COMPETITION COMMITTEE

Fighting Bid Rigging in Public Procurement in Colombia

A Secretariat Report on Colombian Procurement Laws and Practices

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2014

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

Following a request from the Superintendencia de Industria y Comercio (SIC), the OECD Secretariat has prepared the present Report to review the adequacy of Colombia's public procurement legislation and practice with the 25 March 1998 Recommendation of the Council concerning Effective Action Against Hard Core Cartels and the 17 July 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement.

This report follows two training sessions organised by the OECD Secretariat for Colombian procurement officials and SIC officials on the OECD Guidelines for Fighting Bid Rigging in Public Procurement, which took place in December 2012 and February 2013. The purpose of the trainings was to provide practical advice on how to design effective public procurement procedures and detect collusive practices during the course of tender processes, with the aim of reducing the risk of bid rigging in public procurement.

The implementation of the OECD recommendations in this Report, coupled with the increased awareness among Colombian procurement officials of the existence, risks and costs of collusion, will enable Colombia to increase the effectiveness of its public procurement to the benefit of its taxpayers. The Report and its conclusion will also assist SIC in improving the ongoing efforts in fighting collusive practices in public tenders in Colombia.

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INTRODUCTION

The competition authority in Colombia, the Superintendencia de Industria y Comercio (SIC), requested that the Organisation for Economic Co-operation and Development (OECD) review the legal framework and practices pertaining to procurement in Colombia and the initiatives that the SIC has undertaken to both combat collusive practices/bid rigging in public procurement and enhance competition in public procurement procedures. This report examines the status of these matters in relation to the OECD's recommendations and guidelines regarding cartels and bid rigging. In undertaking its work, the OECD relied heavily on the research of SIC staff that examined issues related to bid rigging and competition in public procurement in Colombia. The report is also based on information provided to the OECD Secretariat by the SIC over the period from February 2013 to September 2013.

This report identifies the features currently present in Colombian public procurement and cartel enforcement and awareness and sets forth advice and suggestions that the OECD believes will lead to closer compliance with OECD recommendations and guidelines, more effective procurement and a reduction in the incidence of bid rigging in Colombia. In particular, this report focuses on Colombia's compliance with:

- key provisions in the 25 March 1998 Recommendation of the Council concerning Effective Action Against Hard Core Cartels (the 1998 Recommendation)[1] and specifically with the provision regarding the investigation and prosecution of bid-rigging practices; and,

- the 17 July 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement (the 2012 Recommendation). [2]

1 The Recommendation can be found in Annex 1.

2 The text of the Recommendation is available in English and French at: http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidriggi

The Report contains five sections. The introductory section examines the importance of competition in public procurement and the negative economic consequences of bid rigging. The second section provides a summary of current Colombian legal framework governing procurement by central government departments and agencies. The report then reviews the extent to which Colombia complies with the 1998 Recommendation and the 2012 Recommendation in sections 3 and 4, respectively. Section 5 of the report sets out advice and suggestions that the OECD believes will enable Colombia to combat collusive practices in public procurement more effectively.

The OECD's suggestions are targeted at the Colombian government, the SIC, government purchasing groups and the National Public Procurement Agency, a recently-established central procurement agency[3]. They deal with procurement policies and practices such as: increasing the use of public tenders, consolidated purchases and reverse auctions; preparing detailed, useful market studies; and, reducing disclosure of competitively sensitive procurement and bidding information. The suggestions also call for more information sharing and communications among the SIC, the NPPA and government purchasing officials and for ongoing training activities sponsored by the SIC and NPPA, which will educate government procurement officials about enhancing competition in their procurement procedures and detecting and avoiding bid rigging. The OECD believes that it is critical that the SIC and NPPA work together to ensure that the advice and suggestions put forward in this report are acted upon through the initiatives and support of two champions with vested interests in this important aspect of public policy.

nginpublicprocurement.htm- see Annex 2 for the complete document in English.

3 Agencia Nacional de Contratación Pública in Spanish- also known as Colombia Compra Eficiente.

CHAPTER 1:
COMPETITION IN PUBLIC PROCUREMENT

At the outset, it is important to put the international fight against bid rigging in some context. Bid rigging occurs when firms conspire to increase the prices, or lower the quality, of goods and services, which are purchased by private and public organisations through a bidding process, instead of genuinely competing against each other to win a tender. Bid rigging is a very specific type of collusive or cartel activity with significant, negative economic consequences. It amounts to theft of, and fraud against, buying organisations. Participants in cartels are usually well-organised and resourceful and they tend to operate in secret. No country is immune from these illegal practices. Occasionally, a portion of the increased costs are used by participating companies to pay corrupt procurement officials. In addition to taking resources away from purchasing groups (and ultimately taxpayers in the case of government procurement), these practices can discourage entry by competing companies, diminish public confidence in competitive procurement processes and undermine the benefits of a competitive marketplace.

It is widely recognised that government procurement authorities are often victimised by private sector companies through bid rigging and other price-fixing activities. This is partly due to the large and stable volume of purchases undertaken by governments- procurement by central Colombian government groups amounts to 15.8 percent of Colombia's Gross Domestic Product, a figure somewhat above the average of 12.9 percent for the OECD's 34 member countries. There are over 2,000 organisations at the national and sub-national levels of government that purchase goods and services in Colombia.

As a consequence, the OECD and competition authorities around the world, such as the SIC, have stepped up their efforts to combat this anti-competitive activity that costs governments and their agencies, ministries, departments and state-owned enterprises enormous sums of money each year

that could have been used to fund important and necessary projects related to infrastructure, healthcare and education, among others.[4]

Bid rigging is one of numerous problems that can confront public purchasing groups when they undertake their procurement processes. Other issues include:

- too few suppliers;
- a lack of competition among suppliers;
- price fixing on the part of suppliers in non-tender situations;
- inappropriate legislation and regulations;
- inefficiencies in procurement procedures; and,
- dishonest or corrupt procurement officials.

The primary goal of public procurement groups should be to purchase goods, services and public works in the most effective manner from a sufficient number of suppliers who are actively and genuinely competing to supply what is required. In order to achieve this goal, it is necessary to have the following in place: appropriate laws and regulations; clear and sensible procurement practices; and, professional procurement officials who are well trained and understand and follow the established laws, regulations and practices. Procurement laws should not place unnecessary burdens on procurement groups through overly bureaucratic or complicated procedures and requirements. In essence, procurement laws should be designed to help procurement officials make effective purchases that achieve the best value for money. Although procurement laws and practices can take other public policy goals into account, they should not be designed chiefly for other public policy initiatives such as industrial policy, social policy and regional economic development.[5]

4 A number of economic surveys concerning the level of cartel overcharges, including one undertaken by the OECD, have suggested that the presence of a collusive agreement can increase the prices paid by procurement groups by over 30 percent.

5 Enhancing competition in government procurement, reducing bureaucracy in public procurement processes and implementing the recommendations

Purchasing goods and services needs to have a commercial focus and orientation.

It is vital that procurement officials are keenly aware that some suppliers engage in bid rigging and other collusive activity in order to thwart competitive procurement processes for their own gain and contrary to the best interests of public procurement groups, stakeholders and taxpayers. To deal with this fact, procurement officials must therefore be trained about the forms that bid rigging takes and how to detect and avoid bid rigging. However, no matter how educated and informed public procurement officials may be, there will always be unscrupulous and dishonest companies and corporate personnel who will engage in bid rigging and other collusive activity. Therefore, it is essential that countries put in place competition legislation to deal with these types of activities and establish competent competition authorities with sufficient powers and penalties to deter these anti-competitive actions.

Governments around the world at all levels have a tendency to encourage public procurement officials to award contracts to the lowest bidder as it is the safest course of action from transparency and public perception perspectives. Public buyers have a similar tendency because it is the easiest method of awarding contracts. However, this can be an overly simplistic approach to procurement. As well, it makes bid rigging more likely to occur as it removes some unpredictability from public procurement procedures. It is ironic that bid rigging can really only work when procurement groups routinely select the lowest-priced bid in purchasing selection processes. This is an additional reason why it is important that Colombian policy makers and procurement officials recognise the importance of non-price factors such as quality, service, delivery terms, payment terms, warranties, etc. and permit the use of such selection criteria in awarding contracts.

Evaluating bids and awarding contracts based on price alone makes the most sense when the product or service is simple in nature and the procurement process is routine. Using non-price evaluation factors is a more difficult approach to procurement but it can be the best approach when the good or service to be purchased is complex and there are a number of features or variables considered desirable (public works projects are a good example in this regard). When utilising non-price factors procurement officials need to be

contained in this report would all assist in promoting small- and medium-sized enterprises, a goal of most countries around the world.

careful in assigning the weights to each of the criteria. Governments should give their professional public procurement officials the responsibility of choosing what they believe to be the most appropriate approach to procurement in light of the requirements and circumstances before them.

One goal of the OECD is to assist governments and public procurement groups in establishing appropriate legal frameworks, putting in place suitable and effective procurement policies and practices, and providing the necessary training to professional procurement officials. This assistance is designed to increase the ability of public procurement authorities to achieve value for money in their purchases to the benefit of governments and taxpayers. There is a very close connection between promoting competition in procurement procedures and diminishing the likelihood of suffering from collusive activity on the part of bidders/suppliers.

As noted earlier, on 17 July 2012, the OECD Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement that calls for governments to assess their public procurement laws and practices at all levels of government and to design them to promote more effective procurement and to reduce the risk of bid rigging in public tenders. The Recommendation is another important step in the fight against collusion in public procurement that the OECD has been leading for some time. A critical, earlier OECD step involved the issuance of its Guidelines for Fighting Bid Rigging in Public Procurement (the OECD's Guidelines)[6], which have been disseminated around the world, often during training sessions organised for procurement officials and competition authorities by the OECD's Competition Division.

6 Available at http://www.oecd.org/dataoecd/27/19/42851044.pdf - see also Annex 2. The Guidelines were approved by the OECD's Competition Committee in 2009.

CHAPTER 2:
THE EXISTING LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT IN COLOMBIA

The principal piece of legislation that governs public procurement in Colombia is Law 80 of 1993, which is known as the General Statute for Public Contracting. Law 1150 of 2007 amended Law 80 and forms part of the contracting statute. Among other things, Law 1150 introduced measures regarding efficiency and transparency. Decree 734 of 2012 provided regulations in support of the contracting statute. Law 1508 of 2012 dealt with the increasingly important topic of procurement utilising public-private partnerships.[7] The recently enacted Decree 1510 of 2013 covers, among other matters, market studies (see subsection 5.3) and consolidated purchases (see subsection 5.4). A related piece of legislation is Law 1474, the Anti-corruption Statute, which was passed by the Colombian government in 2011. It includes a provision that deals with public officials involved in bid-rigging agreements. Like the companies and individuals who are parties to such agreements, government purchasers may be fined between 200 and 1000 times the minimum monthly wage, and face imprisonment ranging from 6 to 12 years. Procurement officials may also be subject to dismissal and be banned permanently from working in public office. Companies and individuals convicted of bid rigging may be disqualified from contracting with the government for up to eight (8) years. Disqualification powers rest with the Colombia's Office of the Attorney General (AG) and not with the SIC.[8]

7 Public-private partnerships give government organisations the opportunity to rely on private sector know-how and financial resources. They are often used for large and costly infrastructure projects such as highways, airports, hospitals and educational institutions.

8 Article 410-A of Law 599 of 2000 provides the AG with the power to disqualify individuals or companies. Individuals who take advantage of the SIC's leniency program may have their period of disqualification reduced to no more than five (5) years.

An important development with respect to public procurement in Colombia occurred with the passage of Decree 4170 of 2011, which established the NPPA. This central government agency has a broad mandate with respect to public procurement in Colombia that includes advising on and implementing procurement policies and practices and providing assistance to government purchasing groups and suppliers to the government.

Colombian procurement laws permit public government groups to utilise five (5) different types of procurement procedures depending upon certain circumstances, factors and exceptions: (1) public tenders; (2) an abbreviated selection process (for example, for routine, standardised products); (3) a selection based on qualifications (used for consultancy services where price is not the main consideration); (4) a direct selection or award; and (5) a low-value contract process. Suppliers responding to a procurement selection process are required to submit a bid bond (usually 10 percent of the value of the budgeted amount for the contract). Ordinarily, firms awarded a contract must submit a performance bond to guarantee their compliance with the obligations of the contract although this is not a requirement with respect to low-value contracts (*de menor cuantia*). Colombian public procurement agencies may extend the scope of a contract provided that the increased value of the contract does not exceed 50 percent of the initial value of the contract.

Specific provisions of the above statutes about which this report offers comments and suggestions are described in some detail in section 5.

CHAPTER 3:
COLOMBIAN COMPLIANCE WITH THE PROVISIONS ON FIGHTING BID RIGGING INTHE 1998 RECOMMENDATION OF THE OECD COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS

The OECD Council's Recommendation dealing with actions against cartels was adopted on 25 March 1998 in recognition of the fact that anti-competitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries. For the purposes of the Recommendation, the OECD defined a hard core cartel as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive agreement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce" (emphasis added).[9] The Recommendation invited non-member countries, such as Colombia, to associate themselves with the Recommendation and to implement it.

The OECD Recommendation concerning effective action against hard core cartels has two principal elements, the first of which has a direct bearing on combating bid rigging. It stresses that countries put in place laws to effectively deter collusive activity. The current Colombian administrative and criminal law statutes that address cartel activity in the country comply with this element of the Recommendation as there are effective sanctions to deter firms and individuals (including procurement officials as noted above in section 2) from participating in cartels[10] and the enforcement institutions and procedures

9 Recommendation I. A. 2. a).

10 Law 1340 of 2009 substantially increased the civil fine levels. Corporations can be fined the greater of 150 percent of the profit derived from their illegal conduct or 100,000 times the current minimum monthly wage in Colombia. Individuals face fines of up to 2,000 times the legal minimum monthly wage in force at the instance the fine is imposed.

established pursuant to the statutes include appropriate powers of investigation. Only the AG's Office can seek jail terms for individuals that have engaged in bid rigging and other cartel activity. As a result of the passage of Law 1340 of 2009, the SIC has established an immunity and leniency programme to encourage those who have engaged in collusive and other anticompetitive activity to so advise the SIC and to obtain certain benefits from their cooperation.[11] Any party that suffers damages from collusive activity may seek damages from the courts in Colombia.

With regard to investigating and penalising bid-rigging cartels, it should be noted that the SIC has undertaken several recent initiatives to step up its fight against bid-rigging activity. One of these involved the establishment of a specific bid-rigging enforcement unit in January 2012. This has resulted in a substantial increase in the number of cases under investigation by the SIC, as demonstrated in Table 1 below.[12]

11 Decree 2896 of 2010 sets out the terms, conditions and procedures for the SIC's programme.

12 The SIC believes that training provided to Colombian government procurement officials regarding bid rigging (see subsections 4.3 and 5.11) is another factor in the recent rise in bid-rigging cases as complaints from such officials have been steadily increasing.

