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**BID-RIGGING AND ROLE OF COMPETITION COMMISSION OF INDIA:  
WITH SPECIAL REFERENCE TO ITS IMPACT ON INFRASTRUCTURE  
DEVELOPMENT**

*Mahima Tiwari*

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# **Bid-Rigging and Role of Competition Commission of India: With Special Reference to its Impact on Infrastructure Development**

## **Introduction**

India's demographic growth has put the urban infrastructure under severe pressure. Smaller and semi-urban metropolises have no much space to accommodate growing demands for further extension, and also facing difficulties to cope with the increasing demands on infrastructural services because of inadequate resources. Most of the cities have posed a very grim picture with respect to availability of basic infrastructure.<sup>1</sup> According to the Registrar General & Census Commissioner of India, the urban population in India over the next 25 years is expected to grow 38 per cent and become 534 million in 2026.<sup>2</sup> It may be pointed out that

*“about 21 per cent of the urban population is living in squatter settlements, where access to basic services is extremely poor. Although 89 per cent of the urban population is reported to have access to safe drinking water but there are severe deficiencies with regard to equitable distribution of water. Recent data suggest that water supply is available for 2.9 hours per day across cities and towns. The non-revenue water that includes physical and revenue losses account for 40-60 per cent of total water supply. About 30 to 50 per cent households do not have sewerage connections and Less than 30 per cent of total waste water is treated. Solid waste systems are severally stressed. Average per capita generation of waste is estimated at 0.4 kg per capita per day in cities ranging from 1 lakh to 50 lakh population and the garbage collection efficiency ranges between 50 to 90 per cent of the solid waste generated”.*<sup>3</sup>

It is undeniable that quality & efficient infrastructure services are essential to realize the full potential of the growth in the economy. Thus, the term 'infrastructure development' does not only indicate development into primary sectors, such as rail-road & transportation, but also power, communication, port, industrial parks, water supply,

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<sup>1</sup> FICCI Report, *Urban Infrastructure in India by 2011*. Available at: [http://ficci.in/spdocument/20122/Urban\\_infra.pdf](http://ficci.in/spdocument/20122/Urban_infra.pdf) (Last visited on 22 Oct., 2016).

<sup>2</sup> Registrar General & Census Commissioner of India, *Population Projections for India, 2001-26* (2006).

<sup>3</sup> V. Deepa Nair, *Infrastructure Development in India*, available at: <http://www.mcrhrdi.gov.in/Group12012/introductiontoppp.pdf> (Last visited on 12 Oct., 2016).

sanitation and sewage projects. At the same time, for all possible regional integration, it is important to develop the cross-border infrastructure. Thus, 'infrastructure development' is fine indicator of, not only urban amenities but also global-linkage through inter-linked and improved transportation network, with regional integration process. Though, regional integration process is a politically volatile subject, still the government of India has a definite policy towards regional linkage.<sup>4</sup>

### **Infrastructural Requirements and New Innovations**

With the goals and objective mentioned hereinabove, and within the dynamic economic policies, government of India has planned to build major infrastructure projects including two power plants, 24 smart cities, 23 industrial hubs, six airports, two ports and a six-lane expressway stretching 1,500 kilometres, which means, it will be the world's largest infrastructural project, designed and promoted by Delhi-Mumbai industrial corridor Development Corporation.<sup>5</sup> The whole project is estimated to cost \$100 billion. Of this, \$4.5 billion is being initially funded by the Japanese government as a loan for a period of 40 years at a nominal interest of 0.1 per cent.<sup>6</sup> The government of India earmarked an initial sum of Rs. 12 billion in the Union Budget 2015-16. This will be used to build trunk infrastructure, non-profit-making but essential needs like sewage pipes, water supply and roads. The remaining 90 per cent of the funds will come from private players.<sup>7</sup> Similar huge infrastructure project is the recently proposed, Rs 40,000/- crore National Investment and Infrastructure Fund (NIIF), what could bode well for the country's infrastructure story. The NIIF is meant to fund development of infrastructure projects, including reviving stalled ones. The government will invest Rs 20,000 crore into the NIIF from the Budget, with another Rs 20,000 crore expected to come from private investors. The government's share of the NIIF's corpus is envisaged to be under 50 per cent.<sup>8</sup>

### **Infrastructural Projects and Major Concerns**

The above illustrations portend the story of developing infrastructure projects in India. Though most of these projects are funded by government, however the private sector too with is putting its efforts through PPP model i.e. 'public-private partnership'. The

<sup>4</sup> P. De, *Infrastructure Development in India* in ERIA RESEARCH PROJECT REPORT: INTERNATIONAL INFRASTRUCTURE DEVELOPMENT IN EAST ASIA – TOWARDS BALANCED REGIONAL DEVELOPMENT AND INTEGRATION 2008 105-130 (N. Kumar ed. 2008).

