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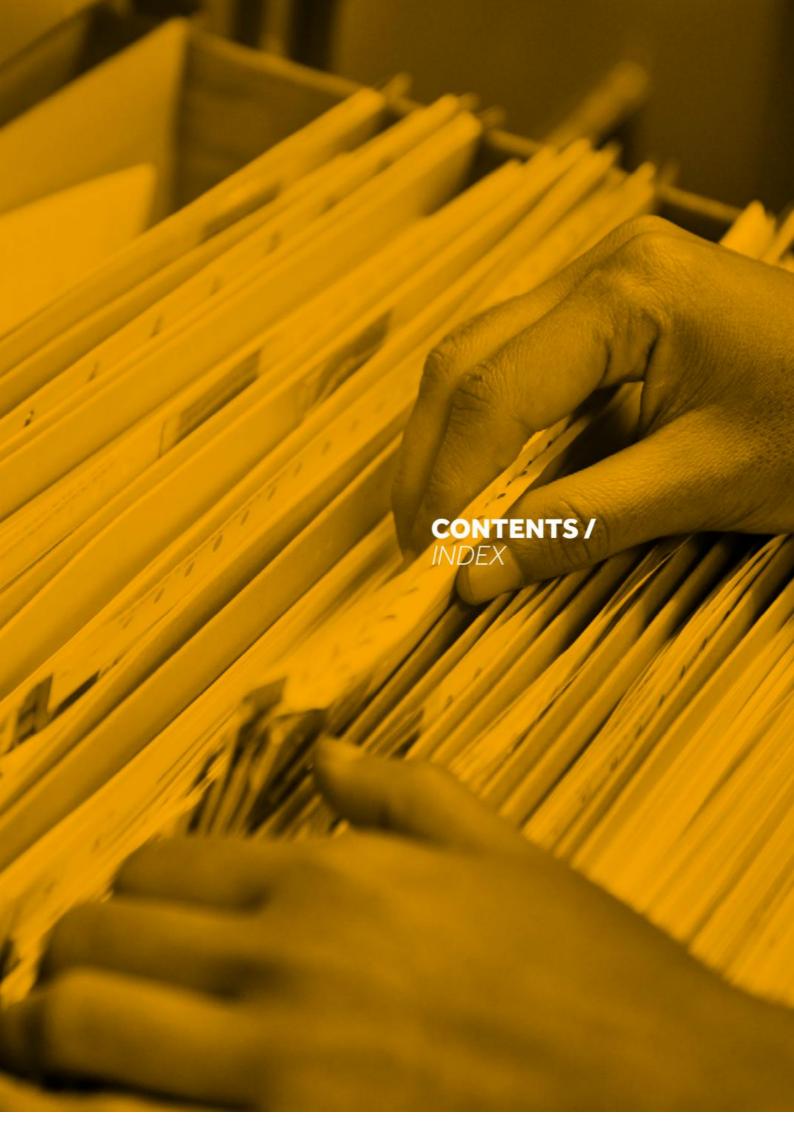
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# Guide to Fight Collusion in Public Procurement



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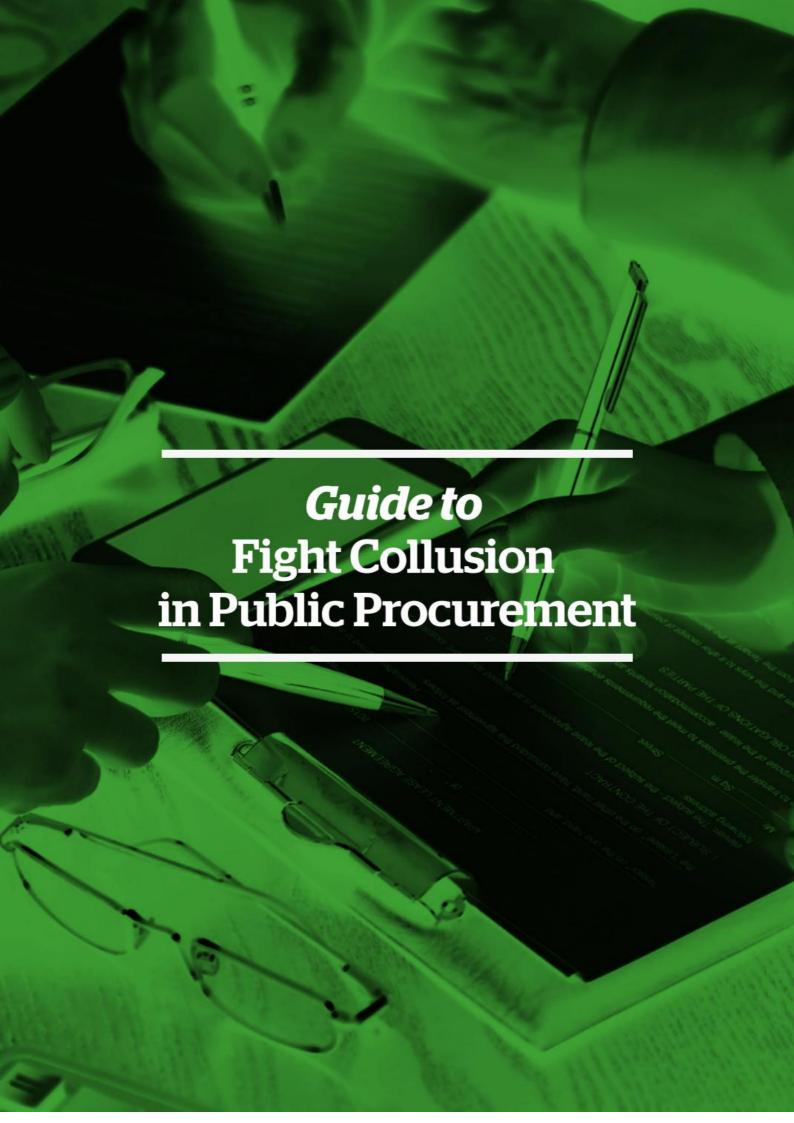
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#### **GLOSSARY**