Table 1. Colombian bid-rigging cases (2002-2013)

Year	Number of investigations opened	Number of individuals/ companies involved	Number of cases with sanctions imposed*	Number of individuals/ companies fined	Total fines imposed in US dollars**
2002	4	28	0	0	0
2003	8	56	0	0	0
2004	0	0	1	6	$28,068
2005	1	13	0	0	0
2006	0	0	0	0	0
2007	0	0	0	0	0
2008	2	18	0	0	0
2009	0	0	1	4	$1,913
2010	2	16	0	0	0
2011	34	58	1	5	$1,330,339
2012	52	93	2	26	$5,208,058
2013***	18	0	4	23	$16,830,941
Total	**121**	**282**	**9**	**64**	**$23,479,370**

* Sanctions may be imposed in a year after a case was opened.

** The value of fines was calculated using the average of the daily official exchange rate for the year in question.

******* Statistics cover the period from January to September.

Source: Information provided by the SIC to the OECD in September 2013.

The above statistics indicate that the SIC has been very active recently in pursuing bid-rigging cases. The number of investigations has increased exponentially with over 100 cases opened since 2011, involving 150 companies and individuals. As well, the SIC has had four (4) cases to date in 2013 in which sanctions have been imposed, almost as many as in the previous eleven years combined- the total fines in two of these cases (US$8.9 million and US$7.4 million) are the largest ever in Colombia for bid-rigging activity.[13] These are clear indications that the SIC and the Colombian government are committed to investigating and sanctioning bid-rigging conspiracies, in accordance with the spirit of the 1998 Recommendation. To date, however, no

13 Three (3) people sanctioned in these cases were fined as market actors or participants rather than just employees following corporate dictates. This allowed the SIC to impose double the fines against the individuals, as permitted under Colombian law.

individual has been subject to a prison term for engaging in bid-rigging activity as the AG's Office has not had any bid-rigging prosecutions since bid rigging was made a criminal offence by virtue of Article 27 of Law 1474 of 2011. The OECD suggests the fight against bid rigging in Colombia would likely benefit greatly from a well-publicised case in which individuals were sent to jail for their roles in a bid-rigging scheme.

The SIC's relatively new leniency program has not yet generated any cases. This is possibly due to a culture in which individuals are reluctant to approach enforcement authorities with information and evidence of wrongdoing. To help counteract this situation, the SIC has undertaken a campaign to educate business officials, through in-person presentations, about the SIC's laws, the new more stringent penalties and the benefits of taking advantage of the leniency program. The OECD encourages the SIC to continue its endeavours in that regard and to conduct comprehensive media campaigns each time a future bid- rigging or cartel case is based on evidence obtained under its leniency program.

As cartel activity can now also be pursued criminally by the Attorney General of Colombia, it is absolutely critical that the SIC and the AG's office both communicate regularly and effectively coordinate their respective investigatory activities. In this regard, the two organisations are currently working together to assess the best approach to handle a specific bid-rigging investigation. It is noteworthy that individuals who have approached the SIC under its leniency program can be granted leniency in an AG criminal action.

As permitted under Colombian law, the AG should regularly seek to have companies and individuals sanctioned for criminal bid-rigging activity disqualified from contracting with government procurement agencies for an appropriate period of time. As many companies depend heavily upon securing contracts from government agencies for much of their profit and even their continued existence, losing the ability to compete for government contracts for several or more years could be a strong deterrent to engaging in bid rigging or other cartel activity. However, in some industries there may be very few suppliers so that banning one or more companies from bidding for government contracts could be seriously detrimental to competition. It would be advisable that views be sought from public procurement agencies which depend on the goods and services provided by the companies and individuals that may be disqualified.

This suggestion is similar in purpose to one outlined in subsection 5.15, which deals with procurement groups seeking damages from companies engaged in bid rigging. Disqualification from bidding on government contracts sends a strong message to companies and the adverse impact on their economic livelihood may be a serious deterrent to cartel activity, as contemplated by the terms of the 1998 Recommendation.

CHAPTER 4:
COLOMBIAN COMPLIANCE WITH THE OECD 2012 RECOMMENDATION FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT AND THE RELATED GUIDELINES

As noted in section 1, the OECD Council recently adopted a Recommendation proposed by the OECD's Competition Committee that directs governments to assess the various features of their public procurement laws and practices at all levels of government in order to ascertain whether they might be inadvertently facilitating collusion even when they are not intended to lessen competition. The 2012 Recommendation builds upon the experience of member and non-member countries with the implementation of the 1998 Recommendation covering hard-core cartels. It recommends that effective enforcement action should be complemented by: 1) reviews of countries' procurement laws and practices to ensure that they do not facilitate the formation of collusive agreements; and, 2) effective advocacy by competition authorities to raise awareness of procurement officials to the risks and costs of collusive practices.

Although Colombia is in compliance with some of the twelve (12) components of the OECD's Recommendation for Fighting Bid Rigging in Public Procurement there a number of areas identified later in this section in which noticeable improvements could be made or additional compliance could be expected to generate a reasonable level of increased benefit. Addressing these deficiencies is covered in section 5.

4.1 The content of the 2012 Recommendation on fighting bid rigging in public procurement

The goal of the OECD's Recommendation is to promote more competitive and effective procurement and to reduce the risk of bid rigging in public tenders. This is in recognition of the fact that public procurement is a key economic activity of governments and has a significant impact on competition and the overall level of competitiveness of markets, with potential benefits for the economy of an entire country. The OECD's Recommendation notes that

competition in public procurement promotes efficiency and produces benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, "value for money" to the benefit of end consumers, users of public services and taxpayers.

Certain rules that govern procurement, the way in which a tender is carried out and the design of tenders themselves may hinder competition and promote collusive arrangements or bid-rigging conspiracies between competitors. The 2012 Recommendation, together with the Guidelines released earlier, are essential instruments to help OECD member governments and other countries reduce such anti-competitive practices and to find effective ways of detecting them.

The SIC's request to the OECD for views and advice regarding the status of procurement in Colombia is an initial, pro-active approach to expedite Colombia's compliance with the OECD Recommendation. While officials responsible for public procurement in Colombia appear to have a reasonable understanding of the need and value of employing effective and competitive procedures, the OECD's study of the current state of affairs (and the SIC's own assessment) suggest that there is considerable room for improvement in order that Colombia both more fully comply with all of the matters outlined in the OECD Recommendation and follow the OECD's Guidelines which are referenced in the Recommendation.

The OECD Recommendation makes explicit reference to the OECD Guidelines which are annexed to the Recommendation and, as such, form an integral part. As a result, it is appropriate to review the key components of the supporting OECD Guidelines. They begin by reviewing the most common forms of bid rigging (e.g. cover bidding, bid suppression, bid rotation and market allocation) and by outlining industry, product and service characteristics that facilitate collusion (e.g. a small number of suppliers, little or no entry, the existence of industry associations, identical or simple products or services, few if any substitutes, and little or no technological change).

The OECD Guidelines include two checklists- the first one on how to design procurement processes to reduce the risk of bid rigging and the second one on how to detect collusion in public procurement. The checklist on how best to design procurement procedures contains a number of useful suggestions to procurement officials, including:

- being informed before starting a tender procedure about market conditions, potential suppliers and prevailing price levels;
- designing the tender process to maximise the potential participation of genuinely competing bidders;
- defining contract requirements clearly and avoiding predictability;
- designing the tender process to effectively reduce communication among bidders;
- carefully choosing the criteria for evaluating and awarding the tender in order to avoid favouring incumbents or giving any kind of preferential treatment to certain suppliers; and,
- raising awareness among procurement staff about the risks of bid rigging in procurement.

The checklist on how to detect bid rigging during the procurement process complements these suggestions and recommends that procurement officials remain alert for:

- warning signs and patterns when businesses are submitting bids (e.g. the same supplier wins all tenders);
- warning signs in tender documents submitted (e.g. identical mistakes);
- warning signs and patterns related to pricing (e.g. large differences between the winning bid and other bids);
- suspicious statements (e.g. spoken or written references to an agreement among bidders); and,
- suspicious behaviour (e.g. suppliers holding regular meetings).

4.2 Colombian compliance with OECD 2012 Recommendation I- effective design of tenders

OECD Recommendation I. seeks to ensure that countries do not have in place procurement laws and practices that undermine competition and increase

the risk of bid rigging, and calls on countries to assess their laws and procurement procedures in that regard. Colombia, like many OECD countries, complies with only some aspects of Recommendation I (see discussion in the following paragraphs) and still has to take the necessary steps to comply fully with the rest of this Recommendation. It must be noted that that the 2012 Recommendation has only been in force for a little more than one year. With the establishment of the NPPA, and with the support of the SIC, Colombia is now in a better position to address compliance with this Recommendation- see subsection 5.1.

Recommendation I.1.suggests that officials responsible for government procurement should understand the general features of the market in question, the range of products and/or services available in the market and the potential suppliers of these products and/or services. This knowledge is usually derived from undertaking comprehensive market studies, which ideally should be developed and shared with other government procurement agencies purchasing the same or similar good or service. From discussions with a cross-section of Colombian procurement officials, the OECD has learned that Colombian government procurement groups do not consistently undertake market studies and that when studies are prepared they are often not sufficiently detailed to be of much value. Consequently, in subsection 5.3 there are several suggestions that will ensure a consistent and informed approach to a vitally important stage of the procurement process.

Other components of Recommendation I deal with promoting competition by maximising the participation of potential bidders (including small- and medium-sized enterprises- SMEs) through establishing participation requirements that are transparent, non-discriminatory and do not unreasonably limit competition (I. 2. i)) and by allowing firms from other countries or from other regions within a country to participate, when appropriate (I. 2. iii)). As noted in the OECD's 2012 Recommendation and its Bid Rigging Guidelines, transparency is vital for procurement designs and processes but can be problematic when indiscriminately applied to the dissemination of competitively-sensitive information as discussed in subsections 5.6 and 5.7. It appears that most Colombian procurement processes do not involve public tenders (they utilise direct awards or involve only a few select participants–see Tables 2 and 3 in subsection 5.2). Consequently, they are not transparent and they often preclude the participation of foreign suppliers, contrary to section 2 of the OECD's Design Checklist and possibly Article 20 of Law 80 of 1993, which requires that foreign bidders be given national treatment, if reciprocal

treatment is accorded to Colombian companies by the foreign country.[14] In apparent contradiction, Law 816 of 2003 was passed to have government procurement specifically support national industry. Some Colombian government procurement officials, who attended the OECD's training sessions described below in subsection 4.3, suggested that the use of direct awards likely benefitted SMEs (as contemplated by Recommendation I. 2. iv.) but through preferential treatment and at the expense of greater competition in the procurement processes.[15] Procedures other than public tenders usually undermine transparency in public procurement and they tend to focus on easing the workload of procurement officials rather than on the functional performance of the goods and services to be procured, as suggested by Recommendation I. 2. ii.

OECD Recommendation I. 3. encourages procurement officials to design their tender processes in order to reduce the opportunities for communication among bidders, either before or during the tender process. Colombian government procurement groups hold public clarification meetings attended by all bidders. As well, government procurement bodies publicise information that could assist in the formation, or continuation, of bid-rigging schemes- budgets, identities of bidders, bid prices, etc. These matters are addressed by the suggestions found in subsections 5.6 and 5.7. Furthermore, there are limited safeguards and rules to ensure that joint bids, sub-contracting and split awards (each of which require communications among bidders) are not used by dishonest suppliers to reduce competition and implement bid-rigging agreements. This last issue also impacts on Colombia's compliance with OECD Recommendation I. 4. which calls on government procurement agencies to adopt selection criteria designed to improve the intensity and effectiveness of competition in the tender process. These shortcomings are addressed in subsections 5.5, 5.6 and 5.7.

14 Colombia has a number of free-trade agreements in place, which include provisions to ensure that the other country's suppliers have equal access to Colombian government procurement processes- for example, see Chapter 9 of the US-Colombia Trade Protection Agreement that came into force on May 15, 2012: http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.

15 A number of sections within Article 4 of Decree 734 of 2012 set out circumstances in which SMEs are actually to be favoured in procurement processes, which goes beyond encouraging their participation.

Colombian government procurement groups have only recently begun to utilise electronic bidding systems (covered by OECD Recommendation I. 5.). Although there has been some use of remote, electronic procedures for reverse auctions (described in subsection 5.8)[16], there is currently limited knowledge of this forward-looking approach to purchasing by Colombian purchasing officials. Two suggestions in subsection 5.8 would enable Colombia to more fully comply with 2012 Recommendation I. 5.

Compliance with OECD Recommendation I. 6. would mandate that all bidders in Colombian government procurement processes be required to sign a Certificate of Independent Bid Determination (CIBD) or equivalent attestation assuring that their submitted bids are genuine, non-collusive, and made with the intention to accept the contract if awarded. Although the SIC has drafted sample documents for use by Colombian government purchasing groups, those groups are not yet making such a document part of their bidding requirements.[17] A related OECD Recommendation (I.7.) suggests that invitations to tender include a warning regarding: the sanctions for bid rigging under Colombian competition law; the sanctions for signing an untruthful Certificate of Independent Bid Determination (or equivalent document); the possibility of being suspended from participating in public tenders for a certain period of time; and, the possibility of being liable for damages to the procurement agency. This warning is not currently used in Colombian government tender documentation. The suggestions found below in subsection 5.9 address compliance with Recommendation I. 6. and Recommendation I. 7.

16 In 2011 the Colombian Institute for the Protection of Children and Young People (IDIPRON in Spanish) initiated a reverse auction process for the procurement of a variety of goods but later abandoned the process when three (3) of the four (4) participants were disqualified. The staff of the SIC subsequently undertook a bid-rigging investigation and recommended that sanctions be imposed on two (2) individuals by the Superintendent of Industry and Commerce. The case is pending.

17 One Colombian government agency, the Institute of Family Welfare, is using its own version of a CIBD.

4.3 Colombian compliance with OECD 2012 Recommendation II- relationships between competition authorities and procurement officials

Recommendation II seeks to ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by competition authorities. Compliance with this recommendation involves close collaboration between government procurement groups and competition authorities with respect to matters such as training, educational material and the means to report suspected collusion to competition authorities.

A recent initiative of the Colombian government should significantly bolster Colombia's compliance with Recommendation II. Through Law 1470 of 2011, the Colombian government established the NPPA in order to have an organisation dedicated to improving coordination and communications among government procurement groups in Colombia. The NPPA's mandate includes the promotion of best practices, efficiency and competition in public procurement, which are key to implementing many of the OECD Council's Recommendations regarding cartels and bid rigging. The NPPA will be called upon to ensure that procurement practices are consistent across the more than 2,000 government procurement groups that exist in Colombia at the central and regional/sub-central levels.

With respect to closer relationships between competition authorities and public procurement groups, the SIC organised two training sessions for procurement officials from the central government, which took place in December 2012 and February 2013. The sessions each lasted two days and focussed on ways to fight and detect collusion in public procurement and on practices to implement to improve public procurement processes. The training involved the participation of an OECD staff member as well as an international competition expert. In compliance with OECD Recommendation III, the procurement officials were provided with copies of the OECD's Guidelines for Fighting Bid Rigging in Public Procurement and were led through presentations describing the different forms of bid rigging, the two Checklists comprising the OECD's Guidelines, international bid-rigging cases and examples of warning signs, which should alert procurement officials to the possible occurrence of bid rigging in their tender situations. Officials from the SIC described the laws pertaining to collusion in Colombia and reviewed a recent prosecution they

undertook with respect to bid rigging on bids submitted for the provision of food services to penitentiaries. The participants were given the opportunity to participate in two hypothetical exercises designed to provide hands-on experience with these issues, to ask questions of the experts and to provide examples and feedback from their own procurement experience.

