



Bid Rigging And Its' Interplay With Anti-Trust Law

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ABSTRACT

An anti-competitive agreement was one that would have the necessary ability to undermine the marketability and fundamentals. Bid Rigging is fundamentally an unlawful practice where the contending parties intrigue with one another to decide the champ in a bid. Whenever there is seen that the bidders coordinate, then, at that point, the costs are demonstrated to be manipulated which is viewed as very higher than cost in the unregulated economy offering process. Antitrust and competition laws are relatively new in India; awareness and understanding of these laws must permeate any business that has followed this practice as a daily practice.

Keywords: Bidder, Bid Rigging, Antitrust law, Competition Law, Anti-competitive agreement

I. Introduction

Bid rigging is 'a special form of secret pricing by which companies adjust their bids for procurement or project contracts.'¹ This distorts the procurement process and can cause significant financial losses, denying the procurement agency a competitive advantage. An offer that is made in response to an invitation to an enterprise's offer is called a bid in order to obtain products or services for the general public. It's a price that was put in where work will be done or where supplies will be provided. Thus, an organization or individual is a bidder entity who submits such a bid through the public procurement process initiated by the Government or Non-government entities.

In some exceptional circumstances, price negotiations may be held but they must only be done with the lowest responsive bidder and only with the competent authority's approval. This results in the crucial stage of "award of contract" which is earnest money i.e., if the lowest bidder offers a financial guarantee along with its tender that guarantee will be accepted and any earnest money offered by unsuccessful tenderers will be returned to them in an interest-free manner. Then after a 'Performance Security' that is the procurer takes step to ensure proper performance of the contract with the funds received from the winning bidder and this is so to make sure that due performance of the contract is fulfilled within the specified time. Again if the supplier violates any clause of the contract, this sum will be forfeited.

Significantly bid rigging occurs due predetermined level of coordination between bidders. Any kinds of collusion are an anti-competitive practice in which bidders deliberately collude with each other to maintain bids at predetermined levels through manipulative behaviour. Public and private entities bidding is used to purchase goods and services at competitive prices that are beneficial to bidders. However, the sole purpose of such bidding is to provide goods or service at favourable prices and conditions; but such potential bidding could be arrested if they engage in collusion and manipulation to keep bid prices at predetermined levels. This type of bidding is also known as price fixing and defeats the purpose of soliciting bids and inherently restricts competition.

All forms of bid rigging have one thing in common i.e., to predetermine the winning bidder by limiting or eliminating potential bidders from competition. As the name suggests, bid rigging occurs through a collusive agreement. Such collusions are carried out in secrecy making bid manipulation difficult to detect. Sometimes

¹ OECD, Glossary of statistical terms available at <http://stats.oecd.org/glossary/detail.asp>

bidders involved in absurd bidding go for unusual tenders that seem quite out of line with the competitive market and therefore sufficient to suggest the possibility of a secret deal.

II. Bid Rigging and Antitrust laws

Since the advent of competition law improved market structures have been regarded as the result of this modern era's most important regulation. It's critical to remember that this law's primary objectives include increasing the purchasing power of the buyer as well as preserving rights and fostering an atmosphere where goods may be freely purchased and sold. The participants in the market pose the greatest threat to a competitive market. If there is a monopoly in the market, for example the monopolist's inclination to enter into contracts for the supply, service and purchasing power of any good will affect the degree of market freedom in the previously mentioned areas. As stipulated in the Indian Constitution, the country needs to have a functional environment in which people can exercise their fundamental rights to freedom of action.

Since market participants alone pose the greatest threat to the market, laws protecting individual rights must also work to boost the market's purchasing power in order to establish a more effective market economy system across the country.² The cases of early bid-fixing that are examined here did not prove personal responsibility. But in two recent cases³ the CCI stated that the liability of the individuals in charge of the company at the time of the infringement was the focus of a different legal procedure and that this issue might come up in a number of similar cases down the road.

In general, in the market competition arises from two different situations, the first one takes place when companies attract buyers by offering lower prices than they should which leads to the closure of certain companies that are unable to sell products at a lower price than the original price, and secondly, the company attracts buyers with its services and the use of advertising tools. From the point of view of global competition, the second scenario is considered the most effective approach, since it is the most beneficial for the buyer while maintaining a better company strategy.

