



COMESA COMPETITION COMMISSION BID RIGGING WORKSHOP- ESWATINI - REPORT

DATE: 26 – 28 February 2024

**VENUE:
HAPPY VALLEY HOTEL EZULWINI, ESWATINI**

A. INTRODUCTION

The workshop brought together participants from the COMESA Institutions, National Competition Authorities and National Procurement Agencies to discuss competition enforcement around bid rigging.

The workshop was organized jointly by United States Department of Justice and the COMESA Competition Commission.

The various institutions discuss and shared experiences on detecting bid rigging in public procurement, investigating bid rigging and designing tenders in a way that minimizes instances of bid rigging.

It was noted from the workshop that a significant portion of Government expenditure is through procurement of goods and services, therefore public procurement plays an important role in ensuring that Governments deliver goods and services to the public.

It is therefore imperative that procurement achieves value for money to minimize wastage of financial resources arising from lack of competition in tenders.

It is therefore important that tenders are efficiently designed to promote competition among bidders because by so doing it lowers the risk of cartels sprouting during the tender process.

The participants were informed that Investigation by competition authorities plays an important role in the fight against bid rigging, and therefore investigators need to be knowledgeable and equipped with the necessary skills and tools to effectively handle bid rigging cases.

Investigating and sanctioning bid rigging cartels in various sectors of the economy not only promotes competition and ensures value for money but has a direct bearing and a direct impact on the general public in terms of Governments saving money that would otherwise have been lost to cartels through bid rigging.

B. THE ESWATINI CASE

The Eswatini Public Procurement Regulatory Agency (**ESPPRA**) noted that Central Government spends E7.845 billion (USD 407 million) which is equivalent to 56% public procurement spend, the Parastatals spend E6.065 billion (USD 314 million) which is 43.2 % of PPS and Local Government / Municipalities spend E110.19 million (USD 5.7 million) which is equivalent to 0.8 % of PPS.

ESPPRA further noted that due to the huge amount of money spent on public procurement, it is imperative to establish a working relationship between the

different partners tasked with safeguarding all issues related to the protection of fair competition in the country. ESPPRA has therefore established a working relationship with Eswatini Competition Commission (ECC).

ESPPRA has therefore established initiatives to prevent bid rigging by conducting joint tender reviews, working with development partners on interventions on bid rigging such as Methodology for Assessing the Procurement System (MAPS), conducting M&E Framework for Public Procurement, and they were soon launching a Standard Bidding Documents.

Other efforts that were in the pipeline by the ESPPRA include working with the Ministry of Finance and the Rwanda Corporation in developing the electronic government procurement system (e-GP).

It was further noted that Section 11 (2) (k) of the Eswatini Competition Act requires that “the Commission may enter into discussions on contentious issues with any regulatory authority in order to harmonize and ensure consistent application of competition principles”, and premised on the above,

ESPPRA was reviewing and activating the MOU with ECC to address topical public procurement and competition topical and salient issues.

C. COMESA COMPETITION COMMISSION (CCC)

The participants were informed of the CCC mandate of monitoring and investigating anti-competitive practices of undertakings within the Common Market and mediating disputes between Member States concerning anti-competitive conduct.

CCC noted that agencies should be aware of the various forms of Collusive tendering which include complementary bidding, bid suppression, and bid rotation. Further, the agencies should be on the lookout of sub-contracting Agreements.

The Bid Rigging/ Collusive tendering market has the following market characteristics



CCC shared bid rigging cases that have been handled within its jurisdiction and they include a fine imposed on Pangaea Securities Limited from Zambia which was fined 3% of its annual turnover for engaging in price fixing with other cartel brokers in the Lusaka securities exchange.

CCC also noted of a case in Kenya where a few pole cartel firms were dominating the supply of poles to Kenya Power and Lighting Company. The investigation by CAK and DCI was zeroing in on price fixing, collusive tendering – a process in which firms agree to share out contracts between themselves and/or fix the price bids.

