METHODS TO DETECT AND COUNTERACT ANTI-COMPETITIVE PRACTICES WITHIN PUBLIC PROCUREMENT PROCEDURE

Viorel CHIVRIGA

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Contact adress:
10/1 Iacob Hincu str., Chisinau, MD-2005
Republic of Moldova
Tel.: (37322) 21 09 32
Fax: (37322) 24 57 14
www.viitorul.org

SUMMARY

ACRONYMS

J.S.C. – Joint Stock Company

L.L.C – Limited Liability Company

NAC - National Anticorruption Center

NASC - National Agency for Settlement of Complaints

PPA - Public Procurement Agency

FOREWORD

The field of public procurement has significantly advanced during the last period of time. A new Public Procurement Law, a series of government decisions that form the basis of the secondary regulatory framework, the Strategy for Development of Public Procurement System for the years 2016-202 have been approved. On the other hand, new institutional background elements have been created by the National Agency for Settlement of Complaints. Also, at present, one could observe the expansion and development of the electronic procurement system that is an efficient tool to ensure transparency and effectiveness in the field of public procurement.

Regardless all the above, a range of problems still persist. In the Strategy for Development of Public Procurement System it is mentioned that "the most frequent irregularities that have been identified in practice are: splitting in small batches/lots within the procurement procedure in order to avoid the ordinary procedures (more contracts having exact values under the threshold,provided to the same contractor); carrying out unjustified procurement from a single source; irregularities with regard to qualification procedure (non-proportional participation criteria or criteria that are not related to the subject of the purchase); unjustified short terms; exclusion of companies under false pretenses in order to favour a selected company; irregularities at the stage of evaluation of offers/bids (delayed acceptance of offers/bids; modification of the submitted offers/bids; rejection of the "unsolicited" offers/bids due to formal reasons or due to reasons that that are not stipulated by the law or in the tender documents); unjustified rejection of all the offers for to repeat the procedure under different requirements; non-compliance with requirements related to transparency and information; ungrounded increase in price during contract execution. Scarce implementation of legislation in the field of public procurement emphasizes the need to provide adequate support with regard to training and capacity building"[1].

[1] Government Decision No. 1332/14.12.2016 on the approval of the 2016-2020 Public Procurement Development Strategy and the Action Plan on its Implementation.Monitorul Oficial [Official Gazette] No. 459-471/1442 as of 23.12.2016.

According to our opinion, there are even more problems in the field of public procurement. Especially we are referring to those that have connection with identification, counteracting and annihilation of the anti-competitive practices related to the realm of public procurement. This situation is owing to the fact that the competitors use a variety of instruments, and the state institutions have limited capacities to identify and annihilate the attempts of the institutions to conduct such practices. Thus, it is necessary to better understand anti-competitive practices belonging to the public procurement field, to endow the state institutions with the tools necessary for identification and prevention, and to ensure transfer of experience, expertize and good practices for the PPA, NASC and the contracting authorities.

CHAPTER I

LEGISLATION AND THE SECONDARY REGULATORY FRAMEWORK

The legislation and the secondary regulatory framework that oversees the aspects related to prevention and counteracting anti-competitive practices include the Competition Law[2], the Public Procurement Law[3], and a series of standard acts.

Article 5 of the Competition Law prohibits, without any advance decision that might have been required in this respect, any type of agreements between enterprises or associations of enterprises, any decisions of associations of enterprises and any concerted/pre-established practices[4] that have as a purpose or its effect impediment, bounding or distortion of competition on the whole market of the Republic of Moldova or any of its parts. The agreements prohibited under Article 5 are void ab initio. The anti-competitive agreements are particularly targeted at:

a) Direct or indirect establishment of purchase or selling prices or of any other conditions related to transactions;
b) Limitation of or control over production, commercialization, technical development or investments;
c) Sharing of markets or supply sources;
d) Participation in collusive tendering/bid rigging or in any other types of competitive tendering;
e) Limitation or impediment to market access and to free competitive practices used by other enterprises as well as agreements related to non-purchase and non-selling to certain enterprises without a reasonable justification;

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[2] Competition Law No. 183 as of 11.07.2012. Monitorul Oficial No.193-197/667 as of 14.09.2012.