- 1) Economic agents: natural or juridical persons, irregular societies, autonomous patrimonies or other entities of public or private law, state or not, with or without profit purposes, that in the market offer or demand goods or services, or whose associates, affiliates, union members or members carry out such activity.
- 2) Cartel: agreement between competitors with the exclusive purpose of restricting, preventing or distorting free competition, such as concerted price fixing, market sharing, concerted restriction of production or agreement between bidders of a selection procedure for contracting with the State. They are considered anti-competitive practices forbidden by the Legislative Decree 1034 and its amendments, Law of Repression of Anticompetitive Behavior.
- 3) Commission: Indecopi's Free Competition Commission (Comisión de Defensa de la Libre Competencia del Indecopi), a body with technical and functional autonomy in charge of complying with Legislative Decree 1034 and its amendments, Law for the Repression of Anticompetitive Behavior.
- 4) Economic Group: is the group of economic agents that, for reasons of ownership, kinship or management, share a center of interest or decision-making unit. In the area of public procurement for the definition of the Economic Group, the provisions of the Regulations of the Law on State Procurement are considered, without prejudice to Indecopi's being able to apply broader criteria for its definition.
- 5) Law on State Procurement: Law 30225, published in the Official Gazette El Peruano on July 11th, 2014 and its amendments; including the recent modification made by the Legislative Decree 1444, published on September 16th, 2018.
- 6) Horizontal collusive practices: agreements, decisions, recommendations or concerted practices made by competing economic agents that have the purpose or effect of restricting, preventing or distorting free competition, such as: the concerted fixing, directly or indirectly, of prices or other commercial or service conditions; the limitation or concerted control of production, sales, technical development or investments; the concerted distribution of customers, suppliers or geographical areas; the conciliation or coordination of offers, bids or proposals or abstention from these in public or private bids or contests or other forms of public contracting or acquisition provided for in the relevant legislation, as well as in public auctions and auctions, among others.
- **7) Regulation of the Law on State Procurement:** Regulation of Law 30225, approved by Supreme Decree 344-2018-EF and published in the Official Gazette El Peruano on December 31th, 2018.
- 8) Technical Secretariat: Technical Secretariat of the Free Competition Commission of Indecopi, a body with technical autonomy that performs the work of instructor of the investigation procedure and sanction of anti-competitive conducts and that issues an opinion on the existence of the offending conduct.





#### 1. Introduction

The importance of government procurement at the global level has led several international organizations such as the World Bank, the Inter-American Development Bank or the Organization for Economic Cooperation and Development (OECD) to devote efforts to promoting improvements in public procurement processes, combating corruption and fostering competition. At the international level, various competition authorities have implemented guides, recommendations or guidelines to promote competition and detect anti-competitive behavior in their respective selection and contracting procedures. These include Colombia, Chile, Mexico, Spain, the United States and the European Union. These guidelines follow, in large part, the example of the Guidelines for Fighting Bid Rigging in Public Procurement, approved by the OECD in 2009.

Through this guide to **Fight Collusion in Public Procurement**, Peru joins this line of efforts to promote competition and this, in turn, generates greater efficiency in public spending. It is, therefore, a consultation document addressed mainly **to all officials who participate in the State selection and contracting procedures, with a double objective. On one hand, to provide them with tools to warn them of possible signs of anti-competitive behavior within public procurement and, on the other hand, to promote the highest possible competition, within the current legal framework.** 

Although the primary recipients of this guide are the officials in charge of selection and contracting procedures within public entities, this document should also serve as a reference for other relevant actors in state contracting such as the State Procurement Supervisory Body (OSCE), the Public Procurement Headquarters - Perú Compras, the Comptroller General of the Republic and, in general, all entities that carry out contracting regardless of the applicable legal regime, as well as companies interested in contracting with public entities and their advisors. Likewise, although this guide takes as a reference the procedures foreseen in the Law on State Procurement and its Regulations, the principles and recommendations of this document may be taken into account in any state-contracting regime, with the objective of favoring competition, to the extent that it does not contradict with the current normative framework.

This guide is a document with educational and cooperative purposes between the different public entities involved with public procurement in the broadest sense. Therefore, its content is only referential and indicative, it does not create or develop legal obligations, and it is not binding for the contracting public entities, or OSCE, Perú Compras, the Office of the Comptroller General, the institutional control bodies or Indecopi. For this reason, it is suggested that this guide is studied and, as far as possible, that the recommendations developed here to be followed in order to improve compliance with the principle of competition in state procurement in general.

#### 2. Competition in Public Procurement

Competition is the cornerstone on which the public procurement regime is based; hence the general rule is that procedures are characterized by being competitive and contain rules oriented to it, which is reinforced by the incorporation of "competition" as one of the guiding principles of the Law on State Procurement<sup>1</sup>. This principle is not exclusive of this rule but is applied in all special legal regimes of procurement, where generally the Law of State Procurement and in particular the principles contained therein are applied in a supplementary manner.

This principle includes two duties: one addressed to public entities and the other to participating companies and bidders. For the former, the principle of competition demands that procurement processes include provisions that allow effective competition, with the purpose of "obtaining the most advantageous proposal to satisfy the public interest underlying the procurement". For the latter, it translates into a duty of not engaging in "practices that restrict or affect competition".



The typification of restrictive practices of competition is found in a different norm, Legislative Decree 1034 and its amendments, the Law of Repression of Anticompetitive Behavior, which applies to all types of state contracting regardless of the applicable legal regime. In the case of state selection and procurement procedures, the so-called horizontal collusive practices, i.e. those agreements, decisions, recommendations or concerted practices between economic agents competing at the same level of a production, distribution or marketing chain, with the aim of eliminating, restricting or limiting competition to the detriment of consumers, other competitors, customers or suppliers, are particularly relevant.

The Law of Repression of Anticompetitive Behavior contains a special section dedicated to collusive practices committed within a selection and contracting procedure with the State. Thus, the agreement or coordination of "offers, bids or proposals" is prohibited and sanctioned, as well as "to abstain from these in bids or contests or other forms of public contracting or procurement provided for in the relevant legislation, as well as in public tenders and auctions"<sup>2</sup>.

Collusions in public tenders or bid rigging are considered absolute prohibitions in the Law on the Repression of Anti-competitive Behavior<sup>3</sup>, due to their appreciably harmful nature for competition and consumers (in this case, public entities), and are subject to sanctions by Indecopi's Free Competition Commission, consisting of administrative fines that may exceed 1,000 UIT, with a maximum of 12% of the sales or earnings received by the company or economic group in the previous year, taking into account when the decision is issued by the Commission.

When a public entity, the OSCE or the State Procurement Tribunal, in the development of a selection procedure, detects the existence of signs of anti-competitive conduct in a selection procedure, it must submit all relevant information to the Technical Secretariat of Indecopi's Free Competition Commission, so it may carry out the respective investigation and, if necessary, initiate a sanctioning procedure and apply the sanctions to those responsible. The identification of evidence and communication with Indecopi should be kept confidential and should not be notified to the alleged perpetrators in order to ensure the effectiveness of the investigation<sup>4</sup>.

It is essential, however, to distinguish anti-competitive conduct in a bid or public contest from other practices such as the simulation or appearance of competition<sup>5</sup>, which are not sanctioned by Indecopi but are prohibited by the Law on State Procurement and other special regimes. This occurs, for example, when two or more natural or legal persons belonging to the same economic group come to participate in the same selection procedure.

When two agents belong to the same economic group, they are not competitors, because they represent the same center of interest<sup>6</sup>. Also, in this sense, one cannot speak of a restrictive practice of competition between two agents who are not competitors. However, despite not qualifying as anti-competitive conduct, the Law on State Procurement prohibits two or more agents of the same economic group from participating in a selection procedure because they give the appearance of non-existent competition.

