

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.

THE COMMERCE ACT

HOW TO RECOGNISE 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. This prevents open and effective competition and can lead to increased prices and reductions in choice, innovation and quality. As a result, procurers (purchasers) are unlikely to achieve best value for money. Bid rigging is a form of cartel conduct and is prohibited by the Commerce Act 1986.

As the conduct is generally carried out in secret, it can be very difficult to detect. The Commerce Commission has produced guidelines to assist purchasers to both recognise and deter this conduct. The guidelines can be found at www.comcom.govt.nz/anti-competitive-practices

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 Commerce Commission.

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- bids that are suddenly withdrawn (eg, on the entry of a new bidder);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.

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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.

If you suspect collusion:

DO	DO NOT
<ul style="list-style-type: none"> ➤ question bidders about their pricing; ➤ note their replies and carefully record for future reference; ➤ check your records for any other suspicious signs; ➤ act normally, so as not to alert the bidders; ➤ continue with the tender process; and ➤ report your suspicions to the Commission. 	<ul style="list-style-type: none"> ➤ 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; ➤ 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 ➤ attempt to apply your own penalty rather than reporting to the Commission.

To check for updates to this fact sheet visit: www.comcom.govt.nz/anti-competitive-practices

This fact sheet is part of a series looking at the Commerce Act and anti-competitive practices. The fact sheet How to Deter Bid Rigging and other fact sheets in this series can be downloaded from www.comcom.govt.nz/anti-competitive-practices

CONTACT

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

This fact sheet is a guideline only and reflects the Commission’s view. The publication is not intended to be definitive and should not be used instead of legal advice. It is businesses’ responsibility to remain up to date with legislation.

Only the courts can make an authoritative ruling on breaches of the Commerce Act.