The fundamental difficulties in conducting competitive bidding process form the basis of public procurement procedures. Public procurement takes place at various stages, finding the 'requirement of goods', 'quantities' and 'specification of such goods' etc. is the first stage. The procurement agency is required to 'issue notice for inviting tender' and 'acceptance of bid/tender' at the second stage. The third stage involves 'opening of bid', 'evaluation of bid' and subsequently creation of a comparative statement of quotation received. Following such evaluation, the agency is expected to select the 'lowest bid'.

Effective competition law and enforcement are important weapons in the public procurement arsenal. Competition law should provide a framework for detecting violations, given the seriousness of bid-rigging and the often-insidious nature of such activities. The relevant competition authorities should enforce the law. In this regard, the starting point of the rule of law should and should be that companies and individuals are free from any wrongdoing unless and until proven otherwise. But the problem of course how else to 'prove.'

Once a company is found to be in default, an individual's liability according to Section 48 of the Act, 2002, who is in charge and responsible for activities of the firm is found guilty to be punished accordingly, unless he can prove that he did not know about the violation or commission of it or has done every possible thing to prevent such breach. Individual directors, managers, secretaries or other executive officers will also be held liable if the wrongdoing occurs with their consent or acquiescence or is attributable to their negligence.

Bid rigging is not easy to detect. However, a closer investigation of suspicious behaviour may reveal collusion. Similar errors or violations (spelling, grammar, format, and calculations), implementation of multiple bids to identify competitors prior to submission, cover bid, bid negotiation, similar corrections, changes indicating minor changes, bids from similar computers, payment from common sources, and frequent collection between the bidders shows that the auction process was hampered by anti-competitive agreements between the bidders. Gone are the days of MRTP, the CCI was introduced for competition enforcement in 2009. The overall objective of the Commission is to create and maintain fair competition in the economy which will ensure and create a level playing field for producers and make the market for the welfare of consumers.

Later in May 2009, an appellate body named the Competition Appellate Tribunal was created and the final appeal lying to the Supreme Court of India. In 2009, the previous MRTP Act was repealed, along with the MRTP Committee established under that Act. The pending MRTP committee cases had been referred to the CCI.

The Competition Act's Section 19⁴ gives the CCI the authority to look into claims of bid rigging that violate Section 3(3)⁵ and Section 27⁶ gives the Commission the authority to take any appropriate action or apply

² Ramappa, T, Competition Law in India- Policy, issues and developments; oxford university press, Pg. No. 5182, (2006)

³ Bio-Med, (P) Ltd., in re, 2015 SCC Online CCI 91: 2015 Comp LR 649 (CCI), also Sheth & Co. (Bomb Containers), In re, 2015 SCC Online CCI 95

⁴ Section 19, The Competition Act 2002

⁵ Section 3(3), The Competition Act 2002

penalties. In particularly vulnerable markets like infrastructure projects, bid-rigging can be detected by closely monitoring all of the avenues through which bidders can interact with one another. This could be verified and checked further by examining the nature of the relationships between the bidders. Even after all these this malpractice is very much still possible; such as notification of the winning offer, suspicious bidder behaviour in a particular industry, unusual behaviour and by looking closely at the similarities between different bidders etc., may be enough information in the documents submitted by various bidders to investigate components of bid rigging.

The Group complies with antitrust laws due to the high risks of noncompliance and the strict antitrust compliance standards outlined in the Company's guidelines. This suggests that every employee is held to the highest standards. However, the guidance is intended specifically for employees who may or may not come into contact with cartel law while carrying out their duties. To oversee and ensure adherence to antitrust regulations, all employees must read and comprehend the material in its entirety. The "guidelines" are not able to address every issue, but they do seek to improve all employees' understanding of antitrust laws. It is therefore recommended to speak with the relevant Compliance Officer(s) within the Group Company(s) whenever further information is required.

There is a growing trend to harmonize antitrust laws in all nations where market economies and free competition are the best models of economic development, despite the lack of uniformity, particularly with regard to procedures.

