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## **BID EXCLUSION RISKS IN PUBLIC PROCUREMENT PROCEDURES WITH FOCUS ON COMPETITION AND NEW DATA PROTECTION RULES RELATED BREACHES**

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# **Public Procurement and Bid Rigging**

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# Outline

- ❑ Competition law aims
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- ❑ Notion of Bid Rigging
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- ❑ Elements of Bid Rigging Schemes
- ❑ Conditions that can facilitate bid rigging
- ❑ “Signs” of Bid Rigging
- ❑ Directive 2014/24/EU
- ❑ Conclusions

# Competition Law - Aims

- ❑ Prohibition of Anticompetitive Agreements (including practices that have not reached the level of an agreement but constitute de facto cooperation, namely concerted practices)
  - Ex. Article 101 TFEU, s.1 Sherman Act
- ❑ Prohibition of the abuse of a companies dominant position in a market
  - Ex. Article 102 TFEU, s. 2 Sherman Act
- ❑ Aim: **To facilitate competition amongst the various economic operators in the market – welfare gains**

# Public Procurement Law - Aims

## ❑ Main Aims:

- Achieve Value for Money (VfM) by selecting the most cost-effective solutions for the public sector's various needs
  - Establish a transparent system that tackles corruption (and by doing so increase the probability of achieving value for money)
- ❑ The level of regulatory emphasis on corruption-prevention varies between jurisdictions

# Notion of Bid Rigging

- ❑ Meaning: Manipulation of the outcome of a procurement (bidding) process
- ❑ Rationale: Limitation of risk between the various competitors (“control the wind”)
- ❑ ‘Per se’ restriction of competition
- ❑ This type of collusion has been estimated to increase prices significantly (conservative estimates suggest by 20% or more) above competitive levels

# Main Types of Bid Rigging

- ❑ Cover bidding:
  - Designated winner – other ‘competitors’ bid higher than the designated winner. The bid of the designated winner “appears” to be the best offer (even though it is overpriced)
  - The bid of the ‘competitors’ contain terms that they would be deemed unacceptable by the procuring entity

# Main Types of Bid Rigging

## ❑ Bid Rotation:

- ‘competitors’ agree to “take turns” in winning (“the long game”). This rotation may reflect the relative position of colluding competitors in the relevant market (for example it may be based on market shares)



# Main Types of Bid Rigging

- ❑ Market allocation
  - Bid Riggers agree to allocate specific markets (e.g. geographically) or customers to each other
- ❑ Bid suppression
  - Competitors agree not to bid or to withdraw submitted bids (thus giving the advantage to the designated winner)

# Elements of Bid Rigging Schemes

- ❑ Agreement on a 'price structure'
- ❑ Agreement on benefits/gains distribution
- ❑ Mechanisms to monitor and enforce compliance

# Elements of Bid Rigging Schemes

- ❑ Although these are features of cartels in general in the context of public procurement they are of particular importance. Why?
- Public Procurement rules/practice may facilitate (through signalling and information sharing) these elements
- As opposed to cartels in other areas, which are inherently unstable, cartels in public procurement appear to be stable; bid riggers appear to have less incentives to “break ranks” because the long term profits outweigh any sort term gains from a defection

# Elements of Bid Rigging Schemes

- ❑ Although these are features of cartels in general in the context of public procurement they are of particular importance. Why?
- Public procurement markets lack a key feature of private markets/consumers: cross elasticity of demand

# Elements of Bid Rigging Schemes

- ❑ However public procurement customers are in a better position to spot cartelisation. How?
  - Because of access to relevant data which if studied systematically can reveal unusual patterns that indicate cartelisation.
- ❑ This means that although bid rigging schemes are more stable on the supply side (little incentive to defect) they are more vulnerable on the demand side (detection).

# Conditions that can Facilitate Bid Rigging

- ❑ Concentrated markets
- ❑ High entry barriers (high investment, sunk-costs)
- ❑ Market Transparency
- ❑ Product homogeneity

# “Signs” of Bid Rigging

- ❑ Suppliers withdraw their bids for no apparent reason
- ❑ Some firms participate often but never win
- ❑ The winning bidder often subcontracts work to unsuccessful ones
- ❑ Pattern of rotation in winning
- ❑ Suppliers who are expected to bid for a tender refrain from doing so
- ❑ Some firms win only in specific geographical areas
- ❑ Significant reduction in price after participation of a new supplier



# Directive 2014/24/EU

❑ Article 57 (4) (d):

(4) Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

....

