

CHALLENGES OF COLLUSION IN THE PROCUREMENT OF COMMON USE ITEMS AND SERVICES IN ETHIOPIAN FEDERAL DEMOCRATIC GOVERNMENT PROCUREMENT SYSTEM: PARLIAMENT'S ROLE

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Abstract

Procurement of essential common-use items and services has a significant impact on the nation's development process. In a country, whether rich or poor, such public procurement is a frequent and familiar undertaking in almost every government administration. In Ethiopia, Public Procurement of common-use items and services must be taken into consideration for the socio-economic well-being of the country at large. The procurement market of common-use items and services in Ethiopia has the risk of restricting competition. It facilitates collusive tendering agreements due to the market structure and the procurement process. The challenging competition violations in the public procurement market are the same as in any ordinary market context and are mainly related to collusion. In this article, an attempt is made to closely look at the prevalence of collusion in the procurement of common items and services that forces the public buyer to pay prices, which are artificially raised, and that, in turn, results in the supra-competitive price paid by the public purchaser. Accordingly, based on the socio-legal research methodology, this paper investigates the role of Parliaments in the Procurement of common-use items and services in Ethiopia and its regulatory functions related to regulations that are formally adopted by the government in order to give effect to law for public procurement of common use items and services or to provide implementing tools in support of its application. Accordingly, due to the entry barriers, a limited number of suppliers with repeated interaction and pre and post-bid meetings of bidders as a result of transparency measures make the public procurement regime favourable for creating concerted practices. It must be kept in mind that parliaments are a part of the Ethiopian government and are responsible for shaping public policy, making laws, and, in democracies, providing legitimacy to the government through elected representation. Parliament functions in law-making, budget scrutiny, and oversight, and it allows it to play a central role in ensuring a good common items and services procurement system.

Keywords: Collusion, Procurement, Common Use Items, Services, Tendering

Introduction

Collusion is defined in the Black Law Dictionary as an agreement to defraud another or to obtain something forbidden by law (Black Law Dictionary, 7th Ed). The public procurement market has the risk of collusive tendering agreements due to the market structure and the procurement process. Competition violations in the public procurement market are the same as in any ordinary market context and are mainly related to collusion (OECD., 2010). Collusion is the main threat to the integrity of the public procurement process (Albert, 2010), and this malaise will never be completely cured because of the intrinsic characteristics of

public procurement regulations that may facilitate collusive arrangements. The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature (Albert, 2016).

Common goods and services are defined separately in the Ethiopian Federal Government Procurement and Property Administration Proclamation No.649/2009, Article 2. First, the proclamation requires that "Goods" mean the raw material, products and equipment and commodities in solid, liquid or gaseous form, marketable software, and live animals, as well as installation, transport, maintenance or similar obligations related to the

supply of the goods if their value does not exceed that of the goods themselves. The same proclamation defines "Services" as any object of procurement other than works, goods, and consultancy services, such as maintenance, security, janitorial, electricity, telecommunication, and water supply services.

Yet key economic findings have not always generated as strong a legislative reaction as could have been expected, and most public procurement regimes still contain several rules and administrative practices that could restrict competition (Albert, 2016). Various factors can restrict and facilitate the formation of collusion (OECD, 2008). However, the role of public procurement in influencing the development of a competitive public market has largely been neglected, and the study of public procurement regulations from the market failure perspective is underdeveloped (Albert, 2015). Moreover, enforcement based on competition principles is necessary if undistorted market competition is to be attained. In this regard, national competition laws and policies can play an essential complementary role. The roles encompass the adoption and enforcement of effective rules to prevent collusive tendering (Robert, 2009).

Coming to Ethiopia, concerning the legal and regulatory public procurement framework, following the downfall of the Derg regime, the government of Ethiopia (Federal Democratic Republic of Ethiopia) promulgated a new public procurement law. After the coming into effect of the new constitution in 1995, the Federal Government of Ethiopia (FGE.) drafted new public

procurement laws and regulations, namely "The Federal Government of Ethiopia the Financial Administration Proclamation № 57/1996", which was repealed by 'The Ethiopian Federal Government Procurement and Property administration proclamation No.649/2009' that deals with procurement and contracts by public bodies. Additionally, in the Ethiopian legal system, administrative contract laws play a vital role in the regulation of public procurement by filling the gaps in the procurement law. However, according to the World Bank report, Ethiopian public procurement rules and regulations were not made on the basis of internationally recognized legal documents such as the UNCITRAL Model Law on Procurement of Goods, Works and Services. In addition, according to the report, 'the procurement laws and regulations were very weak and not comprehensive' (World Bank, 1998).

Statement of the Problem

Public procurement provides multiple opportunities for both the public and private sectors to divert public funds for private gains (Wissenschaftliche, 2002). The prevalence of collusion in public procurement forces the public buyer to pay prices, which are artificially raised, and that, in turn, results in a supra-competitive price paid by the public purchaser. As a country, the wide collusion practice in the public procurement of common items and services causes a direct and immediate negative impact on public expenditure, hampering economic development plans and causing inflation and instability in the market.

