

Unclassified

DAF/COMP/LACF(2016)14

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

01-Apr-2016

English - Or. Bilingual

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 16 March 2016

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from El Salvador --

12-13 April 2016, Mexico City, Mexico

The attached document from El Salvador is circulated under Session III of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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JT03393105

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

Session III Promoting Effective Competition in Public Procurement

Part 2 The use of screens to prevent and detect bid rigging in public procurement

-- CONTRIBUTION FROM EL SAVADOR --

1. In public procurement, the importance of the State as buyer of goods and services to a country's economy is undeniable. The Inter-American Development Bank has estimated that on average the resources involved in government procurement account for 15% of countries' gross domestic product (GDP), equivalent to USD 800 000 million per year for the region.¹ El Salvador is no exception. Between 2000 and 2012, government procurement as a percentage of GDP fluctuated between 9% and 11%.²

2. According to statistics from El Salvador's electronic public procurement system (COMPRASAL)³, in 2015 around USD 985 926 768 was awarded in goods, works and services contracts requested by autonomous institutions (43.40%), central government (29.08%), public enterprises (16.19%), hospitals (4.05%), municipalities (7.21%) and other institutions (0.07%). The majority of these purchases were made through public bidding processes (45.66%), contracts awarded by private agreement (*contratación directa*) (15.00%), open tenders (*libre gestión*) (13.29%) and other processes (26.05%).

¹ Inter-American Development Bank (IDB). *Eficiencia y transparencia en el sector público. Avances en las compras públicas en América Latina y el Caribe* (Efficiency and transparency in the public sector. Government procurement advances in Latin America and the Caribbean). 2002-2012.

² Latin American and Caribbean Economic System (SELA). *Las compras públicas como herramienta de desarrollo en América Latina y el Caribe* (public procurement as a development tool in Latin America and the Caribbean). September 2014.

³ https://www.comprasal.gob.sv/comprasal_web/estadisticaSumario, accessed on 11 March 2016 at 16:00. This data may not reflect the national totals, as they include only data published on the COMPRASAL website of the Ministry of Finance's Regulatory Unit for Procurement and Tendering (*Unidad Normativa de Adquisiciones y Contrataciones* – UNAC).

3. This underscores the importance of using public funds efficiently, which requires promoting more competitive environments that ensure a multiplicity of options, so as to enable the State to obtain the best possible tenders for the procurement of goods and services of the best quality and best price. In that vein, under the reforms of the law on procurement and tendering by public authorities (*Ley de Adquisiciones y Contrataciones de la Administración Pública – LACAP*)⁴ at least 12%⁵ of public institutions' annual budget allocated to the procurement and contracting of goods and services should be awarded to micro, small and medium-sized enterprises. Competition is therefore promoted by making room for micro, small and medium-sized enterprises to participate in public procurement processes, thereby contributing to the country's economic development.

4. For these purposes, in El Salvador, the processes for the planning, awarding, tendering, monitoring and payment of purchases of works, goods and services are governed by the LACAP⁶ and its implementing regulation (RELACAP). Under this regulation, public procurement processes are governed by principles and values such as non-discrimination, advertising, free competition, equality, ethics, transparency, impartiality, probity, centralised regulations and operational decentralisation, to ensure the State's financial resources are used rationally.

5. In addition, the LACAP prohibits tenderers from concluding agreements that aim to restrict free trade, either among themselves or with third parties. Upon learning that this type of practice is being carried out, the competition authority (*Superintendencia de Competencia – SC*)⁷ must be notified.

6. Under El Salvador's competition law (LC), in agreements between competitors, the fixing or restricting of prices in auctions or in any other form of bidding is therefore prohibited⁸, since this harms the public interest by distorting markets and hindering the efficient use of public resources.

