Bid Rigging
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors/Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>04</td>
<td>Letter from the Editor</td>
<td></td>
</tr>
<tr>
<td>06</td>
<td>Summaries</td>
<td></td>
</tr>
<tr>
<td>07</td>
<td>What's Next? Announcements</td>
<td></td>
</tr>
<tr>
<td>08</td>
<td>CARTELS IN PUBLIC PROCUREMENT: A REASSESSMENT</td>
<td>By Alberto Heimler</td>
</tr>
<tr>
<td>16</td>
<td>BID RIGGING AND UMBRELLA DAMAGES</td>
<td>By John Asker, El Hadi Caoui, Vikram Kumar &amp; Enrico De Magistris</td>
</tr>
<tr>
<td>21</td>
<td>PROCUREMENT PLANNING IN THE EU: ASSESSMENT FROM A BID RIGGING PERSPECTIVE</td>
<td>By Penelope Giosa</td>
</tr>
<tr>
<td>28</td>
<td>HUB AND SPOKE CARTELS AND BID RIGGING IN BRAZIL: CURRENT LANDSCAPE AND FORWARD-LOOKING CONSIDERATIONS</td>
<td>By Cristianne Saccab Zarzur &amp; Jackson Ferreira</td>
</tr>
<tr>
<td>33</td>
<td>BID RIGGING IN PUBLIC PROCUREMENT</td>
<td>By May Reda Ibrahim</td>
</tr>
</tbody>
</table>
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Dear Readers,

Bid rigging is an illegal practice whereby businesses collude in a tender process, thwarting the competitive process. This Chronicle delves into the details of this subject. The set of articles below underlines the importance of robust antitrust laws and diligent enforcement, as they are vital tools for preserving market efficiency and ensuring robust competition.

As Alberto Heimler makes clear, bid rigging arrangements are much more stable than normal cartels. Indeed, in normal cartels, members have an incentive to cheat because they are not easily discovered and, by not following the cartel prescriptions, they increase profits by slightly lowering the cartel price and increase quantities beyond the cartel level. In bid rigging, by contrast, quantities are fixed, and bidding is only used to identify the lowest possible price. Further, bidding markets are much more transparent than normal markets further reducing the incentive to cheat.

Developing on this theme, Penelope Giosa describes how the typical State procurement cycle begins with planning: an essential step for successful public contracts. Such planning helps procuring entities to identify their needs and decide what to buy, and specifically when and from what source. In this context, the European legislator enables procuring entities to conduct market consultations prior to tendering. Though preliminary market consultations may promote innovation in the public market, at the same time, through such mechanisms, the risk of bid rigging can be increased. The piece analyzes bid rigging issues that can arise when conducting market consultations and examines extent to which such issues have been effectively dealt with by the EU Commission in its Guidance on Innovation Procurement, as well as in its Notice on Tools to Fight Collusion in Public Procurement.

John Asker, El Hadi Caoui, Vikram Kumar & Enrico De Magistris discuss how, when such a cartel does not include all sellers in a market, it raises the possibility of buyers paying elevated prices on purchases made from non-cartel members. They may therefore suffer “umbrella damages” due to the cartel’s conduct. While certain jurisdictions (e.g. the EU) allow plaintiffs to claim such “umbrella” damages, it is not clear whether plaintiffs seeking umbrella damages in the U.S. even have standing. This article analyzes the role of “umbrella” damages when conducting antitrust harm in bid-rigging cases. It summarizes findings from a case study of these types of damages using data from the Texas dairy industry. It concludes with some practical considerations to be taken into account when assessing such so-called “umbrella” damages.

On the other side of the Atlantic, in Brazil, Cristianne Saccab Zarzur & Jackson Ferreira provide an overview of the current state of play, and case law relating to so-called “hub-and-spoke” arrangements. The article focuses on the Brazilian competition authority’s most prominent hub-and-spoke cartel precedent, which happens to be a bid rigging case. It also underlines the need for risk mitigation measures for companies involved in tenders.

Finally, turning south to Egypt, May Reda Ibrahim discusses enforcement in the area of bid-rigging in public procurement. In that jurisdiction, the risks for companies are greater than ever. This is due to the digitalization of the bidding process, the increased awareness of public entities and private bidders of the risk of collusion in bidding processes, coupled with an effective leniency policy and a web of sanctions. Companies need to carefully design their bids and train their employees to ensure compliance. Also, the particularities of the Egyptian Competition Law regime require from all companies a greater reliance on local expertise to ensure compliance and risk aversion.

In sum, with global trends showing increased awareness of bid rigging, it is crucial for companies to avoid involvement in such practices. Regulatory bodies worldwide are intensifying scrutiny and enforcement, imposing hefty penalties for violations. Adherence to competition law is not only legally mandatory but also vital for maintaining sustainable business operations and corporate reputation.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team
**SUMMARIES**

**08**

**CARTELS IN PUBLIC PROCUREMENT: A REASSESSMENT**
*By Alberto Heimler*

Bidding markets differ from all others because the objective of a cartel is not simply to raise prices, but also to ensure that each colluding firm gains some benefit. As a result, in most bid rigging cartels colluders rotate as adjudicators. The resulting bidding strategies give rise to anomalies in biddings that could be detected by the bid organizers. This is very important because leniency programs are unlikely to be very effective: dismantling a cartel is very seldom beneficial for the possible leniency applicant since she would renounce to all future profits without much gain in return. Furthermore, in public procurement cartel collusion is in many jurisdictions both an administrative and a criminal violation and “confessing” being part of bid rigging becomes too risky. This is why the recent EU ECN+ Directive has eliminated the possibility of criminal sanctions in public procurement cartels. The change is too recent for it to have had any significant effect. As a result, the bulk of bid rigging cartels continues to be discovered through reports by bidding authorities. However, in order to promote more reporting, the structure of incentives has to change. For example, the money saved from a cartel should at least, in part, remain with the administration that helped discover it and the reporting official should reap a career benefit. In any case, competition authorities should create a channel of communication with public purchasers so that the public purchasers would know that informing the competition authority on any suspicion at bid rigging is easy and does not require them to provide full proof.

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**16**

**BID RIGGING AND UMBRELLA DAMAGES**
*By John Asker, El Hadi Caoui, Vikram Kumar & Enrico De Magistris*

When a cartel does not include all sellers in a market, it raises the possibility of buyers paying elevated prices on purchases made from non-cartel members and therefore suffering “umbrella damages” due to the cartel’s conduct. While certain jurisdictions (e.g., the EU) allow plaintiffs to claim umbrella damages, it is not clear whether plaintiffs seeking umbrella damages in the U.S. have standing. This article analyzes the role of umbrella damages when conducting damage assessment in bid-rigging cases. The article explains why umbrella damages may be a consideration in certain auction formats but not others and describes the underlying economic rationale. It summarizes findings from a case study of these types of damages using data from the Texas dairy industry. It concludes with some practical considerations when assessing umbrella damages.

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**21**

**PROCUREMENT PLANNING IN THE EU: ASSESSMENT FROM A BID RIGGING PERSPECTIVE**
*By Penelope Giosa*

The procurement cycle begins with planning, which is an essential step for successful public contracts, because it helps procuring entities to identify their needs and decide what to buy, when and from what source. In this context, the European legislator enables procuring entities to conduct market consultations prior to tendering. However, though the preliminary market consultation promotes innovation in the public market, at the same time the risk of bid rigging can be increased. This article analyzes the bid rigging issues that can arise when conducting market consultations and examines to what extent these issues have been effectively dealt with by the European Commission in the Guidance on Innovation Procurement as well as in the Notice on Tools to Fight Collusion in Public Procurement. Recommendations are also made for further and better reaction to the problem.

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**28**

**HUB AND SPOKE CARTELS AND BID RIGGING IN BRAZIL: CURRENT LANDSCAPE AND FORWARD-LOOKING CONSIDERATIONS**
*By Cristianne Saccab Zarzur & Jackson Ferreira*

This article aims at providing an overview of the current status of Brazilian antitrust landscape and particularly CADE’s case law pertaining to hub and spoke cartels under the perspective of bid rigging. Initially, an overview of bid rigging is laid out. Then, hub and spoke cartels as a potential framework for procurement collusion is presented especially considering CADE’s major hub and spoke cartel precedent, which was a bid rigging case. After that, an analysis is carried out of recent references that CADE’s Tribunal has made to the hub and spoke cartel features in the context of a general bid rigging case. It is argued that CADE’s case law evolution on the issue at stake remains to be seen, although the precedent and quick references made by the Tribunal in other cases already play an important role in terms of legal certainty and predictability. Finally, some risk mitigation measures for the day-to-day business activities of economic agents engaging in supply, distribution or resale of products are laid out in view of the current views of local antitrust authorities on the subject.
BID RIGGING IN PUBLIC PROCUREMENT
By May Reda Ibrahim

Since the promulgation of Law No.182 of 2018 and its executive regulations on public procurement reiterating and emphasizing the prohibition of bid rigging in public procurement in line with the provisions of Law No. 3 of 2005 “Competition Law,” the Egyptian Competition Authority “ECA” has been striving to create a clear and comprehensive landscape for the administration to ensure the efficient enforcement of this prohibition. One of its significant efforts was to publish guidelines for fighting bid rigging in public procurement, which mainly address public officials and employees of the administration, but also offer valuable guidance on how to interpret and enforce the prohibition against market players and undertakings that participate in public tenders, thus enabling them to enhance their compliance the extent that those guidelines offer the necessary guidance for businesses. This note aims to trigger discussions but also further understanding regarding the Egyptian framework for the prohibition of bid rigging in light of these guidelines and the ECA’s enforcement practice, particularly, the recent infringement decisions in the area of bid rigging in public procurement.
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The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.
CARTELS IN PUBLIC PROCUREMENT: A REASSESSMENT

BY ALBERTO HEIMLER

1 Scuola Nazionale dell’Amministrazione (National School of Administration), Rome. I thank Kiritkumar Mehta for helpful comments.
I. INTRODUCTION

Bid rigging is a collusive agreement among competing firms aimed at artificially distorting a bidding process so that adjudication prices are higher and/or the quality of the product/service supplied is lower. The difference from a normal cartel, that leads exactly to the same outcome, is the process by which firms engage in bid rigging and the unique characteristics of a bid rigging cartel. These two elements, the process of finding a consensus on the bidding strategy to be adopted and the specific characteristics by which a bid rigging cartel operates, provide signals to procurement officials to suspect the existence of a bid rigging cartel and allow them to report it to enforcement authorities.

In a normal cartel competing firms meet in order to reduce the degree of competition among themselves (raising prices and/or reducing quality) and then meet subsequently making sure that there is no cheating and ensure that each cartelist market share remain sort of constant through time. On the other hand, in a bid rigging cartel firms get together to identify a strategy to distort the bidding process, but then, since there is only one adjudicating firm per bidding, they have to identify ways to compensate the other participants, offering them side payments or, more often, making sure that bid adjudications rotate among themselves. Detecting cheating is not an issue, because the transparency of the procurement process makes detection of a cheater immediate and costless. As a result no cheating in a bid rigging cartel.

The way the bid is organized affects the strategy to rig it. For example, a bid adjudicated at the minimum prices requires that potential bidders artificially fix their respective bidding price so that the price of adjudication is higher than it should otherwise be. The risk is that, since the possibility to bid is open to all qualified participants, some firms not participating in the collusive scheme wins the bid. This is a risk that cannot be reduced when the bids are adjudicated on the basis of the price only.

When bids are adjudicated on the basis of the most advantageous economic offer, then quality and price are both taken into consideration and the overall ranking of a bid requires aggregation with some predetermined weights. In such cases bid riggers, anticipating the quality of the offer of not participating firms, may more easily identify the price that would lead to adjudication and reduce the risk of adjudication to outsiders.

Finally, when anomalous offers are excluded automatically and the bid is adjudicated to some average price calculated with a pre-established formula (which is done to speed up the procedure), then the strategy of bid riggers may drastically change. This automatic exclusion requirement may induce companies to organize “cartels” whose aim is to artificially induce more bid participants and concentrate the offers around the level of the price that would most probably be considered just not anomalous. The probability for one of the participating firms to win the bid is thus drastically increased.

