

Meeting of the Council at Ministerial Level, 7-8 June 2023**DRAFT REVISED RECOMMENDATION OF THE COUNCIL ON
FIGHTING BID RIGGING IN PUBLIC PROCUREMENT****JT03519962**

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the standards developed by the OECD in the area of competition, in particular to combat hard core cartels and support competitive neutrality, as well as in other policy areas, such as to support the governance of infrastructure;

HAVING REGARD more specifically to the Recommendation of the Council on Public Procurement [[OECD/LEGAL/0411](#)] which sets out general principles and policy guidance on the governance of public procurement in order to improve economy and efficiency and to prevent risks to integrity throughout the public procurement cycle;

RECOGNISING that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

RECOGNISING that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their needs and preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, “value for money” to the benefit of users of public goods and services, and taxpayers;

RECOGNISING that public procurement can be used as a strategic tool to achieve policy objectives such as sustainability and innovation;

RECOGNISING that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices, reducing quality, establishing output restrictions or quotas, or sharing or dividing markets, thus making goods and services unavailable or unnecessarily expensive for public purchasers, to the detriment of final users of public goods and services, and taxpayers;

RECOGNISING that some public procurement rules may inadvertently facilitate collusion;

RECOGNISING that collusion and corruption are distinct problems that affect public procurement, yet they may occur together and reinforce or facilitate each other;

RECOGNISING that competition and integrity in public procurement reinforce each other, and that the formal and informal co-operation of public sector authorities with relevant policy and law enforcement powers is essential;

RECOGNISING that competition in procurement should be fostered, protected and maintained, and exemptions to competitive tendering should be limited to those strictly necessary and justifiable;

RECOGNISING that rules that unduly restrict competition often can be revised in a way that promotes it, while still achieving public policy objectives;

RECOGNISING that many countries have developed tools to detect and limit bid rigging in public procurement tenders, including prioritising enforcement against bidding cartels, developing detection tools and undertaking extensive advocacy towards public procurement authorities and the private sector;

CONSIDERING that the [Guidelines for Fighting Bid Rigging in Public Procurement](#) (hereafter the “Guidelines”) provide detailed guidance for competition authorities and officials responsible for public procurement at all levels of government on the prevention and detection of bid rigging, and may be modified as appropriate by the Competition Committee;

On the proposal of the Competition Committee, in consultation with the Public Governance Committee:

I. AGREES that the purpose of this Recommendation is to promote effective competition, reduce the risk of bid rigging, facilitate the detection of bidding cartels and support the enforcement of the law against bid rigging in public procurement at all levels of government.

II. RECOMMENDS that Members and non-Members having adhered to this Recommendation (hereafter the “Adherents”) prevent bid rigging, by promoting competition and making collusive schemes difficult to establish and maintain. To that effect, Adherents should encourage their relevant authorities to:

1. Understand, in co-operation with sector regulators, the general features of the market in question.
2. Conduct appropriate market research, before procurement procedures are launched, in particular for high risk, impact or value contracts, that:
 - a) identifies supply options that suit the purchase needs, potential suppliers including in other regions or foreign markets, and important cost and market factors to inform tender preparation and help benchmark the bids received; and
 - b) is taken into account in developing procurement strategies that encourage competition for each procurement opportunity.
3. Promote competition by maximising participation of potential bidders by:
 - a) establishing participation requirements that are transparent and non-discriminatory, and that do not unreasonably deter credible bidders from participating in public tenders, favour incumbents or make the participation of new suppliers unnecessarily difficult;
 - b) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products, and make collusion more difficult by reducing the predictability of possible supply solutions;
 - c) allowing bidders from other countries and/ or from other regions within the country in question to participate, where possible and appropriate;
 - d) considering, where this may foster competition and attract more competitive bids, aggregating procurement needs in larger tenders or, alternatively, allowing small and medium-sized firms to participate even if they cannot bid for the entire contract, including by dividing the contract into lots.
4. Assess whether framework agreements, centralised purchasing, joint bids and subcontracts might pose collusion risks.
5. Design the tender process so as to avoid revealing the identity of bidders to each other

or giving bidders opportunities to meet, communicate and exchange information with each other.