As well as providing Colombian government procurement officials with valuable training pertaining to bid rigging, the SIC has established guidelines to assist procurement officials to fight bid rigging in their procurement procedures.[18] The SIC's Bid Rigging Guidelines, which are based on the OECD's Guidelines for Fighting Bid Rigging in Public Procurement, will be an important tool as the SIC undertakes future training sessions with Colombian procurement officials regarding how to detect and avoid bid rigging in public procurement selection processes- see the suggestion in subsection 5.11 below. It should be noted that the SIC's Bid Rigging Guidelines would be more useful if they contained additional information and guidance regarding the design and conduct of procurement processes.

As noted earlier in this report, the SIC recently conducted an internal review of procurement laws and procedures in Colombia, which relied on OECD work, academic experts and international competition authorities. This review puts the organisation in a better position to provide advice and guidance to government procurement groups regarding their implementation of practices that will foster competition and lessen the incidence of bid rigging in Colombian public procurement.

Earlier in 2013 the SIC's Economic Studies Group helped to develop a computer program (its Spanish acronym is ALCO) that is designed to hopefully enable government purchasing officials to more easily identify the existence of bid rigging in their procurement processes. ALCO contains a data base for each procurement process stored in its system that is then analysed for possible collusive activity. The SIC is currently working with a number of Colombian government procurement organisations on pilot tests of ALCO to assess its ease of use and effectiveness as a detection tool.

18 Practical Guidelines to Fight Bid Rigging in Public Procurement (hereinafter the SIC's Bid Rigging Guidelines), which were originally prepared in 2010. Copies of the guidelines were handed out at training sessions with over ten (10) regional government purchasing groups in 2011 and 2012. An updated version of the guidelines was made public on July 25, 2013, and placed on the SIC's web site.

During the course of investigating bid-rigging activity directed at one or more Colombian government procurement groups the SIC provides advice to public procurement officials regarding features of the procurement documentation and process that may have facilitated the collusive activity. This would be invaluable to the affected purchasing officials as the information relates to real-life occurrences and, as such, makes a difficult concept easier to understand.

These sorts of ongoing relationships with procurement agencies, which is the essence of 2012 Recommendation II. 3., will be enhanced through a partnership with the NPPA- see the suggestion in subsection 5.1 below- and through greater information sharing in which the SIC would play an important role- see subsection 5.12.

Recommendation II also advises countries to consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging by, among other things, explicitly including prevention and detection of bid rigging as part of their duties or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials. At this point in time, the first worthwhile approach has been implemented by only a very few Colombian government procurement groups while the OECD and SIC do not believe that the other useful recommendation regarding rewarding procurement officials has been put in place at all. Advice regarding the latter initiative can be found in subsection 5.13.

4.4 Colombian compliance with OECD 2012 Recommendation III- use of the OECD's Guidelines for fighting bid rigging in public procurement

In the two training sessions already organised by the SIC the OECD's Guidelines were provided to all of the almost 200 attendees and the OECD participant conducted three training presentations concerning the content of the Guidelines. Furthermore, as noted above in subsection 4.3, the SIC has developed its own set of bid-rigging guidelines, which are largely based on the OECD's Guidelines. The SIC Bid Rigging Guidelines were originally drafted in 2010 and an updated version was recently made public. The SIC intends to print copies of this document and distribute them at upcoming training sessions that it has scheduled for Colombian government procurement officials.

4.5 Colombian compliance with OECD 2012 Recommendation IV- competition assessments of procurement laws

Recommendation IV calls on countries to develop tools to assess, measure and monitor the impact of public procurement laws and regulations on competition. By virtue of Law 1340 of 2009 and Decree 2897 of 2010, the SIC has a competition advocacy role that enables it to provide recommendations and formal opinions to Colombian government bodies regarding proposed rules and practices that, for example, might limit competition in public procurement procedures (Article 7). The SIC has issued one opinion regarding public procurement matters, that to the NPPA earlier this year, which covered a number of subjects for which the NPPA wished to establish rules and procedures for government purchasing groups. Since 2009 the SIC has also provided 108 competition advocacy opinions to a variety of Colombian government institutions.[19] As well, all proposed legislation that may have an impact on competition must be submitted to the SIC for its review. In addition, Colombian regulatory authorities are required to inform the SIC of any administrative decisions they intend to make that may affect competition and the SIC may issue an opinion regarding any issues that it believes restrict competition. However, these opinions are non-binding although a regulatory authority not following an SIC opinion must support its position in the final decision. Unfortunately, the SIC's competition advocacy activities have not extended to legislation already in place and decisions taken in the past by regulatory bodies. Resolution No. 44649 of 2012, in furtherance of Decree 2897 of 2010, instituted a questionnaire which is a tool that the SIC uses in its assessments[20] and one that regulatory authorities should consult when they are seeking to implement regulations and projects that can have effects on competition.

The Colombian government should give the SIC the legislative power to issue opinions regarding past and proposed legislation that may contain provisions undermining competition in the Colombian marketplace. Also, Colombian regulatory authorities should receive training about the Resolution No. 44649 questionnaire, its purpose and importance, and about how a competition assessment should be undertaken.

19 Information provided by the SIC to the OECD in August 2013.

20 The questionnaire was utilised by the SIC when it provided its recent opinion to the NPPA noted earlier in this paragraph.

CHAPTER 5:
ADVICE AND SUGGESTIONS AIMED AT FIGHTING BID RIGGING IN PROCUREMENT AND IMPROVING COLOMBIAN PROCUREMENT PRACTICES

In this section of the report the OECD puts forth a series of suggestions specific to the situation in Colombia that will enable the country to move closer to compliance with the OECD's 2012 Recommendation. The suggestions are listed in what the OECD views as their relative order of importance. They encompass initiatives and changes that the OECD believes would result in Colombian procurement practices being more closely aligned to the OECD Recommendation and Guidelines, would enhance competition in procurement procedures and would increase the safeguards against collusion in Colombian public procurement. The best party to implement or champion many of the suggestions is the SIC but other organisations such as the Colombian government, the NPPA and government procurement groups will be required to play important roles in following up on the OECD's advice and guidance.

The suggestions, which build upon the recent work and successes of the SIC in its efforts to combat bid rigging, are in bold and are linked to the OECD's 2012 Bid Rigging Recommendation and to one or more sections in the two Checklists that comprise the OECD's Bid Rigging Guidelines.

5.1 The SIC should partner with the National Public Procurement Agency (NPPA)

*** The SIC and NPPA should develop a formal partnership that entails regular and ongoing communications. The two organisations should be jointly involved with: studying procurement issues with competition implications; championing the process to implement pro-competitive changes in procurement procedures; and, organising training and education activities.**

*** The NPPA should chair a council of government procurement officials, with the SIC as a member for its competition and enforcement expertise, to be a forum for identifying and resolving issues with competitive and efficiency implications for government procurement in Colombia.**

As noted in subsection 4.3, the Colombian government established the NPPA in 2011 with the laudable objective of improving coordination and communications among government procurement groups in Colombia, which would assist Colombia in aligning with the OECD Council's Recommendations regarding cartels and bid rigging. Many of the OECD's suggestions later in this section would be implemented quicker and more easily, if the SIC and the NPPA work together on the particular issue. Consequently, the two organisations should develop a formal partnership with regular and ongoing communications with respect to researching procurement issues and implementing pro-competitive changes in procurement procedures. The two groups would also organise training and education activities as contemplated by the suggestion in subsection 5.11. These initiatives would augment Colombia's compliance with OECD Recommendation II, which deals with enhancing the relationship between competition authorities and procurement officials and with increasing the awareness of procurement officials regarding issues related to bid rigging via appropriate documentation and training.

The NPPA should, in support of OECD Recommendation I, take the lead in assessing whether certain features of Colombian procurement laws and practices are inhibiting competition and possibly increasing the likelihood of bid rigging. The NPPA should also be responsible for collecting information and disseminating policies, plans and changes that emanate from the work undertaken by the SIC and NPPA in support of the fight against bid rigging and the enhancement of competition in Colombian procurement processes. It would make sense that the NPPA be responsible for coordinating research into important procurement issues, such as those noted in subsection 5.5, and for spearheading the sharing of appropriate information among the many Colombian public procurement groups, as outlined in subsection 5.12 below. In addition, the NPPA could take the lead in ensuring that the prevention and detection of bid rigging is included as a key duty of procurement officials and that Colombian government procurement groups recognise and reward the successful detection of anti-competitive practices in the assessment of the career performance of procurement officials, as noted in subsection 5.13 and contemplated by OECD Recommendation II. 3. To assist the NPPA in carrying out its important responsibilities, the NPPA should chair a council of

government procurement officials, with the SIC as a member, as an expert body that would address matters that are identified to have significant implications for Colombia's fight against bid rigging and for its goal of improving competition and efficiency in government procurement. The council could be the leaders in ensuring that pro-competitive procurement changes are implemented in a consistent manner across Colombia's many public procurement organisations.

The two suggestions in this section would increase Colombia's compliance with the OECD's 2012 Recommendation, and in particular with Recommendation II, and with Section 6 of the Design Checklist- raising awareness among public procurement officials.

5.2 Colombian procurement officials should increase their use of public tenders

*** The Colombian government, possibly through the NPPA, should instruct its public procurement officials to significantly increase their use of public tenders for their procurement processes.**

*** The Colombian government should establish strict and sound criteria for the use of procurement procedures other than public tenders.**

*** The Colombian government should establish a maximum level of a procurement agency's purchasing budget that can be spent on procurements undertaken without a public tender.**

Although the Colombian government contracting regime calls for the use of tenders as the preferred method for the procurement of goods and services by its public procurement entities, Tables 2 and 3 below[21] demonstrate that the vast majority of public sector contracts in Colombia are awarded through direct contracting and that several other selection processes, which are outlined in section 3, are also used more often than public tenders.[22]

21 Based on statistics registered in the *Sistema Electronica para la Contratación Pública* (*SECOP* in Spanish- Electronic System for Public Procurement in English), which were provided to the OECD by the SIC in March 2013. SECOP is managed by the NPPA.

22 The widespread use of direct contracting was also noted in Joint Report No.14 of the Comptroller General of the Republic (Republic General Auditing) and the Attorney General's Office, June 1, 2011.

Table 2. : Percentages of the total number of Colombian government contracts

	Public Tenders	Direct Awards or Contracting	Other Procurement Processes
2010 (76,485 contracts)	2.36	68.35	29.29
2011 (161,323 contracts)	1.53	54.70	43.77
2012 (328,925 contracts)	0.35	65.75	33.90

Table 3. : Percentages of the money value of Colombian government contracts

	Public Tender	Direct Award or Contracting	Other Procurement Processes
2010	0.03	71.94	28.03
2011	7.78	28.06	63.16
2012	13.23	53.41	33.46

The OECD recognises that it makes sense for public procurement agencies to be permitted the flexibility to purchase via direct awards in the case of small-value contracts or purchases that are best sourced locally for resource, time and cost reasons. However, the overall value of contracts procured under this approach can be quite significant – approximately fifty-four (54) percent of the value of Colombian federal public contracts in 2011 was for minimum quantity contracts.[23]

Finding the appropriate balance in respect of the use of procurement processes other than public tenders can be a challenge. On the one hand, flexibility is obviously desirable and sensible. For highly technical contracts, invitations to only a small number of qualified bidders may result in a more effective and efficient tender, and achieve greater value from the contract award. In markets with a limited number of participants, a requirement for invitations to a greater number of bidders would defeat their purpose. Additionally, where the timeline for a tender is extremely limited, utilising a selection process other than a public tender may save the contracting authority

[23] Information from SECOP provided to the OECD by the SIC in March 2013.

from being required to expend scarce resources to qualify bidders. Finally, when tenders are based upon invitations to only a few but well-qualified suppliers, there may be fewer occurrences of non-performance, sub-standard performance or contract defaults.

On the other hand, utilising direct contract awards or invitations to only a small number of qualified bidders raises a number of potential anti-competitive concerns. Firstly, they limit the pool of bidders and raise the potential for collusion. Invitation-only bids may also preclude new entrants or bidders who may have innovative solutions to a tender. Moreover, invitation-only bids, if frequently used or employed on successive tenders, may raise the potential for bid rigging by the known participants and increase the opportunity for corruption. In addition, they can also prevent cost savings based upon an aggregation of tenders (see description in subsection 5.4), which can be significant, as the OECD Guidelines and international experience have shown.

Colombian public procurement officials need to be instructed to significantly increase their use of public tenders for their procurement processes, which would enhance competition and lessen the likelihood of bid rigging occurring in Colombian public procurement. To reinforce this change in procurement practices, criteria need to be established regarding when it is permissible to utilise procurement procedures other than public tenders. As well, the Colombian government should set a maximum level of a procurement agency's purchasing budget that can be spent on procurements undertaken without a public tender.[24] These latter two changes could be subjects for discussion and agreement at meetings of the council described above in subsection 5.1.

To ensure that meaningful change is occurring, regular reviews should be conducted by the NPPA (possibly with the assistance of the SIC) to gauge the success being achieved in increasing the level of use of public tenders and to assess whether procurement officials are utilising the other selection processes without reasonable justification and whether federal procurement groups are actually taking advantage of the other selection processes by creating multiple, smaller contracts instead of opting for fewer, larger contracts. In addition, the SIC should, during its training sessions noted in subsection 5.11 below,

24 For example, federal procurement groups in Mexico cannot spend more than thirty (30) percent of their annual procurement budget on goods and services acquired without the use of public tenders.

emphasise the need for Colombian procurement officials to conduct procurements predominantly through public tenders in order to obtain "value for money" and to decrease the risks of bid rigging.

These suggestions would support compliance with OECD Recommendations I. 2. i) and iii)- not limiting participation by bidders and allowing a broader base of bidders- and are in accordance with Section 2 of the Design Checklist- maximising the potential participation in procurement procedures by genuinely competing bidders- and with Section 6 of the Design Checklist- raising awareness among public procurement officials.

5.3 Colombian procurement officials should undertake comprehensive market studies on a consistent basis

*** The SIC and the NPPA should establish the minimum acceptable content for market studies through the creation of a checklist, based on best practices, which could then be used by Colombian procurement groups when they undertake their market studies.**

*** The NPPA should arrange for the best quality market studies to be shared among Colombian public procurement agencies to help to achieve more competition, efficiency and consistency in Colombian procurement.**

Market studies are vitally important and a valuable preparatory tool. They should be undertaken even when there is no legal requirement to do so, particularly so for tenders of large value. A thorough understanding of all prevailing market conditions and potential suppliers is essential, if contracting authorities want to both buy effectively and detect and avoid bid rigging. Market studies should identify the characteristics and specifications of the goods and services to be purchased, existing and potential suppliers, alternative products, price trends over time, differences in prices between private and public procurement markets, and costs and other competitive variables, all of which are suggested in the OECD Guidelines. Market studies should be conducted by individuals with procurement and/or research expertise, who are provided with sufficient time and resources.