For many reasons leniency programs are not very effective in procurement cases. First of all, in most jurisdictions bid rigging in public procurement is also a criminal offence leading to jail sentences, as a result immunity for an administrative fine is not sufficient. Furthermore, once a bid is adjudicated (especially when lots are shared among the participating firms), it is very rarely detected subsequently. As a result, leniency candidates prefer to wait instead of coming forward.

The ineffectiveness of leniency programs is in principle not a reason of much concern in bid rigging because signals of bid rigging could be identified by the way competitors participate in the bidding process. Procurement officials are thus good candidates to report what they perceive to be collusive bidding strategies to the relevant enforcement authorities. However, since procurement officials are rewarded for prompt delivery and are never held responsible should a bid be adjudicated at artificially distorted prices, they have little incentives to report their suspicions to enforcement authorities. There are ways to enhance their incentives to report, i.e. making them aware of the damages of bid rigging, linking their career to fighting bid rigging and making the procuring administration able to sue the bid riggers for damages.

Section II will show the differences between a normal cartel and bid rigging. Section III shows how a bid rigging can be detected providing the example of the Italian cartel among management consulting firms. Section IV addresses the issue of the incentives of public procurement official to report their suspicions to the relevant enforcement authorities and finally Section V discusses what happens when anomalous offers are automatically excluded and the bid is adjudicated around some average price. Section VI concludes.

II. CARTEL BEHAVIOR AND BID RIGGING

Cartel is a term generically applied to a wide variety of agreements among competitors having a direct effect on prices. The most common cartel is an agreement among competitors on the price or prices to be charged to some or all of their customers. In normal markets, since market conditions and costs frequently change, price fixing requires frequent contacts between competitors, either in person or through some form of
digital communication. This is particularly necessary for assigning to each market participant the quantities allowed to be produced. Furthermore, since transactions terms are usually secret and are not revealed to third parties, these meetings are necessary to make sure that nobody has cheated on the reached agreement.

In addition to full agreements on which price to charge, cartels can also consist in partial agreements on: the use of a standard formula according to which prices will be computed; maintaining a fixed ratio with the prices of some competing products; eliminating price discounts or establishing uniform discounts; common credit terms to be extended to customers; adhering to published prices, not to advertise, etc. Although these partial agreements do not completely eliminate price competition, they still reduce rivalry between competitors, sometimes substantially. The interesting feature of these partial price fixing agreements is that the agreement takes place once and for all and does not require any further contact between cartel members for it to be implemented or renewed. Nor the agreement needs to be formalized in any way. As a result, proving that competitors actually agree to such commonly adopted practices may be very difficult.

This is also the case for the agreements to allocate customers or territories. They take place once and for all and do not need to be formalized. As a result they are very difficult, if not impossible, to prove. Should the remaining market occupants be very few, the competition they face with respect to prices, service, quality, and innovation may become much weakened. As a result, market-division agreements may have a greater impact on competition than price-fixing.

Both full and partial cartel agreements are difficult to detect because those that are damaged by the cartel (the customers) do not have the information necessary to prove their existence. As for fellow cartel members, they are all either quite happy to be part of the cartel, even when they cheat on the cartel agreement or decide not to participate. In fact, unhappy cartel members do not have to denounce the cartel for it to stop functioning. To the contrary, if they decide to compete against the cartel (cheating), they still benefit from the high prices of the cartel.

In this respect bid rigging agreements are different. They are meant to allocate tenders between potential bidders. They are complex agreements requiring potential bidders to communicate frequently among them in order to identify the most profitable course of action for each bid and/or to a sequence of bids. Bid rigging agreements generally fall into two categories:

“Bid suppression. One or more competitors agree to refrain from tendering or to withdraw a previously submitted tender so that another company can win the tender. The parties to the agreement may administratively or judicially challenge the tenders of companies that are not part to the agreement or otherwise seek to prevent them from tendering, for example, by refusing to supply them with some necessary input.

Complementary bidding. The competing companies agree among themselves who should win a tender, and then agree that the others will submit artificially high bids to create the appearance of vigorous competition.”

In any case there has to be some form of bid rotation, which is the reward that a competitor receives for agreeing not to participate in a bid or to bid an artificially high price. The bid riggers take turns in winning the tender, with the others submitting higher bids. The bid riggers will generally try to equalize the tenders won by each over time or to maintain their historical market share. A strict pattern of rotation is often a clue, not a proof, that bid rigging is present.

There are three types of possibilities for rotation: Rotation in time, i.e. bid riggers rotate in the adjudication of the bids of a single buyer; rotation in time and space, i.e. rotate in the adjudication of the bids of different buyers; instant rotation, i.e. rotation between the lots of a single bid. Among all the three types of rotation, instant rotation is the less risky for the riggers. All happens at once. Otherwise, should firm A favor firm B in today’s bid, there is no guarantee that firm B will reciprocate in the future, either because there is no certainty on the timing of next bid nor on the fact that firm B will either participate or respect its commitments.

Historically leniency programs have been quite successful in the discovery of cartels (not bid rigging though). Evidence suggests that leniency is most probable in the case of a merger (where the acquirer discovers that the acquired firm has been participating in a cartel of which it did not benefit but for which it would be liable in case it would be discovered), when the cartel becomes highly unstable because of widespread cheating, when technical progress makes the cartel irrelevant for one or more participants.

One of these characteristics, widespread cheating, is impossible in the case of bid rigging because the results of the bid are immediately known to all market participants and as a result a cheater would know that he/she would be discovered immediately and be punished afterwards (by interrupting the collusive strategy). Bid rigging cartels are thus much more stable than normal cartels. Furthermore, in most jurisdictions bid rigging

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in public procurement is also a criminal violation. As a result, when leniency would apply only to the administrative fine associated with the antitrust violation, a leniency applicant would risk a jail sentence. Leniency in the case of bid rigging in public procurement is thus traditionally quite unlikely.

In the EU some recent legislative change has addressed these shortcomings and article 23.2 of the recent ECN+ EU Directive provides that

“Member States shall ensure that current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are protected from sanctions imposed in criminal proceedings, in relation to their involvement in the secret cartel covered by the application for immunity from fines, for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU, if they meet the conditions set out in paragraph 1 and actively cooperate with the competent prosecuting authority.”

The change in legislation is too recent to have shown relevant results yet, but certainly the extension of the immunity privilege to the criminal part will provide the right incentives to file for leniency in cases of bid rigging in public procurement.

While the ECN+ Directive has removed some very important impediment to file for leniency in the case of public procurement bid rigging cartels, another Directive, the private enforcement Directive, by making the requests for damages for cartel infringements easier, has negatively affected the general incentive to file for leniency. While the administrative fine in the EU is capped by law at 10 percent of the yearly turnover of the firm, the request for damages has no cap. As a result, for cartels that have lasted for years the damage request may become extremely costly and sometimes even prohibitive for the involved firms. It may well be that the recent strong reduction of leniency driven cases that we see in Europe may also be caused by the high risk of follow-on damage requests.

Unfortunately, the proposal to extend leniency also to damage requests is not appropriate because it would punish the buyers from the leniency applicant that, quite unfairly, would not find any reparation. The solution adopted in the U.S., where buyers from the leniency applicant would receive single not treble compensation, is not available in the EU where damages cannot have a punitive objective. The U.S. solution, while it creates some differences between buyers from a cartel, where some would receive treble while other only single reparations, is a fair one because it compensates all consumers for the suffered damages. In fact damage reparation has to be guaranteed to all and other firms cannot pay for damages they have not caused. In other words, in the EU private enforcement negatively affects the incentive to file for leniency, but we have to live with this. There are no easy solutions.

However in the case of bid rigging cartels in public procurement this is not a reason to despair. Bid rigging agreements always entail some bid rotation. And it is exactly this rotation, together with some anomalies in the biddings of different competitors, that may lead procurement officials to suspect bid rigging.

A public procurement procedure is of an administrative nature and it cannot be interrupted just because there is suspicion of collusion. Public procurement officials should be trained to recognize these suspicious signals in order to report them to the relevant enforcement authorities. It would be then the responsibility of such enforcement authority to open a case (if the evidence provided is sufficiently compelling). In the meantime the procedure could continue and restoration to the purchasing administration would come from damage requests.

III. AN EXAMPLE OF BID RIGGING: THE ITALIAN CARTEL BETWEEN FIRMS CONSULTING ON THE MANAGEMENT OF EU STRUCTURAL FUNDS.

In 2015 the Italian central purchasing agency (“Consip”) launched a bid for purchasing the services of consulting for the management of EU structural funds. The bid was split in 9 different lots of different value, ranging from 3.9 to 11.9 million EUR, for a total value of 60 million EUR. The bidding


5 One other reason for the fall in leniency applications is the lack of ex-officio cases (no ex-officio case in the period 2016-2020 in the EU) and the resulting very low probability of being caught otherwise.

6 Wouter Wils (2023), “Should the EU Competition damages Directive be revised to grant companies that have received immunity from fines under the Competition authorities Leniency programmes also immunity from Damages?” available at: https://papers.ssrn.com/sol3/papers.cfm?abstractid=4479776 arrives to the same conclusion.
was organized according to the most advantageous economic offer, with weights set at 70 percent for quality and 30 percent for the price. Participants could bid for all lots, but a single firm could at the maximum be the adjudicator of three lots and a maximum of 27 million Eur. There were 9 participants to the bidding. After having adjudicated the contract, Consip sent to the Italian competition Authority the following suspicious evidence:

All figures are percentage discounts to the baseline.

There are many anomalies in this bidding pattern. First the highest discounts of the four bidders are all for a different lot. How is this possible? Second these nine highest discounts are of the same order of magnitude. How is this possible? Finally the four companies bid also in other lots, not just for those where they seemed to be mostly interested and also here with discounts of very similar levels. How is this possible?

The Italian Authority after more than a year of investigation concluded that this pattern of bidding did not emerge spontaneously. The four companies had met before the bidding, but failed to provide a reasonable explanation of the reason of their meeting. And indeed the Authority found indirect evidence that they met to coordinate their biddings. It took almost a year to conclude the procedure, indicating that suspicions are not yet a proof!

There are a few interesting issues in this case. The first one is that Consip had chosen a bilinear formula for calculating the score for the price discounts. As a result the four companies, that knew they had the highest quality offer, tried to reduce the average discount for the lots that were not of interest to them, so as to minimize the difference in score between them and any more aggressive bidder. The strategy was not successful for all lots and four lots were adjudicated to firms not participating in the rig. The second issue is that Price Waterhouse did not win any bid but was nonetheless considered responsible of bid rigging and fined.

Finally, the purchasing officials were able to discover the bidding because they had undergone extensive training. The bidding pattern, especially because it involved only a subset of the participating firms, was quite complex to discover.

**IV. THE INCENTIVES OF PUBLIC PROCUREMENT OFFICIALS**

Public procurement officials are evaluated on how well they run the procedure and on how quickly they deliver. The adjudicating price is not an issue of concern for them because it is simply the result of the competitive process. If by any chance the competitive process is distorted it is not the responsibility of procurement officials and they could simply ignore the issue. Even worse, suspicion that there is a cartel (and the process of evidence gathering for reporting it) may delay the whole process of purchasing and therefore goes against the main interest of procurement officials (quick delivery).

Furthermore, the general system of incentives within a Public Administration is not designed to promote the discovery of bid rigging cartels. First of all, the money that is being saved because of the dismantling of a cartel does usually not remain in the administration that actually discovered or helped discovering the cartel, but is redistributed to the general administration budget. Furthermore, the administration that purchased at higher prices because of a cartel could sue for damages, but, in many jurisdictions, damages would be collected by the Treasury, not by the administration that was actually instrumental in the discovery of the cartel. For all these reasons

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7 A formula transforms a discount into a score. A bilinear formula has the characteristics that a predetermined percentage of the total score (in our case 90 percent) is assigned to discounts below the average of all discounts and only the residual percentage (in our case 10 percent) of the score is left available for discounts above that average. Both formulas are linear, but the second one has a much higher slope. This means that an additional percentage of discount with respect of the reference price provides a higher additional score at discounts below the average and a much smaller increase in score for discounts above the average. The formula is chosen to reduce the incentive for excessive discounts. However, since the average depends upon the discounts of all participants, the lower this average the greater the probability that the high-quality firms would win the bid.

