

Unclassified

DAF/COMP/LACF(2016)15

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**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Promoting effective competition in public procurement

-- Contribution from Costa Rica--

12-13 April 2016, Mexico City, Mexico

The attached document from Costa Rica 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.

Contact: Ms. Lynn Robertson, Global Relations Co-ordinator, Competition Division [Tel: +33 1 45 24 18 77 -- E-mail address: Lynn.ROBERTSON@oecd.org]

JT03393111

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/LACF(2016)15
Unclassified

English - Or. Bilingual

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

Detecting collusive practices and imposing sanctions on companies and individuals having participating in the auction for the operation of the bullring and bull running in Zapote for the periods 2012-2013 and 2013-2014

-- CONTRIBUTION FROM COSTA RICA* --

1. General considerations regarding bid rigging

1. Bidding or collusion in public procurement is a form of price-fixing which arises when different competing companies come to an understanding to run part of a market and prevent other competitors from entering a specific market.

2. The main objective of competing companies involved in agreements of this type is to maximise their benefits in terms of profits. In most cases, government institutions and local authorities are more vulnerable to this misconduct since they use significant quantities of their economic resources to acquire goods and services for the community.

3. Companies should therefore compete effectively to produce a range of competitive bids and thus a variety of products and services to be selected on the basis of quality, price and degree of innovation, or other benefits a bid might offer in a procurement process governed by healthy competition between bidders.

4. In an environment with healthy competition, economic actors endeavour to offer the best goods and services as a result of their rivalry in order to secure larger market share and enjoy the associated benefits. In these cases, the parties involved, rather than being in a position of comfort, are in fact engaged in a constant battle to win markets through competition.

* This contribution was drawn up by COPROCOM (Comisión para Promover la Competencia [Commission for the Promotion of Competition]), Ministry of Economy, Industry and Commerce, Costa Rica.

5. There can be no doubt as to the effects of processes which are not competitive. These affect the way the Administration manages its economic resources and undermine the perception of public interest, since an agreement between competitors not to bid individually affects the interests of the community and hence of each Administration user, and the possibilities of acquiring a good or service of the best quality at a reasonable price.

6. The Costa Rican law on competition governs absolute anti-competitive practices through its Article 11, which in this case highlights the ban on: “(...) (d) *establishing, agreeing or co-ordinating bids or abstaining from bidding procedures, competitive tendering procedures or sales by auction. (...)*” As the above shows, the legislature unequivocally established that such conduct is penalised through legal proceedings, with the consequences and rights that may arise for parties that contravene the legislation.

7. Collusion is classified as serious at regulatory level since it represents the most detrimental conduct for the markets. It is therefore declared null and void because of its effects and is accordingly more difficult to remedy. In these cases, the only thing that has to be proved is that the agreement was reached between competitors, and that the conduct is covered by Article 11(d) of the Law on the Promotion of Competition.

8. Costa Rican competition legislation stipulates that collusive tendering and bidding procedures are prohibited and are punishable under Law No. 7472, since they hinder the proper use of instruments provided by the procurement framework (competitive tendering procedures, sales by auction or other bidding procedures) to ensure that the most advantageous formula is selected in seeking the best outcome to satisfy the common interest. It is clear in these cases that the interest of the Administration is general and is geared towards obtaining maximum benefit for the community.

9. Absence of competition in these processes thus has a dual effect in terms of the obtaining of merely administrative benefits on the one hand, and the damage inflicted on social welfare which it is the Administration’s duty to safeguard on the other.

10. Such agreements specifically aim to secure benefits for companies that make up the cartel by imitating the way a monopoly works by restricting output and raising prices, for example, or by rigging the results of bidding procedures, sales by auction and similar procurement processes to obtain greater profits.

11. Given the implications of this behaviour, other alternatives and instruments must be brought to bear through legal reforms, regulations and co-ordination between relevant bodies, and methods and tools to combat collusion at state and municipal level must be brought up to date, since these sectors are more vulnerable to this type of conduct.

2. Investigation carried out and available evidence

12. In exercising its legal powers, the Costa Rican Commission for the Promotion of Competition opened administrative proceedings on the basis of a news item broadcast by a national media outlet reporting that the municipality of San José had allocated control over end-of-year bull running for 400 million colones. This triggered a preliminary investigation to gather evidence or facts that could demonstrate the presence or absence of acts contrary to Law No. 7472.