Colombian procurement statutes require government purchasing groups to undertake a "preliminary study" before they commence a procurement

process.[25] In the past, such studies have largely dealt with the nature of the procurement and procurement process and the intended contractual terms and conditions so they were not true market studies.[26] Feedback from Colombian government procurement officials who attended bid-rigging training sessions in December 2012 and February 2013, suggests that few public procurement officials in Colombia prepare market studies and or have a sense of what should be included in such a study. Consequently, it is advisable that the SIC work in conjunction with the NPPA to establish the minimum acceptable content for market studies through the creation of a checklist, based on best practices, which could then be used by Colombian procurement groups when they undertake their market studies. The two groups should ensure that the procurement officials are instructed to collect a sufficient amount of information from a variety of reliable and knowledgeable sources (including international data and comparisons) to make an informed choice of the tender procedure to use, to establish meaningful reference prices and to assess the desirability of allowing foreign bids. To ensure consistency in the quality of studies, the NPPA should arrange for the best quality market studies to be disseminated among Colombian public procurement agencies.

The SIC and NPPA should assess whether training courses need to be provided periodically to public procurement officials by one or both of the organisations regarding the subject of how to carry out market studies.

The above suggestions would strengthen Colombian compliance with OECD Recommendation I. 1. and they are consistent with Section 1 of the OECD's Design Checklist, both of which deal with being informed about the market, which is absolutely fundamental to effective procurement and to reducing the risk of bid rigging. They would also help to ensure that Colombian procurement groups adhere to Section 3 of the Design Checklist- defining tender requirements clearly.

25 Pursuant to Article 25 of Law 80 of 1993, Article 2.1.1 of Decree 734 of 2012 and Article 15 of Decree 1510 of 2013.

26 Article 15 of the recently enacted Decree 1510 of 2013 now specifically requires Colombian government purchasing officials to undertake a market analysis before a procurement process is commenced.

5.4 Colombian government purchasing groups should expand their internal and external consolidation of purchases

*** The Colombian government should instruct its purchasing organisations, through the NPPA, to identify and act upon opportunities for the consolidation of purchases within individual procurement groups.**

*** The NPPA should coordinate the assessment and identification of appropriate consolidations of purchases across multiple Colombian public procurement groups, including those involving framework agreements.**

*** The NPPA should provide education sessions and documentation to procurement officials relating to the implementation of framework agreements so that such agreements will be regularly used by Colombian government groups.**

Experience from many international jurisdictions suggests that the consolidation of purchases within a procurement agency or across multiple procurement groups often causes, or contributes to, the disruption of existing collusion. As well, the consolidation of purchases enhances buying power which should lead to better purchase prices as suppliers become more anxious to win the business. Consolidations may also discourage companies from establishing bid-rigging agreements in the first place because they are not prepared to forego the chances of winning large-scale contracts.

Framework agreements are a specific form of consolidated purchases. They are entered into between one or more purchasing groups and one or more suppliers and set out the general conditions of the contracts to be entered into within a certain period of time, particularly the conditions related to the price and quantities.

Currently, the consolidation of purchases by Colombian government purchasing groups occurs infrequently and on an ad hoc basis. Until recently, there had not been any impetus or direction from the central government regarding the consolidation of purchases. However, among other matters, Decree 1510 of 2013 deals with consolidated purchases and regulates the use of framework agreements by Colombian government purchasing organisations. Pursuant to this decree, the NPPA has been charged with the responsibility for

ensuring that government groups actually utilise such agreements for some of their purchases.

Colombian government purchasing organisations should be directed by the government and the NPPA to proactively seek out opportunities for the consolidation of purchases within individual procurement groups. With respect to broader-based consolidations through framework agreements, the NPPA should coordinate the assessment and identification of appropriate consolidations and provide education sessions and documentation to procurement officials relating to the implementation of framework agreements.

Although, as noted, the consolidation of purchases has several key benefits (large savings, reduced costs and fewer human resources), the OECD reminds purchasing groups to be careful to ensure that such a strategy does not limit the participation of bidders (e.g. by locking in a pre-determined number of suppliers for a long time) or prevent public procurement groups from obtaining future price reductions in line with prevailing market conditions. In addition, procurement organisations need to also be careful not to permanently reduce the number of suppliers who are capable of participating in a tender (e.g. because they do not have sufficient supply capacity or cannot cover the entire territory) below the optimal number of suppliers that will foster continued vigorous competition and ensure a stable source of supply. Otherwise, in the longer term public buyers may be left with a pool of suppliers which is smaller than the original one and results in a lessening of competition. The possibility of these adverse consequences should be uncovered and assessed during the market study phase of the procurement process.

The above suggestions are consistent with OECD Recommendation I., which urges countries to strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money. It is also consistent with Section 2 of the Design Checklist of the OECD's Guidelines- which deals with maximising the potential participation of genuinely competing bidders- and with Section 3 of the Design Checklist- avoiding predictability in procurement processes.

5.5 The NPPA should address the issues of joint bidding, sub-contracting and split awards

*** The NPPA, possibly in conjunction with the SIC, should obtain statistics regarding how often procurement procedures undertaken by Colombian public procurement groups involve joint bidding, sub-contracting and split awards.**

*** The NPPA and SIC should assess whether it appears that these practices are on balance legitimate in nature or whether they appear, more often than not, to be components of bid-rigging schemes.**

*** To deal with the potential anti-competitive risks of joint bids and sub-contracting, procurement groups should institute certain disclosure requirements for suppliers undertaking such practices.**

*** Colombian public procurement groups should only split a single contract among multiple suppliers in exceptional circumstances.**

Colombian procurement statutes and regulations permit joint bids, sub-contracting and split awards but do not provide guidance on their use. Neither the OECD nor the SIC is aware of how often Colombian government procurement processes and contracts involve these three practices.

Each of these three activities often fosters competition in public procurement processes and can provide procurement groups with more security of supply. For example, joint bids can be a useful way for suppliers with different capabilities or strengths (e.g. a presence in different areas of Colombia, or a focus on different parts of the supply chain or active/specialised in only part of the bid requirements) to get together and submit a more competitive bid by taking advantage of economies of scale, cost sharing and risk reduction. As well, smaller companies can join forces to bid on a tender in which they otherwise would not have been able to participate. However, joint bids can also be used to reduce competition among bidders and to implement a collusive scheme aimed at sharing the market among the participants. Joint bids are less problematic the greater the number of competing suppliers of a good or service.

Procurement authorities should also be aware of the possible collusion issues when permitting sub-contracting. While legitimate in most cases, sub-contracting can, however, be part of a collusive agreement in which the winner

of a tender sub-contracts part of the contract to one or more of the unsuccessful bidders in order to remunerate them for their participation in a bid-rigging scheme (sharing the excess profits generated by cartel activity by compensating non-winning bidders).

In most truly competitive situations firms are extremely reluctant to sub-contract to rivals. There are few plausible reasons why the winner in a tender procedure – who bid alone and therefore expressed an ability to fulfil the contract without relying on rivals – should subsequently assign part of the contract to one or more unsuccessful competitors. In fact, international cases have demonstrated that this practice is frequently one of the mechanisms used to ensure and reward cooperation in a collusive agreement. Smaller firms, however, often legitimately engage in sub-contracting as they do not have the capacity to undertake all of the contract requirements or to complete them in the specified time period.

Split awards, like joint bids, provide contracting authorities with the flexibility to award a contract when a single supplier may not have sufficient capacity to perform the entire procurement itself and or where there is a lack of alternate sources of supply. Both practices also serve the commendable policy goal of permitting small- and medium-sized enterprises to compete to secure all or a portion of a contract when they might not otherwise be able to do so.

Generally speaking, a "winner-takes-all" procurement approach encourages aggressive bidding and is likely to provide the best price for procurement groups. On the other hand, when bidders know with reasonable certainty that a public agency intends to split a contract among several of them, this may provide an incentive for several bidders to establish a focal price and then minimise the differences in bids, so that each of them is awarded part of the contract.

When competition among competitors is weak or when bid rigging is already in place, advertising the fact that multiple suppliers may be chosen allows the cartel to effectively divide up the procurement and monitor bid prices. If split awards are used on successive or recurring contracts, then the tender processes can be used to set up a bid rotation/market sharing scheme in which each member of the cartel can obtain a portion of a procurement agency's business. To dishonest bidders, such a situation may be far more attractive than a traditional bid rotation scheme that requires all bidders, except the winning

bidder, to forego the benefits of the cartel until a future date. The negative consequences may be exacerbated for those products with few suppliers.

The OECD acknowledges that contracting authorities need to have the flexibility in all tenders to ensure that they obtain bids sufficient to allow the contract to be awarded, particularly with respect to procurements for products with a limited number of suppliers or in remote areas of Colombia where requirements may be difficult to fill. However, these considerations should not take away from the primary goal of obtaining value for money.

As suggested above, the NPPA, possibly in conjunction with the SIC, should obtain statistics regarding how often procurement procedures undertaken by Colombian public procurement groups involve joint bidding, sub-contracting and split awards. In addition to compiling the relevant statistics, the NPPA and the SIC should assess whether it appears that these practices are on balance legitimate in nature or whether they appear, more often than not, to be components of bid-rigging schemes. If it is concluded that there is a high frequency of the use of these practices as part of bid-rigging activity, the SIC can initiate selective enforcement activity and work with public procurement agencies to counteract the illegitimate use of these practices by implementing some or all of the remaining recommendations in this section of the report.

To deal with the potential anti-competitive aspects of joint bids, it is advised that, when a procurement group wishes to receive joint bids, it should include a requirement in the call for tenders that bidders must submit an explanation in their bid submissions outlining the pro-competitive aspects of the joint bid. Such justifications might include one or more of the following:

- two or more suppliers are combining their resources to fulfil a contract which is too large for any of them individually; or
- two or more suppliers active in different product markets are providing a single integrated service which none of them could supply independently; or
- two or more suppliers active in different geographic areas are submitting a single bid for all of Colombia or for multiple states that include areas that no single supplier can accommodate on its own.

To reduce some of the risks associated with sub-contracting, bidders should be required to undertake certain disclosure requirements in their bid submissions, for example: i) advise the procurement group of their intention to sub-contract; ii) clearly identify the firms to which they are sub-contracting; and, iii) explain why sub-contracting is necessary for the proper performance of the contract.

With respect to split awards, Colombian public procurement groups should only split a single contract among multiple suppliers in exceptional circumstances. In cases where there is a concern regarding the security of supply, they should consider either issuing multiple tenders involving smaller amounts (and awarding each of them to a single supplier, which can be feasible for smaller suppliers) or consolidating purchases in order to attract additional large bidders.

Implementing this series of suggestions would enhance Colombia's compliance with OECD Recommendations I. 3. and I. 4., which call on government procurement agencies to design tender processes and to adopt selection criteria, which lessen communication among competitors and improve the intensity and effectiveness of competition in the tender process. These suggestions are also consistent with Section 1 of the Design Checklist- being informed about the market, Section 2- maximising the potential participation of genuinely competing bidders, Section 3- defining requirements clearly and avoiding predictability, Section 5- carefully choosing criteria for evaluating and awarding the tender, and Section 6- raising awareness among public procurement officials. As well, the various recommendations relate to Section 1 of the Detection Checklist, which deals with looking for warning signs and patterns when businesses are submitting bids.

5.6 The Colombian government should abolish the legal requirement for government procurement groups to disclose the budgets for their procurement procedures

*** The SIC should, with the support of the NPPA, formally approach the relevant central government officials to seek the necessary amendments.**

Pursuant to several articles of Decree 734 of 2012, Colombian public procurement officials are required to publish the amounts of their budgets earmarked for individual contracts. This requirement is problematic as publishing such monetary figures provides valuable information because all

interested bidders, whether engaged in bid rigging or not, are provided with the purchasing unit's highest acceptable price. Without such information the bidders would have been forced to independently establish what prices they were willing to accept. Furthermore, if there is bid rigging present, knowledge of the maximum price may well lead to the rigged bids becoming even higher. Disclosing the budget for a contract removes what little uncertainty might remain for the illegal activity of companies engaged in bid rigging. To address this inappropriate disclosure requirement, the SIC and NPPA should take the lead with the relevant central government officials to have the necessary amendments enacted to the various provisions within the General Contracting Statute and other statutes and regulations. The SIC should alert the officials to the OECD's Guidelines for Fighting Bid Rigging and this report in support of the required amendments.

Pursuing this suggestion would be consistent with OECD Recommendation I. 3. and with Section 4 of the Design Checklist, both of which deal with reducing communications among bidders.

5.7 The Colombian government should eliminate other types of disclosure

*** A government-wide policy should be instituted that, whenever feasible, exchanges of information with bidders take place by electronic means.**

*** The Colombian government should amend its procurement legislation to eliminate the mandatory requirement for government contracting authorities to hold public clarification meetings during each tender process.**

*** Information about the identity of bidders and the amount they bid should only be released in a form which does not explicitly identify the companies/individuals.**

*** Documents released to the public by procurement groups (such as the minutes of clarification meetings and winning bidders and their prices) should not list nor identify the participants and bid prices in individual procurement processes.**

*** Site visits should only be held when they are absolutely necessary and not as a routine procedure.**

It is recognised that transparency is a key requirement of procurement procedures in Colombia, as it is in many other countries around the world. Transparency is mandated to allow maximum participation and competition in public tenders and to deter corruption. However, there is often a tension between promoting transparency on the one hand and maximising competition and deterring collusive activity in public procurement on the other. A delicate balancing of policy objectives and practices is required to achieve the twin policy goals of transparency and obtaining value for money in all procurement processes. It is therefore critical to establish the proper timing, degree and audience for the disclosure of information in order to attempt to optimally balance the conflicting objectives and risks.

Colombian laws require government procurement groups to hold in-person clarification meetings and, during procurement processes, to disclose a variety of information including the identity of bidders, their bid prices and the price offered by the winning supplier.

The OECD Guidelines highlight the potential for collusion during a tender when bidders are provided the means to know the identities of their potential competitors and possibly to meet with them. International experience confirms that clarification meetings with bidders that are mandated under procurement legislation, as is the case in Colombia, provide a forum where potentially colluding bidders can discuss or finalise an agreement or exchange competitively sensitive information. Furthermore, site visits, lists of those who have requested information on tenders or expressed an interest in the tender, lists of bidders, public bid openings and the public disclosure of the bid price submitted by each bidder have all been identified in the OECD Guidelines as things to be avoided in tendering situations. Where elimination of the opportunity for potential bidders to meet and interact is not feasible, such practices should be minimised and carefully monitored.

One worthwhile approach is to hold clarification meetings "virtually", i.e. by using "remote" technology to eliminate face-to-face meetings of competitors, which is permitted under Colombian law. Accordingly, in the short term, a government-wide policy should be adopted that, whenever feasible, exchanges of information with bidders take place by electronic means. As soon as possible, the mandatory requirement for a contracting authority to hold a public clarification meeting during each tender should be eliminated. The SIC and NPPA should work together to have this initiative raised with appropriate public officials. Any changes in procedures should take into account the ability of

smaller suppliers to adopt the new procedures so as not to discourage or undermine their participation in public procurement processes.