<sup>2</sup> Article 11.1, paragraph j) of the Law for the Repression of Anticompetitive Behavior.

 $<sup>{</sup>f 3}$  Article 11.2 paragraph d) of the Law for the Repression of Anticompetitive Behavior.

<sup>4</sup> Article 14 of the Law on State Procurement.

 $<sup>\</sup>textbf{5} \, \text{Article } 11.1 \, \text{paragraph p)} \, \text{and article } 50.1 \, \text{paragraph c)} \, \text{Law on State Procurement}.$ 

<sup>6 &</sup>quot;(...)there can be no horizontal collusive practices between economic operators belonging to the same economic group. Indeed, economic agents belonging to the same economic group respond to the interest of a decision-making unit and, to that extent, do not effectively compete with each other". Decision 026-2013/ST- CLC-INDECOPI, November 14th, 2013.



#### "Simulation" or "appearance" of competition

On many occasions, public entities submit to the Free Competition Commission copies of files of selection procedures in which there is evidence of a simulation of competition.

The simulation of competition, that is, when two or more agents belonging to the same economic group present themselves for a selection procedure pretending to be competitors, is an infringement of the Law on State Procurement. However, it is not an infringement of the Law on the Repression of Anticompetitive Behavior.

It was the case, for example, of the Public Bidding process 004-2017-EPS TACNA S.A. convened by the Entidad Prestadora de Servicios de Saneamiento de Tacna S.A. to contract the installation of drinking water and sewage networks in various districts of Tacna. In this process, Consorcio Mejesa and J&M Constructores SRL participated, economic operators that were under the control of the marital partnership formed by Jesús Escriba and Marita Alegre. In effect, Mr Jesus Escriba was general manager and principal shareholder of the companies that conformed Consorcio Mejesa and, at the same time, Mrs Marita Alegre was the major shareholder and general manager of J&M Constructores SRL.

The Technical Secretariat of the Free Competition Commission decided not to initiate a sanctioning procedure since Consorcio Mejesa and J&M Constructores SRL acted as an economic unit, whose decision center was the marital partnership formed by Jesús Escriba and Marita Alegre. "(...) Consorcio Mejesa and J&M Constructores SRL are not independent competitors, but instead, the control and decision making concerning each one is under the same unit of interest, so that a horizontal collusive practice between them cannot have been configured".

Source: Decision 022-2018/ST-CLC-INDECOPI, May 9th, 2018 issued by the Technical Secretariat of the Free Competition Commission of Indecopi

The following are the most emblematic cases of anti-competitive conduct punishable by the Law for the Repression of Anti-competitive Behavior, so public entities may know what type of practices are prohibited and be alert to denounce them before the Technical Secretariat of Indecopi's Free Competition Commission when they have evidence of their occurrence. The classification presented below is motivated solely by educational purposes and does not correspond to a legal classification of anti-competitive behavior.

#### a) Price agreements

Price agreements are the most common restrictive practices. In the case of a bidding process or public tender, price agreements consist on a pact between competitors to offer the same selling price for the goods or services covered by the contract. They may also adopt more complex modalities such as minimum price agreements or formulas for calculating the price to be offered.

Within the framework of a selection procedure, the price agreement could have as its objective that the bidders in the collusive pact ensure that the final sale price for which the goods, services, works or consultancies of works subject to a procedure that will be acquired will be the price that they have agreed among themselves. In this way, the bidders have assured a certain level of prices convenient to their interests, in case they are winners of the selection procedure.

If all the bidders present the same economic offer, then the tie-break could be resolved by chance. In this



sense, separate price agreements are not so common but could be accompanied by reciprocal agreements, such as fractioning and distribution of the amount to be obtained in the public tender, or distribution of shifts for the award of state contracts. As an example, in a procedure where is allowed to be distributed the service or work, two companies could agree to offer the same price and divide between themselves the

#### **Case Packaging for Lubricants**

Indecopi's Free Competition Commission sanctioned two companies (Rheem Peruvian and Envases Metálicos) for agreeing on the sale price of metal containers for lubricants, required by the state company Petroperú. The agreement consisted of a concerted increase in the prices offered to Petroperú and a reduction in the volume of units offered, with the objective that the purchase of Petroperú is divided between the two suppliers.

In order to prove the anti-competitive practice, the Commission took into account the following indications:

- Between August 1992 and October 1995, the prices quoted by the two companies were different and on a downward trend.
- The two companies simultaneously changed the prices quoted to Petroperú from October 1995.
- The price quoted in October 1995 and on two subsequent occasions (February and March 1996) by both companies was identical to and higher than that of the last quotations and sales.
- Other customers of the complained companies received offers of different and lower prices than those submitted to Petroperú.
- Both Rheem Peruvian and Envases Metálicos presented their offer reducing the volume of cylinders
  offered to an amount almost equivalent to 50% of those required by Petroperú, although in previous
  years these companies had offered to supply the total number of units requested.
- This way, both companies will obtain the same price and they share between themselves the required amount, making sure Petroperú will contract with both of them.

#### Sale Proposals to Petroperú by Rheem and Envases Metálicos

Date	Petroperú	Rheem Peruana		Envases Metálicos	
Date	requirement	Price	Quantity	Price	Quantity
Aug-92	900	28.07	900	28.00	900
Dic-92	600	27.80	600	27.85	600
Mar-93	600	26.50	600	26.35	600
Feb-94	3,500	22.00	3,500	22.34	3,500
Mar-94	30,000	19.95	30,000	17.95	30,000
Apr-95	20,000	17.70	20,000	18.97	20,000
Oct-95	10,000	23.80	5,020	23.80	5,090
Feb-96	10,000	23.80	5,100	23.80	5,090
Mar-96	10,000	23.80	5,102	23.80	5,000

Source: Decision 004-97-INDECOPI-CLC, February 21st, 1997 issued by the Technical Secretariat of the Free Competition Commission and Decision 255-97/TDC, October 22nd, 1997, issued by the Specialized Court of Free Competition.

A sub-variant of the price agreement may arise at an early stage of the selection procedure. In the elaboration of the market study, it happens when public entities usually ask for quotations from different



#### companies.

In this context, the firms could agree on the same price or a minimum price level ("floor prices") to be quoted to the requesting entity. The objective would be to influence the determination of the estimated or referential value and thereby increase the cost to be paid by the public entity for the goods or services that will later be the subject of a selection procedure.

#### b) Market shares or non-competition agreements

These are the most frequent forms of collusive tendering. These are agreements between bidders or potential bidders that are intended to prevent competition between them and to assign a winner. Due to the absence of competition, the "chosen" winner will be able to obtain more profitable conditions in the provision of goods, services or works to the convening entity.

Market sharing may be based on geographical areas (regions or departments are divided or assigned), type of customers (the winner is chosen according to the convening entity), type of goods or services (the colluding bidders distribute the bids according to the type of good or service that is the subject of the call), amounts involved (the distribution of bids is made according to the values of the contracts to be entered into), among other elements.