8 Here is the list of firms that won the bid for each lot: Lot 1, KPMG; lot 2, Lattanzio (discount 42,7 percent); lot 3, Lattanzio (discount 42,7 percent); lot 4, Deloitte; lot 5, Lattanzio (discount 42,7 percent); lot 6, IT Audit (discount 48,5 percent); lot 7, Ernst Young; lot 8, Deloitte; lot 9, KPMG.
public purchasers are generally indifferent on the existence of cartels. Nobody could ever blame them that they paid too much because of a cartel.⁹

In order to induce more public purchasers to report to the enforcement Authorities their suspicions of bid rigging, the incentive structure has to change. First of all, purchasing administrations should be encouraged to sue for damages originating from bid rigging and such damages (when granted by the judge) should remain in the budget of the suing administration. Furthermore, the career of a public procurers could be also made dependent on the number and importance of the cartels he/she contributed to identify.

The OECD Competition Committee has set up a guidance for procurement officials aimed at helping them discover bid rigging cartel.¹⁰ The guidance identifies a number of elements that purchasing officials have to consider in the running of a bidding processes, like attention on any evidence leading them to suspect that rivals got together before the bidding discussing their respective participation to the procedure. In that case some analysis of previous bids and/or bids by others may help them conclude that there is bid rigging. However public administration officials have to be trained in the use of this guidance, because it requires different skills and competences than those needed for successfully organizing and running a bidding procedure.

Government employees often believe they should have full proof of bid rigging before reporting their suspicion (that should become a certainty) to the enforcement Authority. Since this is quite unlikely, they tend to keep any suspicion for themselves. This is why competition authorities should create a special channel of communication for public procurement officials where they could communicate to the Authority any suspicion they may have on a bid.

Finally, whistle blowers are also very important. They may be employees of firms guilty of cartel infringements. In 2017 the EU has introduced a channel of communication where the identity of whistle blowers would be fully protected in the denunciation of cartel infringements. The same has been done in Italy in March 2023 as required by the whistle-blower EU Directive.¹¹ A recent cartel in Italy was discovered thanks to a whistle blower.¹²

There are also some procedural and legal steps that should be taken to make bid rigging much more difficult.

The first is to centralize purchases (or make sure that bids are not made artificially too small, so that a large purchase cannot be easily divided up among all the firms in the industry) and reduce the incentive to collude because rotation may be too risky and would take years to satisfy all firms involved. Furthermore with centralization the information on the different bids can be found within the same organization, so that any irregularity across different bids can be more easily identified.

Also the rules that favor smaller firms in their participation to tenders on which individually they would not be able to participate because of their small size, should be made more rigorous. In particular temporary consortia should only be allowed if comprised by firms producing complementary goods or services, while simple horizontal consortia (where firms split among themselves a contract for a single product/service) should be prohibited. In fact, temporary consortia between rivals are very often a tool for enforcing a cartel, more than a way to increase competition.¹³

V. AUTOMATIC EXCLUSION OF ANOMALOUS OFFERS

In Italy, like in many other countries, many bids of lower value are adjudicated to the bid closer to some sort of average of part of the biddings. Already in 1992, when the system was much more widespread than today, the Italian competition Authority issued a report on public procurement

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⁹ The importance of incentives is confirmed by the fact that in the last decade the Italian central purchasing agency (CONSIP) has reported quite a number of bid rigging cartels to the Italian Competition Authority. The agency was under heavy criticism by the Administrations that were using its services that instead of providing benefits to them it would purchase at prices higher than if purchases were decentralized. To show that the complaints was unfunded the agency started reporting possible bid rigging cases to the Italian Competition Authority, suggesting that collusion was the cause of the high prices (this is my personal interpretation of these developments based upon chats and small talks).


¹¹ Directive 2019/1937 of 23 October 2019, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937. In Italy the measure has been quite fruitful and since the entry into force of the new instrument (6 months) 34 reports have been filed, quite a remarkable number. We will see how many of these reports are of a good quality and will actually lead to cases.


¹³ As Heimler, A. (2012), “Cartels in public procurement,” Journal of Competition Law and Economics observes, “there is also an efficiency reason why temporary consortia between small rivals should be prohibited: big tenders require big firms because they have the organizational capacity to handle them. The organizational capacity of a big firm is never equal to that of a sum of smaller firms.”
where, among other issues, it denounced the system as prone to collusion. The point made by the Authority was that firms may participate in large number to the bidding, so as to strategically influence the level of the average adjudicating price and increase the probability of adjudication. At the time there was no evidence that such colluding practices were actually widely followed. The Authority just presumed it.

Even today, over 30 years after that Report, the system of adjudication to some sort of average of biddings is still in place in Italy, after ample evidence that the system induces widespread collusion.

Conley & Decarolis (2016) present evidence that bidding in procurement auctions where contracts are awarded to the bid closest to an average of some of the bids is widely characterized by coordinated actions. The paper start with the confession of one of the riggers, Bruno Bresciani, found guilty of having rigged 94 average bid auctions in the Piedmont region of Italy and sentenced to seven years of jail in 2008: “… At the first meeting they said: ‘Why should we kill ourselves and let those coming from the outside laugh at us?’ Here [in Turin] firms from the South were coming and getting the jobs, setting the averages, they used to come with 20, 30 or 40 bids, they used to get the jobs and then what was left for us?…”

But why awarding bids at some average bid price? The reason is that it is believed that prices below a certain threshold are too good to be true and there is a risk that what is needed will not be delivered, will be delivered at a lower (not observable) quality than requested or will be produced underpaying the workforce. A full analysis of the viability of these bids (to avoid such occurrences) is considered too costly, especially for smaller contracts, and adjudicating at some average bid is considered an effective alternative. What is not considered however is that the rules of the game have an impact on the bidding behavior of firms. By the way it is also doubtful that adjudicating at higher prices has any consequence on any definition of quality as presumed by the proponents (if there is no control on quality ex-post the incentive to reduce it remains intact).

In any case, what the system induces is a multiplication of participants that distribute their bids in such a way as to influence the determination of that average, increasing the probability that one of the firms participating in the cartel is awarded the bid. As Conley & Decarolis (2016) report in the case of the cartels operating in the Piedmont region this is what happened:

**Table 2: Cartels operating in Piedmont in the period 2000-03**

<table>
<thead>
<tr>
<th>Group ID</th>
<th>No.Firms</th>
<th>No.Victories</th>
<th>No.Auctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Torinisti (B)</td>
<td>17</td>
<td>83</td>
<td>247</td>
</tr>
<tr>
<td>2. San Mauro (C)</td>
<td>13</td>
<td>35</td>
<td>234</td>
</tr>
<tr>
<td>3. Coop (G)</td>
<td>16</td>
<td>73</td>
<td>240</td>
</tr>
<tr>
<td>4. Pineroloi (A)</td>
<td>11</td>
<td>1</td>
<td>110</td>
</tr>
<tr>
<td>5. Canavesani (E)</td>
<td>11</td>
<td>7</td>
<td>155</td>
</tr>
<tr>
<td>6. Settimo (D)</td>
<td>11</td>
<td>10</td>
<td>220</td>
</tr>
<tr>
<td>7. Provvisiero (F)</td>
<td>7</td>
<td>11</td>
<td>73</td>
</tr>
<tr>
<td>8. Tartara/Ritonnaro (H)</td>
<td>14</td>
<td>1</td>
<td>62</td>
</tr>
</tbody>
</table>

**Source:** Conley & Decarolis (2016)

It is interesting to observe that in the 276 bidding procedures considered eight separate “cartels” were in operation, suggesting that the collusive practices did not eliminate competition altogether. As the table shows, some of these “cartels” were more successful than others.

In April 2008, the owners and managers of numerous construction firms were indeed convicted. The Court documents identify 95 firms that operated in 8 cartels. These cartels were very successful in their activity. Despite representing no more than 10 percent of the firms participating to the bidding procedures, they won about 80 percent of all the auctions held in the Piedmont region between 2000 and 2003.

At the time these collusive practices were implemented the Italian procurement law prescribed a very simple calculation for the average bid and the relevant formula could be easily simulated by firms participating in the bidding procedure. Since then the legislation was changed and now, although adjudication according to some average bid is still in place, the averages are calculated randomly in order to make it more difficult to simulate the exact level of the average bid used for adjudication. Although no other similar case was discovered since 2008 (at least...
to my knowledge), there is some indirect evidence that firms still try to influence these averages. In Italy the number of firms participating in bids with adjudication at some average bid is orders of magnitude higher than when adjudication is at the minimum price16.

VI. CONCLUSION

Bid rigging cartels are much more stable than normal cartels. Indeed, in normal cartels, members have an incentive to cheat because they are not easily discovered and, by not following the cartel prescriptions, they increase profits by slightly lowering the cartel price and increase quantities beyond the cartel level. In bid rigging quantities are fixed and bidding is only used to identify the lowest possible price. Furthermore, bidding markets are much more transparent than normal markets further reducing the incentive to cheat.

This has a strong impact on the effectiveness of leniency programs in bid rigging cartels. Since leniency applications tend to be more probable the less stable a cartel, leniency is quite uncommon in bid rigging cartels. The recent amendments to EU law extending the benefit of leniency to criminal sanction will probably promote leniency applications in bid rigging cartels. At the same time however the damage directive, making it easier to sue for damages, remains a strong disincentive.

The peculiarity of bid rigging cartels is bid rotation and as a result public procurement officials are well placed to suspect that a cartel is artificially distorting a bid. They could thus easily report their suspicions to the relevant enforcement authorities. Unfortunately however, the incentives of public procurement officials are geared towards results (fast procedures, quality deliveries) and prices are not considered a variable of interest to them (prices originate from the bidding and in general are not a responsibility of procurers). Furthermore, public procurers wrongly believe that it is not just sufficient to suspect a cartel to report it. They think that they have to be certain that the bid was rigged and as a result immediately block the procedure. Since this is very seldom the case, they are inclined to do nothing.

There are however some measures that public administrations can adopt to more effectively discover bid rigging cartels:17

1) Promote central purchasing especially whenever there are just a few firms competing in the relevant market.
2) Temporary consortia often organized to allow smaller firms to participate in larger bids for which individually they would not qualify should be allowed only if of a vertical nature, i.e. putting together firms producing complementary goods and services.
3) Introduce career advantages for official that helped discovering a cartel.
4) Promote follow-on damage requests by affected public administration and make sure that the proceedings remain within the purchasing administration.
5) Competition authorities should create a special channel of communication with public purchasers, so that they would know that informing the Authority on any suspicion they may have would be worthwhile; and that they would never be responsible vis à vis the firms involved (the responsibility of any subsequent action rests with the enforcement authority).
6) Discovering bid rigging cartels requires different skills and competences than those necessary for successfully running a bid, so that public purchasers should be adequately trained, possibly by experts in antitrust enforcement.
7) Avoid adjudicating bids to some average price because that average can be artificially influenced by colluding bidders.

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16 I thank Francesco Decarolis for pointing this out to me.
17 Six of these seven suggestions are the same as in Heimler (2012).
BID RIGGING AND UMBRELLA DAMAGES

BY JOHN ASKER, EL HADI CAOUI, VIKRAM KUMAR & ENRICO DE MAGISTRIS

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I. INTRODUCTION

Umbrella damages arise when non-cartel firms take advantage of the softening of market competition due to the presence of a cartel. For instance, non-cartel firms may have an incentive to put up prices in response to cartel members raising their prices, i.e. non-cartel firms may set higher prices under the “umbrella” of elevated cartel prices. As a result, purchasers from non-cartel firms may pay a price that exceeds what the market price would be in the absence of collusion. In this sense, damages inflicted by non-cartel firms can broaden the scope of cartel damages, as long as a causal link between the cartel’s illegal conduct and a price increase by firm(s) not in the cartel is established. While U.S. courts have generally refrained from allowing umbrella damages, other jurisdictions, such as the European Union and Canada, recognize the possibility of plaintiffs seeking umbrella damages from cartelists.

Moreover, even where umbrella claimants have standing, as far as we are aware there has been no rigorous calculation of such damages in a manner that courts have accepted. This raises questions about how significant umbrella damages are and how one could quantify those damages in practice. Caoui (2022) tackles these questions in the context of bid-rigging in auction markets. Auctions are widely used by both public and private entities. In this article, we discuss some of the key insights of that paper.