Other disclosures that Colombian public procurement groups are advised to avoid include: information about the identity of bidders and the amount they bid (bidders should be identified by letters or numbers, not by their names)[27]; other material released by procurement groups (such as the minutes of clarification meetings) which list or identify the participants in a procurement process; and, information about contracts won and fulfilled by individual suppliers (they should be made available either to procurement officials only or, if that is not possible, to the general public but again with some appropriate time delay). Even a short delay in releasing competitively-sensitive information to the public may hinder or disrupt the monitoring and enforcement of a collusive scheme by the participants.

With regard to the issue of site visits, if not prohibitive cost-wise, there can be multiple site visits to divide up the competitors or site visits can be done on a virtual basis.

Each of the above suggestions is consistent with OECD Recommendation I. 3. and with Section 4 of the Design Checklist, both of which address reducing communications among bidders.

5.8 Colombian government procurement groups should increase their use of reverse auctions

Reverse auctions (in Spanish, *ofertas subsecuentes de descuento*) or inverse auctions are unlike a traditional auction because suppliers compete to sell a good or service by successively reducing the bid price they originally proposed in their bid submissions without changing the specifications set forth in their technical proposal. Reverse auctions are obviously different from public tenders which entail only one price submission. Reverse auctions work best when the technical characteristics and specifications of the required goods and services are standardised, there is a sufficient number of qualified suppliers and supplier proposals can be evaluated relatively quickly after each round of sealed bids.

27 Alternatively, more complete information could be made available with a certain time lag (more than six months after the conclusion of the tender), when its usefulness to dishonest bidders would be more limited.

International experience with this type of procurement procedure has resulted in sizeable savings.[28] Recent reverse auctions involving five drugs are estimated to have saved four public health organisations in Mexico approximately 1.7 billion Mexican pesos, about US$1.3 million.[29]

The OECD has noted that for procurement groups to achieve cost savings from the utilisation of reverse auctions they need to operate the procedure on an electronic basis, in order to prevent the opportunity for bidders to observe their competitors' bidding behaviours, and to reduce the time between the rounds of bidding to lessen the ability for bidders to communicate among themselves and establish collusive agreements.[30]

Electronic and in-person reverse auctions are permitted under Colombian procurement law although the law states a preference for electronic versions whenever feasible.[31] There is a push by the Colombian government, through the reforms outlined in its most recent National Development Plan, to introduce technology into government procurement practices. In fact, one of the NPPA's responsibilities is to encourage Colombian government purchasing organisations to utilise technology more often in their procurement processes.

Electronic reverse auctions should be used more frequently by Colombian public procurement organisations and the time periods between bidding rounds should be kept to a bare minimum. The NPPA would be the obvious party to lead this initiative.

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28 For example, in Brazil, Colombia, Ecuador, England, Paraguay, Peru and the United States, as noted in the Gazette of the Government of the State of Mexico, September 3, 2010, p. 10, during the process to include reverse auctions in the State law. As well, between September 2010 and June 2011, the Federal Government of the United Mexican States reported cost savings of 196.8 million Mexican pesos from using reverse auctions- Source: *Quinto Informe de Labores, Secretaría de la Función Pública, 2011*.

29 Fighting Bid Rigging in Public Procurement in Mexico, A Secretariat Analytical Report on Legislation, Regulations and Practices Relating to Procurement Undertaken by ISSSTE, OECD, 2013, page 96.

30 OECD Policy Roundtables, Collusion and Corruption in Public Procurement, 2010, page 27.

31 Articles 3.2.1.2 and 3.2.1.1.6 of Decree 734 of 2012.

The implementation of this suggestion would help Colombia to comply with OECD Recommendation I. 3. and Section 4 of the Design Checklist- reducing communications among bidders. Adopting this recommendation will also help Colombia to comply with OECD recommendation I. 5., which encourages procurement agencies to use electronic bidding systems in order to strengthen efforts to fight collusion and enhance competition in public tenders. As well, implementing this approach will help to maximise potential participation by genuinely competing bidders (Section 2 of the Design Checklist) and to avoid predictability in procurement procedures (Section 3).

5.9 The Colombian government should consider making Certificates of Independent Bid Determination mandatory in Colombian procurement processes

*** Warnings concerning collusive activity should be included by public procurement officials in the procurement documents they provide to suppliers.**

One way to make it more costly and risky for dishonest bidders to collude is to always require those bidding for contracts to submit a Certificate of Independent Bid Determination (CIBD) or a similar document that requires bidders to explicitly state they have not engaged in any conduct that may have adversely affected competition in the selection process such as: agreed with their competitors about bid prices and requirements; disclosed bid prices to any of their competitors; and, attempted to convince a competitor to rig or withdraw bids.

CIBDs may make bid-rigging conspiracies less likely because:

- they inform bidders about the illegality of bid rigging;
- they signal that procurement officials are alert to the issue of collusion; and,
- they add additional penalties, including possibly criminal penalties, for the filing of false statements by the conspirators.

The SIC has recognised the importance of CIBDs and has drafted two sample “no collusion” certificates and provided a model CIBD to the NPPA for its consideration. More detailed examples of CIBDs from Canada and the United States can be found in Annex 3 and Annex 4, respectively.

If the Colombian government does not amend its procurement laws to require CIBDs, the OECD strongly advises that public procurement officials in Colombia begin to require CIBDs in all of their future tenders. Under such a policy it should be made mandatory that CIBDs be signed by senior corporate officials in order to increase the likelihood of collusive activity being investigated, terminated or avoided by those best positioned to detect and affect collusive conduct. A related issue is covered in OECD Recommendation I.7., which suggests that invitations to tender include a warning regarding the sanctions for bid rigging under Colombian competition law, the sanctions for signing an untruthful Certificate of Independent Bid Determination, the possibility of being suspended from participating in future public tenders for a certain period of time, and the possibility of liability for damages to the procuring agency. It is suggested that such a warning be included in all future Colombian government tender document packages. The language of the CIBD and warning statement should be reviewed and approved by the SIC.

The CIBD suggestion would enable Colombia to comply with OECD Recommendation I. 6. As well, utilising CIBDs is one approach outlined in Section 4 of the OECD's Design Checklist to reduce communications among bidders. The inclusion of warnings in the future would ensure that Colombia complies with OECD Recommendation I. 7.

5.10 Colombian government procurement groups should abandon the use of lotteries to pre-select bidders

The SIC advised the OECD that in some Colombian government procurement processes, when there are a relatively large number of interested bidders, procurement groups will use a lottery process to select a smaller number of bidders who will then be the only entities permitted to submit bids in the tender process. Such a practice is not advisable because it does not take into account the quality of the bids that the eliminated bidders might have made and it runs counter to the concept of choosing a winning bid based on merit. This approach is seldom utilised elsewhere in the world.

If it is deemed desirable to reduce the number of bidders to a more manageable number, Colombian public procurement groups should not utilise lotteries but rather should always undertake detailed and appropriate reviews of prospective bidders so that those expected to put forth the best offers in a tender situation will not be randomly eliminated in tendering situations.

This advice is consistent with OECD Recommendation I. 2. and with Section 2 of the OECD's Design Checklist- maximising the potential participation by genuinely competing bidders and with Section 5 of the Design checklist- carefully choosing criteria for evaluating and awarding a tender.

5.11 The SIC, in conjunction with the NPPA, should support procurement training and bid-rigging education activities across the Colombian government

It is absolutely critical for public procurement groups to recruit staff with the appropriate education and experience to function as responsible and professional procurement officials. In addition, public procurement agencies need to constantly upgrade the skills and knowledge of their procurement staff through ongoing training and education. One area of training that is often overlooked is the subject of bid rigging.

As noted in subsection 4.3, the SIC organised two training sessions for procurement officials from the central government, which took place in December 2012 and February 2013. The two, two-day sessions were well received by the government procurement attendees, who gained a much better understanding of bid rigging, how to detect and avoid bid rigging and how to increase competition in public procurement processes.

The SIC, in cooperation with the NPPA, should regularly organise this type of training for Colombian procurement officials as part of an ongoing programme to fight bid rigging in public procurement, to improve the quality of Colombian purchasing practices and to enhance competition in Colombian public purchasing processes. The training program should reflect lessons learned from previous initiatives and include case studies from SIC bid-rigging investigations. The training programs should have the active participation of the NPPA given their statutory responsibilities, knowledge and contacts with respect to government procurement in Colombia.

These two suggestions would help Colombian government procurement agencies to comply with OECD Recommendation II. 2 and with Section 6 of the Design Checklist- both of which concern raising awareness among public procurement officials regarding collusive activity- and with all of the sections of the Detection Checklist, which outline what procurement officials should know and do about bid-rigging activity.

5.12 The NPPA and government procurement groups should enhance the sharing of information among procurement officials

*** Government procurement groups in Colombia should communicate regularly in order to share best practices, market intelligence and instances of suspicious bidding behaviour.**

*** The NPPA should use the council described in subsection 5.1 above to help in implementing this recommendation.**

Government procurement groups in Colombia should engage in a regular dialogue, which would greatly assist Colombia in complying with the OECD's 1998 and 2012 Recommendations. This dialogue should be coordinated by the NPPA. The information-sharing activities would best occur through a formal consultation forum/mechanism to ensure that this positive endeavour does not end up being a short-lived exercise. As suggested in subsection 5.1, the interested parties should establish a council of procurement officials that meets regularly, is chaired by the NPPA and has a SIC official as a permanent advisor. The council would be an ideal forum in which to explore opportunities for consolidating purchases among the central government purchasing bodies, in support of the suggestion in subsection 5.4.

The following benefits of this cooperation could be achieved:

- matters of common interest could be discussed and addressed;
- common "red flags" relating to collusive activity could be reviewed and concerns raised with the SIC;
- procurement groups could ascertain whether they are attracting similar and the same number of qualified bidders; and,
- the various groups could ensure that they are paying prices which are in line with one another (especially for standardised goods) taking into account the relative volumes of purchases, transportation costs and other relevant factors.

Adopting these suggestions would enhance Colombian compliance with all of the components of the OECD Recommendations as well as with Section 1 of the Design Checklist- being informed about the market- and Sections 1-5 of the

Detection Checklist, each of which deal with various forms of suspicious bidding behaviour.

5.13 The Colombian government and the SIC should implement procedures for Colombian government procurement staff to raise concerns relating to bid rigging

*** Clear procedures and reporting lines should be established in order for Colombian procurement officials to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential.**

As Colombian government procurement officials become more aware of the existence of bid rigging and how to detect and avoid it, there will be a need to establish procedures for the officials to bring forward information they feel might constitute bid-rigging activity. It would make sense that this initiative be pursued by both the SIC and NPPA through their partnership activities and the council of procurement officials- see subsections 5.1 and 5.12. The AG's office should also be involved given that the reported activity might be deemed to warrant criminal prosecution. It will be important for the organisations to communicate to procurement officials that, when there are suspicious instances of collusion during tenders, it is not their conduct which is under scrutiny and they are not being faulted in any way for reporting such instances. It would also be important that procurement officials are advised that providing information to the SIC or AG's office does not put them at legal risk for such disclosures. Consideration should be given to whether an anonymous hotline to the SIC or AG's office would be one effective way for procurement officials to report suspicious bidding behaviour.

In a related issue, the SIC and NPPA should assess the merits of setting up a reward and or recognition program to encourage procurement officials to identify and report instances of suspicious or unusual behaviour by bidders. Establishing a recognition/reward program would send a clear signal that the Colombian government is committed to fighting bid rigging and would encourage employees to become a major part of the efforts to combat the problem. Any monetary reward could be partially based on the savings achieved as the result of stopping the collusive activity and the recognition could take into account the successful prosecution by the SIC of the suppliers engaged in the illegal activity.

Implementing these suggestions would help Colombia, and the SIC in particular, to comply with two components of OECD Recommendation II. 3.- 1) encouraging competition authorities to establish a continuing relationship with procurement agencies such that, if preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities with the confidence that competition authorities will help to investigate and prosecute any potential anti-competitive conduct and 2) rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials. As well, the adoption of these suggestions would be consistent with Section 6 of the OECD's Design Checklist- raising awareness among procurement officials- and with all of the Sections of the OECD's Detection Checklist and, in particular, Section 7 which deals with steps to take when bid rigging is suspected.

5.14 Colombian government procurement groups should retain relevant procurement records

*** The NPPA should work with Colombia's government procurement organisations to establish a policy regarding the retention of hard copy and electronic procurement records for a reasonable period of time.**

During the training sessions conducted by the OECD and the SIC Colombian government purchasing officials indicated that the retention of documents pertaining to past procurement procedures was not standardised across the government's many purchasing organisations and that frequently tender documents were disposed of less than a year after the award of a contract. This results in an inability to access a historical data base of previous tenders. With the passage of Decree 734 of 2012 procurement information in SECOP is to be retained for at least three years (Article 2.2.5). Although this statistical information is useful, the most valuable information is generally that received from bidders and suppliers during procurement processes.

Retaining hard copy and electronic records relating to procurement procedures for a reasonable period of time will enable the procurement groups, the NPPA and the SIC to more easily analyse procurement issues of general interest and to identify and investigate any suspicious bidding activities and patterns. The NPPA should be responsible for ensuring that this recommendation is implemented as they would benefit from the information collected when undertaking their study and analysis of procurement issues noted

in subsection 5.1. The procurement council identified in subsections 5.1 and 5.12 would be an excellent venue to discuss what length of retention period makes the most sense in the Colombian context.

The SIC and the NPPA should regularly remind Colombian government procurement officials during meetings and training sessions to take notes of any suspicious events and conversations, sign and date the notes and place them in the relevant procurement file. This will enable procurement officials, the SIC and the NPPA to be aware of past conduct when future events are examined during an investigation of possible collusive activity. Such notes would also be valuable and credible evidence in any prosecutions that might ensue.

Implementing these suggestions would help Colombia to comply with OECD Recommendation I. 5. by encouraging procurement agencies to use electronic systems to store information pertaining to their procurement procedures that would allow for appropriate analysis of bidding behaviour and bid data. As well, it would enhance compliance with OECD Recommendation II. 3. by increasing the likelihood that the SIC will be in a position to investigate and prosecute any potential anti-competitive conduct. Adopting these recommendations would also assist Colombia in complying with Section 1 of the Design Checklist- being informed about the market- and would be helpful regarding all of the sections of the OECD's Detection Checklist.

5.15 Colombian government procurement groups should seek damages in bid-rigging cases

*** The SIC and NPPA should encourage and support government procurement organisations in Colombia to seek compensation for damages when they are the victims of collusive activity.**

Colombian law enables third parties to pursue damages suffered as a result of anti-competitive conduct undertaken by companies and individuals. If Colombian government procurement groups actively and regularly sought damages from colluding parties, this would likely deter some companies from engaging in bid rigging on public tenders. As well, it would send a clear message that public procurement groups were fighting back in the battle against bid rigging.