The issue of corruption arising from public procurement of common items and services is

something to worry about in Ethiopia. This is because "corruption encourages competition in illegal acts and has the potential to reduce the quality of the goods and services provided to the public" (Saima, 2009). As mentioned by the World Bank Institute, due to systemic corruption, 20-30% of procurement is wasted (Caroline, 2014). According to the Corruption Perception Index (CPI) of Transparency International (2016), African countries, including Ethiopia, are listed in the index as the top most corrupt country in the world. Due to the complexity, both public procurement and competition agencies suffer a substantial degree of information asymmetry (Stefan, 2013) in establishing whether a violation is taking place or not. Therefore, it is crucial to carefully consider structural factors facilitating collusion and affecting competition in order to prevent anti-competitive practices in Ethiopia. This research paper shall briefly outline the main source of anti-competitive acts in public procurement and forward the needed regulation to combat such acts related to the procurement of common items and services.

There is no uniform guiding principle for the adoption and application of effective public procurement of goods and services regulation applicable to all countries across the world. However, 'the United Nations Commission on International Trade Law (UNCITRAL) is working to reform the UNCITRAL Model Law of Procurement of Goods and Services (the "UNCITRAL Model Procurement Law, 2014"), an important instrument for harmonizing and strengthening procurement systems throughout the developing world. At the same time, the U.N.

Convention against Corruption, a sweeping commitment to fight corruption internationally, has been signed by 140 countries' (Christopher, 2007). In Ethiopia, the Public Procurement Framework is not backed by aggressive legal and practical reform of public procurement in order to promote sound competition in public procuring common items and service process. There are still practical collusive challenges and structural factors affecting the procurement environment under the regulatory framework of public procurement; thus, in order to tackle and prevent collusive practices in Ethiopia, important roles can be played by having national procurement rules and anti-competitive measures in the framework of public procurement.

A public institution should have a code of conduct and institutional measures. A code of conduct for officers or employees of procuring entities shall be enacted (ibid). This enacted law should address, among other things, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted should be promptly made accessible to the public and systematically maintained (Ibid). Institutional measures in a public procuring agency should have the ability to impose sanctions and debarments.

The parliament functions related to the public procurement framework generally include legislative, budgetary, oversight, elective and representative functions. However, a number of unnecessary practices caused due to the lack of

specific parliament public procurement measures in Ethiopia that specifically deal with the code of conduct for the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement of common items and services, such as declarations of interest in particular procurements, screening procedures, evaluations requirements and institutional regulation for common items and service procuring agencies. In this regard, the role of parliament is crucial for the initiation of enactment of rules or codes of conduct related to the procurement of common items and services in Ethiopia. The general objective of this research is to investigate the challenges of collusion in the procurement of common-use items and services in the Ethiopian Government Procurement Framework and the role of parliaments and to propose recommendations. More specifically, an attempt has been made in this study to examine whether the existing Ethiopian Government Procurement Framework is adequate and capable of ensuring competitiveness, efficiency, and effectiveness in preventing collusion in procuring common items and services in Ethiopia. This study also aims to identify practical challenges of collusion in procuring common items and services in Ethiopia and propose recommendations and suggestions on the role of Parliaments in preventing collusive practices in the procurement of common services in Ethiopia.

Research Methodology

This research employed qualitative research methodology because the qualitative method is deemed to be proper for conceptual analysis used

in order to get a better understanding of the public procurement issues under discussion and provides the researcher with the flexibility to interact with participants in discovering their opinions (Kristina, 2016) as this research is part of socio-legal studies, both doctrinal and non-doctrinal legal research approaches were used in order to undertake this research. It followed a doctrinal legal research approach through analysis of statutory provisions and cases. A non-doctrinal legal research approach was applied to highlight the role and function of parliaments in addressing the major challenges that affect the public procurement of common items and services in Ethiopia.

Collusive Tendering in the Public Procurement Process

Brief Overview of Collusive Tendering

Collusion is the main threat to the integrity of the public procurement process (Albert, 2010), and this malaise will never be completely cured because of the intrinsic characteristics of public procurement regulations that may facilitate collusive arrangements. The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature (Albert, 2016).

However, this key economic finding has not always generated as strong a legislative reaction as could have been expected, and most public procurement regimes still contain several rules and administrative practices that could restrict competition (Ibid). Those are best explained as various factors that can limit and facilitate the formation of collusion. All of these factors must

not necessarily be present for collusion to be likely (OECD). The mere presence or the mere establishment of a set of characteristics that facilitate collusion in a given industry does not mean that illicit conduct is actually being practiced (Stefan, 2013). Due to this complexity, both public procurement and competition agencies suffer a substantial degree of information asymmetry (Ibid) in establishing whether a violation is taking place or not. Therefore, it is crucial to carefully consider structural factors facilitating collusion and affecting competition in order to tackle anti-competitive practices and prevent publicly created competition restrictions.