[3] Public Procurement Law No. 131 as of 03.07.2015. Monitorul Oficial No.197-205/402 as of 31.07.2015.

[4] A form of concerted actions between independent enterprises and/or independent enterprise groups that deliberatively replace the competitiveness risks by practical cooperation between the given enterprises without concluding any agreement in this respect.

f) Use of unequal conditions with regard to similar performance related to commercial partners thus creating them a disadvantage from the competition standpoint;
g) Conclusionof binding contracts compelling the partners to accept additional performances that by their nature or in conformity with commercial usage are not connected with the object of such contracts. At the same time, the agreements concluded between the enterprises that have certain relationships are not qualified as anti-competitive agreements[5]. The provisions of Article 5 are not applicable in case of anti-competitive agreements of minor importance, with the exception those foreseen under Article 9.

Box 1. *Article 9. Prohibited agreements of minor importance*

Art. 5 is applicable to horizontal agreements of minor importance that directly or indirectly, solely or in combination with other factors under the control of parties have as an aim:

a) Fixation of selling price of products to the third parties;
b) Limitation of product range or turnover sales;
c) Sharing of markets or clients;
d) Participation in collusive tendering/bid rigging or in any other types of competitive tendering.

Art.5 is applicable to agreements of minor importance, concluded between non-competitors, which contain any of the restrictions that directly or indirectly, solely or in combination with other factors under the control of parties have as an aim:

a) Restriction of the purchaser's capacity to establish a selling price, without prejudice to the supplier's possibility to impose a maximum price and/or recommend a selling price, provided that the latter is not equivalent to a fix selling price or to the minimum price, established as a result of pressure exerted by one of the parties or as a result of stimulus measures, used by the latter;

[5] Competition LawNo. 183 as of 11.07.2012. Monitorul Oficial No.193-197/667 as of 14.09.2012.

b) Constraints with regard to territory on which the purchaser, as party to the agreement, could sell products that constitute part to the agreement, or constraints with regard to clients to which the purchaser could sell the said products, except the case referring to one of the following restrictions that are not austere:
   - Restriction of active sales to an exclusive territory or to exclusive clientele destined for the supplier or ceded by the supplier to another purchaser in cases when such a restriction does not limit the sales carried out by the purchaser's clients/customers;
   - Restriction of sales to the non-authorized distributors, carried out by the members of a selective distribution system;
   - Restriction of the purchaser's capacity to sell components for incorporation to some clients/customers who could possibly use them to manufacture products that are similar to those manufactured by the supplier;

c) Restriction of sales to final consumers, carried out by the members of a selective distribution system acting on the market as retailers without affecting the possibility to deny to a member of the given system the right to unfold its activities in an adjacent unauthorized office;

d) Restriction of cross-supplies between the distributors within a selective distribution system, including between the distributors which operate at different commercial levels;

e) Restriction agreed upon a supplier of components and a purchaser that incorporates these components, which limits the possibility of the supplier to sell these components as separate parts to the final users, repairers/menders or other service providers who were not designated by the purchasers to repair or maintain his/her products.

Also, Article 7 of the Competition Law provides for prohibition of cartels that represent horizontal anti-competitive agreements, except minor importance agreement, which, directly or indirectly, solely or in combination with other factors under the control of parties have as an aim: fixation of

selling prices of products sold to the third parties; limitation of product range or turnover sales; sharing of markets or clients; participation in collusive tendering/bid rigging or in any other type of competitive tendering. The cartels represent uncompromising anti-competitive agreements that by their nature and by their object have the capacity to preclude, restrict or distort competition.