The investigators need to take note of the following:

They must understand the market to ask informed questions and understand the documents

The investigator must see to get the following documents:

- i. Corporate structure and lists of officers/key employees
- ii. Communications or meetings with competitors (*establish the cellphones, text messages, telephone logs, contact lists, calendars, appointment books, travel records, expense reports*)
- iii. Company emails
- iv. Price lists/announcements
- v. Requests for proposals and bid packages/submissions
- vi. Sales or transactional databases
- vii. Third party documents (email or cloud providers, trade associations, customers/victims)

The participants were also taken through the investigative tools for bid rigging which include:

- i. Leniency programme
- ii. Voluntary and document productions
- iii. Public records research
- iv. Data analytics
- v. Compulsory requests for documents and testimony
- vi. Search warrants (dawn raids)
- vii. Consensual monitoring
- viii. Wiretaps and
- ix. International cooperation

Investigator were informed to be aware of the circumstantial evidence in cartel cases. Some of the features to look for include:

- Suspicious patterns in bid or pricing activity
- Consciousness of guilt of defendant/efforts to conceal conduct
- Variation from normal business practice
- Fact of communication
- Opportunity and motive to conspire
- Response to defenses – i.e. absence of mistake
- Presence/absence from a physical place

The bid rigging investigations have the following features:

- i. Can span many years, can involve numerous corporations and individuals, and large volumes of documents
- ii. Use available incentives to cooperation to develop the case more efficiently and effectively (*it's important to recognize the downside of this approach and investigate accordingly*)
- iii. Be fluid: Must adapt to what you learn at every step of investigation.

D. SUMMARY OF THE SESSION

The investigators must therefore:

- be able to determine if the best value is appropriate for the type of procurement
- Establish what is important and what does the government want to see in the tender responses

- Ensure procurement integrity and mitigate any conflict of interest throughout the process
- Include policy suggestions for preventing bid rigging and collusion
- Understand the role of various stakeholders in preventing and detecting the collusive behavior

Role of procurement process improvement

- Benefits of adopting transparent and competitive procurement processes
- If certain pricing information is publicly available (GSA Schedule) it becomes harder to collude
- Digitize of procurement processes
- Role of third-party monitoring and assessment
- Recommendations for further action
- Policy suggestions for preventing bid rigging and collusion
- Role of various stakeholders in preventing and detecting these activities

Role of data analysis and analytics in detecting collusion

- Use of technology tools and integration into procurement systems can help in detecting patterns and collusion
- Use cloud computing
- Use of artificial intelligence and machine learning for detection
- Private sector is increasingly offering these types of management services

Bid rigging/collusive behavior Preventive methods

- Importance of training and awareness among procurement officers
- Importance of stringent audit and documentation
- Encouraging whistleblowing and ensuring protection for whistleblowers
- Incorporating stronger contract clauses and terms to discourage unethical practices

E. KEY TAKE AWAYS FOR THE AUTHORITY

	Highlights of the sessions	Action Points
i.	There is need to have a multi-agency approach involving competition agencies, anti-corruption agencies and Public Procurement	The Authority to organize joint sessions with the PPRA and EACC with a view of

	Authorities/agencies especially (PPRA) in investigating Bid rigging;	agreeing on how to collaborate in detecting and investigating Bid Rigging
ii.	Jurisdictions are encouraged to design and set up of a procurement system aimed at reducing the risks of Bid Rigging;	The Authority to seek an understanding whether the procurement system in place at the Authority's level and at the PPRA level has mechanisms that minimize risks of Bid Rigging
iii.	Competition agencies need to invest in investigation equipment (software) that will facilitate detection of bid rigging in Bid Rigging;	<p>The Authority in future should consider purchasing software that will investigate and analyze data on bid rigging cases; and</p> <p>The Authority to invest in capacity building of detecting and investigating bid rigging.</p>