

# GUIDELINES FOR PROCURERS – HOW TO RECOGNISE AND DETER BID RIGGING

## COMMERCE ACT

### INTRODUCTION

These guidelines are intended to be a practical tool to assist procurers (purchasers) to ensure open and effective competition and achieve best value for money by:

- spotting and reporting potential bid rigging; and
- designing tender processes that deter bid rigging.

Bid rigging, or collusive tendering, occurs when there is an agreement among some or all of the bidders as to which of them should win a bid. Bid rigging is a form of cartel conduct, and is prohibited by the Commerce Act 1986. Cartels are formed when companies collude with their competitors to increase or maintain prices, divide geographical territories, customers or projects between themselves, agree to limit production, and/or engage in bid rigging. This is usually done in secret.

Cartels may consist of one or more anti-competitive agreements that direct how the involved parties will act (eg, a minimum price to be charged for a product or service, or no discounting), or in some cases not act (eg, not bidding on a tender). An anti-competitive agreement can be very informal (a ‘nod and a wink’) and still remain illegal. Although there are different types of cartels, the aim of each is the same – to maximise the profits of cartel members, while maintaining the illusion of competition. When competitors engage in bid rigging (or other cartel conduct) you, as a customer, risk being overcharged for your purchases. Cartel conduct can damage the welfare of New Zealanders generally by raising prices, and also by negatively affecting other factors such as choice, innovation, quality and investment.

In recent years, the Commerce Commission has investigated a large number of alleged cartels, involving a wide variety of goods and services from electrical infrastructure equipment to towing services, wood preservatives and cardboard boxes.

### PUBLIC PROCURERS

These guidelines are particularly relevant for public procurers. The New Zealand Government is a significant purchaser of goods and services. At approximately \$30 billion per year,<sup>1</sup> the Government’s procurement spend constitutes a large share of taxpayers’ money. To ensure transparency and accountability for this expenditure, the Government has established a general procurement policy based on the principles of best value for money over whole of life, and open and effective competition.<sup>2</sup> Rules for substantial procurement by government departments require an open, competitive bidding process (tendering) as the norm.<sup>3</sup> However, such a process will only work well when competitors act and price independently and honestly.

This document should be read in view of amendments to the Commerce Act made in August 2017. The Commission will update the document in the near future to reflect changes made under the Act.

1. Ministry of Economic Development “Doing Business in NZ/Government Procurement/Government Procurement Reform/Frequently Asked Questions” <[www.med.govt.nz/templates/Page\\_\\_\\_41694.aspx](http://www.med.govt.nz/templates/Page___41694.aspx)>.

2. Ministry of Economic Development “Government Procurement in New Zealand: Policy Guide for Purchasers” (August 2007) <[www.med.govt.nz/templates/MultipageDocumentTOC\\_\\_\\_29467.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC___29467.aspx)>.

3. Ministry of Economic Development “Mandatory Rules for Procurement by Departments” (2006), <[www.med.govt.nz/templates/ContentTopicSummary\\_\\_\\_20913.aspx](http://www.med.govt.nz/templates/ContentTopicSummary___20913.aspx)>.

International experience has shown that government bodies can be targets for cartels. While there are good reasons for the principles and rules governing public procurement, they can unintentionally facilitate collusion. The requirements for transparency of process and disclosure of information can give potential colluders the information required to establish, maintain and enforce a cartel. Gone unchecked, cartel activity in public procurement can cost government significant sums of money, and ultimately it is ratepayers and taxpayers who bear that cost through increased rates/taxes, or reductions in services delivered by government agencies.

Public procurers have a special responsibility to be aware of the potential for collusive arrangements that frustrate the objectives of government procurement policy. They are accordingly expected to be aware of the Commerce Act, and to avoid anti-competitive conduct and arrangements prohibited by the Act.<sup>4</sup>

## WHAT YOU CAN DO

Cartel conduct can be very difficult to spot. As a procurer, you are uniquely placed to spot unusual bidding patterns and/or practices that may indicate unlawful collusion. If you use your procurement experience and market knowledge together with these guidelines to spot the warning signs of collusion, you can minimise the risk that you are being overcharged, and assist the Commission in detecting and deterring cartel behaviour.