Common Structural Factors for Collusive Tendering

The most common structural factors that can create fertile grounds for collusive agreements and restrict competition in the public procurement process include market structure and number of competitors, market transparency, entry barriers and participations, stability of market conditions, frequency of interaction and tendering procedures. In order to understand how these structural factors facilitate collusion and restrict competition in the public procurement process, it is vital to discuss them one by one.

Market Structure and Number of Competitors

The public purchaser is subjected to transparency requirements and is generally constrained by legislation and detailed administrative regulations and procedures that limit the strategic options to contract with all firms in the market compared to a private purchaser (OECD). Additionally, public procurement regulations tend to establish a market-

like mechanism that, in most instances, ends up isolating a part of the market that becomes highly regulated in various aspects (Albert, 2010). These, in most instances, determine the number of suppliers that are eligible to compete for public contracts and affect the competition environment.

The number of competitors in such a public market affects collusion for two main reasons. Firstly, the higher number of competitors in a market makes it difficult to coordinate among suppliers, and reaching an agreement on market shares and prices becomes complex as the number of firms increases (Nicola, 2006). Conversely, suppose participation in the tender is limited to a small number of bidders, and the cost of organizing a suitable cartel will be lower. In that case, terms of coordination become easier and monitoring the respect for terms of coordination and punishment will be easier. Secondly, the higher the number of participants, the smaller the share of the pie they get in collusive agreement (Ibid). Broader participation implies a greater incentive to deviate from any collusive agreement with the aim of bringing the residual market other than the coordinated one since monitoring such deviation becomes very difficult, and punishment is unlikely.

Market Transparency:

Transparency in public procurement refers to the amount of information disclosed to the bidders across different phases of the same tendering process. Since procurement agencies generally operate on behalf of the public and to prevent corruption and favoritism, they are under a duty to perform transparently. However, full transparency of the public procurement process, especially

disclosing competitively sensitive information, can promote collusion (OECD). Collusion can be reached and successfully sustained in a fully transparent public procurement process for two main reasons. Firstly, it gives firms complete and perfect information on the major variables of competition (OECD). Secondly, market transparency facilitates collusion by making deviations from the collusive agreement more easily detectable by rivals who can promptly retaliate (Nicola, 2008). Hence, there has to be a balance that must be struck concerning the degree of transparency needed in the purchasing process.

Stability of Market Conditions

In the case of public procurement, the market conditions, specifically the demand and supply functions, tend to be predictable. In such a scenario, it is easier to coordinate the respective strategies in a market whose conditions are relatively stable. If such variables tend to change frequently, the demand is unpredictable, and the supply conditions are constantly changing, it will be difficult to know the deviation from the agreed collusive terms due to the attempt to gain market shares or if there are more reactions to a demand shock in order to find a new equilibrium (OECD)

Entry Barriers and Participation

Generally, if barriers to entry are low or substitute products exist, collusion will not be successful in forming and maintaining (ibid). In this regard, the actual and potential entry of new competitors in a market is probably the most important force that can limit collusion and bid-rigging. It hinders collusion because potential competitors enter the market attracted by the above rate of profit gained

by the incumbent firm as a result of the collusive scheme (Nicola, 2006). On the contrary, a high entry barrier protects incumbent firms in the market from competitive pressure from potential new entrants. Therefore, it is more likely that the collusive outcome will be reached and maintained sufficiently (OECD)

Frequency of Interaction

In public procurement, the same suppliers get in touch repeatedly in the same or different markets in a relatively short period. A collusive agreement is possible if the same firms regularly meet and interact in the marketplace. Such repeated interactions affect the formation of collusive agreements and bid-rigging. The more frequently the same groups of competitors interact, the easier sustainable collusion becomes since firms are capable of adapting their respective strategies by acting and reacting to other competitors' strategies. Moreover, repeated interaction of bidders either in the same market over time or in different markets allows bidders to observe their respective patterns in bidding, and it allows for more effective punishment of firms bidding against the collusive agreement (Nicola, 2006).

Tendering Procedures

Different tendering procedures are used to award public contracts in the procurement process. It is a complicated task that requires the due consideration of a wide range of factors when designing the tendering procedures. A procurer may choose among several tendering formats, which are mainly defined according to the possibility of bidders improving their bids and the way the buying price is determined (Ibid). However, all tendering

procedures are not equally important from a competitive point of view. The introduction of new and different tendering procedures or allowing the procuring entity to adopt the standard procurement procedures according to the market situation with which it is confronted may achieve positive results in preventing collusion and maintaining robust competition in the process (OECD). For instance, where there are enough firms in the procurement market to sustain reasonable competition, efficient procurement outcomes can usually be achieved through a simple auction or tendering process (ibid). On the other hand, where there are not enough firms to sustain competition, a more sophisticated arrangement of tendering may be necessary to achieve an efficient outcome (ibid). Hence, the choice of the most suitable bidding model, given the circumstances of the procurement, is the starting point of any attempt to prevent collusion in public procurement (ibid).

