient offer but also acts as a disincentive for bidders to present significant price reductions.

7. Excessive weighting given to criteria of negligible importance for the provision, or that impose additional costs on the bidder in relation to the current holder of the contract. In contracts for management of public services, in particular, the requirement that bidders guarantee the continuance of certain organisational or employment conditions associated with the management of the contract by the current contractor reduce the autonomous organisational capacity of new entrants and hinder the achievement of possible costs savings, in addition to making them bear an additional cost not borne by the current holder. For this reason, if those guarantees are considered truly indispensable, it is preferable from the standpoint of competition that their fulfilment

be stipulated as a special condition for the performance of the contract, instead of trying to ensure continuance by considering them as factors to be given points when scoring and assessing the bids. .

c) Precision in the definition of the criteria

The assessment criteria should clearly reflect the specific objectives whose fulfilment is to be assessed and scored, avoiding overly vague descriptions or a confusion of means and ends. .

8. Deficient definition of the assessment criteria. The definition of each criterion selected should clearly indicate the content of the objective pursued. Once the objectives have been specified, the bidder should be left free to decide the most appropriate means for achieving them, without any interference in how the bidders organise their production factors. When the scoring criteria incorporate value judgements, it is advisable to specify the elements that will be taken into account in making that qualitative evaluation, describing them in terms of sub-criteria and indicating the points to be allotted to each.

IMPRECISE ASSESSMENT CRITERIA

A public administration called an open tender to contract an inspection service for 48 bridges. The terms of the tender included four assessment criteria, namely: economic offer, the programme for executing the work, improvements and shortening of the time frame. The terms did not specify what was meant by "improvements" and by "programme for executing the work", leaving the criteria rather vague.

An administration called a tender to contract a media campaign on gender violence. The terms of the tender did not specify the assessment criteria that would be applied.

The terms of a tender for awarding a town planning agreement prior to the land use planning procedures in relation to the establishment of a major shopping complex included the following award criteria: the location of the land, the characteristics of the commercial floor area to be built and the economic contribution of the bidders. Given that the terms of the tender contained no further information as to how those criteria were to be assessed (for example, not specifying whether the site's proximity to the town would be rewarded or punished, or what minimum characteristics the commercial area should have in order to be acceptable), the limits on the discretionary power of the administration that are needed to avoid rendering the bidders defenceless were absent.

Source: Judgement of the Tribunal Superior de Justicia de Castilla La Mancha 338/2000

CONFUSING THE MEANS AND THE ENDS OF THE CONTRACT

A government body called a tender in May 2009 to award a contract for analysis, study and redesign of its economic management procedures. The terms of the tender gave an exhaustive description of the minimum composition of the required work team and the size, qualifications and training of the staff, as well as the proportion of total staff that should work part time and full time. Apart from introducing a possible barrier to provision of the service by certain companies, this last requirement imposes an unjustified limitation on the organisation of resources that the selected tenderer might consider the most efficient.

ASSESSMENT OF INAPPROPRIATE ELEMENTS

In a tender for a public works project, the award criteria included the probability of being able to comply with the construction timetable, taking into account the other works being executed by each bidder and their degree of influence on the tendered works. This is an appropriate criterion for assessing the quality or capacity of the company, but, once that eligibility condition has been met, the responsibility for meeting the timetable falls exclusively to the bidder; it is the bidder who must ensure that it has the necessary resources for executing the work and to do so according to the stipulated time frame.

d) Other aspects to be avoided

9. **Insufficient transparency in the system of attributing points to the assessment criteria**. The mechanism and parameters that determine the progressivity of the scoring should be explained inasmuch as possible in order to avoid excess discretionary power. Also, it is generally preferable to avoid scoring systems that only allot two marks, a minimum, say zero points, and a maximum, if a set figure is met. Instead, a range of intermediate scores between the two should be allowed. When assessing the economic parameters, it is likewise preferable to follow a system of linear progression between the points allotted to each offer and the degree of improvement that it entails in this regard.

10. **Ex ante disclosure of the bid abnormality thresholds**. When establishing the mechanisms for identifying abnormal or disproportionate bids, for example, in prices, the authorities should avoid systems in which there is a preliminary indication of the "maximum competition threshold", that is, the level of the parameter in question beyond which the offer will be considered disproportionate. Disclosing this information can curtail competition severely, especially if the thresholds established excessively curtails the possible range of levels for the parameters. In general, apart from avoiding that they be known ahead of time, it is advisable that the "reckless bidding thresholds" not be expressed in absolute values and that, as already stated, that the elimination of abnormal bids be done using mechanisms that minimise the possibilities of interfering with the incentives to offer low prices. For example, the presumption may be established that a bid is abnormally low if it is

more than a certain percentage lower than the average of all bids submitted, introducing the following mechanism for weeding out such bids: bidders with offers priced below that threshold can be requested to re-examine the contract and decide whether they ratify or withdraw their bid without penalty, with the warning that, once the bid has been ratified, they will not be allowed to plead the emergence of defects or onset of difficulties for complying with the contract on the agreed terms. Later on, during the contract performance stage, if the contractor attempts to make up for the low price offered with defective fulfilment of the contract, it should be held liable for the harm caused to the public interest by its failure to comply with the covenanted terms and conditions.

11. Scoring elements already taken into account when assessing the quality of the bidder. Although this practice is prohibited by the LCSP, as already mentioned, in some cases the overlap between both criteria is not always so obvious. In particular, when the procuring entity decides to give points for certain quality characteristics (for example, through the accreditation of a given certification), the elements scored should reflect the different levels of quality present in the different bids (for example, the extent to which the element scored contributes to enhancing the technical worth of a bid), instead of reiterating the quality, solvency and capacity qualifications of the bidders, which have already been verified. To avoid overlap, the quality characteristics of relevance for scoring the bids should refer to aspects regarding the content of the offer, and reflect functional elements related to the quality objectives pursued, leaving the bidders free as regards to how they demonstrate that quality.