Three fundamental ideas underpin antitrust law:

- (1) The prohibition of anti-competitive agreements and coordinated actions;
- (2) the prohibition of abusing a dominant position or significant market power; and
- (3) the evaluation of acquisitions and joint ventures to avoid dominance work or reduced competition.

Although these guidance notes cover all the topics mentioned above, they are not all inclusive and there may be situations that are not addressed. As a result any questions should be brought up right away with the appropriate Compliance Officer of the organization.

III. Anti-Competitive Agreements

The widely recognized definition of an anti-competitive agreement was one that would have the capacity to compromise the product's marketability and fundamentals, which would then lead to a scenario in which an agreement would emerge about the product's manufacturing, distribution and services, ultimately upsetting the technical aspects of the market. Specific definitions of what constitutes an anti-competitive agreement (ACA) are provided in Section 3 of the CA02, which addresses enforcement of ACA.⁷

Section 3 (1) of the CA02 is structured in the manner in which each anti-competitive conduct is handled. It clearly states that any agreement entered into by any company that has a clear negative impact i.e., Appreciable Adverse Effect on the market will be treated as an anticompetitive agreement. Considering the significant negatives of anti-competitive agreement, any agreement that falls under the Act's definition also agreements that constitute, directly or indirectly, determine the price or supply of a product, or restrict production and supply thereof or that lead to bid-rigging or collusive bidding are deemed to have a significant negative impact on market. Such agreements are regarded as anti-competitive agreements.⁸

This should be kept in mind when considering whether an agreement has any significant adverse effects or not that it is the duty of the CCI to decide regardless of whether such an agreement creates obstacles or pushes a competitor out of the market, or creates an exclusion from entering a competitive market or creates an accrual benefit to the competition, the agreement is only considered invalid. Otherwise, it would affect the company's freedom to enter into any contracts with other companies or persons or institutions in the ordinary course of business.

In a landmark case, the Supreme Court⁹ stated that the main objective for Competition law was to maximizing purchasing power and wealth management in particular the avoidance of anti-competitive behaviour in the market which is greatly assisted by proactive state aid controls. The CA02 aims to regulate contracts between companies, regardless of whether they are in collusion with the basic principles of the market and its fundamentals.

⁶ Section 3(3), The Competition Act 2002

⁷ Ramappa, T, Competition Law in India- Policy, issues and developments, Oxford University Press, Pg. No: 51- 82, (2006)

⁸ Porter, R. H. (1983). A study of cartel stability: The joint executive committee, 1880–1886. *The Bell Journal of Economics*, 14(2), 301–314

⁹ Competition Commission of India vs. Steel authority of India & Anr. [(2010) 10 SCC 744]

Antitrust laws apply when the purpose of the agreement is to restrict competition. An agreement may not be enforced until it can be prohibited. If an agreement is entered into and the parties individually decide not to enforce the agreement they can still be fined for the agreement and vice versa. If the intention of the parties is not to restrict competition but the agreement has restrictive effects on competition, the agreement is also prohibited and the alleged company may be fined.

Any nexus between competitors may raise concern about cartels. Antitrust authorities will always be suspicious of the true intentions of contemporary competitors' meetings. Therefore, all employees should exercise caution when meeting with competitors, including informal meetings, and consider whether the purpose of the meeting is permissible from a cartel perspective. Therefore, employees should contact with the company's compliance officer if they have any doubts about this matter. Obtaining information about competition may also have anti-competitive effects; this can give companies a better understanding of where they can improve future pricing and other business practices.

IV. Relationship with Competitors

Any formal or informal agreement (verbal or written) to maintain prices, limit supply to raise prices or divide markets among industry participants is anti-competitive and all employees must refrain from engaging in such activities. A common goal of bid rigging is to inflate the amount of the winning bid, thereby increasing the amount the winning bidder will receive.

Cartels are agreements between competitors to fix prices, limit production, divide markets, rig bids, etc. All cartels are illegal, whether the agreement is written or oral, express or implied. Cartels are the most serious form of antitrust violations. Employees involved in a cartel can be subject to severe penalties, including imprisonment sentences. Agreements or agreements between competitors regarding prices or terms and conditions to be submitted in response to requests for quotations are generally prohibited. This includes agreeing not to bid.

