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## **Project "Cutting edge improvements in the public procurement system in Moldova through inclusiveness, creativity and law-abiding practices"**



Acest proiect este implementat de IDIS „Viitorul”

**Practices for detecting and counteracting anticompetitive practices in public procurement procedures.**



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### **Anticompetitive practices in public procurement procedures:**

- Involve a secret agreement or a concerted practice between two or more bidders, price fixing or carving up the market to influence the tender results.
- Deprive the public procurement process of actual competition between bidders.
- Lead to increased purchase prices and lower quality of products or services.
- Have a negative impact on contracting authorities and implicitly on consumers.
- Can target any products, services, works.



## **Market features that favor anticompetitive practices in public procurement (I)**

**Limited number of bidders** – as a result of the low number of competitors on the market or too restrictive qualification and selection criteria.

**Product homogeneity** – different products, especially by quality constitute an additional dimension of competition.

**Symmetry of market shares** – competitors of different sizes do not have the motivation to resort to anticompetitive practices.

**Symmetry of costs** – efficient enterprises have no motivation to enter in an anticompetitive practice.

**Recurring bidding** – the frequency of the bidding facilitates the distribution of contracts between bidders.

**Market transparency** – competitors can easily see the key elements in the work of the others: prices, cost structures, sales etc.

**Professional associations** – a favorable environment for members to meet and exchange competitively sensitive information.



## **Behavioral indicators that may suggest an anticompetitive practice (I)**

- the same bidder often has the cheapest offer;
- certain companies win in certain geographic areas – this may be a sign of market sharing based on geographic criteria;
- alternation of the same companies in winning tenders – may suggest the existence of a mechanism for distribution of contracts between bidders;
- unexpected withdrawal from tender or omission to send additional information requested by the contracting authority which leads to disqualification from tender;
- the winning bidder constantly subcontracts to non-winning bidders;
- the winning bidder does not accept the contract, and later he is identified as subcontractor
- meetings between the bidders shortly before the bids submission deadline.



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### **Behavioral indicators that may suggest an anticompetitive practice (II)**

- certain bidders put out to tender values that are hard to explain (fixed amounts) to signalize to others their position in the ranking;
- tenderers' bids are above the expected level and the differences between them are very low and are characterized by low variability;
- the price difference between the winner and other bidders is high, and this can not be explained by the cost structure or other objective factors (courtesy bids);
- certain bidders always participate together in tenders or, on the contrary, never participate in tenders one against the other;
- in case of a multi-stage bidding process, the bidders' ranking does not change from one stage to another;
- two or more companies submit a joint offer, even if at least one of them could have submitted an individual offer.



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### **Indicators specific to tender documents that may suggest an anticompetitive practice in tendering (III)**

- identical misspellings, typing mistakes, using the same font / format;
- the offers contain references to other offers;
- the offers contain telephone / fax number, other data identifying other bidder;
- identical calculation mistakes;
- identical cost estimates for certain products;
- identical offers or a uniform price increase in two or more offers;
- the envelopes from different bidders have the same stamps.



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### Indicators specific to bidders' statements that may suggest an anticompetitive practice (IV)

- justification of prices by taking into account “the recommended prices in the field”, “standard market prices”;
- use of the same terminology to justify price increase;
- clarifications regarding the fact that some companies do not sell in a certain area or to certain customers;
- statements that an area or a customer “belong” to another supplier;
- questions on the Certificate of participation with independent offer;
- details indicating that information that has not been made public is already in possession of competitors (offered prices, details of the offer).



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### **Anticompetitive practices in public procurement**

Two or more bidders in order to obtain illicit income influence the results of the public procurement process adopting a behavior model within one or more public procurement procedures.

Participants in such a practice coordinate their behavior so that they:

- do not submit an offer,
- withdraw the offer,
- submit the offer by agreement or as a result of the exchange of information between bidders.

The use of such anticompetitive practices is favored by:

- the features of the market of the purchased good / service;
- the planning mode of the public procurement process.



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### The most frequent forms of implementation of anticompetitive practices in public procurement (I)

#### **Closed bidding (complementary, courtesy, symbolic bidding):**

- A competitor agrees to submit an offer that is higher than the offer of the designated winner.
- A competitor offers a bid that is known to be too high to be accepted.
- A competitor offers a bid containing special conditions that are known to be unacceptable.



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### **The most frequent forms of implementation of anticompetitive practices in public procurement (II)**

#### **Refrain from bidding**

One or more bidders which would normally participate with bids in tendering or have participated in similar tendering in the past agree to:

refrain from participation

or

withdraw a previously submitted bid so that the designated participant to win the tender.



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### The most frequent forms of implementation of anticompetitive practices in public procurement (III)

#### Bid rotation

All conspirators submit bids, but the winning bidder is designated by **rotation** depending on:

**contract value** where equal amounts are allocated to each participant

or

depending on the **transaction volume** corresponding to the size of each participating company.



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### **The most frequent forms of implementation of anticompetitive practices in public procurement (IV)**

#### **Market allocation**

Competitors decide to carve up the market:

**allocating certain customers** or categories of customers;

or

**allocating products;**

or

**allocating territories.**



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### The most frequent forms of implementation of anticompetitive practices in public procurement (V):

#### **Exclusion of qualified bidders**

Civil servants responsible for public procurement can facilitate selection of a bidder favored by unjust exclusion of qualified bidders, often in collusion with corrupt bidder. This can happen at any time from the beginning of the tender documents development up to the receipt of the offers.

