



THE OECD CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS TO REDUCE THE RISKS OF BID RIGGING

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Main Points

- By using the OECD Design Checklist and other training materials, the risk of bid rigging in tenders can be reduced.
- Key goals:
 - Stay informed about the market
 - Maximise bidder participation
 - Minimise communication among the bidders.



OECD Guidelines for Fighting Bid Rigging

- The Guidelines have two checklists:
 - Design Checklist
 - Detection Checklist
- The Guidelines were approved by the OECD Competition Committee in February 2009.
- The Guidelines are a nonbinding document and reflect the best practices of OECD member countries.



Checklist - Designing Procurement Tenders to Reduce the Risk of Bid Rigging

- Section 1 – Be informed about the market
- Section 2 – Maximise potential participation by genuinely competing bidders
- Section 3 – Define requirements clearly and avoid predictability
- Section 4 – Reduce communication among bidders
- Section 5 – Carefully choose criteria for evaluating and awarding the tender
- Section 6 – Raise awareness among public procurement officials



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 1 -

BE INFORMED BEFORE DESIGNING THE
TENDER PROCESS



Be Informed About Market

- Determine if market characteristics make collusion more likely.
- Learn about suppliers and products.
- Contact other procurement offices.
- Get information about pricing trends.
- Learn about supplier's major costs.
- Look at similar, substitute products.



Example – Water Services in Northern Ireland

- Initial plan was tenders for numerous contracts, each lasting 3-6 months.
- By talking with suppliers, procurer learned bidders did not have staff necessary to bid on such a large number of short contracts.
- Procurer lengthened contracts to 9 months, and spread out the tenders.
- This resulted in a larger number of bidders for each tender.



Example - Power Plants in Brazil

- Procurer learned that a large construction company had exclusive contracts with all turbine manufacturers.
- This made it impossible for other construction companies to bid because they could not get a necessary input (turbines).
- Procurer referred problem to Brazil's competition authority, which took legal action leading to cancellation of exclusive contracts.
- Result was more bidders and lower price.



Your Experiences

- Do you purchase in markets with characteristics which facilitate bid rigging?
- Are there any examples where you learned something about a market that resulted in changing a tender?
- Do you review past tenders?
 - How frequently?
 - With what methods?
- Do you call other buyers that purchase similar products?
 - Other procurement agents?
 - How frequently?
 - Distant purchasers?



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 2 -

MAXIMISE POTENTIAL PARTICIPATION BY
GENUINELY COMPETING BIDDERS



Encourage Participation

- Any conditions that restrict eligibility to bid should be limited, proportionate and necessary.
- Keep cost of preparing bids low, allow adequate time, consider electronic bids.
- If practical, design contract so smaller firms can bid on at least a portion.
- Encourage non-local and foreign firms.



Example - Renovating Schools in England

- Long-term project involving construction work on schools throughout England.
- Concern that local schools would have to depend on small number of local bidders.
- By aggregating all schools in a region into a single tender, project became attractive to more firms, including new entrants.



Example – Chile Highway Tender

- Highway construction tender in Chile
- One tender => only few, major international bidders => higher prices
- Several (smaller) tenders = higher participation of local construction companies => competitive pricing
- Disaggregation of contracts facilitated participation of smaller firms



Example - Prisons in the U.K.

- U.K. wanted to have private firms construct and manage prisons.
- A market for these services did not exist, because previously prisons had been constructed and managed by government.
- For each initial project, bids were awarded to two of the bidders, rather than just the lowest bidder, to encourage long-term participation in the market by more firms.



Your Experiences

- What methods do you use to increase participation in a tender?
- How do you keep bidders' costs low?
- Do you remove firms from registries if they don't bid?
- Do you have rules that may reduce participation?
 - Are there limits on participation by foreign firms?
 - Requirements that specify that certain locally produced goods or services be used?



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 3 -

DEFINE REQUIREMENTS CLEARLY AND
AVOID PREDICTABILITY



Make Requirements Clear and Avoid Predictability

- Specifications and terms should be clear, and centred on function and performance.
- Avoid predictability.
- Allow for substitute products.
- Allow for innovative solutions.



Example - U.K. Ministry of Defence Subcontractors

- Many subcontractors did not bid on Ministry of Defence work.
- Ministry determined this was because of late payments from prime contractors.
- Ministry created innovative payment system which ensured payments to subcontractors were made quickly.
- Result was more subcontractors bid on work.



Your Experiences

- Do you have any examples where a tender was specified in terms of function or performance?
 - How have you encouraged innovation?
 - The use of substitute products?
- How do you ensure that your requirements are clearly understandable?
- Have you ever aggregated or disaggregated orders?