CHAPTER II

ANTI-COMPETITIVE PRACTICES WITHIN THE FRAMEWORK OF PUBLIC PROCUREMENT PROCEDURES

The anti-competitive practices within the framework of public procurement procedures may have different forms. However, they imply a secret agreement or a pre-established practice between two or more offerors/ bidders that is related to price fixing or market sharing with a view to influence the results of the tender. A pre-established practice could contain a direct or indirect contact between the enterprises which intention or effect is either to manipulate the market behavior or to bring to the competitors' notice the behavior pattern that will be followed in the future. A classic example of pre-established practice was the unfounded refusal of the supplier of pharmaceuticals to comply with contractual obligations on integral and timely delivery of pharmaceuticals to medical institutions at the beginning of the year 2015. In conformity with the investigation conducted by the , the enterprises "Dita EstFarm" L.L.C., "Esculap-Farm" L.L.C., "Medeferent Grup" L.L.C., "SanFarm Prim" J.S.C., and "R&P Bolgar Farm" L.L.C. held in 2015 a dominant position on the pharmaceutical delivery market (for certain pharmaceuticals), being contracted by public health care institutions, following the tender organized by the Medicines and Medical Devices Agency on September 10, 2014. In conformity with the data from the Customs Department, those pharmaceuticals that were lacking at the public health care institutions due to non-delivery or insufficient delivery were imported on the territory of the Republic of Moldova by 6 pharmaceutical providers. Also, the enterprises had the possibility to procure pharmaceuticals that they were supposed to deliver to public health care institutions,in accordance with the contracts, from the drug stores and pharmaceutical warehouses from the Republic of Moldova. The enterprises "Esculap-Farm" L.L.C., "Dita EstFarm" L.L.C., "Medeferent Grup" L.L.C., "SanFarm prim" J.S.C., "Metatron" J.S.C. and "R&P Bolgar Farm" L.L.C. deprived the public health

care institutions of the opportunity to procure pharmaceuticals from other suppliers, within the limits of allotted public resources, fact that entailed the access of some actual or potential competitors to relevant markets. As a corollary, the collective interests of the final consumers have been injured, and the final consumers could not benefit from efficient treatment either because of lack of the necessary medications, or because of the increased treatment costs. As a result of an investigation, the Competition Council Plenum stated that the Competition Law has been trespassed by the "Esculap-Farm" L.L.C., "Dita EstFarm" L.L.C., "Medeferent Grup" L.L.C., "SanFarmPrim" J.S.C., "Metatron" J.S.C. and "R&P Bolgar Farm" L.L.C. by ungrounded refusal to integrally delver in due time pharmaceuticals to the public health care institutions in conformity with the concluded contracts and imposed a fine to the aforementioned enterprises in the total amount of 17,4 mln lei[6].

Anti-competitive practices deprive the public procurement process of real manifestation of competition between the tenserersand favours certain offerors/bidders, which often deliver products, services or works at higher prices and at a lesser quality. This situation leads to increase in purchase prices and to decline in quality of delivered products or services. Moreover, there is a negative impact on the contracting authorities, and, by default, on the consumers. The anti-competitive practices relate to any type of products, services and works.

Box 2. *Example of anti-competitive practice*[7]

The NAC (National Anticorruption Center) jointly with the Anticorruption Prosecutor's Office have ferreted out arrangement of fake tenders organized to procure foodstuffs for schools and kindergartens. Under the given criminal record, there were detained 16 persons, out of which 9 public officials from the General Directorate for Education, Youth and Sports of the Chisinau Mayoralty and other institutions, involved in carrying out of tenders and procurement of foodstuffs along with 7 representatives of economic operators who participated in the

[6] Report on the activity of the Competition Council for the year 2016.

[7] https://www.cna.md/lib.php?l=ro&idc=143&t=/Studii-si-analize/Rapoarte-de-activitate&

given process and delivered foodstuffs to public institutions. In the result of special actions taken under covert investigations, there were filed 30 criminal cases relating to decision-making officials from the city district departments and involved economic operators. Pursuant to the criminal investigation data, the process of public procurement was conducted on the background of severe violations of law, characterized by favouring of some economic operators. The fraudulent scheme envisaged signing of procurement contracts by the decision-making authorities from the municipal departments as well as by the economic operators, and consisted of unlawful increase in offers' prices, the most expensive offers being designated the winning ones. By preliminary agreement, several economic operators participated at the tender, displaying different price offers although one founder stood behind it. To obtain favours, economic operators paid to the public servants, either monthly or for each procurement auction/tender, a certain amount of money. During the criminal case investigation, other illegalities have been uncovered as well. Thus, with the goal to obtain a larger profit after the execution of the concluded contracts, the economic operators delivered inferior quality products to the contractors, and the said products were used as foodstuffs for children from kindergartens and schools from the Chisinau municipality. In order to document for the record the criminal activities of the delinquents, 40 pre-emptive searches were conducted at the homes and offices of public servants within the General Directorate for Education, Youth and Sports of the Chisinau Mayoralty as well as of economic operators, and at the Ministry of Defense, the National Agency for Food Safety and the Public Health Center from Hincesti city.

