

# Purchaser's checklist

It is difficult to give black and white advice as to the telltale signs of cartel behaviour, or a bright red line as to when to contact the ACCC. As professionals in your field, you should trust your instincts and, if you smell a rat, take a closer look!

## Signs of possible bid rigging

- Suppliers appear to be taking turns at winning tenders or appear to be sharing the contracts by value.
- Regular suppliers decline to tender for no obvious reason.
- Bidders appear to deliberately include unacceptable terms within their tenders.
- Bidders sometimes bid low and sometimes high on what appears to be the same type of supply.
- You become aware that bidders meet before the close of tender, without you being present.
- The winning firm regularly subcontracts to competitors that submitted higher tenders.
- One firm of professional advisers represent several tenderers.

## Signs of possible price fixing

- Tenders or quotes are much higher than expected. This may indicate collusive pricing, or it may just be overpricing (not illegal in itself). It may simply reveal that your estimates are inaccurate. It is in your commercial interest to make inquiries and determine whether your price expectations are reasonable.
- All suppliers raise prices simultaneously and beyond what seems to be justified by changes in input costs. You can ask suppliers why this is so. You might also consider surveying suppliers of inputs so you are better equipped to recognise suspicious pricing movements.
- Prices submitted are much higher than previous tenders or published price lists.
- A new supplier's price is lower than the usual tenderers. This may indicate there has been collusion amongst the incumbent tenderers.
- Prices drop markedly after a new supplier tenders. This may indicate that the existing suppliers have been colluding and the new supplier has forced them to compete.

## Signs of possible market sharing

- Firms charge different prices in different locations, and the difference can't be explained by transport costs.
- A supplier declines to tender in certain locations, stating that to supply would be an intrusion on someone else's 'patch'.
- A supplier states that they can't supply certain products or services because of agreements with other businesses.
- A firm's representative states that another firm should not have supplied you because of industry agreements.
- Bidders wait to the last minute to submit their bids and express interest in whether a non-local or occasional bidder is present.

## Unusual mistakes

- There are identical spelling or calculation errors in competitors' bids.
- There is an uncanny similarity in the layout or language in competing tenders.
- A tender document is in electronic form and has been prepared on a competitor's computer. (This can sometimes be revealed by checking the document's metadata, usually under 'properties' in the file menu).
- A firm's representative says something that indicates they are aware of the details of a competitor's tender.
- All bids are delivered by one agent or even delivered in the same envelope.

## Whistleblowers

- Let informants know that information can be provided confidentially to you or the ACCC.
- The ACCC immunity policy for cartel conduct can be used by cartel members who break rank and report their involvement.
- If a supplier's employee or agent suggests that they are aware of collusion, do not ignore it. Note the details and report the incident to the ACCC.

## Tender analysis

- Do your records suggest that bidders seem to be taking turns at winning tenders? This may indicate tender rotation.
- Do tenderers appear to win around the same percentage of the contracts from year to year? This may indicate market sharing.
- Do suppliers appear to win contracts in certain areas but not in adjoining areas? This may also indicate market sharing.

# Anti-collusion tender clauses

## Tender clause 1: facilitating reporting to the ACCC

### Option 1

The purchasing authority reserves the right, at its discretion, to report suspected collusive or anti-competitive conduct by tenderers to the appropriate regulatory authority and to provide that authority with any relevant tenderer information.

### Option 2

The purchasing authority's obligation to keep tenderer information confidential will not be breached if the information is disclosed by the purchasing authority to the appropriate regulatory authority because of suspected collusive or anti-competitive tendering behaviour.

## Tender clause 2: disclosure of subcontracting

Tenderers must indicate if they intend any person (or organisation) who is not an employee to perform work on the services, and they must provide their details. The contract with the successful tenderer will require the purchasing authority's prior written approval for any changes to these arrangements, and any further subcontracting.

## Tender clause 3: warranty

The bidder warrants that their tender has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor, other than:

- where certain joint venture arrangements exist between the bidder and a competitor
- where the bidder and a competitor have an agreement that has been authorised by the ACCC
- where the bidder has communicated with a competitor for the purpose of subcontracting a portion of the tender, and where the communication with that competitor is limited to the information required to facilitate that particular subcontract.

In such a situation the bidder agrees to fully disclose the full nature and extent of any agreements with competitors to the tendering body.

In the event that no such disclosure is made, the bidder warrants that their bid has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor regarding:

- prices
- methods, factors or formulas used to calculate prices
- the intention or decision to submit, or not submit, a bid
- the submission of a bid that is non conforming
- the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates
- the terms of the bid.

The bidder acknowledges that if the [department/agency, etc.] accepts the bidder's offer and completes any contract the [department/agency, etc.] will do so in reliance of this warranty.

## Tender clause 4: disclosure of prior anti-competitive conduct

Tenderers must indicate if they, or any corporation or person associated with their tender, including directors and senior management, are or have ever been subject to proceedings related to anti-competitive conduct in Australia or overseas. The information must include:

- the names of the parties to the proceedings
- the case number
- the general nature of the proceedings
- the outcome or current status of the proceedings.

The [department/agency, etc.] reserves the right, at its discretion, to exclude any tenderer from the procurement process if the tenderer, or any corporation or person, including directors or senior managers associated with their tender, have ever contravened the anti-competitive provisions of the *Competition and Consumer Act 2010* or equivalent laws in Australia or overseas.

The [department/agency, etc.] reserves the right, at its discretion, to exclude any tenderer from the procurement process if full disclosure of any or all contraventions of the anti-competitive provisions of the Competition and Consumer Act or equivalent laws in Australia or overseas has not been made.