C. DURATION OF THE CONTRACTS

Excessively long terms, even if they are within the legal limits, pose entry barriers for new operators, who find it impossible to enter the market during the life of the contract

Determining the ideal duration of a contract is crucial for ensuring an adequate level of competition in public tenders. According to the LCSP, the term of the contracts should be established taking into account the nature of the services, the characteristics of their financing and the need to periodically submit their performance to competition. Excessively long terms, even if they are within the legal limits, pose entry barriers for new operators, who find it impossible to enter the market during the life of the contract. Overly short durations, on the other hand, may hinder the achievement of a return on the outlays needed to perform the contracted service, which can deter companies from bidding and thus grant an advantage to the incumbent operators who do not have to make such investments, apart from increasing the management costs borne by the procuring entities.

To reduce both risks:

- It is better that the contracts not last for lengthy periods of time during which they are not exposed to competition.
- Avoid supervening extensions of the contractual term (for example, in contracts for management of public services) as compensation for the introduction of substantial modifications of the contract, unless there is a pressing need to do so, for example, due to an imminent risk of the service being discontinued.
- Even where the extensions are justified and allowable under the tender terms, they should only be relied on as a truly exceptional mechanism, avoiding the risk that granting the contractor successive extensions will close the market for long and potentially indefinite lengths of time.
- In particular, for concessions involving public works and management of public services, the stipulated term should be justified as a function of objective parameters directly related to the time it takes to pay off the investments required for performing the contract or acquiring the contract-related assets.
- The regulatory provisions on contract terms should be given as maximums, which need not be exhausted.

EXTENSIONS OF CONTRACTS FOR MANAGEMENT OF PUBLIC SERVICES

The High Court of Justice of Valencia[2] ruled that it was illegal to add a 10 year extension to the current concession for the municipal urban solid waste pick-up and transportation and road cleaning services. The extension had been granted because a breach of contract or payment default by the administration had upended the concession's economic equilibrium. The Valencia court gave several reasons for its decision. The first is that the possibility of such extension was not originally envisaged in the terms of tender for the contract. The second is that the LCSP only allows the contract to be extended to restore the concession's economic balance in certain circumstances as a result of modifications intentionally brought about by the actions of the administration.

Source: Judgement no. 144/2009 of 17 June 2009 of the Judicial Review Chamber of the TSJ lof the Comunidad Valenciana.

How do the decisions made during the tendering process affect free competition among companies?

1. Equal access to information. The procuring entity should make available to bidders in the tender terms all technical information of relevance for formulating the bids and performing the contract correctly. In contracts for management of public services or public works concessions significant, information asymmetries can arise between the previous concession holder and the rest of the bidders as regards economic factors that are crucial for determining the return earned by the contractor, such as the degree of use of the service or certain operating costs. To prevent lack of familiarity with that information from making it difficult for the other bidders to submit bids that reflect the actual operating parameters, with the consequent lessening of competitive tension, that information should be made public when a contract that is up for renewal is put out to tender.

2. Remedy of errors. When administrative formalities become excessive or unnecessary in relation to the objective pursued, they stand as an obstacle to competition because they impose burdens on the operators that could be avoided and can even exclude offers that are completely competitive. This risk increases when failure to comply with certain procedural requirements is sufficient to render bids ineligible. The regulations anticipate this risk by granting a time period to remedy errors in the filing of administrative documents. As a general rule, errors regarding the accreditation of data or elements regarding characteristics of the company that already existed when the bidding deadline expired can be remedied, whereas those involving the accreditation of something that did not exist at the expiry date, or referring to the content of the bids, cannot be remedied.

3. Effectiveness of the publicity and transparency of the various procedural formalities. Calls for tenders must be publicised, and without prejudice to the use of the mechanisms provided for such purpose in the various official government gazettes, the notices can be disseminated more widely using certain online tools, such as the procurement platform of the Directorate General for State Heritage (Dirección General de Patrimonio del Estado). A broader use of that platform beyond the instances required by regulation by procuring entities to transmit the information on their tenders would expand the circle of potentially interested parties, in particular, in relation to the announcements of tenders, and without the risk of delays that could limit the effectiveness of the publicity.

In any event, the insertion of notices in the respective official journals should be monitored to check that they are placed under adequate headings that do not conceal or mislead about their content.

How do the decisions made after the tendering process affect free competition among companies?

A. SUPERVENING MODIFICATIONS AND COMPLEMENTARY PROVISIONS OF SERVICES

Such a posteriori modifications of the result can eventually vitiate the competitive character of the initial call for tender and introduce changes in the contract or price that alter their nature. These actions may be carried out, moreover, with the aim of obtaining a return on a contract for which the bid price was too low.

1. Supervening modifications. Such changes can only be justified on grounds of public interest that arise from unforeseeable causes, and provided their necessity is duly reasoned in the administrative file. In addition, the modifications cannot affect essential conditions of the contract. In any event, authorities are advised to use this possibility responsibly, within the limits set down by the Act, which requires a rigorous justification of the necessity of the changes, regardless of whether or not the possibility of modification was foreseen in the contract.

ECJ SUCCHI DI FRUTTA JUDGMENT OF 29 APRIL 2004

The European Commission awarded the company Trento Frutta several lots for supply of fruit juice and fruit jams intended for the people of Armenia and of Azerbaijan, with the company receiving, as payment, certain amounts of fruit withdrawn from the market. After the award, the contract was modified to allow the payment to be made in a way that differed from what had been initially stipulated. In view of that decision, Succhi di Frutta, a bidder that had not been selected filed a challenge, arguing that the principles of equal treatment and transparency had been violated, amongst other matters.

The Court of Justice ruled that the procuring entity was not authorised to alter the general tendering system by unilaterally modifying one of the essential conditions because, if that had been indicated in the notice of invitation to tender, the offers the bidders could have submitted would have been significantly different. Consequently, supervening modifications may be regarded as incompatible with Community law unless the modification does not affect any essential or important condition of the invitation to tender, or the possibility of modifications being made, and the type of amendments that are permitted, are provided for clearly and precisely in the tender documents.

The legal rules on supervening modifications initially established in the LCSP has been questioned by Community authorities. Consequently, those rules are likely to be changed in the near-term future to be more restrictive in relation to such subsequent amendments. The following recommendations may be applicable irrespective of the concrete decision eventually made regarding the proposed modifications currently under consideration.