We begin with a brief discussion of the susceptibility of the most commonly observed auction formats — namely, First Price Auctions (“FPAs”) and Second Price Auctions (“SPAs”) — to bidder collusion and the likelihood of observing umbrella damages in those settings. We then discuss the empirical analysis of umbrella damages in Caoui (2022), which examines the bidding behavior of non-cartel bidders in Texas school milk FPAs, which were found to be subject to cartel behavior between 1980 and 1992. This analysis shows that umbrella damages in auction settings can be substantial: Caoui (2022) estimated that the size of umbrella damages in milk auctions in Texas was between 35 and 100 percent of the “direct” damages attributable to the cartel.

II. AUCTION FORMAT AND UMBRELLA DAMAGES

It is widely recognized in the auction literature that a SPA is more susceptible to bidder collusion than a FPA. This is because, in a SPA, reaping collusive gains does not require most cartel members to alter their bidding behavior relative to how they would bid non-cooperatively. Absent

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2 See e.g. Mid-West Paper Products Co v. Continental Group and In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation.
3 Kone and others v. ÖBB-Infrastruktur AG, Case C-557/12
6 For instance, in 2017 federal agencies in the U.S. conducted 19,000 auctions to award contracts worth $1.5 billion, and in 2022 globally art and antiques worth $27 billion were sold through auctions. See https://www.gao.gov/products/gao-18-446; and https://www.statista.com/topics/8930/auction-market-worldwide/#topicOverview.
7 In a FPA, the highest bidder wins the auction and pays the seller their winning bid. Analogously, in a first price procurement, the lowest bidder wins the competition, and the buyer pays the winning bidder the winning (lowest) bid. In an SPA, the highest bidder wins the auction and pays the seller the second highest bid. Analogous to an SPA, in a second price procurement, the lowest bidder wins the competition, but the buyer pays the winning bidder the second lowest bid. Because they are mirror images of each other, insights that apply to the auctions also apply to procurements. Since the empirical application discussed in the last section applies to a procurement setting, in the rest of this article when we refer to an FPA or an SPA, we refer to the procurement setting (where lower prices are preferred by the auctioneer).
bidder collusion, competing bidders in a SPA can do no better than simply bidding their marginal costs.\textsuperscript{10} When bidding cooperatively (i.e. when colluding), as long as the cartel is successful in suppressing competition from the bidder with the second lowest cost, while the “cartel representative”\textsuperscript{11} continues to bid its cost, collusive gains are obtained.\textsuperscript{12}

On the other hand, collusion in a FPA does require changing bidding behavior relative to non-cooperative behavior, thus is seen as more challenging to sustain. Because the winner in a FPA is paid its winning (i.e. lowest) bid, bidders acting non-cooperatively have the incentive to bid an amount that is greater than their marginal cost (i.e. apply a “mark-up”) to turn a profit.\textsuperscript{13} In choosing the level of mark-up, bidders optimally trade off the profit they would make if they won, and the likelihood that their bid would be the lowest.\textsuperscript{14} In order to obtain collusive gains in this setting, the cartel representative (in competition with non-cartelists) will have to inflate her bid (apply a greater mark-up) relative to what she would have bid when bidding non-cooperatively. But that inflation can incentivize other cartel members to undercut the cartel representative, rendering the cartel unstable.\textsuperscript{15}

While the SPA may be more susceptible to collusion than the FPA, should a non-all-inclusive bidding ring (i.e. one that does not include all bidders competing in the market) exist, umbrella damages are less likely in a SPA than a FPA. This is because, in a SPA when competing against a cartel representative that is bidding its cost, non-cartel members have no incentive to bid anything other than their respective costs.\textsuperscript{16} Therefore, if a non-cartel member wins the auction with the lowest bid (equal to its cost), the auctioneer will pay the lowest cost (equivalently, bid) among all other remaining collusive/non-collusive bidders, resulting in no umbrella damages. Indeed, Asker (2010) studies a non-all-inclusive bidding ring in an open outcry SPA setting where no umbrella damages were present.\textsuperscript{17}

However, collusion in a FPA can result in umbrella damages, because if non-cartel members infer that colluding bidders are inflating their bids, it may induce the non-cartel bidders to inflate their bids “under the cartel’s umbrella.” As a result, the prices paid to non-cartel bidders may also be inflated relative to what they would have been absent collusion. Thus, the common wisdom that FPAs are preferred by the auctioneer because they are less prone to collusion than open/SPA is nuanced by the fact that umbrella damages may arise in a FPA. As discussed in the next section, which draws on Caoui (2022), the existence of umbrella damages may particularly be the case if, post-auction, bids and bidder identities are publicly revealed.

\textsuperscript{10} This is best illustrated using a simple numerical example. Suppose there are three bidders, A, B and C, whose cost of providing a product or service can range between 1 and 10. For simplicity, we assume that bidders can only submit whole number bids (1, 2, 3 etc.). Consider bidder A with cost, say, $5. We first ask if A has an incentive to bid something less than $5. Suppose A bids $3, and wins the auction i.e. the second lowest bid was greater than $3. If that second lowest bid was also less than A’s cost, say $4, then A would make a loss of $1 ($4 minus $5). If on the other hand the second lowest bid was greater than $5, say $7, then A would have still won by bidding its cost and turned a profit of $2 ($7 minus $5). Thus, it cannot be optimal to bid less than one’s cost. It is also not optimal to bid greater than one’s cost. To see why, suppose A (with cost $5) submits a bid of $8. It would win the auction if the competing bids were all greater $8, e.g. if the second lowest bid was, say, $9 the winning bidder would make a profit of $4 ($9 minus $5). However, A would lose the auction if competing bids were less than $8. In particular, if the winning bid was greater than A’s cost ($5) but less than its bid ($8), say $7, then A could have won the auction by bidding its cost and turned a profit of $2 ($7 minus $5). If, however, the winning bid was less than $5, then A would be better off not winning the auction (as it would turn a loss). Thus, in a SPA it is optimal for a bidder to simply bid its cost. These arguments apply regardless of whether bidders write down their bid and submit it to the auctioneer, or whether bidding occurs through the more familiar ‘open outcry’ process of calling for a high bid and progressively lowering the bid until only one bidder remains. In the open outcry process, the “bid” is the price beyond which a bidder ceases to participate in the auction.

\textsuperscript{11} The cartel representative is the bidder designated by the cartel to behave competitively in the auction and receive the contract should it be won by the cartel. If the cartel’s representative in a SPA is the member with the lowest cost for that auction, the collusive mechanism is called “efficient”. The mechanism is “inefficient” if the representative is chosen in some other manner (e.g. through randomization). See Caoui (2022) for a discussion of cartel damages under an inefficient collusive mechanism.

\textsuperscript{12} To see why, consider again the numerical example provided in footnote [15]). Suppose bidders A, B and C have costs $5, $6 and $8 respectively. Following the reasoning in the example above, absent any cartel each bidder would bid its cost, A would win the auction, be paid $6 and obtain a payoff of $1. B and C would each obtain a payoff of zero. Now suppose A and B (but not C) form a cartel. If B does not submit a competitive bid, then following the same reasoning as before, A and C would find it optimal to bid their costs. The cartel would thus win the auction with a bid of $5 and obtain a payoff of $3 ($6 minus $3), which the cartelists could split between themselves. Whereas a cartelist could benefit from submitting shill bids or not participating in the auction (through side-payments), should the cartelist choose to submit a serious bid, it is optimal for it to bid its cost. See Marshall and Marx (2007). For a formal treatment of the impact of auction rules on bidders’ ability to collude in SPAs, see Marshall, R. C. & Marx, L. M. (2009). The vulnerability of auctions to bidder collusion. The Quarterly Journal of Economics, 124(2), 883-910.

\textsuperscript{13} Winning with a bid that is less than one’s cost will only lead to the bidder making a loss. For example, if bidders’ costs are distributed uniformly between 0 and 1, then one can show that the optimal non-cooperative bid for a bidder with cost c is \((c+1)/2\).


\textsuperscript{15} This point is best seen through an all-inclusive cartel (i.e. where all bidders are colluding). In this case, the cartel representative may bid the reserve price (i.e. the highest price the buyer is willing to pay) while the other cartel members submit bids that are “too high.” But then, a cartel member whose cost is below the reserve price may have an incentive to deviate from the collusive agreement and bid slightly below the reserve price but above its own cost. The deviating cartelist would be assured of winning the auction and turn a profit. Note that for it to be optimal to deviate from the collusive agreement in this manner, the returns to the deviating cartelist from winning the auction must be greater than any side-payment it may receive from the cartel for complying with the collusive agreement. See Marshall and Marx (2007).

\textsuperscript{16} See note [15]).

Caoui (2022) studies school-milk contracts awarded annually between 1980 and 1992 in three market areas in Northeastern and Southern Texas: Dallas-Fort Worth (“DFW”), Waco and San Antonio. Contracts were awarded at the school district level through procurement auctions to allocate contracts for the supply of school milk. Every year, between May and August, each district organized a first-price procurement auction. To solicit bids, a school district’s food service director published a legal notice of “invitation-to-bid” that was shared with prospective dairy firms in the area. The notice included information on the time and place to submit the bids and the contract specifications. Bids were opened and the amounts and bidders’ identities were publicly announced on the spot.

Aspects of the school milk market made it remarkably susceptible to bidder collusion. Firms competed only on prices as the terms of the contract (quantity and quality) were fixed and the product was homogeneous. There were many small contracts put out to bid, facilitating market division. Bids and bidders’ identities were publicly announced, which helped detect price cuts by cartel members and increased the transparency of prices. Firms frequently interacted as auctions were not held on the same day, enabling retaliation in instances of cheating. The demand for milk was inelastic, so price-increases would yield higher profits without sacrificing much volume. Finally, the market was relatively concentrated, helping coordination.

Some of these market features also enabled potentially large umbrella damages. In particular, the public announcement of all bids and bidders’ identities would result in non-cartel firms learning the price level in the rigged districts and potentially adapting to it. The adaptation was also potentially reinforced by the high frequency of interactions, due to the large number of contracts every year.

In 1992 and 1993, nine leading milk processors accused of collusion in the DFW market area settled with the state.

Caoui (2022) uses a dataset on auctions in this setting, collected by the Antitrust Division of the U.S. Department of Justice, to estimate umbrella damages. Pure Milk Co. was the largest non-cartel school milk supplier in the dataset. The firm’s main plant was located in Waco, TX (i.e. in a different federal order zone than the DFW cartel). Although Pure Milk bid primarily for contracts near its plant in the Waco market area, it also participated in a non-negligible number of auctions for school districts in the DFW market area. On these occasions, Pure Milk bid against the cartel. Caoui (2022) focuses on the contracts in which Pure Milk bid in districts where the cartel was operating.

The paper primarily relies on data on 1,034 auctions, comprising 3,493 bids spanning markets with and without cartel operations, thus providing a unique opportunity to document how non-cartel firms’ bidding behavior is affected by the cartel’s presence. Auctions in which Pure Milk bid are divided by counties into two separate types:

- **Collusive auctions**: school districts located in counties contiguous or close to Dallas Fort Worth in which the cartel presence was established by the Department of Justice. The counties are Comanche, Dallas, Erath, Hood, and Johnson. Such auctions form around 10 percent of Pure Milk’s bids.
- **Competitive auctions**: school districts located in counties outside the Dallas-Fort Worth cartel territory (either in the Waco or San Antonio market areas). The counties are Bell, Bosque, Comal, Coryell, Falls, Hill, Limestone, and McLennan.

Caoui (2022) performed a “reduced form” analysis where Pure Milk’s bid for whole white milk was regressed on a list of observable auction characteristics (e.g. price of raw milk, an input in production of whole white milk) and bidder specific characteristics (e.g. distance of bidder’s closest plant to school district). The results provide suggestive evidence that Pure Milk bid less aggressively when facing the cartel. Pure Milk bid on average 6.2 percent higher in the collusive auctions (facing the cartel) relative to the competitive auctions.