In general, there are two common types of bid rigging, namely companies agreeing to submit a joint contract bids and other offers are submitted so that each company wins an agreed number or connection value.

Intense competition among suppliers helps governments to get the best value for money of purchasing goods and services. Conversely when competition is limited - for example, when suppliers participate in bid rigging - the government pays more than the reasonable price and thereby tax payers hard earned money got wasted. Bid rigging occurs in all types of industries and environments and it occurs all over the world. When bid-rigging affects public procurement, it can be very damaging to taxpayers. One reason for this is that public procurement is often a large part of a country's economy.

Despite the fact that individual entity and business entities may agree to carry out bid-rigging schemes in a variety of ways, they frequently employ one or more of several standard strategies. These methods are not exclusive of one another. For example, cover bidding can be used in conjunction with a bid rotation scheme. These tactics in turn can lead to procurement officials being able to discover the bid rigging and this can then help them to uncover bid rigging schemes.

Competition in public procurement is also undermined on many an occasion especially when public officials choose to abandon fair and just policies and procedures and favour any particular bidder or bidders for monetary consideration or otherwise. Cartels are formed when a company and its competitors enter into agreements to raise or maintain prices at a certain level divide geographical regions, customers or projects between them agree to limit production and/or engage in price manipulation. Accordingly bid rigging occurs when bidders mutually agree to eliminate competition in the procurement process, thus denying the public from getting certain goods or service at a fair price and thereby bid rigging is a form of cartel behaviour.

Although the schemes companies use to rig bids vary, they all have one thing in common i.e., bidders agree to eliminate competition which raises prices and accordingly the government has to pay more. Bid Rigger targets government agencies that purchase goods or services from non-government companies. The seriousness of the violation of Section 3(3)¹⁰ is found in many CCI awards; they do not allow exceptions and do not accept a reason to manipulate offers. Small MSMEs make CCI look vulnerable and often subject to unfair operating conditions. However, some cases have revealed their cartel-like tendencies where industry associations have empowered them to do so. Antitrust and competition laws are relatively new in India; awareness and understanding of these laws must permeate any business that has followed this practice as a daily practice. CCI is committed to ensuring that competition law is taken seriously, without exception. There is no doubt that the evolution of competition law, combined with the focus and scope of CCIs will change the way MSMEs think and strengthen compliance.

¹⁰ Section 3(3), The Competition Act 2002

V. Bid Rigging under Competition law

Law ought to be a tool to control human behaviour whether it is in daily, social or professional interactions. In a democratic nation like India, for a market system to be effective, it is crucial for the development of the market economy in some ways. A dynamic law and policy on competition is needed to control the nation's current market policy. The Indian policy makers implemented the CAO2 with the same goal in mind. It can justify its existence by demonstrating its capacity to offer superior marketing regulations.

The purpose of the Competition Act is inter alia to prevent practices which adversely affect competition, to promote and maintain competition in the market to protect the interests of consumers and to ensure freedom of trade for other market participants in India. Like most international competition laws, Indian competition law also prohibits companies from entering into anti-competitive agreements (including cartels) and abuse of dominant positions, and regulates mergers and acquisitions that meet statutory revenue or asset thresholds. In order to achieve the objectives the CCI was established under the provisions of the Act which focuses on the above three enforcement areas. It also takes up competition advocacy and advisory functions.

The CAO2 adheres to the principles of contemporary competition laws aims to promote competition and defend Indian markets against anticompetitive business practices. The Act prohibits anticompetitive agreements, abuse of dominant position by enterprises and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. To accomplish these goals the Act outlaws and declares null and void any agreement that substantially lessens or threatens to substantially lessen competition in Indian markets. One of these is collusive bidding also known as bid rigging. It is assumed that agreements that are deemed to be anti-competitive having significant harm to competition as defined by Section 3 of the Act. It should be noted that a case of "bid rigging" may involve actions that are not considered to be the definition of bid rigging. In fact, the CCI has established agreements covered by Section 3(3) (a), (b), and(c), as well as (d), in many of the bid rigging cases as mentioned here.