<sup>5</sup> Raksha Kumar, *The world's largest infrastructure project is being built in India – stretching from Delhi to Mumbai* SCROLL.IN (28 Jan., 2016), available at <http://scroll.in/article/746736/the-worlds-largest-infrastructure-project-is-being-built-in-india-stretching-from-delhi-to-mumbai> (Last visited on 12 Oct., 2016).

<sup>6</sup> *Id.*

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

<sup>8</sup> Deepshikha Sikarwar, *Government sets up Rs 40,000 crore National Investment and Infrastructure fund, CEO likely by January-end* THE ECONOMICS TIMES (30 Dec., 2015), available at [http://articles.economictimes.indiatimes.com/2015-12-30/news/69402712\\_1\\_infrastructure-fund-sovereign-wealth-funds-finance-minister-arun-jaitley](http://articles.economictimes.indiatimes.com/2015-12-30/news/69402712_1_infrastructure-fund-sovereign-wealth-funds-finance-minister-arun-jaitley) (Last visited on 12 Oct., 2016).

success in the managing major infrastructural projects are not in terms of quantum of funds invested, but on how the project contributes to the achievement of countries' economic, social and environmental objectives. Another characteristic of a successful infra-project is how the large resources are utilised. This requires careful handling of the monetary aspects.

Procurements for major infra-projects become very complex and technical. It is so, because it involves public expenditure through tax payer's money, and procurement of services, again involving huge public outlay. This often executed through 'Public procurement', which comprises of purchasing of goods and services required for state activities and the basic purpose of which is to secure a best worth for public money. Every authority delegated with financial powers of procuring goods in public interest shall have the responsibility and accountability to bring efficiency, economy and transparency in matters relating to public procurement for the purpose of fair and equitable treatment of suppliers and promotion of competition in public procurement.<sup>9</sup> The performance of public procurement markets has major implication for the effectiveness of governance and well-being of citizens, in both developed and developing countries. Since procurement accounts for such a large part of public resources, it is important that the procurement process occurs in an accountable, transparent and well managed manner.<sup>10</sup> Due to this the most of public procurement is done through a competitive bidding process.

As discussed above, the growth of the infrastructure sector is reliant on regulatory framework, developing appropriate financial mechanisms and ensuring efficient project management. A well devised public procurement policy and procedure would positively impact the overall competitiveness, economic efficiency and the pace to economic development. However, possibilities such as anti-competitive agreements including most infamous bid-rigging, results into loss of public funds as well as faith. Whenever these procurement policies fail, it would have detrimental impact not only on the state, market or individual but also on the system as a whole. All such anti-competitive agreements distort public procurement process, and results into a scar on the sound public governance, which further impedes proper utilisation of national resources, investment and growth.

### **Bid-Rigging: The Phenomena**

According to a report published in the Financial Express, public procurement in India constitutes about 30 per cent of GDP, with total annual expenditure of around Rs 15-20

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<sup>9</sup> See Delhi State Industrial and Infrastructure Development Corporation (DSIIDC) Manual for 'procurement of goods and services', available at: <http://www.dsiidc.org/dsidc/gfrulechap6.pdf> (Last visited on 12 Oct., 20116).

<sup>10</sup> See OECD REPORT ON "PUBLIC PROCUREMENT FOR SUSTAINABLE AND INCLUSIVE GROWTH available at: <http://www.oecd.org/gov/ethics/PublicProcurementRev9.pdf> (Last visited on 12 Oct., 20116).

lakh crore, and that for the Union government alone in the range of Rs 2.5-3 lakh crore.<sup>11</sup> Having this much stake involved, the public procurement activity is most vulnerable to corruption, not only between the suppliers and government staff, but also within the suppliers themselves. The latter emerges in the form of *cartels*, i.e. bid rigging and collusive bidding—a form of cartelisation.