Caoui (2022) also conducts a “structural” analysis of bidding. Here, bidders’ underlying cost distributions (which determine their optimal bids in the auction) were empirically estimated using bid data. The estimates are then used to simulate a set of “but-for” auctions, in

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20 A structural analysis posits an explicit economic model (e.g. demand and supply, competition/collusion etc.). The values of the parameters which govern that economic model are then statistically estimated using market data. See e.g. Davis, P. & Garcés, E. (2009). Quantitative Techniques for Competition and Antitrust Analysis. United Kingdom: Princeton University Press, p 302.
21 For details of the empirical approach, see Caoui (2022) Sections 6.
which cartelized firms are modeled as bidding competitively. Using the auctions in this “but-for” model, Caoui (2022) is able to assess (i) the size of damages caused to school districts by the outsider firm when facing the cartel; and (ii) inefficiencies in contract allocation because the winner is not necessarily the lowest cost bidder. The latter can manifest when there are asymmetries between the cartel and the non-cartel bidders in terms of their respective cost distributions.22

Conceptually, estimates of damages to the auctioneer correspond to the difference between the winning bid of the collusive auction in which the outsider firm bids against the cartel and the winning bid of the competitive auction in which all firms bid non-cooperatively.

In this context:

- Cartel damages are the typical damages antitrust authorities aim to assess, that is, for auctions won by the cartel;
- umbrella damages, may be computed for auctions where the outsider wins against the cartel; and
- harm due to inefficiencies introduced by the cartel mechanism may be measured by the difference in the winner’s cost in the competitive and collusive auctions.

Based on the simulated auctions (which rely on the structurally estimated cost distributions), Caoui (2022) finds that in auctions won by the cartel, the winning collusive bid is between 4.9 percent and 6.4 percent greater than the winning bid in the competitive auction, resulting in direct cartel damages to the auctioneer.23 In addition, on average, in collusive auctions won by a non-cartel member, the non-cartel member’s winning bid is 1.6 percent to 6.4 percent greater than its winning bid in a competitive auction, thereby resulting in umbrella damages to the auctioneer. Indeed, umbrella damages form a non-negligible fraction of cartel damages. Per contract, umbrella damages (conditional on the outsider winning) are estimated to be at least 35 percent of cartel damages (conditional on the cartel winning). Finally, inefficiencies amount to an increase of 5.9 percent of the winner’s cost, equaling $2,337 per contract.

IV. PRACTICAL IMPLICATIONS FOR ASSESSING UMBRELLA DAMAGES

We discuss several practical considerations regarding the role of umbrella damages when conducting damage assessment in bid-rigging cases.

1. As Caoui (2022) shows, rigorous assessment of umbrella damages may be feasible in certain settings such as competitive auctions where bid data and well-developed econometric techniques for analyzing those data are available.
2. The presence of a non-all-inclusive cartel (or partial cartel) could result in an inefficient allocation i.e. the seller with the lowest cost may not win the auction: this occurs, in a FPA, if there are asymmetries in costs between the cartel and non-cartel bidders.
3. The existence of umbrella damages depends on the auction format: An SPA does not lend itself to umbrella damages while an FPA does.
4. The likelihood of observing umbrella damages increases if bidders can infer the existence of a cartel and resulting inflated bids. Factors that may facilitate such inference include (i) frequent interaction between bidders; and (ii) revelation of bidders’ identities and their bids. In addition, umbrella damages may be more likely if the buyer (the auctioneer) is “passive” and does not take strategic actions to counter the cartel (e.g. by inviting new bidders).
5. Umbrella damages may be larger in the presence of an inefficient cartel than an efficient cartel: indeed, an inefficient cartel can be a “weaker competitor,” therefore providing non-cartel firms a greater opportunity to raise their prices.
6. Umbrella damages are harder to establish the more differentiated the products sold in the different auctions are. This is because establishing umbrella damages requires empirically estimating non-collusive bidding behavior, which in turn requires bidding data from auctions where bidders were bidding non-cooperatively. If those non-cooperative auctions are not comparable to the auctions where there was collusion due to, say, product diversity, establishing umbrella damages will be challenging.

23 The lower bound is achieved when the collusive mechanism is inefficient and the upper bound when the collusive mechanism is efficient. See Caoui (2022).
I. INTRODUCTION

The procurement cycle begins with planning, which is an essential step for successful public contracts, as it helps procuring entities to identify their need(s) in terms of goods, works and services and decide accordingly what to buy, when and from what source. For this purpose and to be sure that their expectations are realistic, contracting authorities may seek or accept advice from independent experts or authorities or from market participants. This is what the latest EU Directive 2014/24/EU contemplates in its Articles 40 and 41. For the first time the European legislator explicitly provides for the procuring entities’ ability to conduct market consultations prior to tendering. The old public sector Directive 2004/18/EC had also referred to the use of “technical dialogue” between the public buyer and market, but only sketchily and hesitantly, through its Recital 8.2 Market consultation plays a crucial role, especially when it comes to innovation procurement, because the innovation cycle is normally longer than the procurement cycle.3 However, even if this provision promotes innovation in the public market, as the procuring entities have a wide-ranging insight into the current state of play, i.e. the price structure and market capabilities, before launching a procurement procedure, it is argued that the risk of supplier collusion can be increased under particular circumstances that are not contemplated by Directive 2014/24/EU.

This article will deal with these particular circumstances that Directive 2014/24/EU does not provide for, so as to examine the scope of bid rigging at the procurement planning stage. To this end, the analysis will focus on the preliminary market consultations, which are contemplated in Article 40, as well as on the prior involvement of candidates and tenderers in the preparation of the procurement procedure, which is covered by Article 41 of the EU Directive 2014/24/EU. Hence, the article is structured as follows: Section II analyses the bid rigging issues that can arise when conducting preliminary market consultations. Section III examines to what extent Article 41 addresses the bid rigging concerns discussed in the previous section. Section IV discusses the latest attempts of the European Commission (“Commission”) to deal with bid rigging at the phase of procurement planning and makes recommendations for further and better reaction to this issue. Section V makes some concluding remarks.

II. ARTICLE 40 OF 2014/24/EU DIRECTIVE: ANALYSIS OF BID RIGGING ISSUES

According to Article 40 of the EU Directive, before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency. Hence, preliminary market consultation enables the procuring entities to “find creative ideas from the market, define the conditions for solving the problem, create opportunities for market parties to work with each other and with public buyers and measure the ability of their organisation to take on the risk of innovation.”4

What becomes clear after reading Article 40 of the current EU Directive is that it does not give specific guidance regarding the way that market consultations with market operators should be conducted. This is a particularly significant issue because procuring entities can use various practices when consulting the market, like regular face- to-face meetings between the procurer and the stakeholders and procurement forums as a direct communication channel between procurers and potential suppliers. Thus, the lack of guidance by the current EU Directive means that each contracting authority has the discretion to decide whether the technical dialogue with the market operators will be open or not, based on public sessions or private face-to-face discussions.

Direct communication channels between procurers and potential suppliers are quite widespread and they constitute common practice in the context of market dialogues. Though there is no empirical survey so far about which is the most frequent procedure adopted by procurers in the context of preliminary market consultation, it is argued that the direct engagement of contracting authorities with the economic operators is preferable when the projects are complex and innovative or in order to complement information acquired at the desk-based stage, e.g. after the use of questionnaires or web-based portals.5 Direct engagement saves time and effort and enables contracting authorities to evaluate budget remarks.

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and cost issues, and to identify contract risks and market capacity with greater accuracy. The frequency of direct communication procedures in market analysis is also confirmed by OECD’s survey in 2015 on the implementation of the relevant Recommendation.

In view of the contracting authorities’ tendency to engage directly with potential suppliers in the context of market dialogue and in the absence of any clear red lines in the 2014/24/EU Directive of what contracting authorities should and should not do when dealing directly with economic operators before launching a procurement procedure, it is argued that there are cases where the conduct of market consultations facilitates bid rigging, especially when the economic operators are part of a highly concentrated market structure.

For example, let us suppose that a procuring entity publishes a consultation announcement with the intention of procuring innovative supplies with high technical and financial complexity. This is something particularly common, as market consultations “are relevant for complex procurements that require significant preparation as well as for the procurement of innovative solutions.” They are also traditionally used “to provide knowledge on whether a specific product/technology is already available on the market or still needs to undertake development or whether a product requires customization which was not previously performed.” In case of innovative markets having such a degree of specialisation and complexity, the barriers to entry are supposed to be rather high because incumbents are better placed to “capitalise on the capabilities for coordinating complementary assets which new firms often do not possess” and so their vulnerability to collusion may be great as well. Also, we should not forget that “innovative activity tends to be more concentrated than industrial activity.” Let us think now that the contracting authority invites all the market operators to live events held sparsely over three months in order to exchange views regarding the forthcoming contract phase takes place or to approach them in order to persuade them to merge with them or drop out. This means that even if a bidding ring is not all-inclusive, it may be sustainable under such circumstances, since the bidding behaviour of the outsiders can be easily predicted or controlled by the cartel members. Though there is no empirical evidence that the technical dialogue makes collusion more likely, and the above scenario...

Back to our scenario, in view of the market’s nature which is innovative and highly specialised and so it does not easily attract new entrants, meetings and live events make the interaction of incumbent firms much easier. According to the literature on auction theory, the pre-auction discussions and alliances of firms is a situation of endemic collusion that allows for the formation of bidder cartels or rings prior to the start of the auction, but it cannot be faced by using an auction design. Even if we suppose that despite the barriers to enter the market, there are still new firms that eventually express their interest in participating in the technical dialogue with the relevant contracting authority, open meetings make potential tenderers be identified and known to the competitors. Incumbent firms will know who their potential competitors and entrants are and so they will have the time and opportunity either to monitor the procurement practices of the latter before the contracting phase takes place or to approach them in order to persuade them to merge with them or drop out. This means that even if a bidding ring is not all-inclusive, it may be sustainable under such circumstances, since the bidding behaviour of the outsiders can be easily predicted or controlled by the cartel members. Though there is no empirical evidence that the technical dialogue makes collusion more likely, and the above scenario...

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6 Ibid. 6.
9 Oana S. Pantilimon Voda (fn 3) 220.
12 The time usually needed for the consultation process is between 3 and 6 months. See European Commission (fn 8).
13 Sigma (fn 5), p.3.
16 This happened prior to the Netherlands 3G auction in 2000 of five licences. Apart from mergers, firms which are considered strong potential entrants may enter a partnership with an incumbent or be co-opted into joint ventures with incumbents. See Paul Klemperer “Bidding Markets” (2007)3(1) Journal of Competition Law and Economics, 22-23.
Another aggravating factor in scenarios such as the above is that in the case of innovative works, supplies or services having a high technical, financial, or even contractual complexity, it is inevitable that contracting authorities will engage with one or more of the potential contractors participating in the preliminary market consultations. A small group of market operators dealing with such highly-specialised works, supplies or services, does not give contracting authorities the luxury to hire alternative advisors that act only as technical advisors and not as tenderers in the subsequent competition for the contract. This gives an extra incentive to market operators who take part in the technical dialogue, to make use of the information made available in order to form a bidding ring in the contracting phase. When market operators take part in the preliminary market consultations, they usually have an interest in the resulting contract. Furthermore, according to the 2022 flash Eurobarometer survey on corruption relevant to business, more than four out of ten companies say that involvement of bidders in the design of specifications is one of the most common corruption practices occurring in public procurement practices (47 percent).\(^\text{17}\)

In view of the above, the overall ban of open and public sessions in the context of preliminary market consultations can be suggested, if collusion or incumbent interference are a risk. In such cases, a web-based contact, or the conduct of private face-to-face discussions between the contracting authority and each economic operator can be proposed. However, the simultaneous consultation of several economic operators can highlight some points that were not adequately examined when consulting the economic operators separately.\(^\text{18}\) Also, a “one-size-fits-all” approach would not be preferable, as there may be cases where a contracting authority cannot afford to develop an electronic support platform.

III. ARTICLE 41 OF 2014/24/EU DIRECTIVE: ARE BID RIGGING ISSUES ADDRESSED?

According to Article 41 of the Directive 2014/24/EU, where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

In view of the above, it gets clear that Article 41 is in complete harmony with Article 40 and crystallises the meaning of Article 40. Hence, the essence of both provisions is that a preliminary market consultation before the award procedure is welcome as long as the principle of equal treatment is not violated, and competition is not distorted. This means that in case that the participation of an economic operator in the preliminary market consultation has an impact on competition, e.g. by taking part in the drafting of the relevant documents or by getting involved in the design of specifications, award criteria or the evaluation of bids, the economic operator at issue can be excluded from the procedure.