The legal rules on supervening modifications initially established in the LCSP has been questioned by Community authorities

As a general rule, the supervening modification is granted to the initial selected tenderer for the contract, although there is nothing to prevent it from being done by calling for a new tender. In any event, the procuring entity must demonstrate that it is not possible, or at least less reasonable, to achieve the desired objective through

a new call for tender, which is the most competition-friendly approach.

If a supervening modification is made, in addition to scrupulous compliance with the relevant legal provisions, it should be taken into account that there are complementary measures which may contain or reduce the negative impact on competition of this alternative. Those measures could be provided for in the terms of the tender:

- The terms should contain, in addition to the essential conditions of the contract, an express statement of the elements for which subsequent modifications may be admissible in the event of unforeseeable supervening circumstances. This will provide a clear and binding definition of the acceptable grounds for modifications and so reduce the risk of unjustified amendments.

- Given that the subsequent modifications may arise as a result of a deficient drafting of the terms of the tender or project designs, these have to be prepared applying the utmost effort to minimise the risk of having to revise them later on, with emphasis on avoiding treating circumstances that were perfectly foreseeable at the time the tender is called as if they had been "unforeseeable". If the deficiencies in the project design are attributable to a contractor, consideration should be given to claiming liability for defective performance.

- If there is no call for tender, the administration may covenant the new conditions for the service directly with the contractor, as provided in the Act. If the modification of prices is significant in relation to the original contract price, the prices should be checked against the market, even if the percentage price increase over the original budget falls within the legally permitted thresholds.

- Avoid having the modification include new services or goods not directly attributable to the unforeseeable circumstance that gave rise to the amendment.

Other helpful actions toward this end include:

- Monitor the contracts awarded by the public entity, identifying which ones are modified and by what percentage, and publicly disclose that information in an annual report. If this analysis detects frequent use of these practices, which by their nature should be exceptional, then necessary measures should be taken to achieve a more accurate definition of the object of the contract and specify it in the terms of the tender.

- Another interesting tool is for the procuring entity to analyse the percentage variations of the modified contracts with respect to the initial budget. If those percentages are consistently high (albeit within such legally prescribed limits as may apply), this should be taken as a possible sign that the modifications are not due, at least in full, to unforeseeable circumstances.

2. Complementary provisions of services. EIn practice, such additional provisions of services imply that a new contract is being made and awarded by a negotiated procedure. Their use has to be justified by the existence of unexpected circumstances and be confined to cases where the desired result cannot be achieved through an ordinary tender. The LCSP makes this possibility conditional on the additional sum not surpassing a given percentage variation with respect to the original contract price.

As in the case of subsequent modifications, complementary provisions may be misused, for example, to try to make a contract that was obtained by low-priced bid profitable, or by relying on them in situations that cannot properly be considered unforeseeable, if they arise repeatedly, or to use the modifications to introduce changes that vary from the original contract by a large percentage. Consequently, to avoid such misuse, the application of these changes must be justified clearly and expressly, with a precise identification of the reason that made it necessary. When the circumstances alleged bring the cumulative percentage of the complementary provisions added to close to the maximum permitted by the regulations, or where these practices are used systematically in a large number of contracts awarded by the same procuring entity, this should be taken as a sign of deficient fulfilment of the unpredictability condition.

INAPPROPRIATE USE OF COMPLEMENTARY WORKS

In a case involving complementary works in a building that were awarded in a negotiated procedure without publicity, the administration justified this approach by arguing that new installations had to be undertaken as an additional security measure for the building, and that voice and public address systems had to be installed. The file contains no explanation of the reason why these actions should be considered to be the result of unexpected circumstances, as is required by the LCSP. Therefore, they should and could have been arranged through a duly publicised ordinary call for tender.

B. PRICE MODIFICATIONS

An essential starting point for avoiding undue a posteriori changes of prices and ensure effective performance of the contract is a proper initial estimation of the contractor's compensation, having regard to the market prices for the goods or services in question. If the contract is expected to be priced as a function of certain parameters, such as the investments made, then a clear and simple mechanism should be established for checking those parameters. If from the outset it is clear that no revision of prices will be appropriate, this should be stated in the tender terms, as stipulated by the LCSP.

In those cases where specific formulas are envisaged for price revisions, those formulas need to be designed in a manner consistent with the aim of maintaining the financial equilibrium of the contract, with special care to avoid unjustified modifications.

C. SUBCONTRACTING

An essential starting point for avoiding undue a posteriori changes of prices and ensure effective performance of the contract is a proper initial estimation of the contractor's compensation, having regard to the market prices for the goods or services in question