A bid is an offer made in furtherance of an invitation to an offer made by an enterprise, (for the purpose of this research paper, invitation to the offer is by the Government department) to procure goods or services for the public in general. It is a submitted price at which one will perform work or supply goods.<sup>12</sup> A bidder, thus, is an enterprise or an entity who offers such a bid in the public procurement mechanism initiated by the Government. The public procurement processes are based on some key challenges relating to competitive bidding process. There are various stages in public procurement. The first stage is about identifying the 'requirement of goods', 'specification of goods/services', 'quantities', etc. At the second stage, the procurement agency has to 'issue notice for inviting tender', and 'acceptance of bid/tender'. The third stage is about 'opening of bid', 'evaluation of bid', and then preparation of a comparative statement of quotation received. After evaluation, the agency is expected to determine the 'lowest bid'. In some exceptional cases, *price negotiation* may be conducted, but with the lowest evaluated responsive bidder only and that too, with the approval of the competent authority. This leads to the very important stage of 'award of contract'. At this stage, earnest money, i.e. a monetary guarantee furnished by a tender along with its tender, is taken up, and the earnest money furnished by all unsuccessful tenderer should be returned to them without any interest whatsoever. At this stage, a 'Performance Security', i.e. the amount of money received by the procurer from the successful bidder, is taken to ensure due performance of the contract. This amount will be forfeited if the supplier, breaches any term of the contract.

All these stages of public procurement process are key challenges (from bid to execution) for the government to conduct the competitive bidding process, transparent, efficient and in well managed manner. But the objective of public authorities which is to secure best value for public money may be weakening, if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging disregards the very purpose of inviting tenders and is inherently anti-competitive in nature.

In the last six years of enforcement, the Competition Commission of India (hereinafter referred as CCI) has taken up *suo motu* investigations, based on references from government departments, and has prosecuted cartel allegations in 33 cases of anticompetitive agreements, including 12 cases of bid rigging cartels from PSUs (two cases transferred from erstwhile MRTP Commission). The cartel cases related to a wide spectrum of the economy, covering diverse sectors such as pharma, energy (LPG

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<sup>11</sup> M.M. Sharma, *Getting rid of bid-rigging in public procurement*, available at: <http://www.financialexpress.com/article/fe-columnist/getting-rid-of-bid-rigging-in-public-procurement/138742/> (Last visited on 23 Oct., 20116).

<sup>12</sup> BLACK'S LAW DICTIONARY, (8<sup>th</sup> edn. 2004).

domestic cylinders), media (film/cable distribution and exhibition), travel and tourism (travel agents), infrastructure (cement), food (food storage in FCI godowns), health, transport (shipping, civil aviation, trucks) and recently insurance.<sup>13</sup>

This list also includes an increasing number of cases of bid rigging in the defence sector, related to procurement by military units, such as bid rigging in DGS&D rates contracts for supply of jungle boots to armed forces and recently bid rigging in supply of CN containers (containers with disc required for 81mm bombs to three ordnance factories). Competition Commission of India has already penalised four PSU insurance companies with Rs. 671 crore for bid rigging tenders for providing insurance cover for social welfare schemes of Kerala. In a fairly transparent legal structure, such challenges are signs of developing jurisprudence.<sup>14</sup>

Competition Commission of India has imposed a penalty of Rs. 62.31 crore on three engineering companies for violation of Competition Act concerning forming a Cartel with respect to a tender for an Indian Railway undertaking. A penalty of Rs. 1.91 crore has been imposed on M/s Stone India Ltd., Rs. 5.70 crore on M/s Faveley Transport Rail Technologies India Ltd and Rs.54.70 crore on M/s Escorts Ltd. The penalty has been worked out on the basis of 2 per cent of average turnover of these companies for the three financial years from 2009-10 to 2011-12. The penalty has been imposed after CCI took up a case of *suo motto* basis based on information given by M/s Diesel Loco Modernisation Works (DLMW), a unit of Indian Railways at Patiala, Punjab. The case relates to a DLMW tender wherein the three vendors quoted identical rates for feed valves. Noting that public procurement is a major concern of all competitive authorities in the world, CCI said that it cannot ignore bid rigging in case of small procurement nor can consider small procurements unimportant.<sup>15</sup>

### ***Bid Rigging: Some Illustrations from Abroad***

Transparency International estimates that damage from corruption can represent on average 10 to 25 per cent — and in the worst cases as much as 50 per cent of a contract's value.<sup>16</sup> In Morocco, despite positive reforms to the procurement system, recent calculations by industry experts suggest that corruption still costs the country about 5

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Press Information Bureau Government of India Ministry of Corporate Affairs, *CCI imposes Penalty of Rs.62.31 Crores on Three Companies for Forming a Cartel in a Tender for Indian Railways*, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=103135> (Last visited on 26 Oct, 20116).