Though the introduction of Article 41 in the Directive 2014/24/EU prima facie does not address the bid rigging concerns, to some extent it attempts to deal with this issue, because the communication to the other candidates and tenderers of the information exchanged in the context of the technical dialogue can hurt the economic operators’ incentives to cooperate by giving them new ways to cheat. It has been proved that more information about companies’ actions, rather than information about payoff-relevant parameters, like prices, sales and profits, lets individual firms tailor deviations to current market conditions.\(^\text{19}\) After all, we should not forget that bid riggers usually rely on stable and predictable public purchases and cannot guarantee the provision of innovative services/supplies.\(^\text{20}\) So, the publication of the information exchanged during the technical dialogue can provide a very strong incentive for the members of a bidding ring to deviate from their agreement and compete with their innovative solutions. Yet, Article 41 overlooks the selective information provision, which is an illustrative corruption technique, as explained in the scenario above.

\(^\text{17}\) European Commission “Businesses’ Attitudes Towards Corruption in the EU- Flash Eurobarometer 507” https://europa.eu/eurobarometer/surveys/detail/2657.


\(^\text{20}\) European Commission “Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Ground,” 2021/C 91/01.
The communication to the other candidates and tenderers of the information exchanged during the technical dialogue presupposes that procurement officers are not corrupted, and they do their job in the right way. In case of bribed procurement officers, as presented in the scenario above, the 2014/24/EU Directive remains silent, as it does not suggest any possible mechanism and/or legislative instrument that would control procurement officers and ensure that indeed all the relevant information exchanged in the technical dialogue will eventually be communicated to the other candidates and tenderers by them. Moreover, there is no particular reference to what kind of information should be communicated to the other candidates and tenderers. It remains to be determined by procurement officers at their own discretion which information is relevant and which is not. However, as already presented above, when procurement officers are rather inexperienced and without commercial instinct, they can miss out some points that were raised in their discussion with the market operators and consequently they may omit their disclosure, whereas they should definitely share them with the other candidates and tenderers.

IV. GUIDANCE ON INNOVATION PROCUREMENT AND NOTICE ON TOOLS TO FIGHT COLLUSION IN PUBLIC PROCUREMENT: ROOM FOR IMPROVEMENT?

Though national Competition Authorities (“CAs”) have made efforts to raise awareness among procurement entities on how to take measures at the planning stage of public procurement procedures in order to prevent bid rigging and on how procurement officers could fight collusion, there is still room for improvement. Of course, we must admit that the Commission got off to a good start by issuing the Guidance on Innovation Procurement as well as the Notice on Tools to Fight Collusion in Public Procurement.

In the former soft-law instrument, the Commission managed to set some steps that procuring entities should follow in order to conduct a market consultation process properly. The first step, which is relevant to bid rigging is that a consultation framing note is needed in order to enable the public buyer to identify the best type of prior market consultation to be carried out and the main topics to be discussed during future interviews/meetings. This framing note will help the procuring entities to opt for the right type of market consultation, e.g. group or individual participation meetings. Yet, this recommendation does not deal with the probability that the procurement officers will be corrupted and may not want to choose the best type of prior market consultation but the one that serves better their interests and favours bid rigging.

The second step relevant to bid rigging is the publication of a request for input from suppliers on e-procurement platforms, the procuring entities’ webpage, or specialised websites in order to broaden the group of actors having the opportunity to make their ideas and/or solutions known before the final drafting of the technical specifications. A Prior Information Notice (“PIN”) can also be used to achieve this goal. This is a good recommendation as the bigger the number of active operators in a procurement market the more difficult it is to collude. To this end, we should also mention that from 25 October 2023 procuring entities will have to fill in digital standard forms, i.e. “eForms,” which will increase the ability of companies and other organisations to find procurement notices.

The third step mentioned in the Commission’s Guidance on Innovation Procurement is the preparation of an interview grid, which will make it possible to supervise the exchanges and compare the answers provided by the suppliers. The interview grid is recommended to be sent to the suppliers prior to the meeting. Again, this is another good recommendation because it is important to keep in mind that every time a contracting authority engages directly with economic operators as part of a market analysis, there is a need to plan and manage the relevant process very carefully so as to avoid distortion of subsequent competition. In the same vein, the Commission suggests that for any face-to-face meetings, the buyer should ensure that at least two people are present and take detailed minutes. It is submitted that in order for this suggestion to have realistic results, at least one neutral observer should be present during any face-to-face discussions with the economic operators. In this way, the concern of corrupted procurement officers could be alleviated. The neutral person could indicatively be an employee from the relevant contracting authority that procured the product/work/service at issue. Also, it is suggested that a “Chinese wall” should be built between the procurement officers that conduct face-to-face discussions and launch a preliminary market consultation and those assessing the bids and award the contract. Such a strict functional and physical separation between these two categories of procurement officers would guarantee their integrity throughout the procurement procedure and would help to reduce the risk of corruption that usually facilitates collusion.

22 Ibid 39.
24 European Commission (fn 21).
25 Ibid.
The fourth and last step which is relevant to bid rigging is keeping a good record of the market consultation and producing a summary report that will clarify the most useful information and help formalise the final procurement strategy (choice of the procurement procedure, choice of selection criteria, aspects of the performance of the solution sought, etc.). It is further suggested that this report should be published and sent to the interested economic operators, but, in any case, without referring to the identity and number of the economic operators that responded to the invitation to participate in the technical dialogue. The disclosure of such information would facilitate the implementation of a cartel, by enabling the cartel members to monitor the compliance of each other with the collusive agreement, especially when web-based contact took place or private face-to-face discussions were conducted in the preliminary market consultation. In the same vein, the report should not include the specific points of the tender documents that the contracting authority intends to modify after the preliminary market consultation, because this would facilitate cartel redistributions which may be made to resolve any deviation from the collusive agreement until the publication of the contract notice and of the final tender documents. On the contrary, the report should consist of an updated self-declaration confirming that the procurement officers conducting the preliminary market consultations acted in accordance with the guidelines of their authority, communicated to all candidates and tenderers the information exchanged during or resulting from the market dialogue phase and did not get involved in corrupt practices. In this way, public officers will have the fear of being subject to prosecution under national law in case of misrepresentation and this will be an additional incentive for them to conduct preliminary market consultations as carefully and appropriately as possible.

In the Annex of the Notice on tools to fight collusion in public procurement, the Commission gives some general advice on how to design award procedures in a way that would deter collusion between tenderers. Though there is no direct provision for the preliminary market consultation, some of this advice regard the research of the market before planning and launching the award procedure. Thus, it is advised that the procurement officers use the internet to scour the market, national electronic procurement database to find precedents from previous purchases of the same of similar nature and official professional registers of certified contractors. Furthermore, procurement officers are advised to discuss the matter with colleagues in their service or in other contracting authorities that recently purchased the same product or service and draw on their experience. At this point, it is submitted that procurement officers must also cooperate with national CAs, where the latter possess information about the relevant market. Under certain circumstances, it may be beneficial for contracting authorities to share information with CAs instead of resorting to direct engagement with economic operators. It is understandable that when contracting authorities are interested in the capabilities of economic operators as well as the technical, financial, legal, and operational perspectives of a contract/project, there is usually a need to directly contact the market operators and discuss about these parameters. Yet, when contacting authorities want to gather general market information, it is submitted that they do not have to engage directly with market operators, but they should consult the publicly available reports of CAs where the latter have necessary data at their disposal.

The significance of CAs’ contribution is particularly visible in innovation or otherwise high technology markets, where the identification of market boundaries and the assessment of competition are quite difficult and complex, because a reliable market definition must factor in both performance and potential competition. As already explained, it is in innovation markets that procurement officers conduct the preliminary market consultation and engage directly with the relevant economic operators, enhancing in this way the risk of bid rigging and corrupt practices. Therefore, promoting the cooperation of CAs with contracting authorities in order for the latter to make informed choices with regard to information sharing would restrict the number of opportunities for market operators to interact and contact with the procurement officers.

V. CONCLUDING REMARKS

This article has undertaken a critical review of the first phase of the EU public procurement process, i.e. the procurement planning, and focused on the conduct of preliminary market consultations. As it has been shown, the direct engagement of contracting authorities with market operators in the context of market dialogue raises bid rigging concerns where the opportunities for potential suppliers to meet are numerous and the collusion between public officers and undertakings enables the sustainability of any bidding rings that already exist. Though the Commission got off to a good start by issuing the Guidance on Innovation Procurement as well as the Notice on Tools to Fight Collusion in Public Procurement, it still needs to develop tools and take actions that will improve the market knowledge of the procuring entities, help them with the careful planning and design of procurement processes and enable them to better collaborate with each other as well as with the national CAs. The Commission has already announced its intention to proceed to the aforementioned actions under its strategic priority “Increasing transparency, integrity and better data.”

This article has also argued that procuring entities should in the first place avoid contact with market operators at the procurement planning stage when the cooperation with CAs is possible. This cooperation may take place every time market consultation is necessary in order to gather information relevant to the structure of the market, such as whether there is a sufficient number of suppliers to ensure effective
competition, whether there are suppliers that have previously delivered the proposed public contract and how many economic operators may be
needed to deliver it.

If the direct engagement with market operators is inevitable, then it was suggested that contracting authorities should have a policy for
undertaking preliminary market consultation. Indicatively, the article recommended the drafting of a report at the end of each market analysis,
outlining the issues that have been considered and the main conclusions drawn. Additionally, it was suggested that this report should consist of
an updated self-declaration confirming that the procurement officers conducting the preliminary market consultations acted in accordance with
the guidelines of their authority, communicated to all candidates and tenderers the information exchanged during or resulting from the market
dialogue phase and did not get involved in corrupt practices. The report should also be published and sent to the interested economic operators,
but without referring to the identity and number of the economic operators that responded to the invitation to participate in the technical dia-
logue. The disclosure of such information would facilitate the implementation of a cartel existing among the economic operators. By the same
rationale, the report should not include the specific points of the tender documents that the contracting authority intends to modify after the
preliminary market consultation, because this would facilitate cartel redistributions. Regarding face-to-face discussions of procurement officers
with economic operators, the need for at least one neutral person was highlighted, as well as the fact that the procurement officers conducting
the preliminary market consultation should be different from those assessing the bids and award the public contract.
HUB AND SPOKE CARTELS AND BID RIGGING IN BRAZIL: CURRENT LANDSCAPE AND FORWARD-LOOKING CONSIDERATIONS

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I. INTRODUCTION

Bid rigging is a form of collusion whereby companies conspire to raise prices or lower the quality of goods or services during a bidding process. Such collusive behavior in public tenders is particularly damaging to competition and the public interest, as it jeopardizes the outcome and integrity of public procurement procedures and negatively impacts public services.2

In Brazil, bid rigging is deemed to be grave anticompetitive conduct, exposing participants to civil and criminal liability under antitrust and/or public procurement law.3 Brazil’s antitrust agency (“CADE”) has recognized that companies operating a bid rigging scheme could potentially use various strategies to achieve their objectives, such as fixing the prices to be submitted to a tendering party, presenting proposals without the intention of winning the bid (cover bids), reducing the number of companies bidding in tenders (bid suppression), allocating markets and geographic areas for bidding purposes (market allocation or market division), or alternating the submission of competitive proposals in different bids (bid rotation).4

Given the anticompetitive nature of such conduct, CADE has frequently treated bid-rigging arrangements as hardcore cartels. Illustrative bid rigging cases ruled on by CADE include, for instance, the subway cartel case5 and many cases prosecuted in the context of the so-called Car Wash Operation.6

Recently, for example, CADE tackled a specific type of cartel behavior which first appeared in CADE’s case law within a bid rigging case, as described below. This was a so-called “hub-and-spoke cartel,” a concept which is not new to international antitrust authorities, especially in the United States and the United Kingdom.7

Although not all bid-rigging cases are necessarily characterized as hub-and-spoke cartels, such cases can be characterized as a form of collusion that is increasingly found in bid rigging cases — especially in digital or remote competitive procedures — considering the frequently found hardcore contours of the practice, which ends up demanding a higher degree of care and compliance from companies and economic agents in general when it comes to distribution and resale policies and practices. This article will focus on hub-and-spoke cartels given their importance and practical relevance in the context of bid rigging cases.