Implementing this approach would be consistent with OECD 2012 Recommendation I. 7. as it would demonstrate to suppliers that the warning envisaged in that component of the OECD Recommendation has some teeth. In addition, it would be in compliance with OECD 2012 Recommendation II. 3.,

which encourages a continuing relationship between competition authorities and procurement officials relating to work together with respect to collusive activity. Furthermore, adopting this recommendation would help to comply with Section 7 of the Detection Checklist, which outlines steps to take when bid rigging is encountered by public procurement officials and it would increase awareness among Colombian government purchasing officials about the existence and risks of bid rigging, which is the subject of Section 6 of the Design Checklist.

CHAPTER 6:
CONCLUSIONS

Colombia largely meets the standards and recommendations issued by the OECD in 1998, as it relates to the investigation of prosecution of bid-rigging conspiracies, and with OECD's 2012 Recommendation with respect to taking effective action against bid rigging. Adopting the advice and suggestions put forward in this report prepared by the OECD Secretariat would result in Colombian procurement laws and practices being more closely aligned with the OECD Recommendations and Guidelines.

The suggestions contained in this report are addressed to four groups- the Colombian government, the SIC, the NPPA and Colombian government purchasing organisations and their officials. For ease of reference, Annexes 5 to 8 set out the recommendations applicable to each of these groups.

The OECD believes that the above suggestions will provide the SIC with additional ways to make the organisation a more effective body with respect to the identification of bid-rigging behaviour and the enforcement of the Colombian laws designed to curb such activity. As well, implementing the recommendations contained in this report will enhance the ability of SIC staff to provide guidance and advice to public procurement officials with respect to the identification and avoidance of bid rigging in all types of purchasing processes.

By implementing the suggestions that pertain to the NPPA, that agency will be fulfilling the mandate and responsibilities assigned to it by the Colombian government, which are closely aligned with many of the directions to countries found in the OECD's 2012 Recommendation.

Adopting the suggestions will also promote competition in government procurement procedures, which will assist Colombian public procurement groups to obtain better "value for money" from their purchases, to the direct benefit of the organisations themselves and ultimately to the taxpayers, economy and government of Colombia. The benefits will accrue immediately and will continue over the longer term.

It should be noted that, in order to successfully tackle collusive bidding practices, suggestions and recommendations need to be adopted in a flexible and dynamic way. No single recommendation is likely to be valid for all tender situations or to remain effective over the long term. Bidders who have colluded in the past (or wish to do so in future) may be expected to react to policy and procedural changes instituted by procurement groups and to explore new, more sophisticated and secretive ways to collude. To combat collusion and obtain the best value from its purchases, Colombian procurement groups, the SIC and the NPPA need to be constantly vigilant and ever ready to change "the rules of the game", if that appears to be necessary.

To achieve the full benefits from the advice in this OECD report, it will be necessary for the central government, the SIC and the NPPA to reach out to governments and procurement groups at the sub-central level to ensure that implementation and education is consistent and country-wide.

ANNEX 1:

RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS

25 March 1998 - C(98)35/FINAL

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

HAVING REGARD to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

HAVING REGARD to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international

trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

RECOGNISING that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

RECOGNISING also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

CONSIDERING that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

CONSIDERING that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

a)Effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

b)Enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

a)A "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

b)The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. International Co-operation and Comity in Enforcing Laws Prohibiting Hard Core Cartels

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

a)The common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;

b)To the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

c)A Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

d)Member countries should agree to engage in consultations over issues relating to co-operation.

In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. To maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. To serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. To review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-member countries to associate themselves with this Recommendation and to implement it.

ANNEX 2:

OECD RECOMMENDATION FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT AND THE RELATED GUIDELINES

(17 July 2012 - C(2012)115/CORR1

17 July 2012 - C(2012)115)

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels, which invites "Member countries [to] ensure that their competition laws effectively halt and deter hard core cartels", which include "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices [or] make rigged bids (collusive tenders)" [C(98)35/FINAL];

HAVING REGARD to the Recommendation of the Council on Enhancing Integrity in Public Procurement, which lists collusion among the "integrity violations" in the field of public procurement and recognises that efforts to enhance good governance and integrity in public procurement contribute to an efficient and effective management of public resources and therefore of taxpayers' money [C(2008)105];

HAVING REGARD in particular to Principle 1 (Provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers) and Principle 7 (Provide specific mechanisms to monitor public procurement as well as to detect misconduct and apply sanctions accordingly) of the Council Recommendation on Enhancing Integrity in Public Procurement;

HAVING REGARD to the Third Report on the Implementation of the Council Recommendation concerning Effective Action Against Hard Core Cartels, which lists the fight against anticompetitive behaviour in auctions and in procurement among the enforcement priorities that Members should pursue in their fight against hard core cartels [C(2005)159];

RECOGNISING that public procurement is a key economic activity of governments that has a wider impact on competition in the market, both short term and long term, as it can affect the degree of innovation and the level of investment in a specific industry sector and the overall level of competitiveness of markets, with potential benefits for the whole economy;

RECOGNISING that, in public procurement, competition promotes efficiency, helping to ensure that goods and services offered to public entities more closely match their preferences, producing benefits such as lower prices, improved quality, increased innovation, higher productivity and, more generally, "value for money" to the benefit of end consumers, users of public services and taxpayers;

RECOGNISING that collusion in public tenders, or bid rigging, is among the most egregious violations of competition law that injures the public purchaser by raising prices and restricting supply, thus making goods and services unavailable to some purchasers and unnecessarily expensive for others, to the detriment of final users of public goods and services and taxpayers;

RECOGNISING that some public procurement rules may inadvertently facilitate collusion even when they are not intended to lessen competition;

RECOGNISING that rules that unduly restrict competition often can be revised in a way that promotes market competition while still achieving public policy objectives; and

RECOGNISING the efforts to disseminate the Guidelines on Fighting Bid Rigging in Public Procurement adopted by the Competition Committee in 2009 [DAF/COMP(2009)1/FINAL];

NOTING that a number of OECD Members have developed tools to detect and limit bid rigging in public procurement tenders;

On the proposal of the Competition Committee:

I. **RECOMMENDS** that Members assess the various features of their public procurement laws and practices and their impact on the likelihood of collusion between bidders. Members should strive for public procurement tenders at all levels of government that are designed to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money.

To this effect, officials responsible for public procurement at all levels of government should:

1. Understand, in co-operation with sector regulators, the general features of the market in question, the range of products and/or services available in the market that would suit the requirements of the purchaser and the potential suppliers of these products and/or services.

2. Promote competition by maximising participation of potential bidders by:

    i) establishing participation requirements that are transparent, non-discriminatory, and that do not unreasonably limit competition;

    ii) designing, to the extent possible, tender specifications and terms of reference focusing on functional performance, namely on what is to be achieved, rather than how it is to be done, in order to attract to the tender the highest number of bidders, including suppliers of substitute products;

    iii) allowing firms from other countries or from other regions within the country in question to participate, where appropriate; and

    iv) where possible, allowing smaller firms to participate even if they cannot bid for the entire contract.

3. Design the tender process so as to reduce the opportunities for communication among bidders, either before or during the tender process. For example, sealed-bid tender procedures should be favoured, and the use of clarification meetings or on-site visits

attended personally by bidders should be limited where possible, in favour of remote procedures where the identity of the participants can be kept confidential, such as email communications and other web-based technologies.

4. Adopt selection criteria designed i) to improve the intensity and effectiveness of competition in the tender process, and ii) to ensure that there is always a sufficient number of potential credible bidders with a continuing interest in bidding on future projects. Qualitative selection and award criteria should be chosen in such a way that credible bidders, including small and medium-sized enterprises, are not deterred unnecessarily from participating in public tenders.

5. Strengthen efforts to fight collusion and enhance competition in public tenders by encouraging procurement agencies to use electronic bidding systems, which may be accessible to a broader group of bidders and less expensive, and to store information about public procurement opportunities in order to allow appropriate analysis of bidding behaviour and of bid data.

6. Require all bidders to sign a Certificate of Independent Bid Determination or equivalent attestation that the bid submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded.

7. Include in the invitation to tender a warning regarding the sanctions for bid rigging that exist in the particular jurisdiction, for example fines, prison terms and other penalties under the competition law, suspension from participating in public tenders for a certain period of time, sanctions for signing an untruthful Certificate of Independent Bid Determination, and liability for damages to the procuring agency. Sanctions should ensure sufficient deterrence, taking into account the country's leniency policy, if applicable.

II. **RECOMMENDS** that Members ensure that officials responsible for public procurement at all levels of government are aware of signs, suspicious behaviour and unusual bidding patterns which may indicate collusion, so that these suspicious activities are better identified and investigated by the responsible public agencies.

In particular, Members should encourage competition authorities to:

1. Partner with procurement agencies to produce printed or electronic materials on fraud and collusion awareness indicators to distribute to any individual who will be handling and/or facilitating awards of public funds;

2. Provide or offer support to procurement agencies to set up training for procurement officials, auditors, and investigators at all levels of government on techniques for identifying suspicious behaviour and unusual bidding patterns which may indicate collusion; and

3. Establish a continuing relationship with procurement agencies such that, should preventive mechanisms fail to protect public funds from third-party collusion, those agencies will report the suspected collusion to competition authorities (in addition to any other competent authority) and have the confidence that competition authorities will help investigate and prosecute any potential anti-competitive conduct.

Members should also consider establishing adequate incentives for procurement officials to take effective actions to prevent and detect bid rigging, for example by explicitly including prevention and detection of bid rigging among the statutory duties of procurement officials or by rewarding the successful detection of actual anti-competitive practices in the assessment of the career performance of procurement officials.

III. **RECOMMENDS** that Members encourage officials responsible for public procurement at all levels of government to follow the Guidelines for Fighting Bid Rigging in Public Procurement set out in the Annex to this Recommendation, of which they form an integral part.

IV. **RECOMMENDS** that Members develop tools to assess, measure and monitor the impact on competition of public procurement laws and regulations.

V. **INVITES** Members to disseminate this Recommendation widely within their governments and agencies.

VI. **INVITES** non-Members to adhere to this Recommendation and to implement it.

VII. **INSTRUCTS** the Competition Committee to:

i) serve as a forum for sharing experience under this Recommendation for Members and those non-Members adhering to this Recommendation;

ii) promote this Recommendation with other relevant committees and bodies of the OECD; and

iii) monitor the implementation of this Recommendation and to report to the Council no later than three years following its adoption and, as appropriate, thereafter.

OECD GUIDELINES FOR FIGHTING BID RIGGING IN PUBLIC PROCUREMENT

1. Introduction

Bid rigging (or collusive tendering) 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. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement.[1] Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.

Bid rigging is an illegal practice in all OECD member countries and can be investigated and sanctioned under the competition law and rules. In a number of OECD countries, bid rigging is also a criminal offence.

2. Common forms of bid rigging

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is

[1] In OECD countries, public procurement accounts for approximately 15% of GDP. In many non-OECD countries that figure is even higher. See OECD, Bribery in Procurement, Methods, Actors and Counter-Measures, 2007.

to increase the amount of the winning bid and thus the amount that the winning bidders will gain.

Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting "cover" (higher) bids.[2]

Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques are not mutually exclusive. For instance, cover bidding may be used in conjunction with a bid-rotation scheme. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

- *Cover bidding.* Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.

- *Bid suppression.* Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from

[2] In most instances the compensation payment will be facilitated by the use of a fraudulent invoice for works. In fact, no such work takes place and the invoice is false. The use of fraudulent consulting contracts can also be used for this purpose.

bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.

- *Bid rotation.* In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (*i.e.,* lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

- *Market allocation*. Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement.

3. Industry, product and service characteristics that help support collusion

In order for firms to implement a successful collusive agreement, they must agree on a common course of action for implementing the agreement, monitor whether other firms are abiding by the agreement, and establish a way to punish firms that cheat on the agreement. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Indicators of bid rigging, which are discussed further below, may be more meaningful when certain supporting factors are also present. In such instances, procurement agents should be especially vigilant. Although various industry or product characteristics have been found to help collusion, they need not all be present in order for companies to successfully rig bids.

- *Small number of companies.* Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer

the number of sellers, the easier it is for them to reach an agreement on how to rig bids.

- *Little or no entry.* When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

- *Market conditions.* Significant changes in demand or supply conditions tend to destabilize ongoing bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.

- *Industry associations.* Industry associations[3] can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.

- *Repetitive bidding.* Repetitive purchases increase the chances of collusion. The bidding frequency helps members of a bid-rigging agreement allocate contracts among themselves. In addition, the members of the cartel can punish a cheater by targeting the bids originally allocated to him. Thus, contracts for goods or services that are regular and recurring may require special tools and vigilance to discourage collusive tendering.

- *Identical or simple products or services.* When the products or services that individuals or companies sell are identical or very similar, it is easier for firms to reach an agreement on a common price structure.

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3 Industry or trade associations consist of individuals and firms with common commercial interests, joining together to further their commercial or professional goals.

- *Few if any substitutes.* When there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or firms wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful.

- *Little or no technological change.* Little or no innovation in the product or service helps firms reach an agreement and maintain that agreement over time.

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

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

1. Be informed before designing the tender process

- Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best "value for money". Develop in-house expertise as early as possible.

- Be aware of the characteristics of the market from which you will purchase and recent industry activities or trends that may affect competition for the tender.

- Determine whether the market in which you will purchase has characteristics that make collusion more likely[1].

- Collect information on potential suppliers, their products, their prices and their costs. If possible, compare prices offered in B2B[2] procurement.

1 See "Industry, product and service characteristics that help support collusion" above.

2 Business-to-Business (B2B) is a term commonly used to describe electronic commerce transactions between businesses.

- Collect information about recent price changes. Inform yourself about prices in neighbouring geographic areas and about prices of possible alternative products.

- Collect information about past tenders for the same or similar products.

- Coordinate with other public sector procurers and clients who have recently purchased similar products or services to improve your understanding of the market and its participants.

- If you use external consultants to help you estimate prices or costs ensure that they have signed confidentiality agreements.

2. Design the tender process to maximise the potential participation of genuinely competing bidders

Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

- Avoid unnecessary restrictions that may reduce the number of qualified bidders. Specify minimum requirements that are proportional to the size and content of the procurement contract. Do not specify minimum requirements that create an obstacle to participation, such as controls on the size, composition, or nature of firms that may submit a bid.

- Note that requiring large monetary guarantees from bidders as a condition for bidding may prevent otherwise qualified small bidders from entering the tender process. If possible, ensure amounts are set only so high as to achieve the desired goal of requiring a guarantee.

- Reduce constraints on foreign participation in procurement whenever possible.

- To the extent possible, qualify bidders during the procurement process in order to avoid collusive practices among a pre-qualified group and to increase the amount of uncertainty among firms as to the number and identity of bidders. Avoid a very long period of time between qualification and award, as this may facilitate collusion.

- Reduce the preparation costs of the bid. This can be accomplished in a number of ways:

  - By streamlining tendering procedures across time and products (e.g. use the same application forms, ask for the same type of information, etc.).[3]

  - By packaging tenders (i.e. different procurement projects) to spread the fixed costs of preparing a bid.

  - By keeping official lists of approved contractors or certification by official certification bodies.