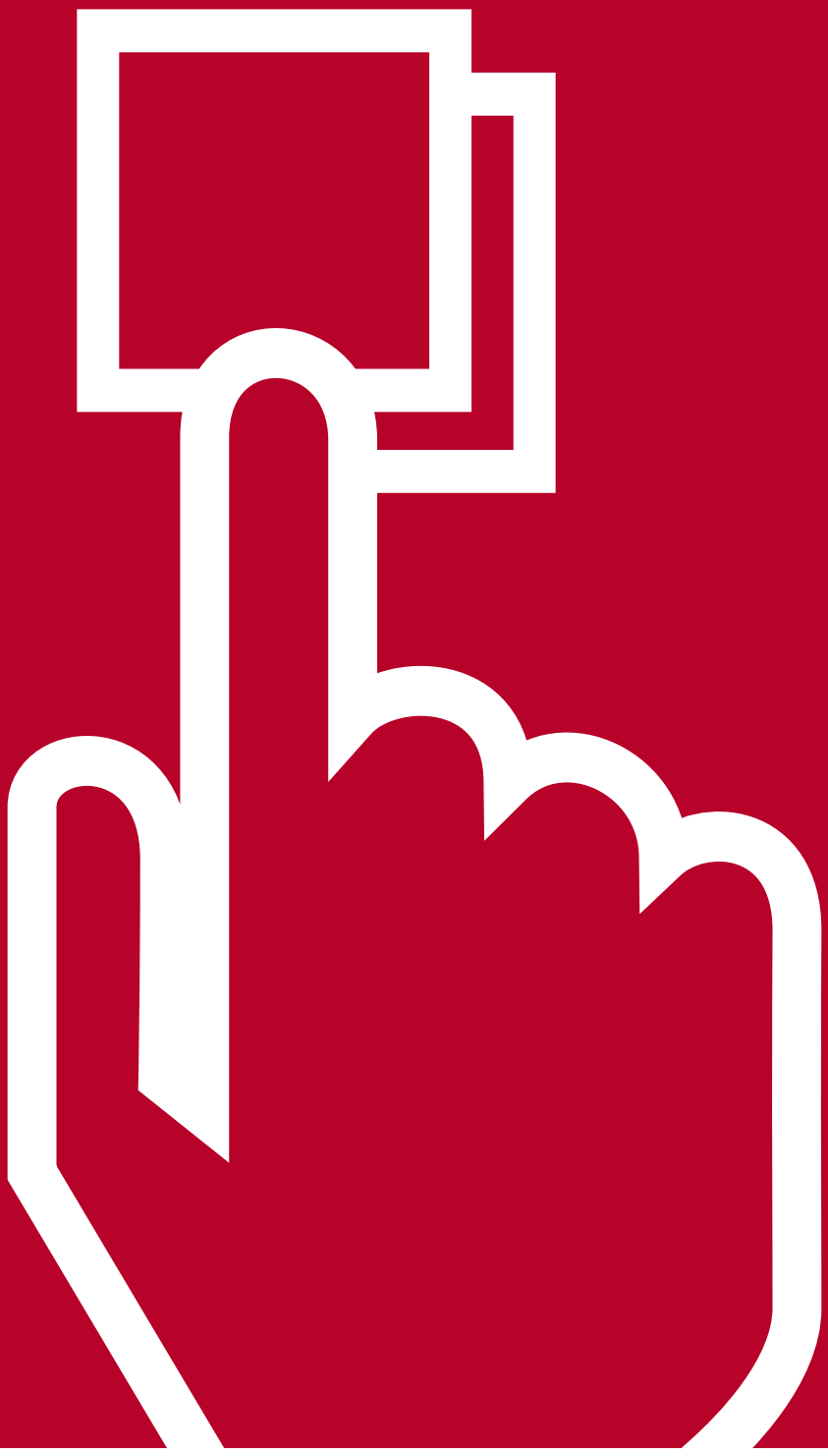
Subcontracting allows the contractor greater flexibility and diversity of organisational options, which can help cut costs. In general, the LCSP allows the contractor to subcontract up to 60% of the amount of the contract, unless otherwise provided in the contract or tender specifications. It also allows the procuring entity to require the contractor to subcontract up to 30% of the budget.

Subcontracting can favour participation by certain companies in the public procurement processes, particularly small and medium enterprises (SMEs). On occasions, however, performance of the contract by one or more different operators apart from the original selected tenderer can give rise to a reduction in competition in the tendering phase, even where done within the limits allowed by the LCSP. This happens where certain companies that could have participated in the tender as bidders choose not to do so, or to submit less aggressive bids, and opt to operate as subcontractors, with the consequent lessening of competition in the tender.

On occasions, however, performance of the contract by one or more different operators apart from the original selected tenderer can give rise to a reduction in competition in the tendering phase

For all of the above reasons, when evaluating what scope to give for possible subcontracting of the service or works, or when deciding to require the contractor to subcontract, the procuring authority must evaluate if the actual market circumstances allow the goal of favouring participation by SMEs in the public contracts to be achieved without a significant reduction of competition in the tendering process.

3.
Bid rigging



Bid rigging

What is bid rigging in a public tender?

Bid rigging in tendering processes occurs when bidders collude to fix the price or any other commercial conditions, or to divide up the market, with the objective of obtaining greater gains from the public tender or auction.

What is so harmful about bid rigging?

These arrangements have a negative impact both on market competition for the goods and services tendered and on the administration's management of public resources. The citizens are thus harmed on two fronts: as consumers, because competition in the market is reduced or eliminated, and as taxpayers, because the resulting public procurement is costlier. By some estimates, prices of goods and services acquired through tenders can be as much as 20% higher when there is bid rigging.

Collusion between companies is prohibited by article 1 of the Spanish Competition Act (LDC), and, according to article 62 of that law, such collusion may be considered a very serious infringement. In this case, article 63 envisages the possibility of imposing fines of up to 10% of the total turnover of the company or, where that turnover cannot be specified, a fine of up to 10 million euros.

Fraudulent circumvention of competition in government tenders is not just an administrative infringement; it can also be considered a criminal offence. Article 262 of the Spanish Criminal Code (Código Penal) provides that persons who distort prices in public tenders and auctions may be punished with prison sentences of from one to three years and a fine equivalent to twelve to twenty-four months, along with possible special disqualification from contracting with government bodies for a period of from three to five years.

Similarly, Additional Provision 27 of the LCSP lays down the obligation of contracting authorities and of the State Administrative Procurement Consultative Board to notify the CNC of possible evidence of conducts contrary to competition law. Breach of this obligation can give rise to administrative liability.

Factors that can facilitate collusion

Attempts at collusion are more likely to succeed when businesses are able to agree on objectives and on common means for achieving them, monitor application of the agreement and punish participants who are lax in carrying out the arrangements.

The existence of this set of conditions will, in turn, depend primarily on the characteristics of the markets where the government procurement is conducted and on the design of the procurement process.

What market characteristics facilitate the existence of collusion?

Collusive conduct in a market tends to be more feasible when:

- The market can be considered stable, because, for example, there are barriers that hinder or prevent entry by new competitors, and no important changes are expected on the demand side or in terms of significant technological innovations in the product in question. Not only do these conditions spawn agreements between rivals, but they also allow such arrangements to last longer.
- The product or service marketed by the companies is relatively homogeneous, making it easier to reach pricing agreements.
- There are no close substitutes for the tendered products or services, leaving the procuring entities with few alternatives if the bidders reach an agreement.
- There are contractual or structural ties between the companies operating in the market that may facilitate coordinated conducts and monitoring of their behaviours

What characteristics in the design of the tender process can favour collusion?