II. OVERVIEW OF THE HUB-AND-SPOKE CARTEL THEORY IN BRAZIL

As laid out in CADE’s case law further detailed below, and in line with international theory and practice,8 a hub-and-spoke cartel violation entails an indirect alignment of prices and/or other commercial variables between competitors, made possible by a commercial partner common to all of them who operates in a non-competing (usually vertically related) market. Generally, the commercial partner is a supplier (hub) that has a supply contract with several distributors/resellers (spokes) that compete with each other.

By contrast with a classic cartel structure, in which direct competitors align themselves on prices or other competitively sensitive variables to curtail competition, in a hub-and-spoke cartel, alignment among competitors is made indirectly, by means of a vertically-related participant in the structure. Such a vertically related entity takes advantage of its position (usually as a common supplier of the spokes) and, as a type of “intermediary,” collects competitively sensitive information. The “hub” not only functions as a type of “channel” for information flow, but

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3 CADE. Guia - Combate a Cartéis em Licitação (2019) https://cdn.cade.gov.br/Portal/Not%C3%ADcias/2019/Cade%20publica%20Guia%20de%20Combate%20a%20Cart%C3%A9is%20em%20Licita%C3%A7%C3%ADo__guia-de-combate-a-cart%C3%A9is-em-licitacao-versao-final-1.pdf, 19 – 24.
5 CADE. Administrative Proceeding No. 08700.004617/2013-41.
6 CADE. Administrative Proceeding No. 08700.001836/2016-11, for instance.
7 Ishihara, Júlia Namie, Analysis parameters of the hub-and-spoke cartel in Brazilian law, Revista de Defesa da Concorrência, V 8 No. 2, 177 (2020).
8 Ishihara, Júlia Namie, op. cit., 190.
also as a “coordinator” of the alignment among the spokes. In sharing sensitive information, it directs the behavior of the information recipient according to its interests within the scheme.

**Figure 1 – Basic Structure of a Hub-And-Spoke Cartel**

An example of a possible arrangement among the hub and its spokes could consist of a “hub”, only permitting a given spoke to participate in a given tender. The others are less competitive, such that the spokes end up not actually competing against one another for the same opportunity (that is, the non-winning spokes submit a *cover bid*).

In practice, the hub can gather information from the spokes regarding the bids they want to participate in, and their respective intended prices. Once the information is gathered, the hub shares them strategically with each spoke, not only disclosing the intended prices, but also aligning on them with each spoke to make sure that the lowest price is pre-determined for one of the bidders, and there are no surprises as to the final winner. In so doing, the hub ends up steering the result of the bid, according to the interests of the scheme. Needless to say, this can be highly detrimental to public entities expecting real competition on prices and conditions for given tenders.

The conduct can also involve a limitation on the number of spokes that are allowed to participate in a given public tender, so that the hub ends up “distributing” the opportunities among the spokes for different tenders. To do so the hub might collect, from each spoke, information on the bids they want to participate in. Once the requisite information is gathered from the spokes individually, the hub can share them with the spokes and, in effect, allocate the bids to each spoke.

As cartel violations, hub-and-spoke cartels constitute an illicit form of conduct by object (that is, they are punishable regardless of their effects)9 and expose perpetrators to heavy fines in Brazil.

Under the Brazilian Antitrust Act (Law No. 12,529/11), companies participating in such a cartel are subject to administrative fines applied by CADE, which can vary from 0.1 to 20 percent of revenue in the field of activity in which the violation occurred, in addition to other penalties, such as publication of the decision in a mass-circulation newspaper, along with prohibitions on contracting with official financial institutions, participating in public tenders, or spinning off assets. Individuals involved in such conduct are also potentially subject to fines from CADE, which can vary from R$ 50,000.00 to R$ 2,000,000,000.00. In the case of administrators directly or indirectly responsible for the violation, the applicable fine ranges from 1 to 20 percent of that applied to the company.

In addition to being administratively penalized by CADE, cartels in Brazil are also subject to criminal prosecution: the crime of participating in a cartel exposes individuals involved to imprisonment from two to five years, plus a fine, under the terms of the Economic Order Crimes Act (Law No. 8,137/90).

Finally, participants in a cartel are also subject, in the civil sphere, to damages lawsuits that can be filed by any victim, and to public civil actions filed by the Public Prosecutor’s Office or other interested parties.10

As it will be further analyzed below, at the time of writing, the only conviction for a hub-and-spoke cartel practice ended up in fines being imposed on the spokes corresponding to 15 percent of their gross revenues in the year preceding the CADE investigation (a high percentage

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10 Laws No. 12,529/11 (Brazilian Competition Act) and 7,347/85 (Public Civil Action Act).
applicable only to hardcore cartels). CADE even imposed an 18 percent surcharge on the hub, in response to the particularly serious role it played in the scheme.11

III. HUB-AND-SPOKE CARTELS IN CADE’S BID RIGGING CASE LAW

A. Brazil’s Leading Hub-and-Spoke Cartel Case to Date

At the time of writing, CADE has ruled on only one hub-and-spoke case. The agency convicted 18 companies and 20 individuals of bid rigging (in public and private procurements) in the sale of interactive whiteboards and projectors.12 CADE's Tribunal ruled on this case on April 12, 2023. The case resulted from a formal investigation (administrative proceeding) launched in 2012. The anti-competitive behavior was found to have occurred from 2009 to 2011 and affected various Brazilian regions. The evidence pointed to an anti-competitive agreement among resellers of interactive whiteboards and projectors of the “Smart Board” brand taking place in three stages.

- First, a reseller would identify a potential customer (among schools, universities and companies in different sectors) interested in purchasing whiteboards and screen projectors. Then, the reseller would inform the supplier (a company called Conesul) who that customer was, and also indicate a reference price which the reseller would submit in the tender, asking for “customer protection” from the other resellers that could be potentially interested in the same customer.

- Second, Conesul would then the other resellers of the requested price and ask them to submit prices above such reference price (cover bids).

- Third, all involved parties would actively behave to restrain competition in public and private tenders by submitting fake proposals (cover bids). Evidence, which involved e-mail communications, also indicated that all involved parties were aware that the practice was anticompetitive, and that they actively collaborated to map out potential customers and execute the bid rigging scheme.

By means of this arrangement, which lasted for years, competition among several resellers for the same customer was only a façade, while the result was pre-determined. Due to the lack of true competition, prices were kept artificially high.

As mentioned above, CADE treated the conduct to be anticompetitive by object, and imposed fines on the participants amounting to approximately R$ 7.9 million.

B. Other Helpful References by CADE’s Tribunal to Hub-and-Spoke Cartels

As detailed below, CADE has been investigating several potential hub-and-spoke cartels, and it remains to be seen how the case law on such anticompetitive practices will evolve. The conduct is increasingly raising interest from the antitrust community in Brazil, and CADE’s Tribunal has been testing the hub-and-spoke cartel theory in other cases. This will bring about more legal certainly and predictability to the case law.

During CADE’s Trial Session No. 217, on August 2, 2023, while a cartel involving gas stations in the countryside of Brazil (in Santa Catarina State) was being reviewed in the plenary session,13 Commissioner Gustavo Augusto explained why, in his opinion, such an arrangement should be interpreted as a hard-core cartel and not a hub-and-spoke cartel.

In his view, a hub-and-spoke cartel is characterized by the presence of an economic agent who is not in the market at issue (the hub), and that agent organizes the cartel of spokes – which are competitors in the same horizontal market. Therefore, he pointed out, there is no direct communication between the different (horizontal) competitors: there are “competitor A” and “competitor C” who are in the same horizontal market and don’t communicate directly among each other; rather, they communicate with “B,” who is another entity that can be vertically integrated to the spokes and that carries out an “ABC”-type of communication.

12 CADE, Administrative Proceeding No. 08012.007043/2010-79.
13 Administrative Proceeding No. 08700.005639/2020-58.
Gustavo Augusto added that an essential requirement of the hub-and-spoke cartel configuration, based on foreign doctrine, is such “ABC” communication, that is, communication from a competitor to the external (vertically related) agent, and from the external agent to the other competitor. This would be an essential element that must be demonstrated in the concrete case.

Having laid out the test above, Gustavo Augusto concurred with the Reporting Commissioner (Luis Bertolino Braido) and determined that there were only two horizontal competitors communicating with each other in a classic, hardcore cartel structure, and not in a hub-and-spoke scheme. Although the evidence indicated references to third parties (especially a fuel distributor called Maxsul), CADE’s Tribunal determined that the dialogues among cartelists did not evidence that the alignment was being made on behalf of any third party.

Although the case was not classified by CADE as a hub-and-spoke cartel, the opinions of the Commissioners including Gustavo Augusto’s helped to revisit and eventually confirm the characteristics of the conduct as laid out in the whiteboards case, thus affirming the legal certainty associated with how CADE is expected to address the practice at issue.

IV. RISK MITIGATION MEASURES

To prevent and detect hub-and-spoke cartel practices, it is paramount that companies address the issue in antitrust compliance programs and trainings, spotting and tackling risky situations for the company’s operations either in the hub (vertically related) position or in the spoke (resellers/competitor) position.

Companies are advised to create, maintain, and periodically review and revise commercial policies involving the supply/distribution/resale of products and services in order to avoid falling into the trap of engaging in communications with vertically related parties which can be used to structure any type of collusive scheme which could be characterized as a hub-and-spoke cartel.

Any policies involving the resale of goods by distributors and/or resellers in different territories must comply with Brazilian law and be set forth in a clear and transparent manner, as those policies could be presented to CADE in an investigation of alleged anticompetitive conduct.

V. CONCLUSION

Hub-and-spoke cartel behavior is highly detrimental to competition and is increasingly drawing CADE’s attention.

It is expected that the agency will refine its techniques to detect those types of practices. CADE has been focusing on improving its cartel and bid-rigging enforcement broadly — for instance, through its well-known “Projeto Cérebro,”14 which is aimed at monitoring publicly available information on pricing and procurement processes. It does so by employing data analysis tools to identify potentially collusive patterns and associated behaviors.

It is also expected that, as more hub-and-spoke cartel cases are investigated, CADE’s jurisprudence on the matter will be refined and will evolve to shed more light on the types of conduct engaged in and the level of exposure of economic agents in their day-to-day business activities.

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BID RIGGING IN PUBLIC PROCUREMENT

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I. INTRODUCTION

In October 2021, the Egyptian Competition Authority (“ECA”) and the General Authority of Government Services (“GAGS”) of the Egyptian Ministry of Finance issued a circular regarding the guidelines (“The Guidelines”) for fighting bid rigging in public procurement. This was done in parallel with the ECA’s campaign entitled “No to collusion in public procurement,” which aims to train the employees of various ministries on how to detect practices that harm competition. The ultimate objective of this campaign is to preserve public funds and ensure effective public expenditure.

Since the Guidelines’ issuance in 2021 to its date, the ECA has been very active in fighting bid rigging. It is seeking to promote the provisions of the Guidelines by regularly organizing workshops and educative sessions for employees of different ministries, public entities and State-owned companies, etc. These sessions provide training on competition law principles in general with a more specific focus on bid rigging in public procurement, its different forms, measures to prevent/reduce the risk of its occurrence, ways and methods to detect it, and the obligation to notify the ECA if the employees suspect a possible infringement in this regard.

Moreover, and as part of its efforts to fight bid rigging in public procurement, recently, the ECA has also been active on the enforcement front. It issued infringement decisions against two companies in the market for the supply of automotive spare parts, on the basis that the two companies agreed on bids for tenders administered by the Public Transport Authority. The ECA also detected several infringements and bid rigging practices in the market for electric poles and iron pipes. Bidders were exchanging confidential and sensitive information, and accordingly coordinating their practices regarding progressing or refraining from entering bidding processes administered by electricity distribution companies. Also in the chemical industries sector, the ECA detected infringements by three companies who coordinated their bids in relation to tenders organized by the Egyptian Petroleum Research Institute.

This note will outline the approach followed by the ECA in detecting bid rigging. It will specifically tackle the substantive assessment of such practices, with a very brief overview of the procedural aspect.

II. THE LEGAL FRAMEWORK OF BID RIGGING IN EGYPT

To begin with, the Guidelines were inspired by best practices in the area of bid-rigging, notably “The Guidelines for Fighting Bid Rigging in Public Procurement issued by the Organization for Economic Co-operation and Development (“OECD”) in March 2009” which served as the main reference for the Guidelines. According to the OECD, bid rigging "occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process."