There is a range of market characteristics that encourage anti-competitive practices related to public procurement. Among those one may find a limited number of tenderers; homogeneity of products, works and services; symmetry of market shares; recursive tendering, market transparency; activity of professional associations.

The limited number of offerors is due to a reduced number of market competitors or is due to qualification and selection criteria that are too

restrictive. In case of public auctions/tenders, it is easier to commit a fraud in order to win a tender when the number of tenerers providing goods, works and services is reduced.

Non-homogenity of products constitutes an additional dimension of the manifestation of competitiveness.In the situation when there is a symmetry of market shares, competitors of different scaleare not motivated to proceed with anti-competitive practices. On the contrary, when some products or services sold by the companies are identical or almost similar, it is easier for the given companies to enter into agreements for to establish a common pricing structure. In case of ***symmetric costs***, the productive enterprises are not motivated to start an anti-competitive practice.

Recurring procurement enhances the chances for secret agreement. The frequency of tendering helps the members who concluded an agreement to manipulate the offer/bid by sharingthe contracts amongthemselves. Moreover, the members of a cartel could sanction a trickster via following the offers initially rendered to the latter. Thus, scheduled and periodic contractsfor goods and services might require special instruments and special caution to discourage fraudulent tendering.

The market transparency ensures greater safety for carrying out tenders under conditions of loyal competition owing to the fact that the offerors/bidders have access to primary information relating to the market elementsand the competitors' activity.

Industrial associations could be used as legal and pro-competitive mechanismsfor the members of a certain business or services sector in order to promote the standards, innovations and competitiveness. Contrariwise, in case when the given associations were prone to commit illegal actions and were inclined to anti-competitive conduct, they were used by the enterprises' officials with the purpose to put into practice and entrench their discussions referring to the modalities and means to conclude and implement a bid-rigging agreement[8].

[8] http://blog.avocatoo.ro/combaterea-trucarii-ofertelor-cadrul-licitatiilor-publice/

CHAPTER III

INDICATORS THAT MIGHT SUGGEST AN ANTI-COMPETITIVE PRACTICE

The officials holding functions and attributions related to the domain of competitiveness point out that there are three groups of indicators that might suggest an anti-competitive practice. They come down to behavioral indicators, to indicators that are characteristic to tender documents and to indicators specific to declarations of the tenderers.

The behavioral indicators that might suggest an anti-competitive practice are:

- The same tenderer often has the cheapest offer/bid;
- Certain companies win tenders in certain geographic zones – this could be a sign of market sharing according to geographic criteria;
- Rotation of the same companies in case of winning tenders – this could suggest about an existence of a mechanism of distribution of contracts between the tender participants;
- Unexpected withdrawal from tendering or omission to transmit additional information that has been requested by the contracting authority, resulting in disqualification for non-compliance with public tender;
- The winning tenderer frequently subcontracts unsuccessful tenderers;
- The winning tenderer does not accept the contractand later it is found that s/he is a subcontractor;
- The tenderers meet shortly before the deadline for the submission of offers;
- Certain tenderers offer values that are difficult to explain (fixed amounts) in order to signal to the others their position within the tender ranking;
- The prices offered by the tenderers exceed the expected amount, and the price differences are very small and are characterized by decreased variability;
- The price offered by the winner and the other offerors is big, and this thing could not be explained by the cost structure or other objective factors (courtesy tenders);

- Certain offerors always participate in tenders together, or vice versa, never bid on tenders against each other;
- In case the tender has several stages, the ranking of the offerors does not change during the said stages;
- Two or more companies submit a joint bid, regardless the fact that at least one of them could have submitted an individual bid.

