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# **THE FOOTING OF BID RIGGING IN CONTEMPORARY JURISDICTION: A COMPARATIVE STUDY BETWEEN EU AND INDIA.**

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## **CONTENTS**

INTRODUCTION .....	
BID RIGGING – DEFINITION .....	
IN THE INDIAN CONTEXT .....	
BACKGROUND TO THE FCI CASE .....	
BID RIGGING IN INDIA AND THE EUROPEAN UNION .....	
TRENDS SEEN IN INDIA AND EU MARKETS .....	
PRECAUTIONS AND SUGGESTIONS .....	
CONCLUSION .....	

## **I. INTRODUCTION**

The author in this essay examines bid rigging, which is one of the anti-competitive behaviours forbidden under the 2002 Competition Act of India. This essay will assist in elucidating the notion of bid-rigging via the use of numerous case laws including the recent FCI judgement and will attempt to clarify the many acts that comprise bid-rigging as well as those that do not.

## **II. BID RIGGING – DEFINITION**

It's illegal for two or more parties to work together to pick the winner of a bidding procedure, according to Investopedia.<sup>1</sup> Collaborating with other bidders to manipulate the bidding process results in an anticompetitive collusion and may result in a price that exceeds the price that would have been acquired in a free market, competitive bidding procedure. To the prejudice of customers and taxpayers, manipulating the bidding process may result in higher prices for goods and services. Commercial contracts can be awarded via a competitive bidding process in any area where bid manipulation is possible <sup>2</sup>.

As such, bid manipulation is possible in auctions for “*automobiles and real estate, building projects, and government procurement contracts. Although bid rigging may take various forms, one of the most typical types happens when firms choose who will win a bidding process in advance*”.<sup>3</sup> To do this, firms may take turns submitting the lowest offer, refrain from bidding entirely, or submit purposefully uncompetitive bids in order to manipulate the result and ensure the preset bidder wins.

Another method of bid rigging is to hire a competitor as a subcontractor in order to manipulate the bidding process. Additionally, a corporation may choose to create a joint venture with a competitor, but only for the purpose of making a single bid and with no intention of collaborating with the other company to save money by pooling resources or expertise.

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<sup>1</sup> Will Kelton, *Bid Rigging*, INVESTOPEDIA (October 14, 2021), [Bid Rigging Definition \(investopedia.com\)](https://investopedia.com)

<sup>2</sup> ‘CCI issues order against firms guilty of bid-rigging and cartelization’ Business Standard <[https://www.business-standard.com/article/economy-policy/cci-issues-order-against-firms-guilty-of-bid-rigging-and-cartelization-121110100395\\_1.html](https://www.business-standard.com/article/economy-policy/cci-issues-order-against-firms-guilty-of-bid-rigging-and-cartelization-121110100395_1.html)>.

<sup>3</sup> *Supra* note 1.

### **III. IN THE INDIAN CONTEXT**

The notion of bid rigging has indirect legitimacy under the Indian Competition Law system. Section 3 of Competition Act, 2002<sup>4</sup>, entails the concept of anti-competitive agreements, empowering the Competition Commission of India to prohibit any agreement between enterprises or individuals engaged in identical or similar trade of goods or services that results in bid rigging or collusive bidding directly or indirectly. These agreements have an “adverse impact on market competition, on the economy”, and so are illegal by law. Entering into anti-competitive agreements under Section 3 of the Competition Act [Act] are one of the practices that restrict adequate competition in the market and are said to have an Appreciable Adverse Effect on Competition [AAEC]. In the case of bid rigging, enterprises/bidders with identical businesses enter into agreements to determine purchase/sale, hindering entry of competitors in the market, conspiring to improve production/distribution of goods/provision of services, controlling market shares by way of allocation of resources, i.e., goods and services to relevant product or geographic market during a ‘Tendering Process’. To determine whether the agreement has a material detrimental impact on competition, one must consider all the determinants aforesaid. <sup>5</sup> Section 3(4)<sup>6</sup> envisages multiple kinds of agreements – both vertical and horizontal that the CCI has recognised to have an AAEC. Bid Rigging is read into Section 3(3)<sup>7</sup> of the Act. Recently, the CCI held 6 companies in Violation of Section 3(1) of the Act.<sup>8</sup> This blog aims to analyse the judgement of CCI imposing a penalty onto these companies and understand the position of law relating to bid rigging in India and also in the European Union.

### **IV. BACKGROUND TO THE FCI CASE**

It was held by CCI that six companies had violated Section 3(1) of the Competition Act, 2002 read with Section 3(3)(d) of that act, which prohibits anticompetitive agreements, and the CCI acted against them on October 29, 2021.

A statement from the Competition Commission of India (CCI) on cartelization in the supply of

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<sup>4</sup> The Competition Act, 2002, No. 13, Acts of Parliament, 2002 (India)

<sup>5</sup> Estate R, ‘FCI tender: CCI issues cease and desist order against firms found guilty of bid rigging and cartelisation’ BUSINESSLINE <<https://www.thehindubusinessline.com/news/fci-tender-cci-issues-cease-and-desist-order-against-firms-found-guilty-of-bid-rigging-and-cartelisation/article37279244.ece>>.