In this regard, it must be emphasized that administrative contracts are designed to allow the administrative authorities to ensure the continuity of public services through recourse to the private sector, under the proviso that the tender or practice shall be awarded to the bidder with the best conditions and the lowest price to ensure the effectiveness of public expenditure.

To ensure such effectiveness, and that the competitive process can achieve lower prices, better quality, and innovation; companies must genuinely and fairly compete. Therefore, the legislator prohibited activities that may harm competition in public procurement.

A. Prohibited Practices under Egyptian Law

Egyptian law No. 182 of 2018 on public procurement and its Executive Regulation Decree No. 692 of 2019 prohibit two different practices that may lead to bid rigging.

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2 The ECA’s guidelines on bid rigging available online at: http://eca.gov.eg/eca/upload/Announcement/Attachment_A/1099/%D8%A7%D8%B1%D8%B4%D8%A7%D8%AF%D8%A7%D8%AA20%D9%85%D9%83%D8%A7%D9%81%D8%AD%D8%A9%20%D8%A7%D9%84%D8%AA98%8A7%87%8A4.pdf.


4 Ibid.

5 Article 35 of Law No. 182 of 2018 on public procurement.
1. **Collusive Tendering**

First, the law prohibits collusion:

Bidders are prohibited from concluding “Any agreement, contract, exchange of information, directly or indirectly, or coordination through third parties, whether that is between any of the contracting management specialists of the administrative authority or other employees in the entity, and the bidder, or between the bidders themselves, or other dealers with the entity, as the case may be, which would lead to:

a. Raising, reducing, or stabilizing the prices of the products in question.

b. Sharing or allocating markets on the basis of geographical areas, distribution centers, type of customers, type of products, market shares or time periods.

c. Coordination regarding progressing or refraining from entering into all the various contracting processes.”

Second, the law further sets out some indications to help officials detect such “coordination”:

i. Submission of identical bids, including agreement on common rules for calculating prices or specifying terms of bids.

ii. Agreement about the person who will submit the bid, and this includes prior agreement on the person who will be awarded the bid, whether on a rotating basis or on a geographical basis, or on the administrative authorities applying to it or the owner of the offer.

iii. Agreement on submitting fictitious bids.

iv. An agreement to prevent a person from competing in bidding.

This provision mainly transposes the classic concept of a cartel to the very specific area of public procurement. In other words, article 5 of the Executive Regulation of the Public Procurement Law is the adapted, more detailed, and specific version of article 6 (c) of the Competition Law which provides that: “Agreements between competing persons in the relevant market are prohibited if they are likely to lead to ... coordination with regard to submitting bids or refraining from entering into tenders, auctions and proposals or any other supply offers.” The aforementioned article 6 (c) is a holistic provision that applies in the context of public procurement but also to other private tenders and auctions; while article 5 of the Executive Regulation of the Public Procurement Law addresses bid-rigging in public procurement only.

2. **Submission of More Than One Bid by Related Persons**

Further, Article 33 of the Public Procurement Law explicitly prohibits bidders from the same group of company (i.e. related persons) from submitting more than one bid for the same process, because this would manipulate the competitive process.

Bidders are prohibited from submitting, individually or in partnership with others (i.e. related parties), more than one bid for one contracting process, unless the bidder is a partner with others by a share that does not allow him to influence the decision-making related to the bid.

In this regard it is worth mentioning that the Public Procurement Law refers explicitly to the very crucial notion of “Related Persons” as defined under the Competition Law, which is defined, *grosso-modo*, as any entity which controls or is directly or indirectly controlled by or under common control with another entity, including material links between entities.

The concept of Related Persons is very fundamental in the ECA’s assessment. The decisional practice of the ECA demonstrates how this notion can be used flexibly depending on the infringement in question and the legal and economic context in which it takes place. For instance, it may be used to deem two separate legal entities (each having a distinct legal personality) as one economic entity, which the ECA will often use in calculating an entity’s market share, the ECA may equally view structural links between two legal entities as a factor facilitating collusion between them. In the latter line of cases ECA tends to disregard the structural links as establishing “one economic entity” but rather as factors that may facilitate collusion.

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6 Article 5 of the Executive Regulation Decree No. 692 of 2019 of Law No. 182 of 2018 on public procurement.

7 Article 33 of Law No. 182 of 2018 and article 83 of the Executive Regulation Decree No. 692 of 2019.
A. Substantive Assessment

1. **Market Definition and its Relevance**

Determining the relevant market is the first step in any competition authority’s assessment. It plays an important role in explaining the legal and economic context within which an agreement or behavior (in this context bid-rigging) is to be implemented. By defining the relevant market, the ECA will be able to assess whether the behavior in question is likely to have an adverse effect on competition.

Market definition is also crucial at the decisional phase for the authority, especially, if an infringement is established, at this stage the market definition plays a major role in determining the appropriate remedies tailored to prevailing market conditions and the nature of the anti-competitive conduct. It helps as well in calculating the fines to be imposed or - in the context of a settlement - the amount to be paid by the undertaking(s) in question.

For the first time, the ECA in its guidelines predetermined the potentially relevant markets in the context of public procurement, limiting therefore the scope of such exercise in future investigations or decisions. The definitions proposed by the ECA will depend on the specific circumstances surrounding each contracting process.

The suggested definition limits the definition of a relevant market to three possible scenarios which are:

1. The contractual process itself (whether a tender, a bid or others)
2. If the contractual process covers more than one term, then in order to define the relevant market, only one of the terms or more shall be sufficient to identify the relevant market, (e.g. if the tender relates to the supply of three different medical products, each of the three products may be considered a separate relevant market, which means that the integrity of the tender includes three different relevant markets.
3. Contractual process for the products subject matter of the process generally and its substitutes if available. (e.g. if it occurs that more than one tender is held for the supply of face masks and it is agreed on bid rotation, then these tenders combined will be considered the relevant market.”

2. **Detecting Bid Rigging and Nature of the Infringement**

The ECA clarifies that for bid-rigging to take place, it will assess whether three cumulative factors are satisfied: (an agreement, between two actual or potential competitors, that may likely lead to an anti-competitive outcome on the relevant market). These are:

1) The existence of an agreement, contract, exchange of information or coordination should exist directly or indirectly.
2) The likelihood of: (a) increasing, decreasing, or fixing prices of sale or purchase of products subject matter of dealings; (b) dividing product markets or allocating them on grounds of geographic areas, distribution centers, type of customers, goods, seasons, or time periods; (c) coordination regarding proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
3) Finally, the agreement must be concluded between actual or potential competitors in the relevant market.

Moreover, in the Guidelines, the ECA emphasized the fact that bid rigging is a restriction on competition by its very object, which results in three important consequences for the substantive assessment:

i) While assessing the likelihood of the anti-competitive outcome on the market, evidence of actual harm to competition in the relevant market is not necessary. It suffices to establish that the agreement’s nature, its mandate, and repercussions will potentially produce such effects within the legal and economic context of the agreement.

ii) Further, the ECA is not limited by the agreement itself, but rather assesses its significance, indications and repercussions on competition within a legal and economic context guided by the definition of the market concerned.

iii) Finally, evidence of the actual implementation of the agreement which may restrict competition in the relevant market is not necessary either. The infringement is simply established by the potential for anti-competitive impact such an agreement may have on the market regardless of its implementation or execution.

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8 ECA’s guidelines on bid rigging available online at: http://eca.gov.eg/ECA/upload/Announcement/Attachment_A/1099/%D8%A7%D8%B1%D8%84%D8%A7%D8%AF%D8%A7%D8%AA%20%D9%85%D9%83%D8%A7%D9%81%D8%AD%D8%A9%20%D8%A7%D9%84%D8%AA%D9%88%D8%A7%D8%B7%D8%A4.pdf.

9 Ibid.
III. LEGAL TOOLS FOR DETECTING BID RIGGING

Although the harmful impact of bid-rigging seems clear and obvious, detection is very complicated. As such, the legislator has granted the administrative authority some powers and competences regarding the assessment of bids in the Public Procurement Law that help identify such conduct.

In article 12 of the Public Procurement Law, the legislator has established a framework for the “pre-offering phase.” At this stage, the administrative authority may request information, proposals, specifications, and more, for the purpose of fulfilling market study procedures, determining its needs in an accurate manner in accordance with market developments, or preparing its annual needs plan.

This phase allows the administrative authority to study the relevant market, gaining insight into quality and prices and, more importantly, collecting information on potential suppliers, their products, their prices, and their costs. It can also be used to detect related parties if any. Such detection is simple if the bidders are considered related parties by ownership. It might be more challenging in case of de facto control. Yet in both cases, the administrative authority refers the matter to the ECA to investigate.

Moreover, the increased digital integration of the government’s bodies and the establishment of the public procurement digital portal means that both administrative authorities and the ECA can perform a real time assessment on different bids, thereby rendering enforcement even more effective.

Finally, and regarding leniency applications, it is worth mentioning that the ECA’s Guidelines regarding the full exemption policy (leniency policy) under article 26 of the Competition Law issued in 2020 stipulates that in order to encourage persons to disclose and report collusive practices in public procurement, the ECA and the administrative authority concerned shall coordinate in order to consider exempting the entity that cooperates with them to uncover and establish the infringement.

In this regard, the ECA will assess the conditions, the behavior, and the official application of such entity in the same way it assesses other infringements under the Competition Law. Although it was not explicitly set out in the leniency policy, it may be argued that the ECA’s statement as clarified above may be interpreted as granting an applicant for leniency an exemption from the penalties provided for under both the Public Procurement Law and the Competition Law. This may be justified by ECA’s huge reliance on leniency applications to uncover bid-rigging, and, to this end, the ECA and the relevant authority may offer such exemptions to incentivize offenders’ collaboration and cooperation.

IV. THE NECESSITY OF COMPLIANCE IN PUBLIC PROCUREMENT

Failure to comply with the public procurement law may subject the entity in question to various kinds of sanctions that could apply in parallel. The risk of being subjected to these sanctions increased further after the adoption of the ECA leniency policy. Although the number of successful leniency applications is not made publicly available, the ECA relies heavily on leniency applications to uncover bid-rigging in public procurement due to an increased awareness of the risks that the entities might be facing in case of failure to comply.

The sanctions that may be imposed vary depending on the infringement and the authority imposing the sanction, and as clarified above, these sanctions may apply in parallel. Below, we will tackle the sanctions that each authority may impose:

A. Sanctions Imposed by the Relevant Administrative Authority

The administrative authority may impose contractual, financial, and administrative sanctions. In this regard, and in the context of bid rigging, it may impose contractual sanctions: for instance, it may terminate the contract with the winning bidder if it is evidenced that it engaged in a
collusive practice. It may also cancel the whole contractual process even before deciding the winning bid without reimbursing the offender(s). The administrative authority may impose administrative sanctions as well, notably by deregistering the offender(s) from the registry of dealers with the administration (i.e. disabling the offender from participating in any future contractual process with the administration). In addition, and if the infringement in question relates to submission of more than one bid by related parties (article 33 of the Public Procurement Law), the administrative authority may exclude the violating bids from the contractual process, it may impose indemnities on the offenders (for any loss the administrative authority has incurred), it may seize the bid bond, and it is further entitled to charge the offender the amount of the execution of the bid by another bidder.

B. Sanctions Imposed by the ECA

Alongside the sanctions imposed by the ECA and given that bid rigging falls within the scope of the Competition Law especially horizontal agreements prohibited under article 6, the ECA may impose various criminal sanctions that may lead to prosecution of the offenders in addition to heavy fines and financial sanctions.

The ECA may also impose remedies on the offender(s), whether behavioral (i.e. an engagement by undertaking to adopt or abstain from adopting certain actions) or structural, to eliminate harmful effects on competition resulting from the anti-competitive behavior.

V. CONCLUSION

The increase in ECA enforcement in the area of bid-rigging in public procurement means that the risks for companies are greater than ever. The digitalization of the bidding process and the increased awareness of public entities and private bidders of the risk of collusion in bidding processes, coupled with an effective leniency policy and a huge web of sanctions that ensure deterrence all mean that the risk for detecting violating companies is now easier and more effective. Companies need to carefully design their bids and train their employees to ensure compliance. Also, the particularities of the Egyptian Competition Law regime require from all companies a greater reliance on local expertise to ensure compliance and risk management.
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