13. It must be noted that the anti-competitive behaviour involved the participation of a number of economic actors in a tendering procedure whereby services or products for sale or to be operated are offered at a minimum price to attract numerous bids and gain maximum benefit in every sense. Bidders thus submit their offers in such a way that the Administration will wait for the highest price bid, in this case the one entailing more money to obtain the right to operate the bullring and to organise bull running for the end-of-year festivals held in the municipality of San José, one of the largest local governments in the country.

14. Because of the existence of evidence of a possible collusion agreement, an investigation was launched which focused on private companies and individuals that may have colluded in the bidding. In

this case, the companies investigated provide services in the fields of consultancy and the management of business and events related to the operation and organisation of the bullring and bull running, *i.e.* management, control, documentation, processing and permits for providing services. Some of these participants had also taken part in bidding procedures concerning the same market on other occasions.

15. The participants were in competition with each other because they provide services and activities of the same kind, as shown by the record of participation in other bidding procedures. In this case, only those who were present at the procedure were investigated, without considering the security deposit for taking part, merely participation pure and simple.

16. Some of the arguments put forward by companies to avoid the investigations included claims that the value or credibility of a news item referring to the bidding and its results was not to be taken very seriously, though it was pointed out to them that it is unlikely that an economic actor faced with an act of this type would allow the media to refer to particular facts without clarifying such a sensitive issue. What is important and was made clear to them is that it was the news item that prompted the review of the comments made. Since other significant evidence came to light, however, it was decided formally to open an investigation to reveal the real truth behind the facts.

17. The fundamental issue in proving this type of conduct is to determine whether the agreement is the result of an understanding among participants who are in competition with each other, without gauging their intent or other elements, given the damage arising out of the conduct *per se*, and identifying the rules that govern the conduct and its effects on the market. In this case, the competitors are economic actors who decide to take part or show an interest in taking part, since experience is not required to participate in the cartel, a competitor being regarded as a party who shows a desire to take part in order to have their bid accepted, since it concerns a possible service for a given date.

18. In this case, the relevant market was identified as the provision of the service of operating the bullring and organising bull running in Zapote in 2012-2013 and 2013-2014, covered by the 2012 bidding procedure promoted by the municipality of San José. It should be added that this is an occasional market since the procurement process relates to festivals held once a year, although two years were assessed in this particular case.

19. The cartel concerned was responsible for operating the bullring for the award period and organising the bulls, and putting on activities connected with bull-running festivals, involving bull running *per se* and additional events. In this case, the successful bidder was entitled to receive all ticket office takings and to sell advertising, food, drinks, t-shirts and souvenirs within the bullring.

20. The participants in the bidding included a company devoted to other activities unrelated to the relevant market, though it did have some experience of these activities since it had already been a successful bidder in another event of the same nature. Other participants were involved in breeding the stock required, an essential input in organising and running the event.

21. Another important feature is that the bidding procedure began at 13:00 and concluded at 13:10, and the contract was awarded for the initial base, highlighting the lack of effective competition for selection.

22. Other statements included assertions such as: “it was a good decision to join together to make ticket prices cheap and create a successful formula for the bullring’s management”, among similar considerations. The comment quoted, among others, was used as evidence during the investigation.

23. The evidence submitted included photographs of the bidding process itself, showing that the participants penalised took front row seats one after another and could be seen talking to each other. Another national newspaper also published a photograph of three of the persons under investigation posing with the single number with which they took part in the bidding and which won them the bid without great

increases in the base, since there was no effective competition. There were also many comments that reaffirm the agreement reached between the parties, and other statements were made in public and as a group.

24. Most of the evidence in this investigation comes from the administrative file kept by the municipality which ran the bidding process and from other statements made by participants in the national media, including television, newspapers, etc.

25. In terms of bid-rigging, participants in bidding procedures or tenders share information with each other, establishing agreements to increase prices or reduce the quality of services or products, collaborating to take part and to eliminate the effective competition that should prevail in the markets. Competition ensures that better priced and better quality products and services are provided which offer innovation and other improvements associated with standards of excellence so that the Administration achieves the best value for money and the best conditions in accordance with the available budget.

26. The investigation showed that participating companies had engaged in anti-competitive practices prohibited under Article 11(d) of Law No. 7472. These practices are considered to be the most harmful to competition and free competition, and in this case the conduct was classified as serious precisely because the companies' conduct affected local government rather than a client or user, affecting the benefits for citizens and the public interest in particular that should be paramount in all public procurement processes.