The above discussion exhibits some features of the public procurement market that favors and facilitates collusion among bidders. The factors that can facilitate collusion and bid-rigging in public procurement can be summarized as small and highly concentrated suppliers with stiff entry barriers, concentrated firms who compete with each other in the same market over time, disclosure of competition-sensitive information for bidders and the manner how submitted bids are evaluated. In general, there is a belief that the risk of collusion can be reduced by ensuring that the public procurement activity is designed and carried out to ensure that three main objectives are achieved:

- Lowering barriers to entry and increasing

participation;

- Limiting the amount of information available about the outcomes of the tender; and
- Reducing the frequency of procurement opportunities (OECD).

Moreover, collusion and bid rigging in public procurement may be reduced through strict and effective enforcement of competition rules. Due to this, bid rigging and collusion are almost universally condemned violations of antitrust rules that could entail prosecution as criminal offences. Numerous jurisdictions opted to fight collusion in public procurement, both in national competition and public procurement regimes—for instance, many OECD. Countries have explicitly focused their antitrust enforcement efforts on combating and preventing bid rigging (Ibid): the Model Law, the EU. Public Sector Directive and COMMER Procurement Regulations contain provisions concerning the promotion of sound competition in public procurement proceedings. Ethiopia is a signatory state to both the Model Law and COMMER Procurement Regulations and enacted the public procurement and property administration proclamation no 649/2009 that determines the process of procurement proceeding at the federal level. The researcher will examine the efficiency of the country's legal and practical framework in promoting sound competition in the public procurement process.

Overview of the Role of Parliaments in Public Procurement in Line with its Basic Functions *Parliaments Vis-Vis Public Procurement*

The regulatory framework of public procurement law as a tool in the formulation and

Parliaments should guide the implementation of an effective and efficient system of public procurement. The key stakeholders in public procurement systems rely extensively on the capability of public procurement bodies to support the development of national procurement systems (SIGMA (2007)). Parliaments are key actors in a good public procurement system because they are involved in creating and overseeing the legal framework within which the security sector operates (DCAF) for security, development and the rule of law (2015). Parliament can improve the performance of the public procurement sector by using its powers to challenge, question, cancel or change the level of competition of whole importers in government *procurement of Common use Items and Services*.

Functions of Parliaments vis-a-vis Public Procurement Framework

Scholars generally summarize the parliament's functions related to the public procurement framework that parliaments have five main functions as follows:-

Legislative functions: Parliament creates laws that determine the mandate, function, organization, and powers of the Public Procurement Agency or providers, as well as management and oversight institutions (Ibid).

Budgetary functions: Parliament has a role in the approval, amendment or rejection of the budget for Public Procurement.

Oversight functions: Parliament monitors and verifies whether the Public Procurement Agency is acting in accordance with the constitution, laws,

regulations and policies to which it is legally subject.

Elective functions: Parliament may scrutinize, veto or approve (top-) appointments within the Public Procurement Agency, as well as vote non-confidence in case of disagreement with government decisions regarding Public Procurement

Representative functions: Parliament provides a public forum for debate on Public Procurement, facilitates political consensus through dialogue and transparency, and gives voice to popular disagreement with government decisions

Crucially, Parliaments function in law-making, budget scrutiny and oversight and allow it to play a central role in ensuring good common items and services procurement system.

The Qualities Required from Parliament

In order to perform their functions related to the public procurement framework, parliaments require at least three qualities:

Authority: parliaments must have sufficient normative and legal authority to oversee the Public Procurement system. Most states have constitutions, basic laws, regulations or statutes that confer this authority formally, but in practice, authority is not always exercised or respected.

Ability: parliaments must have sufficient resources to fulfil their constitutional roles effectively, including institutional support, access to information, analytical and research capacity, specialized skills and working relationships with security institutions and civil society.

Attitude: parliamentary representatives require a strong commitment to the democratic process

because their work is likely to create resistance and provide opportunities for corruption. Members of parliament usually have immunity from prosecution for actions taken in the course of their official duties so that their independence and integrity are protected (Ibid).

The Role of Parliaments in Tackling Collusive Tendering

The role of parliaments in public procurement in influencing the development of a competitive public market has largely been neglected, and the study of public procurement regulations from the market failure perspective is underdeveloped (Albert, 2010). Moreover, enforcement based on competition principles is necessary if undistorted market competition is to be attained. In this regard, national competition laws and policies can play an essential complementary role. The roles encompass the following three elements (Robert, 2009).

- The adoption and enforcement of effective rules to prevent collusive tendering.
- Competition advocacy activities that promote the use of sound public contracting procedures and progressive elimination of regulatory and other barriers to competition
- Other aspects of the enforcement of competition rules include the treatment of mergers and joint ventures.