7. As the institution responsible for overseeing compliance with competition law in El Salvador⁹, the competition authority (SC) strives to promote free competition in public procurement through a range of measures. Joint action with the Regulatory Unit for Procurement and Tendering (UNAC) within the Ministry of Finance has therefore proven strategic. This institution is responsible, *inter alia*, for training, promoting, providing technical assistance for and monitoring compliance by the Institutional Procurement and Tendering Units (*Unidades de Adquisiciones y Contrataciones Institucionales – UACIs*) with all regulations covered by the LACAP.¹⁰

8. The SC and UNAC worked closely with UACIs to incorporate and develop the principle of free competition in public procurement and contracting processes. In 2012, they worked together to update a handbook¹¹ now called the "*Handbook on competition and government procurement: promoting*

⁴ Reforms introduced through Legislative Decree No 725 of 18 May 2011, published in Official Gazette No 102, Volume 391 of 2 June 2011.

⁵ Article 39-C of the LACAP.

⁶ Article 1 of the LACAP.

⁷ Article 26 of the LACAP.

⁸ Article 25(c) of the competition law.

⁹ Article 4 of the competition law.

¹⁰ Article 7 of the LACAP.

¹¹ In 2009, the SC released its handbook "Detecting and preventing collusive bidding in public procurement". However, following the reforms introduced to the LACAP in 2011, UNAC and the SC worked together to update this handbook, in which other subjects such as the importance of public procurement to the national economy, methods of public procurement and the SC's pronouncements on public bidding processes were also included.

*competitive processes for greater efficiency in public spending”, released in October of that year in order to report on the nature of collusive bidding, explain the different technical forms it takes and highlight the harmful effect it has on the economy, as well as analyse the different pronouncements on the subject from the competition authority.*¹²

9. With the support of UNAC, the handbook was circulated through training sessions and practical workshops for employees of central government UACIs, autonomous institutions, municipal authorities, public hospitals and so on. Since 2012, around 800 employees from these institutions have been trained with the aim of publicising the handbook and increasing awareness of the importance of promoting more competitive processes in public procurement, drawing on international best practice and corresponding recommendations made by the OECD Council.¹³

10. In addition, the SC developed a quick test to be used by UACIs as a tool to identify patterns or indications of the possible existence of an agreement between competitors. This test consists of more than 25 questions grouped into three stages:

1. Quick analysis of tenders received: this stage identifies whether there are commonalities or similarities in the characteristics of the tenders or prices, whether there are two or more tenders with similar errors, whether two or more proposals indicate last-minute changes, whether two or more tenders were submitted from the same address, fax number or e-mail, or were submitted by the same person, etc.;
2. Looking for patterns of behaviour that may be common among tenderers: to do this, taking into account information on procedures from previous purchases is recommended, to identify whether the same tenderer always wins, whether a rotation of winning bidders can be identified, whether there is similarity in the number of contracts awarded to individual competitors, etc.;
3. Examining any suspicious behaviour that may indicate that there has been collaboration between the tenderers during the process, such as a price increase by one supplier with no obvious objective reason, as compared with prices offered previously, if certain suppliers withdraw from the process despite the possibility of winning or if a company that cannot possibly fulfil the purpose of the tendered contract submits a tender, etc.

11. If the results of the test indicate evidence of collusive agreement, the UACIs must inform the SC so that it can analyse the information and proceed accordingly.

12. Furthermore, within the framework of measures for promoting competitive processes in public procurement, the SC has issued some 70 recommendations since 2010 as a result of opinions on regulations¹⁴, preliminary measures¹⁵ and proceedings for anti-competitive practices¹⁶, aimed at different government institutions in order to improve competitive conditions in these processes.

¹² Competition Authority. Competition and government procurement: promoting competitive processes for greater efficiency in public spending, 2012.

¹³ For more information, see “2012 Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement”, approved by the Council on 17 July 2012.

¹⁴ SC-020-OP/PN/R-2010, Decision of 18 May 2010; SC-002-OP/PN/R-2011, Decision of 15 April 2011; SC-048-O/PN/R-2012 Decision of 16 January 2013; SC-028-O/PN/R-2013, Decision of 31 July 2013; SC-030-O/PN/R-2013 Decision of 21 August 2013.

¹⁵ SC-005-O/AP/R-2010, Decision of 9 March 2010; SC-020-O/AP/NR-2012, Decision of 27 September 2012; SC-051-O/AP/NR-2013, Decision of 31 January 2015.