6. Regularly review the level of competition in past tenders to inform tender planning;
7. Design tender specifications, and selection and award criteria that a) improve the intensity and effectiveness of competition in the tender process, and b) ensure that a sufficient number of potential credible bidders remain in the market.
8. Ensure that tender specifications and any other information regarding the tender are clear, and use, to the extent possible, standardised general contract terms.
9. Use, to the extent possible, electronic procurement systems for all stages of the procurement process, from publication of the procurement opportunity, submission of bids and bidding documentation, to contract signature, payments, delivery and acceptance, and contract close-out. These systems may be accessible to a broader group of bidders, are less expensive and reduce risks of collusion.
10. Keep reliable and comprehensive procurement databases, which:
 - a) are consistent across contracting authorities;
 - b) cover all procurement process stages to support pro-competitive tender design as well as appropriate law enforcement;
 - c) include data about bids (both successful and unsuccessful) and contracts (including amendments and subcontracts) and key variables (such as firm identifiers) that facilitate evaluating whether bid rigging might have occurred;
 - d) are accessible to public procurement officials and relevant law enforcement authorities, including competition authorities.
11. Ensure that contract delivery corresponds to contract terms, and subject contract renegotiation to clear, specific and pre-determined conditions.
12. Require all bidders to sign an attestation, such as a certificate of independent bid determination, that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.
13. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, debarment from participating in public tenders for a certain period of time, sanctions for signing an untruthful attestation that the bid is genuine and non-collusive, and liability for damages to the contracting authority.

III. RECOMMENDS that Adherents endeavour to detect bid rigging and enforce the law against it, by ensuring that all relevant stakeholders are aware of the signs, suspicious behaviour and unusual bidding patterns that may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public authorities. To that effect, Adherents should encourage competition authorities to:

1. Partner with procurement and other relevant authorities such as anti-corruption and audit authorities, and public prosecutors (if applicable), to raise awareness of fraud and collusion within the authorities, and of relevant indicators ("red flags") for staff and other involved individuals handling and/or facilitating awards of public funds.
2. Provide or offer support to procurement authorities to set up training for procurement officials, auditors and investigators at all levels of government, as well

as prosecutors and judges (where appropriate), on techniques for identifying suspicious behaviour and unusual bidding patterns that may indicate collusion.

3. Establish a continuing relationship with procurement authorities such that, should preventive mechanisms fail to protect public funds from collusion, those authorities will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct and that the reporting person may not be exposed to retaliation.
4. Undertake advocacy vis-à-vis possible suppliers and trade and industry bodies, to alert them to bid rigging risks, sanctions, leniency programmes and whistle-blower tools, and seek their engagement in the effective prevention and detection of bid rigging, including, eventually, through competition law compliance initiatives. Such advocacy can include training and guidelines.
5. Consider developing digital filters (screens) of procurement data to help detect bidding cartels.

IV. RECOMMENDS that Adherents seek to limit bid-rigging risks and assess their procurement laws and practices to ensure that they do not inadvertently facilitate collusion. To that effect, Adherents should:

1. Have rules or guidelines on procurement transparency, and the conditions and timing of releasing tender-related information.
2. Give preference to competitive tendering and limit exemptions to those necessary, justifiable and already foreseen in the law.
3. Involve competition authorities in reforms of procurement laws, and consider granting them an advisory role to ensure a competition perspective in the design of significant large-scale tenders and standard bidding templates.
4. Consider adequate incentives for procurement officials to prevent and detect bid rigging, such as an explicit inclusion of prevention and detection of bid rigging among the duties and training of procurement officials and rewarding the successful detection of anti-competitive practices in the professional performance evaluation of procurement officials.
5. Encourage formal and informal co-operation among competition authorities and other relevant authorities such as public-procurement, audit and anti-corruption authorities, and criminal prosecutors (if applicable), including through the development of common policies, information exchange, co-ordination and assistance in delivering their respective mandates in the context of public procurement.

V. RECOMMENDS that Adherents provide for appropriate sanctions and redress for bid rigging. To that effect, Adherents should:

1. Provide for sufficiently deterrent sanctions for bid rigging, taking into account the applicable leniency policy.
2. Consider the debarment from on-going or future public tenders of the firm as well as concerned individuals having engaged in bid rigging, with discretion to assess if debarment of the firm would lead to a significant reduction of competition, while considering debarment of individuals in all cases.
3. Keep a central debarment register.

4. Exempt from debarment or shorten the debarment period for successful first-in leniency applicants.
5. Consider exempting successful first-in leniency applicants from damages claims.
6. Ensure that anyone who has suffered harm caused by bid-rigging cartels, including the contracting authority, may seek redress or compensation from the persons or entities that caused harm.
7. Provide for effective procedures for bidders' challenges of procurement decisions.

VI. RECOMMENDS that Adherents assess, measure and monitor the impact on competition of public procurement laws and regulations.

VII. INVITES the Secretary-General to disseminate this Recommendation.

VIII. INVITES the Adherents to disseminate this Recommendation at all levels of government.

IX. INVITES non-Adherents to take due account of, and adhere to, this Recommendation.

X. INSTRUCTS the Competition Committee, in consultation with the Public Governance Committee, to:

- a) Serve as a forum for sharing experience with respect to implementation of this Recommendation;
- b) Review and update the Guidelines to ensure they remain relevant;
- c) Develop a toolkit to support the implementation of this Recommendation, which will include in particular the updated Guidelines; and
- d) Report to the Council on the implementation, dissemination and continued relevance of this Recommendation no later than five years following its revision and at least every ten years thereafter.