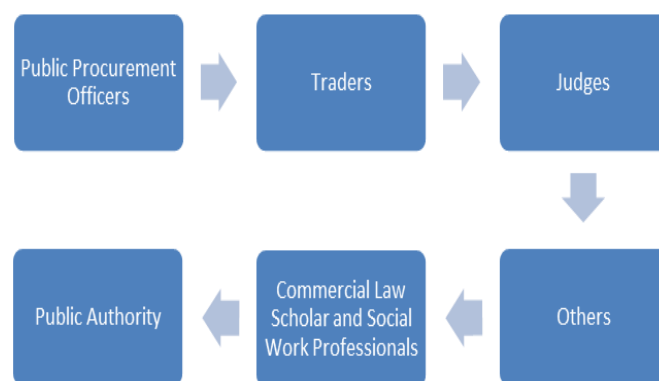
The interrelation of public procurement rules and policies is discussed in both economic and legal measures. The same is true when it comes to the important roles of parliaments that can enact efficient national competition and procurement

rules in the framework of public procurement.

Collusion under the Public Procurement Regime of Ethiopia and its Challenges in Procuring Common Items and Services

Under this study, different concerned stakeholders who have a direct relation to Collusion in Public Procurement in Ethiopia and specific areas of procurement of common items and services were purposefully selected by the researcher. Accordingly, they conducted key informant interviews and focused group discussions. The following respondents are mainly in the study:

Figure 1: Position of the Respondents



The following points summarize the major challenges in Collusion in Public Procurement in Ethiopia, basing the key informant interviews, discussions, and researcher investigations on the key issues raised and focus on the vocal problems in procuring common items and services in Ethiopia.

The Need for Efficient Public Procurement Rules and Enforcement Framework

Similar to its international counterpart, the Regulation, with a view to attracting as many possible participants in public procurement proceedings, requires disclosure of information about procurement objects and conditions of the contract coupled with the bidding documents to

have clear and sufficient descriptions of the goods and services to be purchased (COMMESSA). Fighting the anti-competitive behavior of firms is also recognized. Accordingly, pursuant to Article 15(2(b)) of the public procurement regulation, collusive practices in the public procurement proceeding are prohibited. The resulting civil and criminal liability of bidders is left to be determined by a member state's public procurement or competition law.

Crucially, the procurement proclamation prohibits collusion in the public procurement process. For this purpose, it incorporates a rule of conduct that suppliers must observe, prohibits anti-competitive behaviors and empowers the Agency to take the necessary measures for their observance. For instance, the public procurement proclamation prohibits candidates from plotting with others in an act of false competition. It authorizes the Agency to give warning or suspend candidates for a definite or indefinite period that collide with others to affect the outcome of the procurement (Public Procurement Proclamation No 649/2009).

In addition to this, the Agency can reject bids, quotations, and proposals when there is a concerted practice between suppliers (ibid). Regarding the possible criminal liability resulting from collusive tendering, Article 77(3(b)) of the procurement proclamation provides rigorous imprisonment of not less than five years and not more than 25 years and a penalty with a fine not less than Birr 25,000 and not more than Birr 50,000.

However, the mere recognition of competition-embedded principles in the public procurement framework does not simply guarantee effective

competition in the procurement process. It further requires addressing competition concerns in public procurement and devising a solution to this effect.

Fortunately, there are recent developments in the study of public procurement that indicate the need to give more attention to the possible competition restrictions or distortions created by public procurement rules and administrative practices. In order to identify direct competition concerns in Ethiopia, the interview results show that procurement rules and administrative practices that govern the design of tender terms, the choice of tendering procedures and awarding criteria of public contracts and structural factors that facilitate supplier's coordination resulting in indirect competition needs to be strictly regulated.

Barriers Hindrance from the Procurement Proceedings

To begin with, collusion is likely in a relatively stable and predictable demand of the public purchaser. A public procurement market can be considered stable where there are barriers that prevent entry by new competitors and where there are no important changes in demand (Office of Fair Trading, 2019). However, when we analyze the public procurement framework of Ethiopia, we see that there are several entry barriers attributable to excessive contract aggregation and overly narrow technical requirements. The barriers hinder small and medium enterprises and other capable candidates from the procurement proceedings.

Concerning the demand of the public purchaser, the goods and services are relatively standardized and clearly specified. There are clear references in the text of the law and other documents suggesting the

same. For instance, the procurement directive under annexes 3(1.1) b and 4 provides a list of non-complex procurement items purchased for ordinary consumption of public organizations. Regarding goods and services that are purchased under the framework agreement, they are provided in a brochure often prepared by government offices. Such publicity and prior communication for bidders give the opportunity to predict the demand of the public purchaser and may allow suppliers to divide and share contracts (interview result, 2022)¹.