13. Work carried out to date has educated and increased the awareness of those directly involved in public procurement processes. However, the adoption and application of tools for the timely detection of indicators of possible collusion in these cases requires a degree of supervision. For this reason, in 2016, the SC has produced a “Pilot Plan on Incorporating Competition Principles in Public Bidding Processes¹⁷” so that the SC, in conjunction with a partner institution, can conduct a competition analysis of public procurement processes for goods or services specified in advance and for a defined period, to provide the UACI of the partner institution with the necessary tools periodically to conduct self-audits of competition in its processes.

14. Specifically, the aim is for competition principles to be incorporated into the design and implementation of procurement processes, to warn about possible instances of collusion in public procurement, and to deepen the competition culture within the participating public institutions.

15. As part of meeting the latter objective, the design of an electronic system for monitoring competition in public procurement (also known as “screening”) is envisaged to serve as a tool that enables the UACI of the partner institution to carry out its own monitoring of its processes in order to detect any anti-competitive practices that should be reported to the SC.

16. As regards methodology, it is proposed that the pilot plan be implemented in six stages. These will begin with (1) identification and selection of the partner institution, taking into account variables such as geographic location, size of budget allocated, total amount of public purchases, availability, political context and security. (2) Having established this, the inter-agency working group will be set up, and the training of officials from the UACI will begin in order to develop their skills and abilities for interpreting and applying competition law to public procurement and contracting processes, as well as to promote ongoing communication between the UACI and the SC.

17. Ongoing implementation with (3) identification of the information subject to analysis. To do this, finalised processes for goods or services that are sensitive due to their size in the agency budget, and that fall within the past five years, will be selected. (4) Having identified this information, the terms of reference prepared by the partner institution will be analysed and evaluated in order to check that there are no conditions that limit or exclude the participation of other competitors or that influence their behaviour in the process.

18. (5) Tender and award behaviour will then be analysed. This will generate historical records that help to detect possible collusive tenders by identifying rotations or patterns in awarding contracts. This can be used by the UACI as a tool to carry out its own monitoring of information about the behaviour of its public procurement and contracting processes in future.

19. (6) The final stage involves preparing a report containing the analysis findings, in which the results and indications identified will be outlined in detail. This report will be prepared by the SC and submitted to the authorities of the partner institution, which will also receive suggestions for improvements or steps for safeguarding competition in public procurement processes.

20. The results may also be disseminated to the public in order to convey the importance and benefits of competition in these processes.

21. The pilot plan includes monitoring by the SC of the efficiency of the tools developed in order to assess the impact of their implementation. To do this, indicators such as an increase or decrease in

¹⁶ SC-012-O/PS/R-2013, Decision of 17 April 2015; SC-029-D/PS/NR-2013, Decision of 8 July 2015.

¹⁷ It is envisaged that this pilot plan will be implemented in the second half of 2016.

tenderers in new bids, the ratio of terms withdrawn to tenders received, changes in price or quality/price ratio, suspicious behaviour reported or collusive bidding detected will be taken into account.

22. By implementing this plan, the SC will be taking an important leap forward in the field of public procurement, helping the UACI of the partner institution to learn by doing, and allowing it to take a more active role in the prevention and detection of any collusive bidding so as to ensure efficient use of public funds in procurement and tendering processes.

23. It is hoped that this work can be expanded on and replicated in other public institutions interested in its implementation so that the lessons learned from implementing this plan will be incorporated into other projects of a similar nature.

24. As regards the interplay of proactive tools for detecting cartels, such as screening, and reactive tools such as leniency programmes, it must be noted that the SC has introduced a series of reforms to the LC that include the leniency programme¹⁸, with the aim of making it more efficient and attractive to economic agents. It is not therefore possible to make an assessment of how the tools interact, since both are still under discussion and development.

¹⁸ The proposed reform of provisions relating to leniency consists of drafting a clear outline of the requirements for obtaining the benefit and fully exempting the beneficiary from penalties when the collaboration is effective in confirming the existence of the practice. At present, the benefit of leniency provides for partial exemption from the penalty for economic agents who fulfil the requirements laid down in Article 39 of the LC.