Specific indicators relating to tender documents that might suggest an anti-competitive practice:

- Identical spelling mistakes, proofreading mistakes, use of the same font/format;
- The offers/bids contain references to other offers/bids;
- The offers/bids contain the telephone/fax number and other data that identify another offeror/bidder;
- Identical arithmetical errors;
- Identical cost estimations for certain products;
- Identical offers or uniform increase in prices related to two or more offers/bids;
- The envelopes from different offerors/bidders have the same seal.

Indicators specific to declarationsof tenderers that might suggest an anti-competitive practice:

- Justification of prices through considering "sector recommended prices", "standard market prices";
- Usage of the same terminology for justification of increase in prices;
- Clarifications referring to the fact that certain companies do not sell in certain areas or to certain clients;
- Mentions that an area or a client is belonging to another supplier;
- Questions concerning the Participation Certificate under an independent offer;
- Clarifications indicating that the information which has not been made public is already known by the competitors (tendered prices, details referring to the offer/bid)[9].

[9] Romanian Competition Council.

CHAPTER IV

ANTI-COMPETITIVE PRACTICES WITHIN PUBLIC PROCUREMENT PROCEDURES

Two ormore offerors, in order to obtain ill-gotten gains, through their behavior adopted within one or several public procurement procedures, influence the results of the public procurement procedure. The participants at such a practice coordinate their behavior so that they do not submit the offer, withdraw the offer, or submit the offer/bid in conformity with the agreement or in the result of information exchange between the offerors. Applying to such anti-competitive practices is stimulated by the market characteristics of the procured commodity/service and by the mode of planning of the public procurement process.

The most frequent forms to carry out anti-competitive practices within public procurement procedures are:

Closed bidding (complementary, courtesy, symbolic)

A competitor agrees to submit a bid that is larger than the bid of the designated winner, or submits a bid, which is known to be way too big for to be accepted, or submits a bid that contains special terms that could not be accepted. Closed biding creates an impression that there is a true competition on the market.

Withholding from bidding

Tenderers agree to withhold from participation at tender or to withdraw the offers/bids that have already been submitted so that the tender be won by a participant designated by the competitors.

Alternating (rotating) bid

All the participants to an agreement submit offers/bids, and the winning tendereris designated via rotation, depending on the value of the contract, in which case equal sums are earmarked to each participant, or depending on the volume of transaction, in compliance with the position of each participating company.

Market sharing

The participants to an agreement decide to share the markets amongst themselves through customer allocation or allocation of certain categories of customers, or through allocation of products or assignment of geographic territories.

Exclusion of qualified tenderers

The public officials in charge for public procurement could facilitate the selection of a favoured tenderer by means of unfair exclusion of qualified tenderers, often in collusion/concert with a corrupted tenderer. This could happen at any stage starting from the beginning when the tender documents are elaborated and until receipt of tenders. Some examples of exclusion tactics relating to eligible tenderers are: proposing narrow or unjustifiably difficult pre-qualification criteria, or biased assessment criteria. For example, in case of a competitive international tender that requires provision of goods within a very short contract period that could exclude many international tenderers, tenderers coul be excluded due to longer transportation terms.

Useless public procurement

Public procurement of goods and services that is useless, excessive or inappropriate, or unnecessary repair works could represent a sign of corruption or of purchases for personal use or for reselling:

- Huge volume of unusual or unexplainable procurementof products or services from a specific supplier;
- Replacement or repairing following an extremely short period of time;
- Unusual or superficial analysis of the needs and their justification;
- Need to procure commodities(according to purchased quantities).

Pre-arranged specifications

Pre-arranged specifications show up when the public official, accountable for public procurement, often in collusion with an offeror, elaborates an invitation to tender that contains specifications, which are either too narrow, or too large. The unjustified narrow specifications allow for qualification only of a single favoured tenderer. In some cases, the public officials who are in charge of public procurement allow the favoured tenderers to elaborate

the specifications. The unjustified large specifications are used to qualify a tenderer that otherwise could not be qualified to participate in tender.