Remember you will not be liable for any cartel conduct carried out by suppliers.

These guidelines will provide you with practical tips to help you not only to recognise and report, but also to deter, collusive conduct.

## DIFFERENT TYPES OF CARTEL CONDUCT

There are four main types of cartel conduct prohibited by the Commerce Act:

- bid rigging;
- market sharing;
- price fixing; and
- agreements to restrict output.

Cartelists will often employ a combination of these strategies in relation to any one tender.

Examples are given for each type of cartel conduct. As the Australian Trade Practices Act has similar provisions to New Zealand's Commerce Act, some examples given are from Australia.

4. The Office of the Auditor-General "Procurement Guidance for Public Entities" (2008), section 4.26, <[www.oag.govt.nz/2008/procurement-guide/](http://www.oag.govt.nz/2008/procurement-guide/)>.

## BID RIGGING

Bid rigging, or collusive tendering, occurs when there is an agreement among some or all of the bidders as to which of them should win the bid (the designated winner), thus eliminating competition among the colluding bidders.

There are several different types of bid-rigging agreements:

- *Cover bidding* occurs when competitors agree to submit a bid that is higher in price than that of the cartel's designated winner, or contains terms that are unacceptable to the purchaser, in order to ensure that the bid of the designated winner is selected by the purchaser, while still giving the impression of competition.
- *Bid suppression* occurs when competitors agree not to submit a bid, or to withdraw a previously submitted bid, so that the cartel's designated winner's bid will be selected.
- *Bid rotation* occurs when competitors agree to take turns being the winning bidder. Contracts may be allocated equally among competitors by volume or value, or the division may correspond to the respective sizes of each company.

Bid-rigging conspiracies can last undetected for many years, resulting in higher costs for goods and services and depriving government purchasers, and consequently taxpayers, of the benefits of true competition.

### EXAMPLE

#### **Christchurch bus cartel**

The chief executive officer of Christchurch Transport Limited had approached its next biggest competitor in the market for subsidised passenger bus services in metropolitan Christchurch. He had proposed an exchange of tender information with a view to bid rigging in order to ensure the retention of the routes historically held by each of the companies.

Despite the discussions, the businesses did not enter into a bid-rigging arrangement. Accordingly, this conduct amounted only to an attempt to breach the Commerce Act. However, the High Court of New Zealand accepted that if major competitors had exchanged sensitive information or bid-rigged, there would have been considerable scope for profit to be made in the form of an increased subsidy to be paid by the Regional Council to the successful tenderer.

The High Court ordered Christchurch Transport Limited to pay a fine of \$380,000, and its chief executive officer a fine of \$10,000, for an attempt to fix prices by bid rigging.

## MARKET SHARING

Market sharing, or market allocation, occurs when competitors agree to divide up markets among themselves. This could be through the allocation of customers, products or geographic regions to particular members of the cartel.

Following the making of such an agreement, cartel members will rig bids to ensure that the winning tender is that submitted by the party to whom that customer/product/region had been allocated.

## EXAMPLE

**Visy packaging cartel**

Visy and its competitor Amcor coordinated price rises and swapped information when negotiating quotes for larger customers to ensure that each would retain specific customers, thereby maintaining stable market shares in the corrugated fibre packaging (cardboard) industry. On occasions when the collusion was unsuccessful and a customer elected to swap supplier, another customer contract of around the same value would be exchanged.

Amcor management notified the cartel to the Australian Competition and Consumer Commission (ACCC) through its leniency policy and Amcor and its employees were accordingly granted immunity from prosecution.

The cardboard industry in Australia is worth around A\$1.8 billion to A\$2 billion per year. As a result of the cartel, many customers were significantly overcharged for their packaging purchases, and ultimately this was passed on to their own customers.