The distribution or non-competition pact may be manifested in different ways:

#### b.1. Abstentions as a whole

The collusive pact bidders agree not to submit to a selection procedure, as a pressure mechanism for the public entity to raise the estimated or referential value or modify undesired requirements or conditions of the selection procedure, including a change in the contracting mechanism. They may also agree not to send quotations in the initial stage when the market studies are being elaborated.

Alternatively, the abstention agreement may be aimed at favoring a particular bidder. In such a case, the bidders abstain from participating except for the one that has been chosen as the winner by the cartel members.

#### b.2. Safeguard offers and disqualifications

In order to implement the collusive arrangement that seeks to favor a particular bidder, all other participating undertakings may submit bids that only give the appearance of genuine competition. Thus, these bids will not be better than the bid chosen by the cartel as the winning bid. It may be, for example:

- (i) The bidders agree to submit financial bids higher than that of the bidder chosen to win the bid so the chosen one wins.
- (ii) Bidders agree to submit bids that do not meet the minimum requirements of the selection procedure and will be disqualified, except the one chosen to win.
- (iii) A combination of the above, which means that the ones who are not chosen to win will not meet the requirements needed in order to make the chosen one win.
- (iv) The bidders agree that, even if any of them were chosen, they would not enter into a contract with the entity, in order to make the entity organize a new procedure, unless it is the bidder chosen



who has won the bid.

#### b.3. Rotation of winners

In this case, the companies involved in the bidding cartel continue to present themselves to the selection procedures, in the appearance of genuine competition, but in reality, they have taken turns winning the bids. As mentioned above, the factor for deciding which one would be the bidder who wins can be diverse: type of entity, amounts involved, and geographical area, among others.

The concerted favoring of a determined company (in any of the above modalities) can then be rewarded through various forms to the other companies:

- The subcontracting of bidders who did not win or did not participate in the competition.
- Payment of invoices to bidders who did not win or did not participate in the competition, for other types of services.
- The development of joint ventures in other types of projects (consortiums, joint ventures, among others) in which the companies that did not win or did not participate in the competition receive special profits, premiums or bonuses.

#### **U.S. Real Estate Case**

The U.S. government initiated a case against a group of real estate agents for engaging in a collusive practice in the framework of the bids they submitted to the public auctions of foreclosed properties in Fairfax County, Virginia.

The agreement consisted of fixing a lower price for the purchase of these properties and, to that end, they had agreed not to bid in the public auctions in which these properties were offered. During these auctions, the colluded agents refrained from bidding, while one agent selected in the agreement was the only one to bid and obtain the property at a lower price. The agents would then divide the properties and the savings surpluses.

Source: 148 F.3d 359. United States v. S Romer. United States Court of Appeals, Fourth Circuit.

#### c) Collusive associations

This occurs when two or more companies join in associative contracts (such as consortium) as a result of a collusive pact.

Consortiums are lawful and are permitted as a general rule by the Law on State Procurement and other state procurement regimes. However, greater vigilance should be exercised when these consortiums are formed in markets where there are few competitors or when it is formed by companies that have a high market share with the capacity to independently offer the subject matter of the procurement, (not being reasonable an agreement with a competitor). In addition to requiring evidence (such as meetings or exchanges of communications) that shows that there was no legitimate motivation for complementarity among potential bidders, but instead there was a collusive agreement not to compete among them, usually in a plurality of public tenders.



#### 3. Markets exposed to little competition and anti-competitive behavior

Some markets (more than others) present conditions in which it is easier for firms to collude. These conditions are not adverse in themselves, but they do merit special attention from the authorities in order to detect possible anti-competitive behavior. The literature on Economics and Competition Law identifies the following market characteristics:

- Reduced number of companies in the market<sup>7</sup>.
- Few or no new entrants to the market in recent years<sup>8</sup>.
- Relatively homogeneous goods or services<sup>9</sup>.
- Few substitutes for goods and services<sup>10</sup>.
- High market entry barriers<sup>11</sup>.
- Scarce innovation in the market in recent years<sup>12</sup>.
- Stable demand<sup>13</sup>.
- Public information on prices and main commercial conditions of goods and services, or easily accessible<sup>14</sup>.
- The existence of a relatively active trade, business or professional association<sup>15</sup>.

In the case of public purchases, it is common the presentation of similar goods or services or that the demand is predictable, as it seeks to generate predictability and agility in procurement <sup>16</sup>. It does not, however, prevent the convening entities and supervisory body from being attentive to possible signs of anti-competitive behavior, especially when it can be foreseen that there could be little competition in a selection procedure. The latter may be the case, for example, if:

- · During the market research phase, no quotations or low quotations were received.
- There is a history of the cancellation of the selection procedure, or it has been previously declared void.

Where it is possible that there may be little competition or that anti-competitive behavior may exist, public bodies should pay particular attention. Therefore, it is suggested to take into account the guidelines for promoting competition developed in Chapter 4 and identifying possible indications of anti-competitive behavior presented in Chapter 5.

 $<sup>\</sup>textbf{7} \ \text{The fewer companies, the easier it is to reach an agreement.} \ A \ \text{collusive pact between 2.3 or 4 companies is more likely than between 10, 15 or 20 companies.}$ 

<sup>8</sup> A collusive agreement between known companies becomes more viable, without fear of the entry of a new competitor that could break the pact or reduce its effectiveness. This may occur, for example, if no new bidder has entered in the selection procedures of the last 2 or 3 years.

<sup>9</sup> This occurs, for example, in the case of goods that are of little complexity or that qualify as commodities, such as, for example, office supplies or unprocessed food, where it is easier for suppliers to agree because the characteristics of the products will correspond to the same standard.

<sup>10</sup> If there are few substitutes, the adoption and subsistence of a collusive arrangement is more accessible, as there is no fear that buyers will purchase other types of products. It can happen, for example, with gasoline or paper where substitution is difficult.

<sup>11</sup> In markets with high barriers to market entry (very high investments or very costly legal authorizations in time and resources) there is less competition and a greater possibility of implementing an active anti-competitive practice.

<sup>12</sup> In a market with little innovation (e.g. file cabinets) it is more comfortable for a group of competitors to be able to reach a collusive agreement, as they will not have to agree on the characteristics of the good or service, compared to a market where there is more innovation (e.g. software), and there is no single standard of the good or service.

<sup>13</sup> If the purchase of a good or service remains constant (e.g. the annual contracting of the surveillance service) it becomes more predictable for bidders and less difficult to reach an agreement between competitors.

<sup>14</sup> If the prices of the goods or services offered are public (for example, they are on a website, or they are displayed on signs visible to the public) it is easier to monitor that competitors have respected the price agreed in a collusive scheme.

<sup>15</sup> If there is a guild that brings together the leading companies in the market, this association could serve as a space or opportunity for meeting and collusive agreements between competitors.