  - By allowing adequate time for firms to prepare and submit a bid. For example, consider publishing details of pipeline projects well in advance using trade and professional journals, websites or magazines.

  - By using an electronic bidding system, if available.

- Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only.[4] For example, in larger contracts look for areas in the tender that would be attractive and appropriate for small and medium sized enterprises.

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3 Streamlining the preparation of the bid nevertheless should not prevent procurement officials from seeking continuous improvements of the procurement process (procedure chosen, quantities bought, timing, etc.).

4 Procurement officials should also be aware that, if wrongly implemented (e.g. in an easily predictable manner), the 'splitting contracts' technique could provide an opportunity to conspirators to better allocate contracts.

- Do not disqualify bidders from future competitions or immediately remove them from a bidding list if they fail to submit a bid on a recent tender.

- Be flexible in regard to the number of firms from whom you require a bid. For example, if you start with a requirement for 5 bidders but receive bids from only 3 firms, consider whether it is possible to obtain a competitive outcome from the 3 firms, rather than insisting on a re-tendering exercise, which is likely to make it all the more clear that competition is scarce.

3. Define your requirements clearly and avoid predictability

Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

- Define your requirements as clearly as possible in the tender offer. Specifications should be independently checked before final issue to ensure they can be clearly understood. Try not to leave room for suppliers to define key terms after the tender is awarded.

- Use performance specifications and state what is actually required, rather than providing a product description.

- Avoid going to tender while a contract is still in the early stages of specification: a comprehensive definition of the need is a key to good procurement. In rare circumstances where this is unavoidable, require

bidders to quote per unit. This rate can then be applied once quantities are known.

- Define your specifications allowing for substitute products or in terms of functional performance and requirements whenever possible. Alternative or innovative sources of supply make collusive practices more difficult.

- Avoid predictability in your contract requirements: consider aggregating or disaggregating contracts so as to vary the size and timing of tenders.

- Work together with other public sector procurers and run joint procurement.

- Avoid presenting contracts with identical values that can be easily shared among competitors.

4. Design the tender process to effectively reduce communication among bidders

When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation. Where possible, consider the following:

- Invite interested suppliers to dialogue with the procuring agency on the technical and administrative specifications of the procurement opportunity. However, avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings.

- Limit as much as possible communications between bidders during the tender process.[5] Open tenders enable communication and signalling between bidders. A requirement that bids must be submitted in person provides an opportunity for last minute communication and deal-making among firms. This could be prevented, for example, by using electronic bidding.

- Carefully consider what information is disclosed to bidders at the time of the public bid opening.

- When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward.

- Where there are concerns about collusion due to the characteristics of the market or product, if possible, use a first-price sealed bid auction rather than a reverse auction.

- Consider if procurement methods other than single stage tenders based primarily on price can yield a more efficient outcome. Other types of procurement may include negotiated tenders[6] and framework agreements.[7]

- Use a maximum reserve price only if it is based on thorough market research and officials are convinced it is very competitive. Do not publish the reserve price, but keep it confidential in the file or deposit it with another public authority.

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5 For example, if the bidders need to do a site inspection, avoid gathering the bidders in the same facility at the same time.

6 In negotiated tenders the procurer sets out a broad plan and the tenderer(s) then work out the details with the procurer, thereby arriving at a price.

7 In framework agreements, the procurer asks a large number of firms, say 20, to submit details of their ability in terms of qualitative factors such as experience, safety qualifications, etc., and then chooses a small number, say 5 tenderers, to be in a framework - subsequent jobs are then allocated primarily according to ability or may be the subject of further 'mini' tenders with each of the tenderers submitting a price for the job.

- Beware of using industry consultants to conduct the tendering process, as they may have established working relationships with individual bidders. Instead, use the consultant's expertise to clearly describe the criteria/specification, and conduct the procurement process in-house.

- Whenever possible, request that bids be filed anonymously (e.g. consider identifying bidders with numbers or symbols) and allow bids to be submitted by telephone or mail.

- Do not disclose or unnecessarily limit the number of bidders in the bidding process.

- Require bidders to disclose all communications with competitors. Consider requiring bidders to sign a Certificate of Independent Bid Determination.[8]

- Require bidders to disclose upfront if they intend to use subcontractors, which can be a way to split the profits among bid riggers.

- Because joint bids can be a way to split profits among bid riggers, be particularly vigilant about joint bids by firms that have been convicted or fined by the competition authorities for collusion. Be cautious even if collusion occurred in other markets and even if the firms involved do not have the capacity to present separate bids.

- Include in the tender offer a warning regarding the sanctions in your country for bid rigging, e.g. suspension from participating in public tenders for a certain period, any sanctions if the conspirators signed a Certificate of Independent Bid Determination, the possibility for the

[8] A Certificate of Independent Bid Determination requires bidders to disclose all material facts about any communications that they have had with competitors pertaining to the invitation to tender. In order to discourage non-genuine, fraudulent or collusive bids, and thereby eliminate the inefficiency and extra cost to procurement, procurement officials may wish to require a statement or attestation by each bidder that the bid it has submitted is genuine, non-collusive, and made with the intention to accept the contract if awarded. Consideration may be given to requiring the signature of an individual with the authority to represent the firm and adding separate penalties for statements that are fraudulently or inaccurately made.

procuring agency to seek damages, and any sanctions under the competition law.

- Indicate to bidders that any claims of increased input costs that cause the budget to be exceeded will be thoroughly investigated.[9]

- If, during the procurement process, you are assisted by external consultants, ensure that they are properly trained, that they sign confidentiality agreements, and that they are subject to a reporting requirement if they become aware of improper competitor behaviour or any potential conflict of interest.

5. Carefully choose your criteria for evaluating and awarding the tender

All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

- When designing the tender offer, think of the impact that your choice of criteria will have on future competition.

- Whenever evaluating bidders on criteria other than price (e.g., product quality, post-sale services, etc.) such criteria need to be described and weighted adequately in advance in order to avoid post-award challenges. When properly used, such criteria can reward innovation and cost-cutting measures, along with promoting competitive pricing. The extent to which the weighting criteria are disclosed in advance of the tender closing can affect the ability of the bidders to coordinate their bid.

- Avoid any kind of preferential treatment for a certain class, or type, of suppliers.

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9 Cost increases during the execution phase of a contract should be carefully monitored as they may be a front for corruption and bribery.

- Do not favour incumbents.[10] Tools that ensure as much anonymity as possible throughout the procurement process may counteract incumbent advantages.

- Do not over-emphasise the importance of performance records. Whenever possible, consider other relevant experience.

- Avoid splitting contracts between suppliers with identical bids. Investigate the reasons for the identical bids and, if necessary, consider re-issuing the invitation to tender or award the contract to one supplier only.

- Make inquiries if prices or bids do not make sense, but never discuss these issues with the bidders collectively.

- Whenever possible under the legal requirements governing the award notices, keep the terms and conditions of each firm's bid confidential. Educate those who are involved in the contract process (e.g., preparation, estimates, etc.) about strict confidentiality.

- Reserve the right not to award the contract if it is suspected that the bidding outcome is not competitive.

6. Raise awareness among your staff about the risks of bid rigging in procurement

Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies (and competition authorities) to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender. Often a collusive scheme is only revealed when one examines the results from a number of tenders over a period of time.

10 The incumbent is the company currently supplying the goods or services to the public administration and whose contract is coming to an end.

- Implement a regular training program on bid rigging and cartel detection for your staff, with the help of the competition agency or external legal consultants.

- Store information about the characteristics of past tenders (e.g., store information such as the product purchased, each participant's bid, and the identity of the winner).

- Periodically review the history of tenders for particular products or services and try to discern suspicious patterns, especially in industries susceptible to collusion.[11]

- Adopt a policy to review selected tenders periodically.

- Undertake comparison checks between lists of companies that have submitted an expression of interest and companies that have submitted bids to identify possible trends such as bid withdrawals and use of sub-contractors.

- Conduct interviews with vendors who no longer bid on tenders and unsuccessful vendors.

- Establish a complaint mechanism for firms to convey competition concerns. For example, clearly identify the person or the office to which complaints must be submitted (and provide their contact details) and ensure an appropriate level of confidentiality.

- Make use of mechanisms, such as a whistleblower system, to collect information on bid rigging from companies and their employees. Consider launching requests in the media to invite companies to provide the authorities with information on potential collusion.

- Inform yourself about your country's leniency policy,[12] if applicable, and review your policy on suspension from qualification to bid, where

11 See "Industry, product and service characteristics that help support collusion" above.

12 Such policies generally provide for immunity from antitrust legal proceedings to the first party to apply under the policy who admits its

there has been a finding of collusive activity, to determine whether it is harmonious with your country's leniency policy.

- Establish internal procedures that encourage or require officials to report suspicious statements or behaviour to the competition authorities in addition to the procurement agency's internal audit group and comptroller, and consider setting up incentives to encourage officials to do so.

- Establish cooperative relationships with the competition authority (e.g. set up a mechanism for communication, listing information to be provided when procurement officials contact competition agencies, etc.).

involvement in particular cartel activities, including bid rigging schemes, and agrees to cooperate with the competition authority's investigation.

CHECKLIST FOR DETECTING BID RIGGING IN PUBLIC PROCUREMENT

Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does. Be on guard throughout the entire procurement process, as well as during your preliminary market research.

1. Look for warning signs and patterns when businesses are submitting bids

Certain bidding patterns and practices seem at odds with a competitive market and suggest the possibility of bid rigging. Search for odd patterns in the ways that firms bid and the frequency with which they win or lose tender offers. Sub-contracting and undisclosed joint venture practices can also raise suspicions.

- The same supplier is often the lowest bidder.
- There is a geographic allocation of winning tenders. Some firms submit tenders that win in only certain geographic areas.
- Regular suppliers fail to bid on a tender they would normally be expected to bid for, but have continued to bid for other tenders.
- Some suppliers unexpectedly withdraw from bidding.
- Certain companies always submit bids but never win.
- Each company seems to take a turn being the winning bidder.

- Two or more businesses submit a joint bid even though at least one of them could have bid on its own.

- The winning bidder repeatedly subcontracts work to unsuccessful bidders.

- The winning bidder does not accept the contract and is later found to be a subcontractor.

- Competitors regularly socialise or hold meetings shortly before the tender deadline.

2. Look for warning signs in all documents submitted

Telltale signs of a bid-rigging conspiracy can be found in the various documents that companies submit. Although companies that are part of the bid-rigging agreement will try to keep it secret, carelessness, or boastfulness or guilt on the part of the conspirators, may result in clues that ultimately lead to its discovery. Carefully compare all documents for evidence that suggests that the bids were prepared by the same person or were prepared jointly.

- Identical mistakes in the bid documents or letters submitted by different companies, such as spelling errors.

- Bids from different companies contain similar handwriting or typeface or use identical forms or stationery.

- Bid documents from one company make express reference to competitors' bids or use another bidder's letterhead or fax number.

- Bids from different companies contain identical miscalculations.

- Bids from different companies contain a significant number of identical estimates of the cost of certain items.

- The packaging from different companies has similar postmarks or post metering machine marks.

- Bid documents from different companies indicate numerous last minute adjustments, such as the use of erasures or other physical alterations.

- Bid documents submitted by different companies contain less detail than would be necessary or expected, or give other indications of not being genuine.

- Competitors submit identical tenders or the prices submitted by bidders increase in regular increments.

3. Look for warning signs and patterns related to pricing

Bid prices can be used to help uncover collusion. Look for patterns that suggest that companies may be coordinating their efforts such as price increases that cannot be explained by cost increases. When losing bids are much higher than the winner's bid, conspirators may be using a cover bidding scheme. A common practice in cover pricing schemes is for the provider of the cover price to add 10 percent or more to the lowest bid. Bid prices that are higher than the engineering cost estimates or higher than prior bids for similar tenders may also indicate collusion. The following may be suspicious:

- Sudden and identical increases in price or price ranges by bidders that cannot be explained by cost increases.

- Anticipated discounts or rebates disappear unexpectedly.

- Identical pricing can raise concerns especially when one of the following is true:

  - Suppliers' prices were the same for a long period of time,

  - Suppliers' prices were previously different from one another,

  - Suppliers increased price and it is not justified by increased costs, or

  - Suppliers eliminated discounts, especially in a market where discounts were historically given.

- A large difference between the price of a winning bid and other bids.

- A certain supplier's bid is much higher for a particular contract than that supplier's bid for another similar contract.

- There are significant reductions from past price levels after a bid from a new or infrequent supplier, e.g. the new supplier may have disrupted an existing bidding cartel.

- Local suppliers are bidding higher prices for local delivery than for delivery to destinations farther away.

- Similar transportation costs are specified by local and non-local companies.

- Only one bidder contacts wholesalers for pricing information prior to a bid submission.

- Unexpected features of public bids in an auction, electronic or otherwise -- such as offers including unusual numbers where one would expect a rounded number of hundreds or thousands -- may indicate that bidders are using the bids themselves as a vehicle to collude by communicating information or signalling preferences.

4. Look for suspicious statements at all times

When working with vendors watch carefully for suspicious statements that suggest that companies may have reached an agreement or coordinated their prices or selling practices.

- Spoken or written references to an agreement among bidders.

- Statements that bidders justify their prices by looking at "industry suggested prices", "standard market prices" or "industry price schedules".

- Statements indicating that certain firms do not sell in a particular area or to particular customers.

- Statements indicating that an area or customer "belongs to" another supplier.

- Statements indicating advance non-public knowledge of competitors' pricing or bid details or foreknowledge of a firm's success or failure in a competition for which the results have yet to be published.

- Statements indicating that a supplier submitted a courtesy, complementary, token, symbolic or cover bid.

- Use of the same terminology by various suppliers when explaining price increases.

- Questions or concerns expressed about Certificates of Independent Bid Determination, or indications that, although signed (or even submitted unsigned), they are not taken seriously.

- Cover letters from bidders refusing to observe certain tender conditions or referring to discussions, perhaps within a trade association.

5. Look for suspicious behaviour at all times

Look for references to meetings or events at which suppliers may have an opportunity to discuss prices, or behaviour that suggests a company is taking certain actions that only benefit other firms. Forms of suspicious behaviour could include the following:

- Suppliers meet privately before submitting bids, sometimes in the vicinity of the location where bids are to be submitted.

- Suppliers regularly socialize together or appear to hold regular meetings.

- A company requests a bid package for itself and a competitor.

- A company submits both its own and a competitor's bid and bidding documents.

- A bid is submitted by a company that is incapable of successfully completing the contract.

- A company brings multiple bids to a bid opening and chooses which bid to submit after determining (or trying to determine) who else is bidding.

- Several bidders make similar enquiries to the procurement agency or submit similar requests or materials.

6. A caution about indicators of bid rigging

The indicators of possible bid rigging described above identify numerous suspicious bid and pricing patterns as well as suspicious statements and behaviours. They should not however be taken as proof that firms are engaging in bid rigging. For example, a firm may have not bid on a particular tender offer because it was too busy to handle the work. High bids may simply reflect a different assessment of the cost of a project. Nevertheless, when suspicious patterns in bids and pricing are detected or when procurement agents hear odd statements or observe peculiar behaviour, further investigation of bid rigging is required. A regular pattern of suspicious behaviour over a period of time is often a better indicator of possible bid rigging than evidence from a single bid. Carefully record all information so that a pattern of behaviour can be established over time.