<sup>16</sup> Transparency International, *HANDBOOK: CURBING CORRUPTION IN PUBLIC PROCUREMENT*' (2006).



per cent of the value of each contracted purchase.<sup>17</sup> In the Philippines, business insiders have speculated that this cost may reach up to 50 per cent.<sup>18</sup>

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.

### ***Bid-Rigging: Conceptualisation***

The Competition Act, 2002, follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anticompetitive practices by enterprises. The Act prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. To achieve these objectives, the Act prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India, and all such agreement would be void. The Bid rigging or collusive bidding is one of such agreements, treated as detrimental to competition, shall be presumed to have appreciable adverse effect on competition under Section 3 of the Act. The Explanation to section 3(3) of the Competition Commission Act, 2002 defines bid rigging in the following terms:

[A]ny agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert. Thus, bid-rigging is an anti-competitive in nature.

Bid-rigging may occurs in various methods, some of the most common methods are: Bid Suppression, Complementary Bidding, Bid rotation, Sub-contracting and Market Division.

- *Bid-Suppression*: wherein many bidders who apply for the tender, either refuse to bid or refrain from bidding or withdraw its bid, so that the designated bidder wins the tender.

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<sup>17</sup> See *Cleaning up government*, OECD Observer. No. 275, November 2009. Available at: [www.oecdobserver.org/m/fullstory.php/aid/3109/Cleaning\\_up\\_government.html](http://www.oecdobserver.org/m/fullstory.php/aid/3109/Cleaning_up_government.html) (Last visited on 23 Oct., 20116).

<sup>18</sup> See, *Half of supply cost traced to corruption* BUSINESS INSIGHTS (27 Oct., 2010). Available at [www.malaya.com.ph/10272010/busi3.html](http://www.malaya.com.ph/10272010/busi3.html) (Last visited on 26 Oct., 20116).

- *Complementary Bidding*: wherein the bidder participate in the bidding process for participatory sake. Thus, one or more competitors agree to bid, either at a very high price or offer bids, in addition to certain specific untenable conditions, so that, the bid in totality is rejected by the authority floating the tender. By indulging in this form of bidding, the competitors merely give an impression of participating in the bidding process, whereas, in reality, they have no intention of procuring the tender.
- *Bid Rotation*: is another format of Bid-rigging wherein all conspirators submit bids but take turn being the lowest bidder. The term of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirators company. A strict bid rotation pattern defies the law of chance and suggests the existence of collusion.
- *Sub-Contracting*: is an scheme of bid-rigging and as the term suggests, it refers to a scenario when the remaining competitors except the designated winner, agree to not bid, on the condition of receiving subcontracts or supply of ancillary contracts in exchange of their 'non participation' in the bidding process.
- *Market Division*: is that form of Bid-rigging wherein market division or allocation schemes are formulated through an agreement by which competitors divide markets among themselves. Here, competing firms allocate specific customers or types of customers, products or territories among themselves.

In a nutshell, the above forms of bid rigging suggests that the competitors in question agree to quote identical prices, the hope being that in the end each will receive its 'fair' share of orders.

Bid-Rigging may be detected by keeping absolute vigilance over the vulnerable market, such as infrastructure projects, keeping a track on all the opportunities that bidder have to communicate with each other. This may be further checked and verified by examining the kind of relationship amongst the bidders. This may be done even after announcement of the successful bid. Suspicious bidding patterns in a given sector, unusual behaviour and by examining or scrutinising the similarities among the documents submitted by different bidders may provide enough hint to look into the aspects of bid-rigging.