The Federal Court of Australia, following a settlement agreement between the parties, fined Visy A\$36 million, and two of its top executives A\$2 million in total, plus costs for participation in a cartel in the cardboard industry.

Proceedings are currently before the High Court of New Zealand in relation to the same or a similar cartel, as it allegedly operated in New Zealand.

## PRICE FIXING

Price fixing occurs when there is an agreement among competitors to raise, fix or otherwise maintain the price of a good or service.

This includes agreements to:

- set a minimum price;
- eliminate or reduce discounts;
- adopt a formula for computing price;
- increase prices; or
- hold prices firm.

Price fixing affects a customer's ability to shop around for lower prices.

### EXAMPLE

#### **Koppers Arch, Nufarm and Osmose wood preservatives cartel**

Following an investigation into the markets for two wood preservatives, the Commerce Commission brought proceedings in the High Court of New Zealand against Koppers Arch Wood Protection (NZ) Limited, its Australian parent company, three Nufarm companies and two Osmose companies including individual executives for breaches of the price fixing provisions of the Commerce Act. The unlawful conduct included competitors agreeing to:

- share pricing information;
- simultaneously raise prices;
- not compete on price; and
- not compete for each other's customers.

As a result of the cartel, farmers paid higher prices for fenceposts and homeowners paid more for their house framing and decking timber.

The High Court imposed fines totalling \$6.75 million on the parties to the cartel and imposed an additional \$750,000 penalty on Koppers Arch for attempts to exclude a new entrant.

One executive, the former group general manager of Osmose, was fined \$100,000 after admitting involvement in the cartel. This is the highest penalty imposed in New Zealand on an individual cartel member and reflected a discount for an early guilty plea.

## OUTPUT RESTRICTIONS

Output restrictions occur when competitors agree to reduce or restrict supply of a good or service with the aim of limiting availability, and therefore increasing prices.

### EXAMPLE

#### **Tasmanian salmon growers' cartel**

In 2003 the ACCC commenced proceedings against salmon producer Tassal and the Tasmanian Salmon Growers Association, alleging they entered into an arrangement to limit the supply of salmon and to fix, control or maintain the price of salmon.

It was alleged that Tassal and the Association had agreed that the five major growers would 'grade out' 10 per cent of salmon from the 2001 year class, and that they would later consider a possible grading out of a further 5 per cent. The purpose of these agreements was to reduce fish numbers to ensure the financial viability of the salmon farming industry in Tasmania. At the time the arrangement was entered into the Tasmanian salmon industry was in financial difficulty and supply was outstripping demand.

The Federal Court of Australia held that there was an arrangement or understanding between competitors to limit the supply of fish and that this would likely have the effect of controlling or maintaining price, in breach of the anti-competitive provisions of the Australian Trade Practices Act. Tassal and the Association agreed with the Court's findings.

Because of the very difficult state of the industry, and the fact that legal advice had been sought and cooperation shown, the ACCC decided not to pursue penalties. Instead, court orders were obtained that required the industry to establish a trade practice compliance training programme, and stop any future collusions.

## HOW TO RECOGNISE BID RIGGING AND OTHER CARTEL CONDUCT

A cartel can be difficult to detect as cartel conduct is generally carried out in secret. There are no simple indicators of a cartel's existence, but there are warning signs that, if picked up on, may lead to early detection of a cartel.

As a procurer you are in a good position to notice these warning signs and bring them to the attention of the Commission. Even the most conscientious purchaser can be unaware that a tender has been affected by cartel conduct. Set out below are things to look out for when going through the tender process.

Remember – the following factors are indicators of collusion that may call for further investigation. They are not in themselves evidence of collusion. There may be legitimate business reasons for any of the following conduct. If you have suspicions, report them to the Commission.