7. Steps procurement officials should take if bid rigging is suspected

If you suspect that bid rigging is occurring, there are a number of steps you should take in order to help uncover it and stop it.

- Have a working understanding of the law on bid rigging in your jurisdiction.

- Do not discuss your concerns with suspected participants.

- Keep all documents, including bid documents, correspondence, envelopes, etc.

- Keep a detailed record of all suspicious behaviour and statements including dates, who was involved, and who else was present and what precisely occurred or was said. Notes should be made during the event or while they are fresh in the official's memory so as to provide an accurate description of what transpired.

- Contact the relevant competition authority in your jurisdiction.

- After consulting with your internal legal staff, consider whether it is appropriate to proceed with the tender offer.

ANNEX 3:

CERTIFICATE OF INDEPENDENT BID DETERMINATION (CANADA)

I, the undersigned, in submitting the accompanying bid or tender (hereinafter "bid") to:

_____
(Corporate Name of Recipient of this Submission)

for:

_____
(Name and Number of Bid and Project)

in response to the call or request (hereinafter "call") for bids made by:

_____
(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: that:

_____
(Corporate Name of Bidder or Tenderer [hereinafter "Bidder"])

1. I have read and I understand the contents of this Certificate;
2. I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
3. I am authorized by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;

4. each person whose signature appears on the accompanying bid has been authorized by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;

5. for the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder, who:

    a. has been requested to submit a bid in response to this call for bids;
    b. could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;

6. the Bidder discloses that (check one of the following, as applicable):

    c. the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
    d. the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;

7. in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

    e. prices;
    f. methods, factors or formulas used to calculate prices;
    g. the intention or decision to submit, or not to submit, a bid; or
    h. the submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (6)(b) above;

8. in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorized by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;

9. the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

_____
(Printed Name and Signature of Authorized Agent of Bidder)

_____ _____
(Position Title) (Date)

ANNEX 4:

CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (UNITED STATES, APRIL 1985)

(a) The offeror certifies that—

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to—

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory—

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this provision _____ [insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the offeror's organization];

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) of this provision have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this provision.

(c) If the offeror deletes or modifies paragraph (a)(2) of this provision, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure.

ANNEX 5:

RECOMMENDATIONS ADDRESSED TO THE GOVERNMENT OF COLOMBIA

1. Increasing the use of public tenders
The Colombian government, possibly through the NPPA, should instruct its public procurement officials to significantly increase their use of public tenders for their procurement processes. The Colombian government should establish strict and sound criteria for the use of procurement procedures other than public tenders. The Colombian government should establish a maximum level of a procurement agency's purchasing budget that can be spent on procurements undertaken without a public tender.
2. Consolidating purchases
The Colombian government should instruct its purchasing organisations, through the NPPA, to identify and act upon opportunities for the consolidation of purchases within individual procurement groups.
3. Abolishing the legal requirement to publish budgets for procurement contracts
The Colombian government should abolish the legal requirement for government procurement groups to disclose the budgets for their procurement procedures.

4. Eliminating certain problematic disclosure requirements
The Colombian government should institute a government-wide policy that, whenever feasible, exchanges of information with bidders will take place by electronic means. The Colombian government should amend its procurement legislation to eliminate the mandatory requirement for government contracting authorities to hold public clarification meetings during each tender process. The SIC should, during the training sessions it conducts for government procurement officials, emphasise the need for procurement officials to conduct procurements predominantly through public tenders in order to obtain "value for money" and to decrease the risks of bid rigging.
5. Requiring the submission by suppliers of Certificates of Independent Bid Disclosure in Colombian government procurement processes budgets
The Colombian government should consider making Certificates of Independent Bid Determination mandatory in Colombian government procurement processes by amending its procurement legislation.
6. Implementing procedures for Colombian government procurement staff to raise concerns relating to bid rigging
The Colombian government, the SIC and the NPPA should work together to establish clear procedures and reporting lines in order for Colombian procurement officials to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential.

ANNEX 6:

RECOMMENDATIONS ADDRESSED TO THE SIC

1. The SIC should partner with the National Public Procurement Agency (NPPA)
The NPPA and the SIC should develop a formal partnership that entails regular and ongoing communications. The two organisations should be jointly involved with: studying procurement issues with competition implications; championing the process to implement pro-competitive changes in procurement procedures; and, organising training and education activities.
2. Increasing the use of public tenders
The SIC should, during the training sessions it conducts for government procurement officials, emphasise the need for procurement officials to conduct procurements predominantly through public tenders in order to obtain "value for money" and to decrease the risks of bid rigging.
3. Conducting market studies
The SIC and NPPA should establish the minimum acceptable content for market studies through the creation of a checklist, based on best practices, which could then be used by Colombian procurement groups when they undertake their market studies. The SIC and NPPA should assess whether training courses need to be provided periodically to public procurement officials by one or both of the organisations regarding the subject of how to carry out market studies.

4. Addressing the issues of joint bidding, sub-contracting and split awards
The SIC and the NPPA should assess whether it appears that, on balance, the practices of joint bidding, sub-contracting and split awards are legitimate in nature or whether they appear, more often than not, to be components of bid-rigging schemes.
5. Abolishing the legal requirement to publish budgets for procurement contracts
The SIC should, with the support of the NPPA, formally approach the relevant central government officials to seek the necessary amendments to end the legal requirement for government purchasing groups to publicise the budgets for individual procurement processes.
6. Eliminating certain problematic disclosure requirements
The SIC and NPPA should work together with appropriate public officials to have a government-wide policy instituted that, whenever feasible, exchanges of information with bidders will take place by electronic means.
7. Requiring the submission by suppliers of Certificates of Independent Bid Disclosure (CIBD) in Colombian government procurement processes
The SIC should review and approve the language of any CIBD and warning statement concerning collusive activity that become part of Colombian government purchasing documentation.
8. Supporting procurement training and bid-rigging education for Colombian government purchasing organisations
The SIC, in cooperation with the NPPA, should regularly organise training for Colombian procurement officials as part of an ongoing programme to fight bid rigging in public procurement, to improve the quality of Colombian purchasing practices and to enhance competition in Colombian public purchasing processes. The training programs should involve the active participation of the NPPA given their statutory responsibilities, knowledge and contacts with respect to government procurement in Colombia.

9. Implementing procedures for Colombian government procurement staff to raise concerns relating to bid rigging
The SIC, the Colombian government and the NPPA should work together to establish clear procedures and reporting lines in order for Colombian procurement officials to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential. The SIC and the NPPA should assess the merits of setting up a reward and or recognition program to encourage procurement officials to identify and report instances of suspicious or unusual behaviour by bidders.
10. Retaining relevant procurement records
The SIC and the NPPA should regularly remind Colombian government procurement officials during meetings and training sessions to take notes of any suspicious events and conversations, sign and date the notes and place them in the relevant procurement file.
11. Seeking damages in bid-rigging cases
The SIC and the NPPA should encourage and support government procurement organisations in Colombia to seek compensation for damages when they are the victims of collusive activity.

ANNEX 7:

RECOMMENDATIONS ADDRESSED TO THE NATIONAL PUBLIC PROCUREMENT AGENCY

1. The National Public Procurement Agency (NPPA) should partner with the SIC
The NPPA and the SIC should develop a formal partnership that entails regular and ongoing communications. The two organisations should be jointly involved with: studying procurement issues with competition implications; championing the process to implement pro-competitive changes in procurement procedures; and, organising training and education activities. The NPPA should chair a council of government procurement officials, with the SIC as a member for its competition and enforcement expertise, to be a forum for identifying and resolving issues with competitive and efficiency implications for government procurement in Colombia.
2. Increasing the use of public tenders
Regular reviews should be conducted by the NPPA (possibly with the assistance of the SIC) to gauge the success being achieved in increasing the use of public tenders and to assess whether: procurement officials are utilising other selection processes without reasonable justification; and or federal procurement groups are actually taking advantage of other selection processes by creating multiple, smaller contracts instead of opting for fewer, larger contracts.
3. Conducting market studies
The NPPA and the SIC should establish the minimum acceptable content for market studies through the creation of a checklist, based on best practices, which could then be used by Colombian procurement groups when they undertake their market studies.

The NPPA should arrange for the best quality market studies to be shared among Colombian public procurement agencies to help to achieve more competition, efficiency and consistency in Colombian procurement.

The NPPA and the SIC should assess whether training courses need to be provided periodically to public procurement officials by one or both of the organisations regarding the subject of how to carry out market studies.

4. Consolidating purchases

The NPPA should coordinate the assessment and identification of appropriate consolidations of purchases across multiple Colombian public procurement groups, including those involving framework agreements.

The NPPA should provide education sessions and documentation to procurement officials relating to the implementation of framework agreements so that such agreements will be regularly used by Colombian government groups.

5. Addressing the issues of joint bidding, sub-contracting and split awards

The NPPA, possibly in conjunction with the SIC, should obtain statistics regarding how often procurement procedures undertaken by Colombian public procurement groups involve joint bidding, sub-contracting and split awards.

The NPPA and SIC should assess whether it appears that, on balance, the practices of joint bidding, sub-contracting and split awards are legitimate in nature or whether they appear, more often than not, to be components of bid-rigging schemes.

6. Eliminating certain problematic disclosure requirements

The NPPA and the SIC should work together with appropriate public officials to have a government-wide policy instituted that, whenever feasible, exchanges of information with bidders will take place by electronic means.

7. Increasing the use of electronic reverse auctions

The NPPA should work with Colombian government procurement organisations to ensure that they utilise electronic reverse auctions more frequently in their procurement processes.

8. Supporting procurement training and bid-rigging education for Colombian government purchasing organisations

The NPPA, in cooperation with the SIC, should regularly organise training for Colombian procurement officials as part of an ongoing programme to fight bid rigging in public procurement, to improve the quality of Colombian purchasing practices and to enhance competition in Colombian public purchasing processes. The NPPA should be actively involved in the training programs given their statutory responsibilities, knowledge and contacts with respect to government procurement in Colombia.

9. Sharing information across Colombian government purchasing organisations

The NPPA should ensure that government procurement groups enhance their exchanging of information and communicate regularly in order to share best practices, market intelligence and instances of suspicious bidding behaviour. The NPPA should use the council noted in recommendation 1 above to help in implementing this recommendation.

10. Implementing procedures for Colombian government procurement staff to raise concerns relating to bid rigging

The NPPA should work together with the Colombian government and the SIC to establish clear procedures and reporting lines in order for Colombian procurement officials to report any suspicious instances of collusion during tenders. Reporting procedures should take into consideration the possible need to keep the identities of procurement officials confidential.

The NPPA and the SIC should assess the merits of setting up a reward and or recognition program to encourage procurement officials to identify and report instances of suspicious or unusual behaviour by bidders.

11. Retaining relevant procurement records
The NPPA should work with Colombia's government procurement organisations to establish a policy regarding the retention of hard copy and electronic procurement records for a reasonable period of time. The NPPA and the SIC should regularly remind Colombian government procurement officials during meetings and training sessions to take notes of any suspicious events and conversations, sign and date the notes and place them in the relevant procurement file.
12. Seeking damages in bid-rigging cases
The NPPA and SIC should encourage and support government procurement organisations in Colombia to seek compensation for damages when they are the victims of collusive activity.

ANNEX 8:

RECOMMENDATIONS ADDRESSED TO COLOMBIAN GOVERNMENT PROCUREMENT GROUPS

1. Increasing the use of public tenders
Colombian procurement officials should increase their use of public tenders.
2. Conducting market studies
Colombian procurement officials should undertake comprehensive market studies on a consistent basis.
3. Consolidating purchases
Colombian government purchasing groups should expand their internal and external consolidation of purchases.
4. Addressing the issues of joint bidding, sub-contracting and split awards
To deal with the potential anti-competitive aspects of joint bids, when a procurement group wishes to receive joint bids, they should include a requirement in the call for tenders that bidders must submit an explanation in their bid submissions outlining the pro-competitive aspects of the joint bid. Such justifications might include one or more of the following: • two or more suppliers are combining their resources to fulfil a contract which is too large for any of them individually; or • two or more suppliers active in different product markets are providing a single integrated service which none of them could supply independently; or

- two or more suppliers active in different geographic areas are submitting a single bid for all of Colombia or for multiple states that include areas that no single supplier can accommodate on its own.

To reduce some of the risks associated with sub-contracting government procurement groups should require bidders to undertake certain disclosure requirements in their bid submissions, for example: i) advise the procurement group of their intention to sub-contract; ii) clearly identify the firms to which they are sub-contracting; and, iii) explain why sub-contracting is necessary for the proper performance of the contract.

Colombian public procurement groups should only split a single contract among multiple suppliers in exceptional circumstances. In cases where there is a concern regarding the security of supply, they should consider either issuing multiple tenders involving smaller amounts (and awarding each of them to a single supplier, which can be feasible for smaller suppliers) or consolidating purchases in order to attract additional large bidders.

5. Eliminating certain problematic disclosure requirements

Colombian government procurement groups should release information about the identity of bidders and the amount they bid only in a form which does not explicitly identify the companies/individuals involved.

Documents released to the public by Colombian government procurement groups (such as the minutes of clarification meetings and winning bidders and their prices) should not list nor identify the participants and their bid prices in individual procurement processes.

Colombian government procurement organisations should only hold site visits when they are absolutely necessary and not as a routine procedure. If not prohibitive cost-wise, procurement officials should consider the use of multiple site visits to divide up the competitors or site visits should be done on a virtual basis.

6. Increasing the use of electronic reverse auctions

Electronic reverse auctions should be used more frequently by Colombian public procurement organisations.

Colombian government procurement groups should ensure that the time periods between auction bidding rounds are kept to a bare minimum to lessen the possibility of communications among suppliers.

7. Requiring the submission by suppliers of Certificates of Independent Bid Determination (CIBDs) in Colombian government procurement processes

If the Colombian government does not amend its procurement laws to require CIBDs, Colombian public procurement groups should begin to require CIBDs to be submitted by bidders in all future tenders.

Colombian government purchasing organisations should institute a policy that CIBDs must be signed by senior corporate officials in order to increase the likelihood of collusive activity being investigated, terminated or avoided by those best positioned to detect and affect collusive conduct.

Warnings concerning collusive activity should be included by Colombian government procurement groups in the procurement documents they provide to suppliers**.**

8. Abandoning the use of lotteries to pre-select bidders in Colombian government procurement processes

Colombian government procurement groups should abandon the use of lotteries to pre-select bidders when they anticipate a large pool of potential suppliers for a particular procurement contract.

9. Sharing information across Colombian government purchasing organisations

Government procurement groups in Colombia should communicate regularly in order to share best practices, market intelligence and instances of suspicious bidding behaviour.

10. Retaining relevant procurement records

Colombia's government procurement organisations should work with the NPPA to establish a policy regarding the retention of hard copy and electronic procurement records for a reasonable period of time.

11. Seeking damages in bid-rigging cases

Colombian government procurement groups should work with the SIC and NPPA to seek damages when they are the victims of collusive activity.