#### **Examples of tactics of exclusion of eligible bidders:**

- Organization of narrow criteria or unreasonably difficult prequalification criteria.
- Biased evaluation criteria: For example, in a competitive international tender that requires the delivery of goods in a very short period of the contract, because this can exclude many international tenderers whose transportation would take longer.



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### The most frequent forms of implementation of anticompetitive practices in public procurement (VI):

#### **Useless public procurement**

Useless, excessive or inappropriate public procurement of goods or services or unnecessary repairs may indicate corruption or purchases for personal use or for resale.

#### **Alarm indicators for useless public procurement:**

- Large volume of unusual or unexplained purchases of products or services from a particular supplier.
- Replacement or repair after an unusually short period of time.
- Unusual or shallow analysis of needs and justification to support the need to purchase the goods (in purchased quantities).



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### **The most frequent forms of implementation of anticompetitive practices in public procurement (VII):**

#### **Rigged specifications**

- Rigged specifications appear when a civil servant responsible for public procurement, often in collusion with a bidder, develops a request for proposal containing specifications either too narrow or too large.
- Unjustified narrow specifications allow only a favored bidder to qualify. In some cases, the civil servants responsible for public procurement allow the favored bidder to develop the specifications.
- Unjustified large specifications are used to qualify a bidder which otherwise can not qualify to participate in the tendering.



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### **The most frequent forms of implementation of anticompetitive practices in public procurement (VIII):**

#### **Manipulation of the tendering procedure**

A civil servant responsible for public procurement, as a result of corruption, frequently manipulates the bidding process for the benefit of a favored bidder. These manipulations include disclosure of information about competing bids, acceptance of delayed bids, change of the bids and repeated tendering.

#### **Indicators of manipulation of the tendering procedure:**

Indications of bids changing after submission: written corrections, deletions/erasures, or text insertions between rows changing key information (i.e. the prices, bid validity terms).

The winning bid is canceled for errors and the tender is repeated or awarded to another company.



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### **The most frequent forms of implementation of anticompetitive practices in public procurement (VIII): Manipulation of the tendering procedure**

#### **Indicators of manipulation of the tendering procedure:**

- The bids are not in a sealed envelope.
- The bids are not kept in a secure location with limited access.
- Acceptance of delayed bids.
- The deadline for submitting bids is extended after some of the bids have been submitted.
- The submitted bids “disappear”.
- The contract was not repeatedly tendered, even if fewer bids than the minimum required were received.
- Lack of written records about the procurement process.
- Delays in completing the assessment or delays between publication of the notice regarding the winning bidder and signing the contract (may indicate on negotiation of corrupt conditions).



## **The most frequent forms of implementation of anticompetitive practices in public procurement (IX):**

### **Shell companies**

Shell companies are fictional companies (often consulting firms), also called “front companies”, which are not legal entities created for the following purposes:

- Created to get contracts in non-transparent ways.
- Established by civil servants of the contracting authority to issue false invoices.
- As “shadow bidders” which submit higher price offers to facilitate the choice of the designated winner and create the impression of competition.



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### Prevention measures for anticompetitive practices specific to contracting authorities (I)

#### **Rigorous informing prior to the public procurement process about:**

products/services available on the market that meet the need of the contracting authority;  
possible bidders;  
market tendencies;  
previous tenders organized for the purchase of the same product/service;  
ensuring confidentiality when working with external consultants.

#### **Maximization of bidders' participation**

establishment of qualification and selection criteria that do not unreasonably restrict competition;  
reducing bidding costs (giving a reasonable period for offer preparation, linking of tenders);  
division of public procurement contracts into lots to allow SMEs to participate.



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### **Prevention measures for anticompetitive practices specific to contracting authorities (II)**

#### **Clear definition of requirements from terms of reference and predictability avoidance**

- use of performance specifications when defining requirements;
- defining specifications taking into account substitutable products;
- variation of the size of the public procurement contracts either by merging contracts or by dividing them;
- changing the public procurement timetable from year to year;
- in case a contract is awarded by lots, it is recommended that the number of the lots set should not be the same as the potential number of bidders and the size of lots to be different;
- organization of joint public procurement with other contracting authorities, in case of public procurement contracts of small size that are periodically repeated and target similar products.



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### **Prevention measures for anticompetitive practices specific to contracting authorities (III)**

#### **Avoiding communication between bidders**

in case of market consultation, it is recommended to organize separate meetings with economic operators;

when the bids are opened and results communicated provision of competitively sensitive information, which can distort competition in future tenders should be avoided.

#### **Training the staff involved in the organization of public procurement procedures on the risks of anticompetitive practice;**

#### **Identifying situations that suggest a possible anticompetitive practice and notification of the Competition Council.**



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### **Prevention measures for anticompetitive practices specific to bidders**

**The bidders can play an important role in detecting anticompetitive practices in public procurement by:**

notifying the competition authority, if an anticompetitive practice is suspected;

applying to the leniency policy of the Competition Council.

**The leniency policy is a favorable treatment given by the Competition Council to companies involved in a cartel, and which cooperate with the competition authority in order to discover these anticompetitive practices.**