### THINGS TO LOOK OUT FOR

Look for suspicious bidding patterns:

- a pattern of winning bidders revealed over time (eg, bids being won in a pattern such as A, B, C, A, B, C, or particular bidders always winning contracts of a particular type or size);
- a bidder that bids relatively high in some tenders but then relatively low in other similar tenders;
- a bidder that never wins but keeps on bidding; and/or
- a bidder that rarely bids but always wins when it does so.

Look for suspicious bidding behaviour:

- likely bidders not submitting a bid;
- bids that are suddenly withdrawn (eg, on the entry of a new bidder);
- bids received at the same time, on the same paper and/or with the same post mark;
- bids received containing identical wording, particularly if it is unusual wording;

- bids containing the same errors (eg, misspelled words or mistakes in calculations);
- bids containing less detail than expected, or without required documentation;
- the same amendments being made to bids from different parties; and/or
- last minute amendments made to bids without objective justification.

Look for suspicious pricing:

- suspiciously high individual bids without objective justification;
- all bids surprisingly high;
- identical pricing;
- all discounts or rebates surprisingly small;
- pricing that makes no sense to you;
- a new company entering the bidding at a much lower price (this may indicate that the new company's bid is competitive and the existing companies have submitted elevated, non-competitive prices); and/or
- bid pricing noticeably different from previous bids with no objective justification (eg, a change in input costs). Keeping a database of previous tenders will assist with this.

Look out for other warning signs:

- the successful bidder not taking the contract, or withdrawing before the contract is awarded, without objective justification;
- the successful bidder later subcontracting to another supplier, particularly one who had submitted a higher bid;
- indications that the competitors have communicated with each other, eg, a bidder having knowledge of a competitor's bid (or previous bid), a bidder expressing surprise at being the lowest bidder, or a bidder having knowledge of matters that you have only communicated to another bidder; and/or
- a bidder referring to 'industry' or 'standard' prices or practices.

#### EXCEPTIONS UNDER THE COMMERCE ACT

You should be aware that there are some instances when apparently collusive arrangements do not breach the Commerce Act. They include:

- joint ventures (where companies combine their operations for a particular project); and
- authorisation by the Commission. In circumstances where the detriment of an anti-competitive arrangement is outweighed by the public benefit, the Commission may expressly allow the arrangement.

If you suspect collusion:

DO	DO NOT
<ul style="list-style-type: none"> <li>➤ question bidders about their pricing;</li> <li>➤ note their replies and carefully record for future reference;</li> <li>➤ check your records for any other suspicious signs;</li> <li>➤ act normally, so as not to alert the bidders;</li> <li>➤ continue with the tender process; and</li> <li>➤ report your suspicions to the Commission.</li> </ul>	<ul style="list-style-type: none"> <li>➤ accuse the bidders of illegal behaviour – if you are right, this may give them time to cover their tracks. If you are wrong, and your actions damage a bidder's reputation, you may be accused of defamation;</li> <li>➤ launch your own internal investigation without contacting the Commission. This might alert cartel members that they may be exposed and give them time to destroy evidence; or</li> <li>➤ attempt to apply your own penalty rather than reporting to the Commission.</li> </ul>

## INDUSTRY CHARACTERISTICS THAT MIGHT SUPPORT COLLUSION

Although bid rigging can occur in any sector, some markets are more susceptible than others due to particular features of the product or market. The presence of the following factors, for example, may increase the need for vigilance:

- a small number of bidders – the fewer the bidders, the easier it is for bid rigging to occur. This is particularly so where you have the same bidders involved in repeated procurements;
- little or no new entry to the bidding market – a lack of new entrants into the bidding market may facilitate existing bid-rigging efforts;
- simple or identical products – if the goods or services being purchased are standardised, simple and do not change over time it is easier for competitors to reach an agreement on price and to make that agreement longstanding;
- few substitutes – where there are few, if any, suitable alternative goods or services, companies and individuals wishing to rig bids have the comfort of knowing that their efforts to raise prices are more likely to be successful;
- regular and recurring bidding – regular bidding for the same product or service allows cartel members to allocate contracts among themselves. It also allows the cartel to credibly threaten to punish a member who acts against the interests of the cartel by targeting bids originally allocated to that member, and in that way can minimise deviations from the cartel agreement;
- existence of trade associations or other forums (professional or social) in which competitors are given the opportunity to get together and discuss matters face to face; and
- constant, predictable demand – a constant flow of demand tends to increase bid-rigging arrangements, whereas significant changes in demand or supply conditions can upset existing arrangements.