Regarding entry barriers and their impact on the possibility of creating fertile ground for collusive tendering, there are entry barriers in the public procurement process attributable to procurement procedures, tendering design and award criteria. In practice, the interview result discloses that there are complaints that are lodged repeatedly by the business community who become unable to compete in the public procurement proceeding after the introduction of the framework agreement. Accordingly, the authority did not deny the fact that the framework agreement excludes numerous small businesses from participating on such proceedings. But the primary reason is the financial and managerial incapacity of firms to perform as per the terms of the contract effectively. Concerning the procurement of common goods and services in Ethiopia, it is argued that fewer suppliers emerged as advantageous and repeatedly won public contracts as a result of such procurement procedures. This is where, as per the interview result, there is fear of aggregation of contract and

the possible entry restriction in one way or another, which may become a contributing factor for collusive tendering due to repeated interaction of suppliers. However, there are no proven concerted practices yet.

Frequency of Interaction of Bidder and the Risk of Collusion

In light of the fact that collusion is easier to form and sustain when bidders repeatedly interact either on the same market over time or in different markets, one of the areas in which the authority fears the risk of collusive tendering is due to contractual and structural ties between the companies. The previously mentioned informant asserted that the risk of collusion particularly arises in the case of international competitive bidding and procurement involving domestic conglomerates such as MIDROC.K.LSAM P.L.C. (interview result, 2022)². The problem intensifies due to the difficulty of proving contractual or structural ties of suppliers registered in another jurisdiction coupled with the inefficiency of the Agency in detecting and monitoring anti-competitive behaviors.

Under the public procurement regime of Ethiopia, most federal procurements, which are termed special procurements, are centralized and carried out by the Agency (Federal Procurement Directive 2010). For instance, currently, the Agency is procuring common items for all Universities, Federal government entities and some project-based undertakings. This can entail restrictions on participation due to high costs, several entry barriers, and contract aggregation (interview result,

2022).³ Even though this is aimed at achieving economies of scale, its adverse effect in opening doors for collusive practices is undeniable. This practice makes traders compete for a variety of goods and services at one center. In turn, this may lead traders to choose to apportion a variety of goods and services rather than compete with each other. This can generate publicly created competition distortion or collusion in the public procurement market, and it is against the principle of fair and equal competition grounds for competitors.

Open Market Transparency in Public procurement and its effect on Collusion

Transparency in the public procurement regime of Ethiopia is intended to facilitate the monitoring and auditing of procurement procedures and enhance the accountability of participants in the process. However, there are some transparency measures, both in the text of the law and in practice that may facilitate the likelihood of collusion. For instance, Article 23(2) of the procurement proclamation allows the disclosure of information about the terms and conditions offered by winning and losing bidder. Such stipulations facilitate monitoring and detection of deviation by collusive firms and retaliate against the offenders, hence opening the room for the continuation of concerted practices. The good thing is that the proclamation tries to make a balance by reconciling transparency, where strategic and sensitive information that prejudices competition should not be disclosed (Public Procurement Proclamation No 649/2009).

However, there is a practice that provides opportunities for bidders to meet and communicate before and during the tender process. According to the Procurement Office in the Agency (interview result, 2022)⁴, there are repeated meetings with suppliers from the registered list at least three times a year. This increased transparency measure is employed to pinpoint the problems in the procurement process and to provide solutions on common understanding. However, such repeated meeting practices have the risk of facilitating collusive tendering, but firmly argued that the trend enhances strategic cooperation of suppliers of common goods and services. Hence, the discussion on open transparency shows the need to devise an appropriate solution for minimizing or, if possible, eliminating the rooms that facilitate collusive tendering.

Aggressive Implementation of Rules in tackling anti-competitive behaviors

Firms' anti-competitive behaviours are prohibited pursuant to Article 7 of the competition proclamation. Accordingly, an agreement between businesses, if it has the effect of preventing or lessening competition due to collusive tendering, market allocation, customer allocation and geographic allocation in any tendering, is a serious infringement of the law. One of the prerequisites for effectively tackling anti-competitive behaviours is the adoption of rules prohibiting those acts, but at the same time, they must be backed by aggressive implementation. In our case, an administrative penalty based on an infringement of the 42(2). The competition and consumer protection authority

penalizes businesses that are found to be liable for the commission of prohibited acts provided under Article 7(1& 2) of the same proclamation.

Concerning criminal liability, the power is vested in the competent federal court, but the authority prosecutor should institute the case. The prosecutor initiated the case based on the investigation conducted pursuant to Article 39(1(b)) of the competition proclamation. Ironically, the power of the inquiry entailing criminal penalty, pursuant to Article 39(1(b)), is only limited to the offences committed in transgression of Articles 22 and 24 of the competition proclamation (Trade Competition and Consumer Protection Proclamation 813/2013).

The violations provided under Articles 22 and 24 of the competition proclamation deal with consumer protection, but other violations, such as collusive tendering, are beyond the power of investigation. As a result, criminal prosecution of firms' anti-competitive behaviors in public procurement proceedings is impossible, and it puts the power of the authority's prosecutor in limbo.