Although bid rigging can occur in any sector of the economy, some sectors are more prone to occur due to the specific characteristics of that industry or products concerned. Such characteristic tends to support bid-rigging efforts by companies. Procurement is particularly vulnerable to fraud and corruption according to the World Bank's and INT study. This vulnerability is mainly due to the large sums of money involved and the difficulty of effectively monitoring large one's contracts. In addition to procurement, DIR also found other deficiencies in contracts and financial management. The problems encountered by INT most often arose in procurement - corrupt payments to officials and the diversion of contracts to favoured bidders; collusive bidders to obtain contracts; and submission of fraud bids designed to circumvent the competitive bidding process.

Cartels form when companies work with their competitors to raise or maintain prices, divide geographies, clients or projects between them, agree on boundaries, production and participate in bid-rigging. Bid rigging is a form of cartel behaviour. It is when bidders accept eliminating competition in the procurement process and depriving the public of a fair price. Bidders can eliminate competition when awarding government contracts in several simple ways, for example:

- A competitor agrees to make an uncompetitive bid that is too high accepts or contains terms that are unacceptable to the buyer.
- A competitor agrees not to bid or bid withdraw an offer of consideration.
- A competitor agrees not to bid in certain geographical areas or only for certain public bodies.

While the schemes used by companies to manipulate bids vary they all have one thing in common: the bidders agree to eliminate competition so that prices are higher and the government pays more. Cartels can consist of one or more anti-competitive agreements that direct the people involved the parties will act (for example a minimum price for a product or service, or no discount), or in some cases not to act (e.g., not to bid on a tender). It could be an anti-competitive agreement very informal (a "nod and a wink") but remains illegal.

Although there are several types' cartels, the goal of each is the same: to maximize the profits of the members of the cartel, while preserving them the illusion of competition. When competitors engage in bidding fraud (or other cartel behaviour) a customer runs the risk of being overloaded with purchases. Cartel behaviour can harm the well-being of citizens usually through price increases and also through negative impacts on other factors such as choice, innovation, quality and investment.

VI. Conclusion

In a competitive market for goods and services, any specification that appears to be designed in a way that favours a particular company deserves scrutiny. For example, specifications that are too narrow can be used to exclude otherwise qualified bidders or prove unsuitable for single-source pricing. Specifications that are too vague or broad may allow unqualified bidders to compete or justify fraudulent change in orders after contract is awarded. Sometimes program officials even allow favourable applicants to prepare specifications. Although different industries or products characteristics that have been conducive to collusion and coordination, but not all of them are necessary for a company to be successful in bid rigging. Indeed, the

modern economy revolves around the public and private partnership. It is also undeniable that the government mechanism i.e., for the provision of a service or something else is always subject to market forces. When the time comes, i.e., subject to market forces, although there is nothing to worry about when it tilts its management of those who begin to violate the rules of the fair market, perhaps cause corrupt activity. Bid rigging or any other form of bid falsification, i.e., nothing but an anticompetitive agreement that needs to be investigated from that view. Such practices are not only collusive and do not promote economic laws but also cause huge losses to public finances.

India's efforts to expose cartels and other anti-competitive agreements would go a long way toward promoting ethical business practices, enhancing market competition and promoting equitable economic growth. That way from this perspective, it is always imperative to stop this practice by creating a fair and competitive market. It could also be added that the country is one of important actors in the modern economy, especially in the development of the welfare economy because in this economic model, there is always an opportunity for the big fish to catch the small fish. This is not only a violation of fair economic rules, but also restricts competition and thus hinders development.

It is a well-known fact that there are many laws in India; all that is required is that they be strictly observed. It is also proposed to apply more strictly the provisions of the Competition Law of 2002 in order to prevent other firms from doing the aforementioned malpractices. More importantly, it is also relevant when considering any appreciable adverse effect that any concluded agreement will have, assessed such agreements in such a way that failure to do so will in turn affect the validity of the fundamental rights granted under the Constitution of India.

Abbreviation

ACA- Anti Competitive Agreement

CA02- Competition Act, 2002

CCI- Competition Commission of India

DIR- Detailed Implementation Review

INT- Department of Institutional Integrity

MRTP- Monopolies and Restrictive Trade Practices MSME- Micro, Small and Medium Enterprises

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