Collusion may also follow a period of vigorous competition, eg, a price war, as competitors try to find a way to recoup lost revenue by raising prices again.

Generally, collusion may also become more prevalent during an economic downturn as businesses seek to replace lost business with gains from collusive activity.

## HOW TO DETER BID RIGGING AND OTHER CARTEL CONDUCT

The risks of anti-competitive conduct in procurement can be mitigated by designing tenders in a way that minimises the likelihood of collusion. For public procurers this includes following good procurement practice in line with government procurement policies and rules.<sup>5</sup>

As a first step, if you are new to the role, learn about the market. This will better enable you to spot any warning signs of collusive conduct. Gather information about the products, suppliers and conditions in the marketplace, especially potential suppliers' prices and costs. Include information about prices in other geographic areas or for similar products. Collect information about past tenders, and, if in the public sector, seek information from other public procurers who have recently purchased similar goods or services, to improve your understanding.

In relation to the procurement process itself, there are a number of practical steps that you can take to minimise the risk of collusion:

- Include anti-collusion clauses in your tender documents.
  - Warn bidders that you will report all suspicions of collusion to the Commission.
  - Require disclosure of all subcontracting arrangements that involve communications between competitors.
  - Require bidders where possible to sign a warranty that their bid has been independently developed and that there has been no communication with competitors about, and no contract, arrangement or understanding has been entered into with competitors about price, bid submission or terms of the bid, including quality and quantity of goods or services. If such a warranty cannot be signed, seek

5. See footnotes 2, 3 and 4.



disclosure of contacts with competitors with regard to the bid.

- Require bidders to disclose any proceedings involving anti-competitive conduct in New Zealand or overseas involving the bidder, including related companies and senior management.
- Reserve the right not to award the contract if there are suspicions of collusion.

Some suggested clauses for inclusion in your tender documents can be found in Appendix 1.

- Ensure the largest number of potential bidders. The probability of bid rigging increases if you have a small number of potential bidders. Accordingly:
  - if a public sector procurer, use the Government Electronic Tenders Service (GETS) to advertise tender opportunities;
  - keep tender requirements clear and easy to follow, thereby encouraging more companies to bid;
  - think carefully about unnecessary restrictions on bidders that may eliminate companies that are in fact qualified for the job;
  - keep the costs of bidding down – allow adequate time for bid preparation, use an electronic bidding system if possible, do not require information that is of little use, and keep amendments to the forms/processes to a minimum;
  - avoid discriminatory or preferential treatment of certain classes of suppliers, or companies that have contracts up for renewal, which can discourage other suppliers from bidding. Anonymity of bidders may help to avoid this;
  - consider allowing bids on a portion only of a large contract, thereby allowing small and medium-sized companies to participate; and
  - be open to bids from foreign companies on a non-discriminatory basis (as is required of public entities under government procurement policy).
- Make it harder for bidders to communicate and agree on a strategy. In particular:
  - avoid unnecessarily presenting the bidders with opportunities to communicate with each other (eg, at pre-bid face-to-face meetings or at site inspections);
  - if pre-bid meetings are necessary, mitigate the risk of collusion by, for example, reminding attendees of their obligations under the Commerce Act;
  - where possible and practical keep the identity of bidders undisclosed to make it more difficult for cartel members to contact all bidders;
  - try to avoid predictable procurement patterns which facilitate bid-rigging schemes (eg, vary the scope of successive contracts by aggregating or disaggregating contracts);
  - manage the risks that may be associated with the use of industry consultants to conduct the tender process who may have established working relationships with bidders. Ensure any external consultants used have signed confidentiality agreements and are subject to a reporting requirement in respect of inappropriate competitor behaviour; and
  - if bids or prices do not make sense, discuss with individual bidders (not with bidders collectively);
- Define tender specifications in terms of what you want the product to do rather than by reference to specific products. This can make bid-rigging agreements more difficult to implement by allowing for alternative or innovative sources of supply.
- Remove any obligation to bid as a condition of staying on a standing list of pre-qualified suppliers.
- Consider seeking reasons for any failure to bid by a company from whom you would expect a bid.
- In the public sector consider aggregating purchases with another government body to increase the incentives for suppliers to compete, and to disrupt bid rotation schemes.
- At the end of the process, think carefully about publicly disclosing bidding information such as who bid or what the winning price was (except as required by the rules of public procurement).