Crucially, high attention is required from authorities with regard to concerns of collusive tendering of common goods and services where procurement is conducted via an international competitive bidding procedure. The greatest fear with open international competitive biddings is because participating candidates are registered abroad, and it is difficult for the Agency to monitor whether there are structural or contractual ties between them.

The other point is concerned with fighting concerted collusive tendering of common goods and services practices; both the public procurement and national competition rules play an

indispensable role in tackling or minimizing the practice. The procurement proclamation prohibits collusion and bid-rigging in the procurement process. Similarly, the national competition provides the same stipulation, but there is no aggressive implementation of both types of rules. Either body of law initiates a single case. Lack of ability to detect the signs of collusive tendering from the part of public procurement is also a major problem.

Lack of Sufficient Precedents against Collusion Practices in Ethiopia

Although no sufficient precedent against collusion practices on common goods and services in the procurement process exists in Ethiopia, it does not guarantee the absence of collusive tendering. Practically, the public procurement market has an environment that is conducive to the creation of collusive tendering behaviours on common goods and services. For instance, due to entry barriers such as excessive contract aggregation, overly narrow technical requirements, and predictability of demands due to standardization of goods and services and prior communications, the market is stable. Moreover, due to the above entry barriers, a limited number of suppliers with repeated interaction and pre and post-bid meetings of bidders as a result of transparency measures make the public procurement regime favourable for creating concerted practices.

Conclusion

This paper examines the Public Procurement of common-use items and services in Ethiopia and the regulations that are formally adopted by the government in order to give effect to the law for

public procurement of common-use items and services or to provide implementing tools in support of its application.

The procurement market of common-use items and services in Ethiopia has the risk of restricting competition. It facilitates collusive tendering agreements due to the market structure and the procurement process. The challenging competition violations in the public procurement market are the same as in any ordinary market context and are mainly related to collusion. For instance, due to the entry barriers, a limited number of suppliers with repeated interaction and pre and post-bid meetings of bidders as a result of transparency measures make the public procurement regime favorable for creating concerted practices. Furthermore, the stability of market conditions, entry barriers, frequency of interaction and market transparency are the challenging matters with regard to collusive tendering of common goods and services in Ethiopia. Regarding fighting concerted collusive tendering of common goods and services practices, both the public procurement and national competition rules play an indispensable role in tackling or minimizing the practice. However, no sufficient precedent against collusion practices exists in Procurements process in Ethiopia. But this does not guarantee the absence of collusive tendering in common goods and services. Crucially and practically, the public procurement market has an environment that is conducive for the creation of anti-competitive tendering of common goods and services.

So far, the important role of parliaments is to enact efficient national competition and procurement

rules in the framework of public procurement. Following the Parliament's functions in law-making, it has budget scrutiny and oversight functions and plays a central role in ensuring good common items and services procurement system. It must be kept in mind that parliaments are a part of the Ethiopian government and are responsible for shaping public policy, making laws, and, in democracies, providing legitimacy to the government through elected representation.

Recommendations

Based on the major examination of this article, the following recommendations are recommended.

- In order to reduce the impact of procurement procedures and practices in the procurement process related to common goods and services in Ethiopia, it is necessary to know the present. Internationally recognized guidelines should back Public Procurement laws.
- The introduction of the most suitable bidding model, given the circumstances of the procurement, is, therefore, the starting point of any attempt to prevent collusion in the public procurement of common items and services that should be adopted in Ethiopia. In this regard, the role of parliaments with concerned organs is crucial in introducing a special bidding model.
- Clear standards should be set with regard to the stability of market conditions, entry barriers, frequency of interaction, and market transparency, which are challenging matters in relation to the collusive tendering of common goods and services in Ethiopia.

- The fight against anti-competitive behaviours requires a high level of commitment from both. On the procurer's side and parliament's side. It begins with the aggressive implementation of both types of rules in the procurement of common items and services process and the legislative oversight on a regular basis.
- There has to be cooperation between the procurement agency and competition authority for the purpose of detecting and deterring anti-competitive behaviors of firms in the procurement process. Therefore, there has to be sustainable training and education of public procurement officials on detecting and investigating the signs of collusive tendering of common goods and services.
- Moreover, in order to limit the wider discretionary power of the public bodies on designing tender terms, tendering procedures and awarding criteria, there has to be a uniform protocol tailored based on the specific circumstances of procurement of common goods to ensure uniformity in the procurement process.
- To establish an information management system to ensure data analysis to identify suspicious bidding patterns and train the procurement workforce regularly on better tender design and detection of collusion.