<sup>16</sup> In fact, with the recent modification of the Law on Public Procurement approved by Legislative Decree 1444, the concept of "homologation" has been strengthened, allowing public entities, national and sectorial policy issuers, to standardize the technical characteristics in their specific area of competence. This change has the potential to reduce the transaction costs of public procurement processes, improve standardization, generate predictability and facilitate the participation of a greater number of suppliers through a single list of requirements. Even the OECD recommends that public procurement contracts develop and use instruments to improve contracting procedures, reduce duplication and achieve greater profitability. In: OECD Studies on Public Governance: Public Procurement in Peru; strengthening capacity and coordination. 2017





#### 4. Guidelines for promoting competition

It is vital that officials involved in selection and procurement procedures bear in mind the benefits of competition and, before making a decision, ask themselves whether competition will encourage or restrict competition and whether there is no alternative which, while respecting the existing legal framework, would achieve the same objectives by promoting greater competition.

The following are some guidelines that public entities could follow to promote competition at different stages of the selection and procurement procedures under their responsibility. These are neither legal nor binding obligations. They are only recommended practices to make selection procedures more competitive. These recommendations are not legally mandatory, but they follow those made by the OECD and other competition agencies.

#### a) Encourage corporate purchasing

Making joint purchases with other state entities increases the likelihood of obtaining a better price per unit of product or service required. At the same time, money and time associated with conducting the selection procedure can have costs reductions. Therefore, entities must consider using this mechanism whenever possible.

#### b) Avoid possible cases of addressing and disproportionate requirements

When defining the requirements to participate in a selection procedure, it is advisable to identify if only (1) one bidder can fulfill any of them, and could be unjustifiably favored. If possible, the requirements should preferably aim at the functional performance expected of the goods or services, as well as at what is expected of bidders, avoiding any targeting and calling more bidders.

Likewise, when formulating technical specifications or terms of reference, it should be avoided to include requirements that are disproportionate to the type of good or service to be contracted, without sacrificing the suitability and quality of the goods or services required.

#### Requirements restricting competition

In various pronouncements, the State Procurement Tribunal has reviewed the lawfulness of the requirements contemplated in the bases of the selection procedures convened by public entities to assess whether they comply with the principles of competition, equal treatment and free competition.

Thus, for example, in a case of a simplified award, the Tribunal found that a public entity requiring the purchase of ceramics had provided -among the characteristics of the goods to be acquired-elements such as texture and finishes that coincided only with the offer of a particular brand. Thus, a single supplier was favored without, in any case, having followed the standardization process required to do so.

For this reason, it declared the entire selection procedure null and void and that it goes back to the call stage.

Source: Decision 2054-2016-TCE-S3, December 15th, 2016, issued by the Court on Public Procurement of OSCE



#### c) Choosing evaluation factors that meet the objective of procurement and are pro-competitive

The evaluation factors for choosing the winner of a selection procedure should seek a perceptible utility for the convening entity. Thus, it is recommended that the evaluation factor for selecting a bidder not only allows for differentiation between bids but that the differentiating element is relevant to the purposes pursued by the public entity. It should be avoided that the evaluation factor becomes an indirect way of addressing or limiting competition.

#### **Public Transportation Corridors Case**

The Public Tender 001-2012-MML-IMPL was convened by the Metropolitan Institute Protransporte of Lima (Protransporte) on behalf of the Metropolitan Municipality of Lima in order to grant the concession for the provision of public passenger transport service in the route packages of the Complementary Corridors belonging to the Integrated Transport System of Lima.

The qualification in this selection procedure privileged with a higher score those transport companies that already offered services on the routes to be tendered. This discouraged new companies -national or foreign, and with a significant economic and technical capacity- to submit proposals. As a result, in 36 packages of routes tendered (out of a total of 49 packages) there was hardly a bidder; and in 6 packages, none.

For this reason, the Commission for the Defense of Free Competition drafted and approved a Competition Advocacy that recommended "avoiding restrictions on the participation of incoming companies by favoring operating or established companies" <sup>17</sup>.

Source: Decision 013-2015/ST-CLC issued by the Technical Secretariat of the Free Competition Commission and Competition Advocacy of Public Tender 0012012-MML-IMPL, approved by the Free Competition Commission

#### d) Maintain fluid communication with the competition authority

A convening entity must know how to contact the competition authority (Indecopi) and maintain an open channel of communication, both to report possible anti-competitive behavior and to request its opinion (formally) on how to encourage greater competition within a selection procedure.

The e-mail address: ST-CLC@indecopi.gob.pe and telephone number: (511) 2247800, annex 3101, are available for this type of communication.

<sup>17</sup> The Metropolitan Municipality of Lima accepted the recommendations and informed that the tender of the complementary brokers was in the formulation phase and that the recommendations would be implemented in the transaction phase, which involves the opening of the project to the market and the reception of the bidder's offers.



#### 5. Signals for the detection of anti-competitive behavior

A public body must be vigilant in identifying those elements that may be indicative of the commission of anti-competitive conduct within a selection procedure, such as those outlined in Chapter 2 of this guide. Although the public entity is not responsible for sanctioning anti-competitive practices committed by participants in a selection procedure -a task entrusted by our legislation to Indecopi-, it is crucial that the public entity try to identify and alert Indecopi of signs of anti-competitive practices<sup>18</sup>.

In addition to the attention provided during the selection procedure, it is recommended that the convening entities periodically and comparatively analyze the results of the selection procedures convened, and take note of the relevant events occurring within them to detect possible patterns of behavior and trends.

The following are some warning signs that public bodies may take into consideration to detect and report possible anti-competitive behavior.

Two preliminary considerations are relevant when a public body has suspicions of the commission of anticompetitive conduct or identifies some of the signs of collusion:

#### 1. There are greater possibilities of anticompetitive behavior in certain markets

To this end, the descriptive characteristics of markets prone to collusion, outlined in Chapter 3 of this guide, should be taken into account, and particular vigilance should be exercised in selection procedures relating to such markets.

#### 2. Not every indication or signal in itself proves the commission of anti-competitive practice.

Many of the signals presented in this guide may have perfectly rational explanations or be mere coincidences that do not imply a prior collusive pact. It is therefore important to examine them in detail and to understand the reasons that may underlie each of them.

When several clues are presented together, there is a greater likelihood of anti-competitive behavior. In these cases, it is essential that when the **public entity becomes aware of these signals, it can communicate it to Indecopi in a confidential manner as soon as possible, without interrupting the selection procedures.** 

The timely and confidential intervention of Indecopi, while the selection procedure continues, may help to collect more evidence and confirm or rule out the suspected anticompetitive practice.

#### 5.1. Warning signs at the preparatory stage

#### a) Joint replies to requests for quotations or identical or similar replies

Companies may agree to try to influence the convening entity in the determination of the estimated or referential value. The collusive agreement, in this case, could consist of the presentation of quotations at a certain price level, with amounts that are quite similar or even identical, in response to the requirements made by the entity for the determination of the reference value. In this way, the fixing of said value will respond to the amount agreed upon by the potential bidders.