## PROVIDE TRAINING TO STAFF

Training in the detection and deterrence of cartels for all procurement staff will assist staff to design a procurement process that is less susceptible to collusive conduct. The Commission would be happy to discuss this with you.

For public procurers the Ministry of Economic Development will also be providing training in good procurement practice in line with government procurement policies and rules. See [www.procurement.govt.nz](http://www.procurement.govt.nz) for details.

We recommend keeping a database of past and present bid results to assist in the detection of bidding patterns. Collusive schemes may only be revealed when the results of tenders over a period of time are analysed.

## THE COMMERCE COMMISSION

One of the roles of the Commission is to enforce the Commerce Act. The purpose of the Act is to promote competition in markets for the long-term benefit of consumers in New Zealand.

To that end, the Commission's activities include the investigation of allegations of cartel conduct prohibited by the Act and the taking of appropriate action. This can lead to the Commission prosecuting the suppliers who have been colluding. You will not be prosecuted for unknowingly awarding a contract to a cartel member.

## PENALTIES

If the court finds that a business has breached the Commerce Act it may impose a pecuniary penalty per breach of up to \$10 million, three times the commercial gain or 10 per cent of turnover. Individuals can be fined up to \$500,000 per breach. In addition, the court may ban an individual from managing a company for up to five years.

Third parties can also pursue their own private actions for potential breaches of the Commerce Act.

## LENIENCY POLICY

If you are contacted by a supplier who claims to be part of a cartel, refer them to the Commission's leniency policy available on the Commission's website at [www.comcom.govt.nz/cartel-leniency-policy/](http://www.comcom.govt.nz/cartel-leniency-policy/)

Under that policy the Commission will grant immunity from Commission-initiated proceedings to the first person involved in a cartel to come forward with information about the cartel and cooperate fully with the Commission in its investigation and prosecution of the cartel.

Leniency applications must be directed to the General Manager Enforcement of the Commerce Commission on 04 924 3720 or email [gm.enforcement@comcom.govt.nz](mailto:gm.enforcement@comcom.govt.nz)

## CONFIDENTIALITY

You may contact the Commission on a completely confidential basis. In that case, the Commission will not reveal your identity as the source of its information.

The Commission's investigations can take many months before a conclusion is reached. Accordingly, you should continue with business as normal, including completion of your tender process.

Contact the Commerce Commission with information about possible breaches of the Commerce Act.  
Telephone our Contact Centre during office hours on 0800 943 600  
Write to us at Contact Centre, PO Box 2351, Wellington 6140  
Email us at [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz)  
Website [www.comcom.govt.nz](http://www.comcom.govt.nz)

## REFERENCES

The Commission wishes to acknowledge the following sources of information used in these guidelines:

Australian Competition and Consumer Commission *Cartels: Deterrence and Detection A Guide for Government Procurement Officers* (2009).

Ministry of Economic Development *Mandatory Rules for Procurement by Departments* (2006).

Ministry of Economic Development *Government Procurement in New Zealand: Policy Guide for Purchasers* (2007).

