



**REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY-
COMPETITION COMMISSION**

**DECISION
No. 243 of 11 September 2012**

“Recommendations on increasing competition in public procurement”

The Competition Commission, composed of

- Lindita Milo (Lati) Chair
- Rezana Konomi Deputy Chair
- Servete Gruda Member
- Koço Broka Member
- Iva Zajmi Member

in its meeting of 11 September 2012 reviewed the Case with:

Subject-matter: Review of the Investigation Report and of the Draft Law on Amendments to Law No. 9643 of 20 November 2006 "On Public Procurement", in order to give recommendations on increasing competition in public procurement.

Legal basis: Articles 24 (d) and (f) and 70 (2) of Law no. 9121 of 28 July 2003 "On Competition Protection".

After reviewing the Report on the investigation into the market of private security procurement, and the Secretary General's Report on the assessment of the Draft Law on Amendments to Law No. 9643 of 20 November 2006 "On Public Procurement", as amended,

THE COMPETITION COMMISSION NOTES THAT:

I. On investigation cases

1. An amount of evidence was reviewed in order to assess market behaviour from the point of view of the Competition Protection Law, in the investigation into the behaviour of the undertakings under the investigation into the private security procurement market.
2. The review of the evidence related to the competition on the market of private security service procurement, based on OECD Guidelines for Fighting Bid Rigging in Public Procurement, showed that there was bid rigging in the procurement of security services, which is considered as a prohibited agreement because it aims at significantly restricting competition on the private security service procurement market.

3. One of the bid rigging schemes that was used by the undertakings under investigation was the subcontracting scheme. Under such a scheme, after the award of the contract, the winning bidder subcontracted the procured service to the non-winning bidders that participated in the procurement or to entities that did not participate in the procurement procedures.
4. The laws and regulations on public procurement allow the operator that is awarded a contract (contractor) to subcontract a part of its public contract on the basis of the specified conditions. Under public procurement rules, the *Contracting Authority especially allows subcontracting in order to encourage the participation of smaller and medium-sized operators.*
5. However, given the specific nature of private security services, which require the assumption of responsibilities by the contracting operator directly, and independent competition of the relevant companies, subcontracting is not the best way to encourage the participation of smaller and medium-sized operators in procurements. In the contrary, subcontracting increases cooperation among competing bidders in the provision of the relevant services, by allowing for increased communication among them, given the constant nature of the services and the collaborative relationships among them before and after the awarding of the contract, which is typical of bid rigging.
6. If subcontracting is allowed without any criteria at all it can be an unjustified cause for restricting competition among economic operators.

II. On the Draft Law

7. Following a communication from the Public Procurement Agency in relation to the published Draft Law on Amendments to Law No. 9643 of 20 November 2006 “On Public Procurement”, as amended, the Competition Authority reviewed the amendments from the perspective of the Competition Protection Law.
8. The proposed amendments affect various articles of the current Public Procurement Law, and are of a procedural nature. What we found in the Draft Law, however, is that it reflects a change that was recommended in Paragraph I.1 of Competition Commission Decision No. 158 of 12 November 2010 “Several recommendations on preventing *bid rigging* in public procurement”.
9. In order to better understand what bid rigging is it is important to include a definition in the Public Procurement Law, which is the Law laying down procurement procedures, during which bid rigging also occurs.
10. In order to prevent and fight bid rigging in public procurement, and to raise economic operators and procurement officers’ awareness of the serious consequences of bid rigging as laid down in the Competition Protection Law, we think that it is a positive thing to clearly specify in the Public Procurement Law (PPL) that: *for a bid to be valid it must be prepared and submitted completely independently from the rest of competing bids and from other non-bidding operators.*
11. In order to allow economic operators a sufficient period of time for them to provide arguments for an abnormally low bid, and eliminate the “abusive” power

of contracting authorities to set that period subjectively on a case-by-case basis, and to ensure equal treatment of economic operators participating in public procurement procedures, we think that the abovementioned period should be laid down in the Law.

FOR THESE REASONS:

The Competition Commission, pursuant to Article 24 (d) and (f) and Article 70 (2) of Law no. 9121 of 28 July 2003 "On Competition Protection", with the proposal of the Secretariat,

DECIDED:

- I. Article 4(2) of the Draft Law drafted by PPA provides that: The following point (d) is added to Paragraph 3 in Article 13 "Public Procurement Agency":

"d) Where there is a final decision on bid rigging taken by the Competition Authority."

We suggest that the word "Authority" is replaced with "Commission" because the Competition Commission is the decision-making body. Thus, it should be change into:

"d) Where there is a final decision on bid rigging taken by the Competition Commission."

- II. Recommend that the Public Procurement Agency take the following legal initiative:

1. Add the following paragraph in Article 3 "Definitions":

*"**Bid rigging in public procurement**" is a form of price-fixing and/or procurement market-sharing agreement, which happens: First, when undertakings of which it is expected to compete secretly agree on the amount of bid to be submitted thus eliminating price competition; and, second, when undertakings agree on which undertaking will submit the lowest bid, and agree on a rotation of winning bids so that each undertaking receives an agreed amount of contracts."*

2. Add the following provision in Article 46 or in another appropriate article:

"For a bid to be valid (qualifying) it must be prepared and submitted completely independently from the rest of competing bids and from other non-bidding operators."

Proof of this can be a bidder's signature on an "Independent Bid Certificate", which was recommended to PPA to include in the standard tender documentation in its Decision No. 158 of 12 November 2010 "Several recommendations on the prevention of public procurement bid rigging".

3. Article 56 "Unusually Low Bids" should specify a sufficient time period within which economic operators will submit their arguments in relation to their unusually low bid.

4. Article 61 "Subcontracting" of Law No. 9643 of 20 November 2006 "On Public Procurement", as amended, a paragraph should be added providing that:

"Contracting authorities shall in no case allow subcontracting among bidders participating in the same procurement procedure as this behaviour is in conflict with the principle of independent bidding, nor shall they allow subcontracting in the case of those contracts where, due to their specific and continuous nature, have to be performed by their contractors."

The same prohibition should also be laid down in the relevant Chapter in the Council of Ministers' Decree on public procurement.

III. For the purpose of increasing transparency and competition in public procurement, Contracting Authorities should publish during and at the end of procurement procedure all the documents that are related to the procedure (mainly: the complete contract award notice and the complete contract signing form) and should ensure that they are maintained on PPA official website over time.

IV. The Secretary-General shall communicate this Decision to the Public Procurement Agency and the relevant stakeholders.

This Decision shall enter into force immediately.

COMPETITION COMMISSION

Servete GRUDA

(_____)
Member

Koço BROKA

(_____)
Member

Iva ZAJMI

(_____)
Member

Rezana KONOMI

(_____)
Deputy Chair

Lindita MILO (LATI)

CHAIRPERSON