<sup>18</sup> Article 14 of the Law on State Procurement



#### b) Silence or delays coinciding with requests for quotations

Companies may also agree to jointly refrain from meeting the listing requirements made by the convening entity. In the face of an apparent lack of interested parties, the entity sets a high and attractive benchmark, or cancels the selection procedure and opts for a selection or procurement mechanism more suited to the interests of potential bidders (e.g. direct procurement).

#### **Hemodialysis Case**

The Free Competition Commission -in a decision confirmed by the Court Specialized in the Defense of Competition- sanctioned a group of hemodialysis centers in Lima and Callao for having used the contributions sent to the Social Health Insurance (Essalud) as a means of coordinating offers within the framework of the selection procedures that this entity convened during the years 2010, 2011 and 2012 to procure hemodialysis services. It was a price cartel through which they sent quotations to Essalud with a price previously fixed between them, which would have originated an increase in the referential value and the price to be paid by Essalud in the public tenders to which it called.

"385. It should be remembered that the conduct of the centres investigated focused on submitting consensual quotations to EsSalud. This action had the potential to increase the upper limit of the economic proposals (referential value) to be presented in the selection processes called by EsSalud for the annual procurement of the hemodialysis service, thus allowing [the hemodialysis centers] to receive in Lima and Callao a price closer to that paid in other cities of the country. (...)

390. Faced with this situation, and had EsSalud not discovered that the payment expectations sent in the contributions of the Centers corresponded to a collective action to obtain a greater payment, EsSalud would have taken these contributions as a reliable source of the existing price in the market for the provision of the hemodialysis service with reuse, increasing the upper limit of the economic proposals, by using this information as one of the sources for its determination".

Source: Decision 019-2016/CLC-INDECOPI, February 10th, 2016, issued by the Free Competition Commission and Decision 068-2018/SDC-INDECOPI, issued on March 26, 2008, by the Court Specialized on Free Competition.

#### 5.2. Warning Signs at the Participant Registration Stage

#### a) Unusual participants

It may be strange for some companies to register as participants and go through important stages of the selection procedure (such as submission of tenders), but do not submit any tenders or submit one that is intended for disqualification (e.g. because it does not meet the minimum conditions required).

While there is freedom for a company to choose not to participate as a bidder, the hypothesis that the unusual participant could be a part of a scheme for monitoring or supervising a collusive arrangement should not be ruled out, which makes more sense if it repeatedly occurs in various selection procedures.



#### b) Unexpected absence of participants

One way of exerting pressure on the part of a group of companies or a trade association is not to participate in a selection procedure even though they have the conditions to do so. It may be an indication of a collusive agreement if it is accompanied by other conduct such as, for example, communications from a group of companies or a trade association opposing some aspect of the selection procedure (e.g. the reference value or the term of the invitation).

It also occurs when suppliers who previously participated in a selection procedure cease to do so for no apparent reason, or when they abstain from participating even though they do participate in similar procedures convened by other public entities. This decision, in principle legitimate, could also respond to a collusive agreement to stop competing or to share the market according to the convening entities.

Potential bidders could also agree not to participate in a selection procedure, with the aim of having the selection procedure be declared void and the bidding entity moving to a selection scheme more attractive to its interests (e.g. moving from a public tender to a simplified allocation).

#### 5.3. Warning signs in the stage of formulation of consultations and comments

#### a) Identical or similar consultations and observations

If the consultations and observations of a plurality of companies are coincident or even identical, it can be an indicator of a previous agreement between competing companies to jointly influence the determination of the bases of the selection procedure.

These similarities may arise not only in the content of consultations and observations but also in aspects of form (other than those required by law or institutionally), such as, for example, spelling or drafting errors, among others.

#### b) Directed consultations and observations

An unusual aspect could occur if more than one company formulates a consultation or observation from a selection procedure, the content of which - if handled by the convening entity - favors a particular bidding company. It could be an indicator of a collusive pact to benefit a company.

#### 5.4. Warning signs after the prequalification stage

#### a) Unexpected withdrawals or disqualifications

In selection procedures where a pre-qualification stage is envisaged, there is an opportunity for participating companies to identify with each other and contact each other for a potential collusive arrangement. It occurs between the time when the list of pre-qualified bidders is published and the time when they must submit their final bid.

If any of the pre-qualified bidders unexpectedly withdraws from submitting a final proposal, or the sending bidder fails to meet the minimum requirements, one can explore the hypothesis that this occurred as a result of a collusive arrangement.



#### b) Consortiums between pre-qualified companies

If a company has managed to pass the pre-qualification stage, it is possible because it could take charge of the contract, in case it is chosen.

In this context, it may be strange that two or more pre-qualified companies decide to form a consortium (when the bases permit). Consideration should also be given to the hypothesis that the decision responds to a motive of avoiding competition among them and sharing the profits of the selection procedure.

#### 5.5. Warning Signs at the Bid Submission Stage

#### a) Economic or technical offers with an identical or repeated pattern

The coincidence of prices in an economic offer may be due to more than one reason. It may respond, for example, to a highly competitive market or to signals provided by the convening entity itself, which happens, for example, when several bidders submit a price offer that matches with that of the referential or estimated value.

As a result, price matching becomes relevant as an indication of possible collusive behavior when prices are strangely high (compared to previous bids, for example) or when a pattern is repeated in more than one selection procedure (before the same or another entity).

Coincidences in structures or cost estimates may also be indicators of a collusive arrangement, when these are required as part of the description of the economic offer.

Another repetitive pattern can be seen when two or more bidders present the same professional staff in the offers of the same selection procedure in a market where there is no shortage of professionals. The collusive hypothesis makes more sense if there are other coincidence such as the identity of content or date in the legalized letters of commitment of essential personnel presented by different bidders.

Also in this assumption, the coincidence of qualified personnel, warehouses, infrastructure or other aspects acquire relevance as an indication of possible collusive behavior, when it is a repeated and unjustified pattern in more than one selection procedure.

#### b) Repeatedly losing or disqualified bids

In order to give the appearance of legality and the non-existence of a collusive agreement, some companies may participate in the contest without any expectation of winning. In this case, the bidders repeatedly present offers destined to lose (for example, offers that exceed the referential value when repeatedly the winning offer is at the same level or below the referential value), or even offers that will be disqualified for not complying with some minimum requirement or for not having the respective capacity to execute the work, or for exceeding the referential value beyond what is legally allowed.

#### c) Sudden or unusual increases in the prices offered

A high price in the bid of some bidders may be due to rational profit-maximizing behavior. However, if prices are strangely high in several of the bidders, or if there is a considerable increase in comparison with previous or close selection procedures over time (conducted by the same entity or other



convening entities), this may be a preliminary indication of a collusive arrangement between the bidders.