OECD *Guidelines for Fighting Bid Rigging in Public Procurement*.

OECD *Detecting Bid Rigging in Public Procurement*.

OECD *Designing Tenders to Reduce Bid Rigging*.

OECD *Policy Brief – Fighting Cartels in Public Procurement* (2008).

OECD, Directorate for Financial and Enterprise Affairs Competition Committee Working Party No. 3 on Co-operation and Enforcement *Public Procurement – The Role of Competition Authorities in Promoting Competition – United States* (2007).

Office of the Auditor-General *Procurement Guidance for Public Entities* (2008).

United Kingdom Office of Fair Trading *Making Competition Work for You – A Guide for Public Sector Procurers of Construction*.

United States Department of Justice *Price Fixing and Bid Rigging – They Happen: What They Are and What to Look For*.

## APPENDIX 1: SUGGESTED ANTI-COLLUSION TENDER CLAUSES

The following are examples of clauses you may wish to include in your tender documentation.

These clauses are intended as a guide only. If you are in doubt about your rights and obligations you should obtain independent legal advice.

### TENDER CLAUSE 1: FACILITATING REPORTING TO THE COMMERCE COMMISSION

#### OPTION 1

The purchasing authority reserves the right, at its discretion, to report suspected collusive or anti-competitive conduct by tenderers to the appropriate regulatory authority and to provide that authority with any relevant tenderer information.

#### OPTION 2

The purchasing authority's obligation to keep tenderer information confidential will not be breached if the information is disclosed by the purchasing authority to the appropriate regulatory authority because of suspected collusive or anti-competitive tendering behaviour.

### TENDER CLAUSE 2: DISCLOSURE OF SUBCONTRACTING

Tenderers must indicate if they intend any person (or organisation) who is not an employee to perform work on the services, and they must provide their details. The contract with the successful tenderer will require the purchasing authority's prior written approval for any changes to these arrangements, and any further subcontracting.

### TENDER CLAUSE 3: WARRANTY

The bidder warrants that their tender has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor, other than:

- where certain joint venture arrangements exist between the bidder and a competitor;
- where the bidder and a competitor have an agreement that has been authorised by the Commerce Commission; and
- where the bidder has communicated with a competitor for the purpose of subcontracting a portion of the tender, and where the communication with that competitor is limited to the information required to facilitate that particular subcontract.

In such a situation, the bidder agrees to fully disclose to the tendering body the full nature and extent of any agreements with competitors.

In the event that no such disclosure is made, the bidder warrants that their bid has not been prepared with any consultation, communication, contract, arrangement or understanding with any competitor regarding:

- prices;
- methods, factors or formulas used to calculate prices;
- the intention or decision to submit, or not submit, a bid;
- the submission of a bid that is non-conforming;
- the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates; and/or
- the terms of the bid.

The bidder acknowledges that if the [department/agency etc] accepts the bidder's offer and completes any contract, the [department/agency etc] will do so in reliance on this warranty.

#### TENDER CLAUSE 4: DISCLOSURE OF PRIOR ANTI-COMPETITIVE CONDUCT

Tenderers must indicate if they, or any corporation or person associated with their tender including directors and senior management, are or have ever been subject to proceedings related to anti-competitive conduct in New Zealand or overseas. The information must include:

- the names of the parties to the proceedings;
- the case number;
- the general nature of the proceedings; and
- the outcome or current status of the proceedings.

The [department/agency etc] reserves the right, at its discretion, to exclude any tenderer from the procurement process if the tenderer, or any corporation or person, including directors or senior managers associated with their tender, has ever contravened the anti-competitive provisions of the Commerce Act or equivalent laws in New Zealand or overseas.

The [department/agency etc] reserves the right, at its discretion, to exclude any tenderer from the procurement process if full disclosure of any or all contraventions of the anti-competitive provisions of the Commerce Act or equivalent laws in New Zealand or overseas has not been made.