The first part of this Guide set forth some basic guidelines for promoting competition in the different phases of the public procurement process: in the decision to tender a contract, in the choice of procedure, in the design of the terms of the tender, during the conduct of the procedure and during the performance of the contract.

Fostering competition through the above recommendations implicitly reduces the capacity of businesses to collude. More specifically, public authorities may also take other factors into account to discourage collusive conducts. Those factors specifically refer to conditions that tend to hinder and restrict the participation of potential competing bidders, facilitate the predictability of the procurement conditions and/or allow communication between bidders.

- With respect to the number of bidders, in addition to the recommendations set out in the first part of the Guide for widening and diversifying participation, all measures that heighten

uncertainty amongst the bidders regarding the number and identify of their possible competitors will also tend to curtail collusion.

■ With respect to the **predictability** of the terms of the tender, generally speaking, there is more incentive to compete when the contract is large and tenders are not very frequent.

It is likewise important to hinder the predictability of the requirements, by varying the size of the contracts (for example, aggregating or disaggregating them, or by purchasing jointly with other government procuring entities) and the tender calendars. In this regard, it should also be taken into account that, if a contract is divided up, the size and design of the lots to be tendered have important implications for possible collusive arrangements, in that they affect not just the number of potential bidders (lots that are too big can make it difficult for small businesses), but also impact the predictability of the tenders and the possibilities of various bidders dividing up the contract between them.

If it is decided to split up the contracts to be tendered, the number of lots should not be similar to the expected number of bidders and, in all events, not all lots should be of the same size

To prevent these risks, it is useful to keep the following guidelines in mind:

■ If it is decided to split up the contracts to be tendered, the number of lots should not be similar to the expected number of bidders and, in all events, not all lots should be of the same size.

■ Consider the possibility of adding contracts with other contracting authorities, especially when the contracts have the same subject matter, are small, have similar characteristics and are tendered repeatedly. Combining contracts of different procuring entities can reduce the predictability of the tenders and thus make it hard for companies to divide up the market.

This pooling of contracts can be organised through the central procurement offices created by regional and provincial governments, as stipulated by the LCSP. Those purchasing office can serve as a vehicle for local governments to combine or pool the procurement of certain services.

Nevertheless, it should be borne in mind that combining contracts can deter participation by small and medium enterprises by increasing the size of the tender.

EXAMPLE: SCHOOL MILK CONTRACTS

In the 1990s authorities discovered the existence of anti-competitive agreements between companies in the public procurement of milk for schools in the USA. This practice was favoured by the presence of the following circumstances: the product offered was identical, the market was stable, and there were many repeated tenders in small lots (one tender for each school per contract period). The collusion in this area lasted for decades and was described by the US Justice Department as an "epidemic". The anti-collusion mechanism proposed in this case was to combine contracts for different schools. This reduced the number of tenders and increased the size of the lots, thereby diminishing the predictability of the procedures and making it more difficult for competitors to divide up the market.

Sources: Porter & Douglas (1999) "Ohio School Milk Markets: An Analysis of Bidding". Rand Journal of Economics. Vol. 30. The New York Times (5 August 1991), U.S. Investigating School Milk Bidding in 16 States.

- Lastly, with respect to **communication between bidders**, the contracting authorities face the difficulty of finding a balance between procurement transparency requirements, the fulfilment of which is indispensable for fighting corruption, amongst other things, and the need to avoid the disclosure of information that can facilitate collusion. Although the decision adopted varies as a function of concrete situations, some guidelines to keep in mind are:

  - The law requires disclosure of certain information on the resolution of previous awards, in accordance with the transparency principle of article 123 of the LCSP. In addition, it allows both the provision of additional information at the request of the bidders and the restriction of the data provided if their disclosure is liable to distort competition. The tendering authority must therefore evaluate the content of its communications on a case-by-case basis and avoid providing information that may in the future be used for coordinated bidding by competitors.

  - In those cases where the law contemplates the possibility of holding meetings with the companies before the tender procedure, such meetings should be done individually and never as a group.

  - In order to safeguard the secrecy of the bids, they should not be submitted in person and the administration should manage them internally using codes.

  - When a given tender has to be suspended or voided for lack of qualified bids, the likelihood of collusion in a new tender increases. This risk can be curbed by modifying the design of the tender and by making sure that the new design does not use less competitive procedures; for example, recourse to framework agreements should be avoided, especially if there have been previous contacts with the companies to implement them.

  - The predictability of the tenders also makes it easier for bidders to communicate with each other.

- Special attention has to be paid to the risk of inter-bidder communication, before and during the tender process, if there are contractual or structural links between them, for example, through their participation in sector associations or where informational transparency between them is higher for whatever reasons.

By way of conclusion to this section, it should be taken into account, in any event, that neither the presence of these characteristics in markets and tendering procedures ensures the existence of anti-competitive conducts, nor does their absence guarantee that there will be no risk of collusion. All of them should be taken as indicators or elements to be considered when deciding in which cases a more detailed analysis should be carried out.

What forms can bid rigging take?

Collusion normally has two objectives, to fix the price or budget offered and/or dividing up the market, although companies may also choose to agree other specific conditions of the tendered contract terms (timetables, technical characteristics, etc.).

- **Price fixing agreements**: in order to obtain a higher price than the one that would be produced by a competitive tender, bidders may, amongst other options, strike agreements on the discounts to offer, set minimum prices or apply the same price calculation formula.

EXAMPLE: ORTHOPAEDIC CORSETS

The members of the Association of Orthopaedists of Castilla y León were fined by the former Tribunal de Defensa de la Competencia (TDC) for agreeing in 1992 to offer the same prices and conditions in the tender called by the INSALUD public healthcare system of Burgos for the purchase of orthopaedic corsets. The Association also agreed prices with five other non-member bidders who participated in the tender. The TDC sanctioned the companies involved and the individuals who participated in the agreement.

Source: TDC Decision of 12 December 1996 in Case 364/95 Orthopaedists of Castilla-León.

EXAMPLE: VACCINATIONS

Between 1992 and 1995 seven laboratories submitted the same prices in tenders called by the Andalusian Health Service for the acquisition of flu vaccines. The Health Department of the Government of Andalusia filed a complaint with the TDC in 1995 because in that year, in addition to the presentation of seven identical offers in a sealed-envelope bid, the price offered was considerably higher than in previous tenders and higher than the maximum tender budget. The TDC ruled the facts to have been proven and fined the laboratories for fixing the bid prices.