Manipulating the tendering procedure

Indicators regarding manipulation of the tendering procedure:

- Bids are not placed in a sealed envelope;
- Bids are not kept in a safe place with restricted access;
- Acceptance of delayed bids/tenderers;
- The deadline for submission of tenders is extended after submission of some offers/bids;
- The submitted offers/bids "disappear";
- The contract was not subject to a repeated tender, although the number of received offers/bids is under the necessary minimum;
- Lack of written records regarding the procurement process;
- Delays related to assessment of evaluation or delays between the publication of the announcement about the winning tenderer and signing of the contract (could indicate negotiation of discreditable terms and conditions).

Fake (shadow, cut-out) companies/shell companies

Shell companies are fake companies (usually consultancy firms), also known as "front companies" that represent non-legal entities, established for the purpose to:

- Obtain contracts in a non-transparent way;
- Issue fake invoices (these companies are set up by public officials of the contracting authority);
- Play the role of "shadow bidders" that submit bids at higher prices to facilitate the election of the designed winner and create an atmosphere of competitition.

The literature describes that "public procurement, in case of projects with European funding, could be defrauded through the following means:

Corruption – bribery and illegal commissions – an official act could be influenced by offering or receiving of some "valuable items".

Discrepant/conflicting bids – the employer responsible for the contracts provides to a favourite tenderer confidential information that is unavailable to the other participants.

Manipulation of tenders – a preferential contract is selected after modification/ loss/annulment of other offers/bids on the ground of some material errors.

Failure to declare the conflicts of interest – one or several employees from the contracting authority have hiddenfinancial interest as regards the grant contract.

Manipulation of specifications – the proposals or invitations to tender procedures could contain specifications that are adjusted to the requirements of a certain tenderer.

Secret co-operation practices – the contractors from a certain region or a certain industry could enter into agreements in order to remove competition and increase prices (submitting "fake tenders").

Disclosure of data referring to tender – a certain tenderer receives classified information as well as estimative budgets, favourite solutions or information on the competitors' offers.

Miscalculation of costs – purposeful invoicing of some costs that are not allowed or are not reasonable, or could not be directly or indirectly assigned to a contract.

Non-compliance with contractual specifications – the contractors do not comply with the specifications of the contract, but declare that they took them into account.

Unjustified attribution of contracts to a single offeror – drafting very restrictive specifications or extension of contracts previously awarded instead of non-tendering.

Fragmentation of public procurement – a procurement could be split in two or more parts or two or moreprocurement contracts with a view to avoid competitiveness or an investigation/audit.

Combining contracts – collecting the same charges for several orders having different volumes of activity resulting in over-invoicing.

Manipulation of prices – price quotationsdo not contain exact figures, fact leading to price increase.

Replacement of product - replacementof products without informing the customer. Fake or double invoices, or invoices showing off excessive prices.

Providers of fake services – fictitious payments could be authorized by the employees; some contractors could institute shell companies"[10].

[10] Tamas Szora Attila. *Public Procurement*. Cluj-Napoca: EIKON, 2013.

CHAPTER V

RECOMMENDATIONS ON PREVENTION OF ANTI-COMPETITIVE PRACTICES

- Organization and conducting of specialized trainings in the matter ofanti-competitive practices for the officials from the CC, PPA, NASC, contracting authorities, representatives of mass-media.
- Publication of informative materials, TV show, specialized guidelines covering the subject of anti-competitive practices.
- Providing information to the interested parties on the products, works and services that are available on the market and which correspond to the needs of the contracting authority, potential offerors; providing information about market, and tenders previously organized to procure the same product or service.
- Defining clearly the requirements from the task-books and avoiding of predictability by means of performance specifications used to define the requirements; defining specifications taking into account the substitutable goods; sizing the dimensionof public procurement contracts, either by merging contracts or by splitting them; changing the public procurement calendar for year after year.
- Organization of public procurement along with the contracting authorities, in case when small size public procurement contracts are recurrent and relate to similar products. In the event of an award contract divided into lots, it is recommended that the number of the established lots be different from the number of the potential tenderers and that the dimension of the lots be different, too.
- Creation of conditions for participation at tenders for a large number of offerors/bidders (non-restrictive qualification and selection criteria, reduced bidding costs, etc.).
- Employment of independent specialists able to elaborate the specifications for complex products or services.

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Knowledge
creating
development