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 4 -

REDUCE COMMUNICATION AMONG BIDDERS



Reduce Communication Among Bidders

- Try to keep the identity of bidders secret:
 - Avoid bringing bidders together in one place.
 - Do not identify bidders by name before, during or after the tender.
 - Do not disclose the number of bidders.
 - Use mail, telephone and electronic bidding where possible.
- Avoid disclosing competitive sensitive information.
- Avoid using industry consultants if they facilitate communication.
- Require Certificate of Independent Bid Determination.



Example - Casing and Pipe in Indonesia

- Rules of tender required bidders who could only supply some of the required products to get a “letter of support” from a bidder who could supply all products.
- This requirement lead to communications among bidders because some bidders had to seek a “letter of support” from other bidders.
- The communications lead to sharing of bid prices before the bid, and a bid rigging agreement.



Example – U.S. Real Estate Auctions

- Tenders involved sale of foreclosed real estate.
 - (Rather than procurement, as in other examples, this case involved sale of product through an auction).
- Auction was held on court-house steps.
- This brought all bidders together in the same place before the bidding, which made it easier for them to communicate with each other and rig bids and pay a lower price.



Example - Certificate of Independent Bid Determination in U.S.

- Bidder certifies it has had no communication with any competitor about prices, intention to submit an offer, or how prices were calculated.
- Bidder certifies it has not disclosed terms of its bid to any competitor.
- Bidder certifies it has not attempted to get any other firm to bid, or not to bid, in order to restrict competition.
- Knowingly submitting a false certificate is a crime.



Why use CIBDs?

- Informs bidders about what competition law requires
- If bidder knowingly submits false certificate, may be prosecuted for lying to the government
- Can prosecute attempts to rig bids, or cases where evidence of a bid rigging agreement is weak



U.S. CIBD

Bid offeror must certify:

1. The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
2. The prices in this offer have not been and will *not be knowingly disclosed* by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
3. No *attempt* has been made or will be made by the offeror to *induce* any other concern to submit or not to submit an offer for the purpose of restricting competition.



Your Experiences

- Have you ever been aware of any communication among competitors?
- Do your tender rules or working methods make it easier for competitors to communicate?
 - Identify who the other bidders are?
 - Know the number of bidders?
 - See each bidders bid after the award?
- What products or services that you purchase might be bought using e-procurement methods?
- Do you use Certificates of Independent Bid Determination?



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 5 -

CAREFULLY CHOOSE CRITERIA FOR
EVALUATING AND AWARDING THE TENDER



State Any Award Criteria in Addition to Price

- Clear and fair criteria encourage participation of bidders in future tenders.
- Criteria should reward innovation and cost cutting.
- Criteria should not favour incumbents or certain groups.
- Criteria should not discourage new bidders.



Example - Norwegian Complaints Board for Public Procurement

- Independent Government Board provides efficient procedure to handle complaints by bidders that a tender was not fair or properly evaluated.
- Result is an improved tender process and more entities willing to participate in bids because they are considered fair.



Your Experiences

- Are there ways for bidders to challenge the criteria used in a bid? Or how the criteria were applied?
- Do you know of any situation where some criteria favoured a certain bidder(s) or discouraged new bidders?
- Are the terms of each firm's bid and their identity kept confidential?



CHECKLIST FOR DESIGNING THE PROCUREMENT PROCESS

- SECTION 6 -

RAISE AWARENESS AMONG PUBLIC
PROCUREMENT OFFICIALS



Train Procurement Staff

- Designing tenders that limit bid rigging requires an understanding of how bid rigging occurs.
- Procurement agencies should:
 - Study past tenders
 - Talk with other procurers
 - Talk with potential and former bidders
 - Work with legal staff and competition authorities.



Example - Public Sector Partnership in Finland

- Finish Competition Authority conducted half-day seminars for public procurement officials in cities throughout country.
- Focused on how to design tenders, how to detect bid rigging, and how the Authority and courts enforce the law.



Example - Outreach and Training in U.S.

- Government lawyers have conducted seminars for procurers for many years.
- This has led to a relationship of trust between procurers and government lawyers and the reporting of possible bid rigging.
- The prosecution of cases reported by procurers has led to a reduction of bid rigging.



Conclusion

- The OECD Design Checklist is one important tool to help reduce the amount of bid rigging in public procurement.
- We encourage you to review your current and future tenders with the Checklist in mind, and make changes that can prevent the losses caused by bid rigging.



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