27. Given the effects and losses caused, fines were levied on six economic actors for taking part in the agreement that led to collusion, taking into account the damage caused, indications of intent, the affected market, the duration of the practice, reoffending and other aspects evidencing the damage.

28. It should be remembered that the bidding process studied included the sale by auction of two consecutive periods, *i.e.* 2012-2013 and 2013-2014, with a base of 200 million colones per period, *i.e.* four hundred million colones (CRC 400 000 000) in total. Greater benefits were not achieved because of the lack of effective competition, which is why the award was made for the base amount, leading to the need to investigate the conduct and penalise wrongdoers.

29. Another notable factor is that, in the 2014-2015 bidding procedure, *i.e.* the year following the periods investigated, the municipality's profit stood at 540 million colones, which means that the bidding base increased by 35% from one period to the next. The object or service to be procured and the conditions may vary from year to year, making a comparison difficult since the object of some competitive tendering procedures is the administration of festivals, while others also involve the use of broadcasting rights for open or national network television, making these competitive tendering procedures attractive.

3. Final considerations and recommendations

30. In view of the current rules and the damage caused by collusion agreements, the internal workings of institutions that run public procurement processes must be reviewed in order to provide accurate mechanisms to detect these practices and avoid market impacts.

31. The work carried out thus far in detecting cartels plays a key role as a precedent for other investigations, when the performance of certain institutions and the results obtained can be assessed.

32. It should be noted that this investigation is related, to some extent, to another case opened by another authority, which means that investigations in connection with administrative proceedings contribute to other measures or decisions that might be taken by other authorities without a formal co-operation agreement.

33. The investigation process must focus on more innovative and realistic methods, since the agreement to collude and its effects can be perceived in the various positions of the offenders expressed in

the written media and on television, together with other details of conduct which are crucial in demonstrating anti-competitive activity.

34. Sanction criteria have changed substantially, since these practices and the difficulty of verifying them, as indicated by international best practices, require adaptation in seeking the truth so that the Competition Authority can establish practical approaches to find evidence in the form of physical public action representing collusion.

35. Ensuring competition in public procurement processes and eliminating barriers to entry are fundamental pillars in safeguarding competition and the purchase of goods and services intended for the community.

36. In response to OECD recommendations and the need to review the alternatives available under Costa Rican legislation to support practices of this kind, a legal change is required and new tools must be developed to detect cartels, such as the creation of a central system for administrative procurement which enables competition processes to be screened.

37. The markets are dynamic, and the authorities responsible for ensuring effective competition in them have a responsibility to introduce legal innovations, draw up agreements and incorporate the changes required to ensure comprehensive safeguarding of competition. This will guarantee that market players enjoy the flexibility and dynamism to perform commercial activities without barriers that hinder healthy competition.

38. Reflection on the extent of measures suggests that bodies responsible for procurement procedures also bear considerable responsibility because they must remain vigilant throughout the whole process and must alert the competition authority where appropriate.

39. Collusion may provide a breeding ground for other offences, though the prevention of such behaviour requires interinstitutional co-ordination to allow warning mechanisms to be established in particular sectors, as well as legal instruments to make detection measures more efficient.

40. This would bring about better management of public resources and their exploitation in the common interest by ensuring that personnel responsible for procurement procedures specialise in identifying signs of cartel involvement.

41. Improvements could also include a leniency programme as a specific alternative for detecting hard core cartels, since few options are available for persons who wish to co-operate in investigating these offences. This would require a legal record respecting the negotiating terms and the acceptance of evidence, statements and other facts that could constitute positive evidence of collusion.

42. In investigating these practices, the only co-operation that can be obtained must be based on the legal guidelines laid down in Law No. 7472 so that evidence can be included in the investigation process. No formal agreements or other kinds of assistance have been established with other bodies to detect such practices because, as stated above, investigations and the inclusion of facts is governed by a current legal regulation.

43. To ensure co-operation with other bodies and specifically when safeguarding anti-corruption measures, sectors that may be vulnerable to this type of practice must be assessed and the respective rules may have to authorise co-ordination between authorities when collusion is detected and when corruption is suspected or revealed as investigations develop.

44. Finally, the Authority has been very active in taking measures to promote the culture of competition and has, in particular, involved a significant number of municipalities in capacity building by way of best international practices disseminated by the OECD to ensure that managing bodies are better informed and aware of the existence of collusion.