<sup>6</sup> *Supra* note 4

<sup>7</sup> *Id.*

<sup>8</sup> In Re: Food Corporation of India, Ref. Case No. 07 of 2018.

Low-Density Poly Ethylene Covers (LDPE) to Food Corporation of India (FCI) revealed that these companies had manipulated the bidding process by determining prices directly or indirectly, allocating tenders, coordinating bid prices, and so on. FCI had a Reference filed on its behalf, and that's how the case got started, according to the press release.

*“In this backdrop, CCI issued a cease-and-desist order against the firms found guilty of bid rigging and cartelization in the said tenders floated by FCI. However, CCI refrained from imposing any monetary penalty considering that four out of six firms had filed lesser penalty applications and admitted their conduct, confessed their modus operandi during investigation thereby fully cooperated with CCI,”* read the release.

*“Moreover, the firms were also MSMEs with limited staff/ turnover and the prevailing economic situation arising due to the outbreak of COVID-19, stress wrought upon the MSME sector in the wake of the said pandemic,”* it added.

FCI was held liable for purchasing LDPE covers that safeguarded huge food grain stocks from rain and fumigation. FCI purchased these covers through a rate running contract entered into with a variety of suppliers by inviting bids through tenders. The CCI passed an order under Section 26(1) of the Act holding that there exists a *prima facie* case of contraventions of provisos under the Act – Section 3(3)(d) read with Section 3(1). The Director General through its investigation caught hold of multiple WhatsApp conversations between the six companies and tracked down the history of these companies involving in fixing the price of LDPE covers, Limiting and Restricting the supply of LDPE covers, Sharing the quantities of the tenders over the years, thereby rigging the bids vis a vis the tenders floated by FCI.

The CCI, while understanding the legality of the arrangement between the companies, examined the definition of “agreement” under Section 2(b)<sup>9</sup> and due to the inclusive nature of the definition, multiple wide interpretations shall be drawn. They opined that the provision covers those situations where the parties act “on the basis of a nod or a wink”. This was done to prove that the Act does attract civil liability. Held that the standard of proof to prove the existence of an agreement would not be on the basis of it being beyond reasonable doubt but of it being on the basis of preponderance of probabilities. Therefore proving that an agreement existed between the companies. The CCI subsequently after perusing through multiple evidences held that the companies were involved in an anti-competitive practice, i.e., Section 3(3)(d) r/w 3(1) and held that a direct contravention of these provisions fulfils the criteria of

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<sup>9</sup> *Supra* note 4.

proving an Appreciable Adverse Effect in Competition within India. The Companies could not sufficiently prove that the contraventions committed by them did not fulfil Section 19<sup>10</sup> and that their acts were done without the knowledge or that they had exercised enough due diligence to prevent such violations of the Act and were eventually held liable under Section 48(1) and 48(2) of the Act. CCI, under Section 27(a)<sup>11</sup> of the Act, passed a cease and desist order against the companies.

## V. BID RIGGING IN INDIA AND THE EUROPEAN UNION

Bid rigging costs taxpayers money and prevents more efficient rivals from participating in the process. Bid rigging may also result in a lack of incentives for suppliers, resulting in a decrease in the quality and innovation that come from healthy competition. The Competition Act, 2002 defines bid rigging as any arrangement between firms or individuals involved in comparable manufacturing or trade of products or services. The agreement defines bid rigging as the act of manipulating or eliminating competition for bids, as well as the unfavourable impact or manipulation of the process itself. The Act is intended to prohibit anticompetitive conduct, to promote and sustain competition in markets, to safeguard consumer interests, and to ensure other market players' freedom of trade. Cartels' emergence in the market results in the suffocation of a healthy market, and they have been dubbed 'cancers of the open market economy.' Such arrangements aimed at stifling market competition are specifically prohibited under Indian competition law. Bid manipulation is thought to be particularly prevalent in public procurement<sup>12</sup>.

Indian law provides for the appointment of an impartial commission to investigate allegations of infringement. The Commission places a premium on two fundamental principles: enforcement and advocacy. The "Competition Commission of India" is tasked with the responsibility of eradicating such practices. It has the authority to discover anti-competitive agreements and to

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<sup>10</sup> *Supra* note 4.

<sup>11</sup> *Supra* note 4.

<sup>12</sup> 'CCI issues cease and desist order against six firms guilty of bid rigging and cartelization in FCI tender' Indiainfoline <[https://www.indiainfoline.com/article/news-top-story/cci-issues-cease-and-desist-order-against-six-firms-guilty-of-bid-rigging-and-cartelization-in-fci-tender-121110200296\\_1.html](https://www.indiainfoline.com/article/news-top-story/cci-issues-cease-and-desist-order-against-six-firms-guilty-of-bid-rigging-and-cartelization-in-fci-tender-121110200296_1.html)>.