Source: TDC Decision of 30 September 1998 in Case 395/97 Flu vaccines.

■ **Market sharing arrangements**: Bidders may try to arrange to divide up geographical markets or customers. Normally such allocation of tenders is done according to the pre-existing market shares.

EXAMPLE: ELECTRIC SWITCHGEAR

In 2007 the European Commission sanctioned 11 groups of companies for participating in a gas insulated switchgear cartel from 1988 to 2004. The cartel members shared information on tenders with the aim of coordinating their bidding and dividing up the market according to their respective market shares. Specifically, the Japanese and European participants in the cartel agreed not to sell or bid in tenders outside their geographical area.

Source: European Commission IP/07/80. Pending judicial review.

EXAMPLE: INDUSTRIAL BAGS

In 2005 the European Commission sanctioned 16 companies in the plastic industrial bags sector for collusive conducts. The cartel affected the national markets of Germany, Belgium, Netherlands, Luxembourg, France and Spain, and, in some cases, had remained in effect for 20 years. The market sharing arrangement was organised through a system of account managers in which the company with the largest share in a geographical area or with a given customer had the function of coordinating the bidding by the rest of the bidders in order to be selected as the winning bidder while at the same time giving a false appearance of competition.

Source: European Commission. IP/05/1508

EXAMPLE: OPENING OF PROCEEDING S/0226/10 ROAD TENDERS

In February 2010 the Investigations Division of the CNC opened formal proceedings against 53 companies in the construction sector for possible anti-competitive practices consisting in sharing of tenders and fixing prices in public tenders for the rehabilitation and resurfacing of streets and roads. The opening of the inquiry does not prejudge the final outcome.

Source: Notice on case S/0226/10 Road tenders.

What kind of techniques are used to engage in bid rigging?

Bidders use different techniques for carrying out agreements, independently of the objective of the collusion. Such agreements will often involve a previous designation of which offer should emerge as the winning bid in a tender. Since the amount of the bid, or of others that the participants may present in the future, should be enough to allow all participants to increase their profits, these arrangements normally include various means by which the selected bidder will compensate the others and distribute those gains.

The most common collusion techniques employed for ensuring the previously agreed bid is selected are the following, generally applied simultaneously:

- **Cover bidding**: the parties to the agreement who have been previously determined will not win submit bids that have no chance of being selected. These offers are known by various names: complementary, courtesy, token bidding. They can take various forms, for example, the supposed competitors can present a bid they know is too high to be considered, or high enough to exceed the pre-arranged winner, or write conditions into the bid that are unlikely to be acceptable to the procuring agency. This allows them to choose which bidder will win while giving the process a veneer of competitive legitimacy.

EXAMPLE: LIFTS AND ESCALATORS

In 2007 the European Commission sanctioned four lift and escalator companies (Otis, KONE, Schindler and ThyssenKrupp) for engaging in various collusive agreements between 1995 and 2004 that included bid rigging arrangements. In calls for bids in Belgium, Netherlands, Germany and Luxembourg, the companies used the cover bidding to share markets: the winner was decided according to market shares and the other bidders coordinated to offer prices that were too high to win. In Germany and Netherlands, there were also guarantees of continuance of pre-existing customers: a company already supplying a given agency, was assured of being selected as winner in subsequent tenders.

Source: European Commission. IP/07/209. Pending judicial review

EXAMPLE: CONSTRUCTION INDUSTRY IN ENGLAND

The United Kingdom competition authority sanctioned more than 100 companies that colluded in public and private tenders for the construction of hospitals, schools and universities in 2000-2006. The bid rigging included cover bidding and, in some cases, false invoices to disguise compensatory payments between bidders. These conducts were investigated pursuant to a complaint filed by an auditor of the national health system.

Source: OFT. Construction industry in England CE/4327-04. April 2008.

EXAMPLE: MANAGEMENT OF MEDICAL WASTE

The CNC in 2010 fined four companies in the medical waste management sector for allocating tenders called by the public health systems of various regional governments from at least 1994 to 2007. It was shown that the companies allocated those government customers by coordinating their bids through the creation of temporary joint ventures, cover bidding and suppression of bids.

Source: CNC Decision of 18 January 2010 in Case S/0014/07 Management of Medical Waste). Pending judicial review.

- **Bid suppression**: once a decision is reached as to which company is to win the contract, the rest of the companies abstain from submitting bids.
- **Bid rotation**: the members of the agreement take turns being the designated successful bidder, normally through the use of cover bidding. Since in this system all of the companies are eventually designated winners of a contract, it does not normally require a subsequent distribution of earnings.

EXAMPLE: INSULIN AND INJECTABLE SERUMS

In January 2010 the Federal Competition Commission (CFC) of Mexico sanctioned six pharmaceutical laboratories for rigging bids in tenders called by the Mexican Social Insurance Institute (IMSS) for the acquisition of human insulin and injectable serums during 2003-2006. The sanctioned companies took turns winning the contract for supply these medications in the tenders periodically called by the IMSS. The winning company offered an artificially high price but with the certainty that the rest of the competitors would submit prices that were even higher. The fine levied was the largest possible under the competition law applicable at that time in Mexico.

Source: Federal Competition Commission of Mexico. Case number 10-03-2006, Resolution on Baxter, S.A. de C.V. et al. Pending judicial review

EXAMPLE: RADIATOR PIPING

In 1998 the European Commission fined ten manufacturers of radiator piping for collusive practices. In Germany and Denmark the companies used a bid rotation system to allocate tendered contracts amongst themselves. The group would designate the company that was to win the contract and the rest of the bidders would then present higher bids.

Source: European Commission. IP/98/911.

EXAMPLE: MOVING COMPANIES

In 2008 the European Commission sanctioned nine Belgian international moving companies. The cartel operated during 19 years and rigged public tenders using a cover bidding system. The companies distributed the profits through compensation payments they called "commissions", which were included in the end price and distributed amongst the unsuccessful bidders using false invoices.

Source: European Commission. IP/08/415. Pending judicial review.