References

Albert Sanchez Graells, 'Competition law and Public Procurement' in J. Galloway (eds.), *Intersection of Antitrust Policy and Regulations Workshop* (Oxford 2016)

Albert Sanchez Graells, *More Competition Oriented Public Procurement to Foster*

Social Welfare" (The International Public Procurement Conference, Seoul 2010)

Albert Sanchez Graells, *Competition and Public Procurement, Intersection of Antitrust Workshop*, 2015

Albert Sanchez Graells, *Public Procurement and the E.U.U.U. Competition Rules* (2nd ed., Hart Publishing 2015)

Caroline Nicholas, 'Legal background: an introduction to the UNCITRAL Model Law on Public Procurement' (EBRD-MAE-CONSIP Tor Vergata Master Programme in Public Procurement, April 2014)

Caroline Nicholas, *The W.T.O. ReW.T.O.e on Government Procurement: Challenge and Reform* (eds), *Work of UNCITRAL on Government Procurement: Purpose, Objectives and Complementarities with the Work of W.T.O. (2W.T.O.)* Cambridge University Press

Christopher R. Yukins, 'INTEGRATING INTEGRITY AND PROCUREMENT: THE UNITED NATIONS CONVENTION AGAINST CORRUPTION AND THE UNCITRAL MODEL PROCUREMENT LAW' (2007) 36 *Public Contract Law Journal*

Collusion and Competition from a State and Market Perspective, *Public Procurement: Global Revolution VT Conferences* (University of Nottingham School of Law 2013)

Competition and Public Procurement, Intersection of Antitrust Workshop Report, (2015)

D.C.A.F. CD.C.A.F.e for security, development and the rule of law (2015), "Parliaments Roles and responsibilities in good security sector governance."

D.C.A.F. CD.C.A.F.e for security, development and the rule of law (2015), "Parliaments Roles and responsibilities in good security sector governance."

Kristina Simion, *Qualitative and Quantitative Approach to Rule of Law Research* (1STedn, International Network to Promote Rule of Law 2016)

Nicola Demitri and Gustavo Piga, *Hand Book of Procurement* (1st ed. Cambridge University Press 2006)

OECD., *OECD. etition and Procurement Key Findings* [Session 1998-2010]

O.E.C.D., O.E.C.D.ic Procurement: The Role of Competition Authorities in Promoting Competition 2008

O.E.C.D., O.E.C.D.ic Procurement: The Role of Competition Authorities in Promoting Competition (2011)

Office of Fair Trading, Assessing the Impact of Public Sector Procurement on Competition, Commission National De La Competentia, Guide on Public Procurement and Competition

Robert D. Anderson and William A. Kovacic, 'Competition Policy and International Trade Liberalization: Essential Complements to Ensure Good Performance in Public Procurement' [Public Procurement Law Review, No 18, 2009]

Saima J. Zuberi, 'The High Cost of Controlling Corruption: The Achilles Heel of the O.E.C.D. DO.E.C.D.thodology for Assessment of National Procurement Systems', 40 Cont. L.J, 209, 211

SIGMA (2007), Central Public Procurement Structures and Capacity in Member States of the European Union, SIGMA Paper No. 40, O.E.C.D. PO.E.C.D.shing, Paris

Stefan E. Weishaar Cartels, Competition and Public Procurement; Law and Economics Approach to Bid Rigging (1st ed., Edward Elgar Publishing 2013)

Transparency International: Corruption Perception Index (2016)

Wissenschaftliche Artikel zu, 'OECD, OECD Principles for Integrity in Public Procurement' (Transparency International, 2002)

World Bank, 'Country Procurement Assessment Report' (1998)

Laws

Ethiopian Federal Government Procurement and Property Administration Proclamation 2009 (Federal Negarit Gazeta, 60 years 15 No.649/2009)

Federal Procurement Directive 2010

Trade Competition and Consumer Protection Proclamation 813/2013

United Nations Commission on International Trade Law: UNCITRAL Model Law on Public Procurement (General Assembly resolution 66/95, United Nations Publication Sales No. E.14.V.1 (2014)

United Nations Commission on International Trade Law: UNCITRAL Model Law on Public Procurement (General Assembly resolution 66/95, United Nations Publication Sales No. E.14.V.1 (2014) Article 26

Online Sources/Websites

<http://www.oecd.org/competition/cartel/46235884pdf>

http://www.uncitral.org/uncitral/en/uncitral/texts/procurement_infrastructure/2014_Model.html

[http://issat.dcaf.ch__Parliament's Roles and Responsibilities in good security sector governance](http://issat.dcaf.ch__Parliament's_Roles_and_Responsibilities_in_good_security_sector_governance)

<http://www.oecd.org/competition/cartel/46235884pdf>

http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.htm

<http://cpi.transparency.org/cpi2016/results>

Foot Notes

¹ Interview with Procurement and Contract Administration Directorate in Agency whose name kept for privacy reasons, interviewed on May 22, 2022

² Interview with Competition Advocacy, Training and Consumer Support Officer in Competition Authority whose name is kept for privacy reasons; the Interview was held April 10, 2022

³ Interview with the Head for Procurement and Property Administration Directorate at Federal Public University in Ethiopia, whose name is kept for privacy reasons; the Interview was held in May 2022

⁴ Interview with FDRE Public Procurement and Property Administration Agency Higher Procurement Expert whose name kept for privacy reason, interview held on April 27, 2022