#### d) Sudden or unusual reductions in the prices offered

A sudden fall in the prices offered by bidders not explained by a reduction in costs or a variation in market conditions may be an indicator of the termination of a collusive pact. For this reason, it is appropriate to analyze for this indicator what has changed between one selection procedure and another. One hypothesis could be that the entry of a new competitor, for example, has led to a higher level of competition and the end of a collusive arrangement.

#### e) Striking and sustained differences between the prices offered and the price offered by the winning firm

It may be the case that a group of companies have coordinated distribution of tenders so that they take turns to win certain public tenders. Where this is the case, one way to implement such an agreement is for the losing firms to submit distant bids at prices or conditions less favorable than those of the firm designated to win the public tender. If this repeatedly occurs in several selection procedures involving the same group of undertakings, the hypothesis that this pattern of conduct has been previously agreed between the bidding undertakings may be considered.

#### f) Bids and contract awards follow a geographical pattern

Suppliers may have agreed on the geographical distribution of tenders and, under that agreement, the same bidder wins the tenders in a particular area, while the rest of the bidders continuously choose not to present themselves, or to present a proposal that is disqualified or loses in the tender. These aspects would be the case when there is the possibility of competition at the national level.

#### **Medical Oxygen Case**

The Free Competition Commission determined that three companies (Praxair Perú, Aga and Messer Gases del Perú) have distributed between themselves selection procedures convened by the Social Health Insurance (Essalud) for the acquisition of liquid and gas medical oxygen between January 1999 and June 2004. The distribution had been made geographically, with one company winning bids in the north of the country, another in the center, and the third in the capital, Lima, and the south of the country.

During that period, the companies in question executed a collusive scheme whereby, in each selection procedure, two of them presented "safeguard" positions, above the upper limit established by the public procurement rules then in force, in order to disqualify themselves and guarantee that Essalud would grant good pro to the third company that had previously been designated among them.

 $Source: Decision\,051-2010/CLC-INDECOPI, August\,13th, 2010, issued\,by\,the\,Free\,Competition\,Commission\,and\,Decision\,1167-2013/SDC-INDECOPI,\,July\,15th,\,2013,\,issued\,by\,the\,Specialized\,Court\,on\,Competition.$ 



#### g) Suppliers withdraw from the selection procedure or desist from submitting a tender

An additional wake-up call may occur when a company or group of companies have registered as participants and go through some stages of the selection procedure such as the submission of bids and desist from further bidding at the last minute. Attendance at this type of session may be due to monitoring of the collusive pact, or to care for appearances, simulating genuine competition.

#### **Hemodialysis Case**

In the above mentioned case, the Free Competition Commission proved that, after submitting their agreed-upon quotations, and due to the fact that EsSalud did not raise the referential value for the contracting of the hemodialysis service based on those quotations, the hemodialysis centers jointly and concerted abstained from participating in the selection procedures called by said entity, with the purpose of obliging it to make use of its quotations for the determination of the mentioned referential value. These aspects led EsSalud to declare these selection procedures void and to make successive calls for proposals for more than two (2) years.

On the other hand, the Commission verified that, although the hemodialysis centers mentioned above abstained from presenting themselves to the selection procedures called by EsSalud, many of them continued to provide the hemodialysis service in favor of their members by other public contracting modalities.

Source: Decision 019/2016/CLC-INDECOPI, February 10th, 2016, issued by the Free Competition Commission and Decision 068-2018/SDC-INDECOPI, March 26th, 2018, issued by the Specialized Court on Competition.

#### h) Rotations in the successful tenderer of the award of the contract

A strange pattern in selection procedures occurs when successful bidders rotate on a regular basis as if they had agreed to take turns winning public tenders.

#### i) Unusual consortium

Consortiums are, prima facie, lawful and permitted by the State's legal contracting regime and may even, in some instances, favor competition (e.g. small or medium-sized enterprises that join together to meet technical requirements and compete with larger companies). However, in exceptional cases, where other elements are involved, they could indicate a collusive arrangement.

In effect, the consortium may not have its origin in need for complementarity but in a collusive pact, when it is noticed that, due to the amounts involved or the requirements stipulated, the companies that make up the consortium could have competed separately. An indication for this type of cases may arise when, without any significant variation in market conditions, two or more companies begin to resort to a selection procedure in a consortium, when before they did so independently. Besides, the agreement could involve consortium participation not only in a public tender but also in a set of selection procedures.



#### Consortiums and competition

The Superintendence of Industry and Commerce of Colombia (SIC), the Colombian competition agency, investigated two consortiums related to the provision of computer services and technological solutions, Consorcio Computadoras 2002 and Consorcio Implementación Técnica, through a collusive bidding process in the framework of a contest convened by the Institute of Urban Development.

The SIC detected the existence of several signs of a restrictive practice of competition. In the first place, it verified that the natural persons that were part of the competing consortium had been members of consortia in previous contests and bids. Also, these people shared an office, personnel and equipment for the development of their activities.

Likewise, the natural persons had helped each other in the constitution of the competing consortia (Consorcio Computadoras 2002 and Consorcio Implementación Técnica) and even in the elaboration of the proposals for the bidding -following the same format and a very similar economic proposal- in which they were supposed to compete. Finally, the two consortiums were constituted on the same day. Moreover, they coincided again in the date of presentation of their proposals to the bidding process.

The aspects mentioned above led the SIC to conclude that the members of the consortium had colluded to win the bid called by the Urban Development Institute and that the composition of the consortia had been part of the collusive scheme.

Source: Decision 21822 de 2004 of the Superintendence of Industry and Commerce of Colombia.

#### j) The offers contain identical or similar content or formats

Sometimes, bidders who are part of a cartel decide to entrust one of them or a third party with the preparation of the documents containing their bids. The identity or great similarity in the formats of presentation (different from those required by law or institutionally) can be an indicator of the existence of a pact of this nature.

Similar characteristics can be found in typography, calligraphy, letterhead, structure and presentation of documents and even in spelling mistakes and errors (calculation errors, corrections or deletions, the inclusion of data corresponding to other companies, among others).



### 5.6. Warning signs at the stage of contractual performance or after the award of the contract to the winning bid

#### a) The winner of the bid subcontracts his former competitors

When such a situation arises, the hypothesis that it responds to a previous collusive pact, whereby the winner of the tender shares his profits with the cartel members through subcontracts must be studied.

#### b) The winner of the bid does not sign the contract as a result of a collusive arrangement

This scenario would occur when the original winner does not sign the contract with the convening entity, as previously agreed in a collusive arrangement (e.g., in a scenario where a competitor wins a bid that was not supposed to win, decides not to sign the contract to join the collusive arrangement). It should be noted that the procurement rules sanction the non-signing of a contract. For this reason, the economic benefit derived from possible anticompetitive conduct should be higher than the fine that would have to be assumed the winning company for not signing the contract.

#### 5.7. Other types of signals

#### a) Suspicious contacts

The participants in a selection procedure meet on dates close to crucial moments in the selection procedure (after quotations have been requested from the convening entity, or at a date close to the final deadline for the registration of participants or the submission of bids, for example). These meetings could respond to the need to agree on actions against the selection procedure.