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into **agreements** with other economic operators aimed at distorting competition



# Directive 2014/14/EU

- ❑ Only agreements? What about concerted practices?
  - Anticompetitive conduct (including for example involvement in concerted practices) may be considered as professional misconduct (covered in Article 57 (4) (c))
- Argument in support of this interpretation may be found in C-470/13 *Generali-Providencia Biztosító Zrt*

# Conclusions

- ❑ Sometimes PPL unwittingly creates opportunities for bid rigging
  - Ex. Too much transparency of the procurement process information about the winning bid (“who?” and “how much”?) may lead to communication of useful information for the next bid
- ❑ Contracting Authorities should:
  - Encourage participation
  - The stipulation of requirement should be based on functionality (i.e. substitutable products)

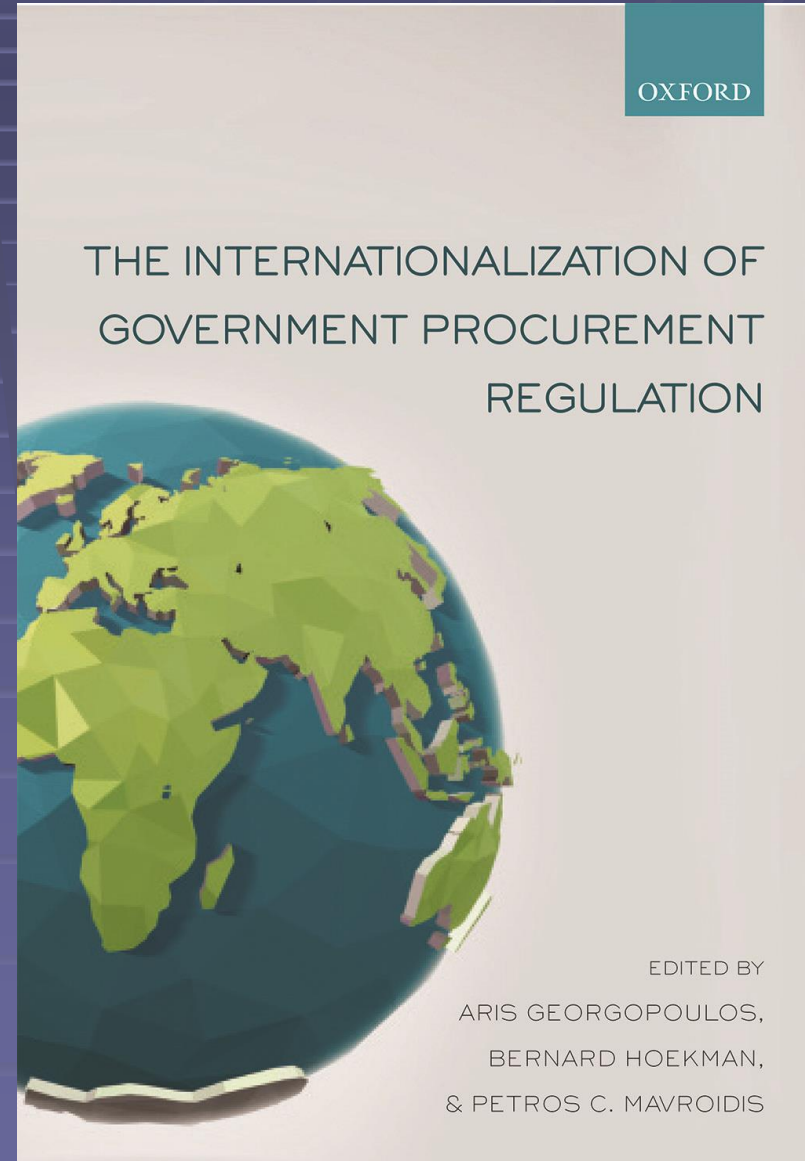
# Conclusions

- ❑ Contracting Authorities Should (cont.):
  - Refrain from facilitating communication amongst competitors (no general meetings, disclosure of bidders' identity)
- ❑ Competition Authorities/Agencies should coordinate their actions with the Public Procurement supervisory bodies (when such bodies exist)
- ❑ Competition Authorities/ Agencies should be consulted before any PPL amendments

# Thank You

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