Once a tender has been resolved, the successful bidder has various methods for compensating the rest of participants to the collusive agreement. All of these techniques are kept secret to avoid leaving signs of the existence of the collusive agreement. Those methods include:

- False billing for non-existent work, generally consulting services.
- The successful bidder subcontracts part of the work associated with the goods and services procured through the public tender or auction to other companies that participated in the cover bidding or whatever other bid rigging technique may have been used.

How can the authorities detect the existence of bid rigging?

There are diverse signs which, though they should not be taken as a necessary or sufficient condition to demonstrate the existence of bid rigging, do nonetheless provide information that can help government agencies decide when more in-depth investigation is warranted.

When interpreting these indicators it should be kept in mind that, in general, their reliability and capacity to reveal the existence of collusion is greater if they are analysed systematically, comparing the results and practices observed over a long period of time or in similar tenders. In this regard, focusing efforts on detecting suspicious behaviour patterns maintained during given periods of time is more useful than attempts to identify problems in one specific operation.

Indicators to be taken into account in the presentation of bids and award of the contracts:

- A smaller than normal number of companies submit bids.
- There are companies that do not participate in a tender in which they would haven normally been expected to take part, though they continue bidding in tenders of similar characteristics called by other agencies.
- Some companies always bid even though they never win. This may be a sign that these companies engage in cover bidding in exchange for some type of compensation from the winning bidder.
- Several companies submit a joint bid even though at least one of them could have done so individually.
- Bidding by several companies that are related or belong to the same group. Although this may be legally permissible, belonging to the same corporate group can facilitate coordination of strategies.
- The same company often submits the best bid to a procuring entity, a likely sign that there is collusion to share the market.

- Some companies only win contracts in certain geographical areas, even though they participate in tenders in various.
- The bidders seem to take turns over time in submitting the winning bid.
- The selected bidder repeatedly subcontracts part of the contract to other companies that were not selected in the relevant tender or auction.

Price-related indicators:

The prices offered in a tender procedure can also indicate the existence of collusion, above all if reflect increases over previous similar tenders that are not justified by higher costs, or when some of the prices bid are much higher than the winning bid, a typical sign of cover bidding.

In general, the bid price patterns should be examined carefully if one or more of the following are detected:

- Sudden identical price increases by bidders not explained by higher costs.
- The companies make identical and/or highly unrealistic cost estimates of certain items.
- Significant differences in the prices offered by the same company for a similar contract before different government agencies or private entities.
- Bids priced higher before procuring entities in a given area by companies based there than offered by those same companies before other agencies.
- Significant reductions in bid prices subsequent to the appearance of a new bidder may point to the prior existence of agreements between competitors.
- Across-the-board price increases in all bids with respect to previous tenders not justified by cost increases or other apparent reason.
- Bidding at prices above the maximum award budget. The companies may have reached an agreement for the tender to be declared void for lack of qualified bids and force the procuring entity to increase the maximum budget.

Although these indicators focus on analysing prices, collusion may also be detected by paying attention to other characteristics of the condition that determine its award, such as identical execution timetables, coordinated modifications of previously offered conditions, similarity in the technical characteristics of the bids, etc.

Indicators in the documentation or behaviour of the companies

On many occasions no complex techniques are needed to detect collusive behaviour. Certain queries or informal comments made by the bidders themselves to the procuring entities, or the presence of unusual characteristics in the proposals, may offer signs of possible collusion between competitors that should be taken into account by those agencies.

Unusual characteristics of the proposals and in their presentation, for example:

- Errors of calculation, spelling mistakes or formal problems in the presentation of the bid that are seen in several offers.
- The presence of erasures or strikeouts in all bids may be the sign of a last-minute agreement.
- Bids presented by different companies with the same stationery or typography.
- Bids sent from the same postal address, fax number or email.

Statements by the bidders:

- Spoken or written references to the possible existence of an agreement.
- Systemic abstention to submit bids in certain areas or to certain procuring bodies.
- Questions or concerns about what implications the existence of an agreement may have.
- Use by several bidders of similar terminology when explaining, for example, price increases.

Other suspicious behaviour:

- A company acquires the tender terms for itself and for a competitor, or submit its own bid and that of another company at the same time.
- A company submits an offer that it would not have the capacity to carry out.
- Only one of the various companies participating in a tender has actually searched for the cost and price information of relevance for preparing a bid, for example, by contacting the suppliers of needed components.

What specific measures can government agencies adopt to reduce the probability of collusion?

Staff at the procuring entities play a crucial role in preventing and detecting collusive agreements in public tendering.

Enhancing the effectiveness of their function in this respect requires special attention to two fronts: measures aimed at facilitating access to information on markets, products and suppliers related to the subject matter of the public contracts within their area of competence, and setting guidelines, especially where groupings of companies are involved, or in cases where there are signs or reasonable suspicions that a cartel exists.

Access to information

La probabilidad de colusión entre oferentes se incrementa cuando The likelihood of bid rigging increases where there are information asymmetries, that is, when the companies participating in a tender have more information on the market structure and functioning than the procuring entity.

To avoid or correct this risk, the personnel of those agencies should be encouraged and empowered to obtain information on basic aspects such as the possible suppliers, prices and costs of the tendered products, as well as on recent changes in all of those data and the industry trends that can affect supplyside competition.

Although this information can be obtained in many diverse ways, having access to and the means to exploit relevant data from previous tenders is one of the most important tools. Consequently, one of the priority actions in this area should be systematic recording and compilation of all relevant information: winning bids, the price or other award conditions, bidders who have participated in different tenders and the characteristics of those tenders, etc.

Setting up and maintaining this database is a fundamental tool for detecting the existence of suspicious behaviour patterns that may persist over long time periods. As discussed earlier, such analysis is especially effective for preventing collusive arrangements in public tendering procedures.

To prevent, detect and punish collusive behaviour it is important that historical information be compiled and that the staff of the procuring entity be trained in its use:
It is advisable to:

- Give staff training on the techniques for detecting and preventing collusion.
- Systematically record information from past tenders, saving the data on the winning bids, the price and other award conditions and all relevant information regarding the bidders who participated in the tenders. This allows suspicious patterns, trends and indicators to be identified and monitored.
- Know how to file complaints before the CNC or the regional competition authorities when suspicious conducts are detected.