#### **Hemodialysis Case**

In the case mentioned above, one of the indications considered by the Free Competition Commission to conclude that there had been a cartel between several hemodialysis centers in Lima and Callao was the existence of meetings of the representatives of those establishments at the request of quotations required by Essalud. In effect, meetings were convened within 24 hours following the request for quotation, while the meeting was scheduled for the same day or the day following the call.

Source: Decision 019/2016/CLC-INDECOPI, February 10th, 2016, issued by the Free Competition Commission and Decision 068-2018/SDC-INDECOPI, March 26th, 2018, issued by the Court Specialized on Competition.

#### b) Spoken or written references to an agreement between bidders

In the context of written communication by the bidders or a meeting or interview with officials of the convening entities, the same bidders may inadvertently reveal some indication of a collusive arrangement.

This may be the case if the bidders refer to an agreement between them, to a union meeting or union agreement, to a "gentleman's agreement", to "suggested prices" by a union or "the industry", to the existence of "standard market prices", to the existence of zones or clients "belonging" to other suppliers, among other similar ones.



#### c) Shared instruments

Other coinciding data that may reveal that two companies actually belong to the same economic group (and, therefore, have simulated competition), or being independent have agreed to stop competing, might be: the declaration of the same bank account; the same e-mail account; the same computer for sending documentation in the case of electronic tenders; the same address for sending and receiving communications; the same fiscal address; the same address indicated as warehouse, factory, point of distribution, point of sale, and other similar. The same person could even present the offers and documentation of two or more bidders or collect or acquire the documents for two or more companies.

Shared instruments may be indicative of anti-competitive behavior, provided that the firms involved are not part of the same economic group<sup>19</sup> of each other is not met.

#### 6. Contact with Indecopi

Officials belongings to the public entities convening the meeting, the OSCE, or any citizen may contact the Technical Secretariat or the Free Competition Commission of Indecopi to communicate the existence of evidence of the commission of anti-competitive conduct.

To facilitate the task of the Technical Secretariat, it is recommended that the person making contact have at hand specific relevant information such as the data of the selection procedure and the market involved, the identification of the bidders, the type of conduct presumed to have been committed, and any evidence of possible anti-competitive behavior (documents, e-mails, videos, photographs, among others).

If necessary, the Technical Secretariat may keep the identity of the complainant confidential and will act with reserve in the development of its investigations.

Similarly, any official may also contact the Technical Secretariat for guidance on how to encourage greater competition in the selection and contracting procedures of their entity, or for any queries on the content and scope of this guide.

Contact with the Technical Secretariat can be made Monday through Friday from 8:30 a.m. to 5:30 p.m. through the following means:

Telephone: (511) 2247800, extension 3101 Email address: ST-CLC@indecopi.gob.pe Address: De la Prosa 104 Street, San Borja, Lima 41,

<sup>19</sup> Shared instruments may be indicative of anti-competitive behavior, provided that the firms involved are not part of the same economic group it should be pointed out that there is no infringement of the rules of free competition in the case of joint action on the market by operators belonging to the same economic group because they are considered to be one and the same centre of interest and therefore one of the requirements of horizontal collusive practices requiring anti-competitive coordination to be carried out by operators independent of each other is not met.





## **Annex 1:** Checklist to identify indications of possible anti-competitive behavior

Stage	Signs of Anti-Competitive Behaviors	
Preparatory	Joint, identical or similar responses to requests for quotation	1
	Silences or delays coinciding with requests for quotations	1
Participant Registration	Unusual participants	1
	Unexpected absence of participants	1
Queries and observations	Identical or similar queries and observations	1
	Directed queries and observations	1
After prequalification	Unexpected withdrawals or disqualifications	√
	A consortium between pre-qualified companies	$\checkmark$
	Identical economic or technical offers or with a defined pattern	1
	Repeatedly losing or disqualified bids	<b>√</b>
	Sudden or unusual increases in the prices offered	<b>√</b>
	Sudden or unusual reductions in offered prices	√
Presentation of	Eye-catching and sustained differences between the prices offered and the winning price	1
bids	Bids and awarding bids that follow a geographical pattern	1
	Participants who withdraw from the procedure or desist from submitting an offer	✓
	Rotations in the successful bidder of the contract award	1
	Unusual consortiums	
	Offers with identical or similar contents or formats	1
After contract	The winner subcontracts to its former competitors	1
award	The winner does not sign the contract	<b>√</b>
	Suspicious contacts or meetings between competitors	1
Other signs	References to an agreement between bidders	1
	Instruments or resources shared between competitors	1



#### Annex 2:

Cooperation chart between Indecopi and other public entities





Suspicions of anti-competitive behavior may arise in the process of contracting with the State.





In these cases, the Guide to Fight Collusion on Public Procurement assists state entities in identifying possible indications of anti-competitive behavior.







ST-CLC@indecopi.gob.pe

If the existence of possible signs is verified, they can communicate with Indecopi, without informing the presumed responsible parties.



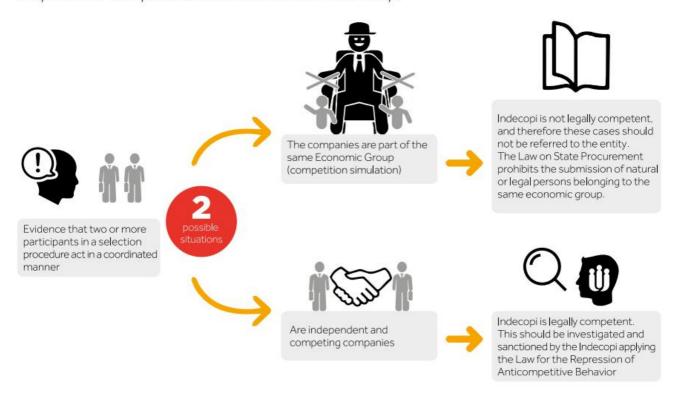




Indecopi will be in charge of investigating and, if necessary, sanctioning for the commission of anti-competitive conducts.

#### Annex 3:

Graph of anti-competitive behavior and Economic Group





#### Annex 4:

#### Examples of Economic Groups



A, B and C have the same General Manager, who has the power to make the main administrative and commercial decisions of the three companies, among them, their offer in selection procedures. Therefore, A, B and C belong to the same Economic Group because they share the same source of control in the General Manager.



A, B and C have as majority shareholders (more than 70%) Mr Pérez or Mrs López, who form a marital partnership. For this reason, A, B and C form part of the same Economic Group since their source of control is the marital partnership Pérez López, who can influence the adoption of the strategic decisions of such companies in the selection procedures.



A has Mr Pérez as majority shareholder, and company B has company C as majority shareholder, which in turn has Mr Pérez as sole shareholder. In this case, A, B and C form part of the same Economic Group, as their source of control (direct or indirect) is Mr Pérez, who can influence the adoption of the strategic decisions of such companies in the selection procedures.





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