According to CCI, certain patterns in bids can give rise to suspicion of collusion. Situations of suspicious behaviour include the following (illustrative and not exhaustive):

- a) The bid offers by different bidders contain same or similar errors and irregularities (spelling, grammatical and calculation). This may indicate that the designated bid winner has prepared all other bids (of the losers).
- b) Bid documents contain the same corrections and alterations indicating last minute changes.
- c) A bidder seeks a bid package for himself/herself and also for the competitor.
- d) A bidder submits his/her bid and also the competitor's.
- e) A party brings multiple bids to a bid opening and submits its bid after coming to know as to who else is bidding.

- f) A bidder makes a statement indicating advance knowledge of the offers of the competitors.
- g) A bidder makes a statement that a bid is a 'complementary', 'token' or 'cover' bid.
- h) A bidder makes a statement that the bidders have discussed prices and reached an understanding.

### **Bid-Rigging and Powers of CCI**

In exercise of powers vested under Section 19 of the Act, the Commission may inquire into any alleged contravention under subsection (3) of Section 3 of the Act that proscribes bid rigging.

The Commission, on being satisfied that there exists a prima facie case of bid rigging, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The

Director General, for the purpose of carrying out investigation, is also vested with powers of civil court besides powers to conduct 'search and seizure'.

The CCI has the power to pass *inter alia* any or all of the following orders:<sup>19</sup>

- a) direct the parties to discontinue and not to re-enter such agreement;
- b) direct the enterprise concerned to modify the agreement;
- c) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and pass such other orders or issue such directions as it may deem fit.
- d) In addition, the Commission can impose such penalty as it may deem fit. The penalty can be up to 10 per cent of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding

In case the bid-rigging or collusive bidding agreement referred to in section 3 subsection 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or 10 per cent of its total turnover for each year of the continuance of such agreement, whichever is higher.

The penalty can therefore be severe, and result in heavy financial and other cost on the erring party. It would follow that if any anti-competitive agreement, including agreement for bid rigging or collusive bidding, is entered into by an association, such as a trade association, such association could also be liable to be proceeded against under

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<sup>19</sup> Section 27, The Competition Act, 2002

the provisions of the Act, and it could be subject to any of the orders under section 27 mentioned above, including the imposition the penalty.

### ***Impact of Bid-Rigging on Infrastructure Projects***

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.

### ***Dealing With Bid-Rigging***

For any effective dealing with bid-rigging, one needs to establish in-house expertise to check such bid-rigging at earliest. It is always better to have ready-made data about the potential suppliers of the product/service and also the past similar tenders. Cost confidentialities must be maintained; especially services of external consultants are used to estimate prices or costs. It should also be noted that tender process should be designed to maximize potential participation. Thus, methods including reduced the cost of bidding, universalization of bidders, and opportunities to smaller firms etc. may be used as techniques to deal to bid rigging. Apart from all these, it is most important to avoid 'predictability' element in the bidding process. Tenders must be clearly drafted allowing no space for certainty. More predictable procurement schedules and unchanging quantities sold or bought can enable collusion.

To reduce communication among bidders, the procurement officials should be aware of factors that aid in collusion. Information disclosed to the bidders must be considered at the time of public bid opening. Since there is no rule as such, tenders must be designed according to the situation. The intensity and effectiveness of the selection criteria must be chosen with care to avoid preferences for any certain type or class of suppliers.

### **Conclusion**

It is a fact that a modern day economy revolves around the interplay of public and private partnership. It is also undeniable that government mechanism, where it is about providing services or others things, is always subject to market forces. Till the time, it is subject to market forces, there is nothing to worry about, however, the moment it tilts towards individual management, and it starts violating rules of fair market, and may result into corrupt practices. Bid rigging or any other type of collusive bidding, which is nothing but a type of anti-competitive agreement, needs to be checked from that perspective. Such practices are not only collusive in nature and detrimental to economic rules, but at the same time results into huge loss to the state revenue. From this perspective, it is always mandatory that such practice may be nipped in the bud by creating fair market with full of competition. It may also be added that state is one of the crucial player in the modern day economy, especially in a developing welfare economy, because, here in such type of economic model, there is always a possibility of big fish

seizing the smaller one. This is not only against fair economic rules but also anti-competitive, and in turn anti-developmental.

- Mahima Tiwari\*

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\* Mahima V. Tiwari, Research Scholar, Faculty of Commerce & Management, Dr. Shakunatala Mishra National Rehabilitation University Lucknow. Email: sentmail2mahii@gmail.com