*“levy a penalty of up to 10% of the enterprise's average revenue for the prior three years”*. Additionally, *“the Commission has the authority to impose a penalty on each cartel member (manufacturer, seller, distributor, and/or service provider)”*. Additionally,

it has the authority to prosecute directors/officials of any corporation that violates India's competition rules. The Commission may launch an investigation into any violation of a provision of the Act according to Section 3(3) of the Act. In such cases, the Commission has the same authority as a civil court of the country. The Indian Constitution guarantees a fair and equitable market.

Bid rigging is likewise prohibited in the EU and is a direct violation of the European Union's “Treaty on the Functioning of the European Union (TFEU)”.<sup>13</sup> The EU approach makes no distinction between bid rigging in private and public procurement and treats it the same as other market-wide infractions such as market sharing. Certain EU member states, such as Germany and the United Kingdom, have enacted particular criminal punishments against bid rigging. “The European Commission” has the authority to impose fines on defaulters (up to 10% of the prior business year's global revenue). This is computed particularly based on a variety of parameters such as the seriousness of the infringement, the value of sales, and the length of the infringement. The policy is founded on deterrence concepts, both particular and general. Additionally, the policy protects whistle-blowers (in terms of penalties) and allows for fee reductions in exchange for cooperation. Additionally, an infringing party may be barred from participating in public procurement. This exclusion may be required or optional, depending on the applicable national legislation. This exclusion must be proportionate to the nature of the offence. If no time term is specified in the ruling, it shall not exceed three years from the date of the relevant occurrences<sup>14</sup>.

## **VI. TRENDS SEEN IN INDIA AND EU MARKETS**

Bid rigging takes many forms and may be found in every market. The most prevalent variations

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<sup>13</sup> The Treaty on the Functioning of the European Union, C 326/49 (1957).

<sup>14</sup> Competition Commission of India, Advocacy Booklet 2021  
<[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/Bid%20Rigging.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Bid%20Rigging.pdf)>.

include<sup>15</sup>: Suppression of bids, Additional or cover bids, Bid Rotating, Subcontracting. The market is divided among the competitors based on a variety of factors. These elements might include geographic location, tender type or size, price, and other factors. A cartel is distinct from collusion in that it is a productive organisation that includes a large number of participants. These manufacturers have a monopoly on the market because they work together. Territorial cartels (division based on geography), syndicates (a unified group of competitors against new entrants), and customer cartels (division of consumers) are all common in India and the EU.

Because of the prevalence of corruption in India's economy, unethical business activities, such as bid rigging, are both encouraged and exacerbated. Understanding and evaluating inconsistencies in public procurement is essential to tackling corruption. The overall competitiveness of the Indian products and services industry is impacted by the size of the country's public procurement market share. However, this does not imply that bid-rigging does not take place in industrialised countries.

## **VII. PRECAUTIONS AND SUGGESTIONS**

An effective legal system, identification of indicators of bidding-rigging, and the design of tenders to minimise bidding-rigging are all recommended measures against bid-rigging. Signs of bidding rigging include geographical allocation, sudden withdrawal from the process, never winning any of the bids, winning all the time, very close bids that defy chance, joint bids despite having the resources to bid alone, repeated subcontracting to losing bidders, and holding meetings or communications between competitors before placing bids. Bid-rigging is a high probability in cases when patterns defy the odds.

Remember that the severity of a crime should be proportional to the severity of its consequences. There should be no additional constraints or a complicated system that fails to operate, like in India. There should be no barriers to participation, such as the size, composition, or type of

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<sup>15</sup> iPleaders. 2021. Bid rigging in public procurement sector : a comparative analysis of India and EU - iPleaders. [online] Available at: <<https://blog.ipleaders.in/bid-rigging-in-public-procurement-sector-a-comparative-analysis-of-india-and-eu/>> [Accessed 18 November 2021].

businesses, in procurements of all sizes and scopes. Additionally, a decrease in the number of international participants may help develop a healthy competition. So that there is less room for collusion, it is important that bidders' qualifications are not pre-determined. A decrease in the cost of preparing a bid also encourages new participants to participate. Streamlining processes across services, items, or industries may help. Bid-rigging is often blamed on India's lack of streamlining. Smaller or mid-level enterprises might benefit from the project's distribution or allocation of lots, provided that this is done with care. Predictability should be reduced as much as possible in all situations. There should be no contact between the bidders throughout the tender process, or at least limited communication. One of the most effective ways to combat bid-rigging is to raise awareness amongst your employees.

## **VIII. CONCLUSION**

Bid rigging is detrimental to the country's competitive environment since it might result in erroneous price escalation. In India, the majority of bids are solicited by the public, and bid manipulation may result in the loss of public funds. Bid manipulation may also result in the awarding of critical projects to inept parties, which can have severe effects. The preceding case law demonstrates that the Commission has been proactive in punishing cartels engaged in bid-rigging. In these digital times, it is critical that the Commission's investigative powers be strengthened and that the Commission is granted broader authority to examine bid-rigging in many areas of the economy.