The special case of economic interest groupings and temporary joint ventures

Participating in tenders in the form of temporary joint ventures (TJVs) or economic interest groupings (EIGs) can have positive effects, as it makes it easier for smaller businesses to pool resources in order to participate and obtain the funding needed for the associated investments.

Such alliances, however, can also promote collusion and therefore warrant special attention. Some of the signs that these organisational forms involve an anti-competitive agreement include:

1. Where some of the EIG or TJV members have the requisite capacity to have participated in the tender separately.

2. Simultaneous participation by companies from the same group in a tender, for example, where one company in the group participates individually and another does so through a TJV or EIG

3. The companies in the TJV or EIG together account for a large part of the business in the public or private sector.

4. A TJV or EIG with a large aggregate market share rejects participation in the group by other companies that do not have the capacity to form an independent competitive JV or EIG in order to take part in the tender.

5. If companies that previously tried to participate in the tender under a TJV or EIG but were not allowed to do so eventually take part individually, they may maintain the intention of coordinating their efforts. Such situations have been investigated and sanctioned by the TDC on diverse occasions.

6. The companies participate separately in the tender and then subcontract performance to an EIG to which they all belong. This arrangement could reflect the existence of a market-sharing agreement to ensure that they perform the contract jointly regardless of who wins the bid.

EXAMPLE: INSERSO TRAVEL

Viajes Halcón, Barceló, Iberia and Marsans set up an EIG that took part in a tender for senior citizen travel services organised by the INSERSO in 1995. When the procurement board did not allow the grouping to participate, the companies chose to submit individual bids but fixing prices and certain conditions of their offers. In addition, they agreed that the winning bidder would subcontract the work to the AIE, which would allocate it amongst the four members, who presented identical bids. The TDC fined the companies involved.

Source: TDC Decision of 25 November 2000 in Case 476/99 Travel Agencies..

EXAMPLE: AMBULANCES

An ambulance company in Orense filed a complaint in 2003 that an EIG in the sector was closing off the public and private market by allocating the business amongst its members. Certain clauses of the EIG agreement were held to be anti-competitive by the TDC.

A similar conclusion was reached in the case of a consortium set up by 13 ambulance companies in Cuenca to participate in a public tender. This association included clauses intended to share the public and private market.

Source: TDC Decision of 5 June 2006 in Case 565/03, Ambulancias de Orense). Pending judicial review. TDC Decision of 20 September 2006 in Case 565/05, Ambulancias Conquenses.

When there are prior suspicions of bid rigging, what basic principles should be respected?

- It is preferable to use ordinary tendering procedures, particularly open tenders, and not overuse mechanisms such as the framework agreement and the dynamic systems discussed earlier.
- Given their transparency, electronic auctions make it easier to detect breaches of collusion agreements and to know the prices and conduct of competitors, especially in recurring auctions.
- If a multi-phase auction process is chosen, it is recommended that holding it be conditional on achieving participation by at least a certain minimum number of companies. It is also advisable that the information provided to bidders be limited to what is required by law; for example, bidders can be notified of their classification at each phase of the process, but without giving them further information such as the number of bidders in each phase, prices offered or scores given to other elements of the offers from other bidders.
- Information should be requested on the legal status of bidders to check their autonomous decision making power and possible corporate ties between them.
- If outside consultants have been used to define the technical criteria, management of the award process should not be delegated to them. If there is such delegation, they must sign a confidentiality agreement, as well as a statement of absence of conflicts of interest.
- Bidders must be warned that any increase in the initial budget will be investigated very closely and any subsequent amendment of the contract that is not adequately justified will require a new call for tender.
- The offices responsible for making the award should inform bidders of the penalties and fines imposed in the event of collusion, by including, for example, in the specific administrative clauses a reference to the administrative and criminal law implications of such conducts.

PROPOSED TEXT TO BE INCLUDED IN THE TENDER TERMS:

In Spain collusion between companies is prohibited by article 1 of the Competition Act 15/2007 of 3 July 2007 (LDC). According to article 62 of that Act, collusion may be considered a very serious infringement, in which case article 63 provides a fine of up to 10% of the total turnover of the companies or, if it cannot be defined, a fine of more than 10 million euros. In addition, according to article 61.2 of the LDC, liability for collusion will rest not only with the company directly involved, but also with the companies or persons that control said company.

Fraudulent circumvention of competition in government tenders is not just an administrative infringement; it can also be considered a criminal offence. Article 262 of the Spanish Criminal Code (Código Penal) provides that persons who distort prices in public tenders and auctions may be punished with prison sentences of from one to three years, special disqualification from participating in judicial auctions and a fine equivalent to twelve to twenty-four months, along with possible special disqualification from contracting with government bodies for a period of from three to five years.

Similarly, Additional Provision 27 of the LCSP lays down the obligation of contracting authorities and of the State Administrative Procurement Consultative Board to notify the CNC of possible evidence of conducts contrary to competition law. Breach of this obligation can give rise to administrative liability.

- Where there are well founded suspicions of a collusion agreement, it is useful to have the notice of the call for tender indicate that bidders must state in their offers whether they intend to use subcontractors and the name of such possible subcontractor companies, as this can help detect the existence of a cartel compensation mechanism. In certain cases, consideration can even be given to the possibility of having the terms of the tender prohibit subcontracting parts of the contract to the same companies as participated in the tender, except with the express authorisation of the procuring agency.

- When the procurement board gives a similar score to the bids received, it should not divide the contract up into lots and distribute it amongst the bidders, as this augments the risk of collusion in future tendering.

What steps should authorities take if they find possible evidence of bid rigging in a tender?

1. Report it to the CNC or to the regional competition authorities.
2. Consider the advisability of suspending the call for tender.
3. Contribute to the subsequent investigation by doing the following:

   - Save all documents related to the tender (bids, envelopes, logs of communications, correspondence, etc.).
   - Make a record of all relevant conducts and statements so that detailed information can be provided on all circumstances that would appear to bear out those suspicions.
   - Do not discuss or mention the suspicions with the companies involved.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