

# Public Tenders and Competition Law: Are We Acting Competitively in Australia?

*By Leandra Diem & Barbora Jedličková | University of Queensland*



*Edited by Barbora Jedlickova*

# Public Tenders and Competition Law: Are We Acting Competitively in Australia?

By Leandra Diem\* & Barbora Jedličková\*\*

The concept of competition law as it relates to public procurement is not a particularly common topic of discussion in Australia. Unlike in Switzerland and some other developed countries with well-established competition-law regimes,<sup>1</sup> discussions in this area in Australia have been limited, and there are not many cases that we can draw upon as examples. In recent years, the Australian competition law watchdog, the ACCC, has been inviting public procurement officials to its media releases on cartel conduct and asked them to contact them directly to learn more about detecting cartel behavior.<sup>2</sup> This attention to public procurement started to emerge from the end of 2019, when, the ACCC published 'a guide for government procurement professionals on cartel deterrence and detection'.<sup>3</sup> This was followed by issuing a '[w]arning on cartel conduct risk in public sector tenders' in November 2021<sup>4</sup> and a successful case. In April 2023, the ACCC succeeded in a Federal Court ruling in a bid-rigging case,<sup>5</sup> which involved a \$250 million public tender for Charles Darwin University.

Thus, the ACCC recognises the importance of keeping an eye on potential anticompetitive behavior, which can happen in public tenders, especially in the form of bid rigging. However, the lack of cases makes it look as though there is no real issue and that companies generally compete fairly in public tenders. One must therefore ask a question: why is it that we do not see many examples of anticompetitive behavior in public tenders in Australia, while other well-established competition-law regimes (and even

jurisdictions smaller than Australia, such as Switzerland) have been addressing anticompetitive cartel behavior, such as bid rigging, in public tenders on a regular basis?

## What do Competition Law and Public Procurement Have in Common?

Public authorities, including government departments and local authorities, purchase products and services through the public procurement process. This commonly occurs through competitive bidding processes in the form of public tenders, whereby businesses compete for a specific tender by placing a bid. If they do not compete but, instead, pretend to compete by rigging the bid, they contravene competition law, in particular the *Competition and Consumer Act 2010* (Cth), which prohibits "bid rigging," as a type of cartel activity. Such behavior increases prices and has a detrimental effect on quality and innovation to the disadvantage of the economy and consumers. When this kind of behavior occurs in public tenders, the additional undesirable impact against the public interest is that taxpayers must foot the bill for the anticompetitive, high prices.

## Public Procurement and Bid Rigging in Switzerland

Bid rigging agreements have long been a widespread topic in Switzerland. They are primarily pursued under the auspices of the *Federal Act on Cartels and other Restraints of*

---

\* PhD Candidate and Research Assistant, Chair of Public and Economic Law, Faculty of Law, University of Lucerne, Switzerland; and Visiting Scholar, TC Beirne School of Law, University of Queensland (September – December 2023).

\*\* Senior Lecturer and Fellow, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland.

<sup>1</sup> The Czech Republic, Germany, Belgium, France, Italy, Greece and Austria for example.

<sup>2</sup> For example, see <https://www.accc.gov.au/media-release/court-action-for-alleged-tendering-cartel-at-wa-mining-camps>, accessed on 19/4/2024.

<sup>3</sup> Available at <https://www.accc.gov.au/about-us/publications/cartels-deterrence-and-detection-a-guide-for-government-procurement-professionals>, accessed on 19/4/2024.

<sup>4</sup> Available at <https://www.accc.gov.au/media-release/warning-on-cartel-conduct-risk-in-public-sector-tenders>, accessed on 19/4/2024.

<sup>5</sup> *ACCC v. Ashton Raggatt McDougall Pty Ltd* [2023] FCA 351.

*Competition (Cartel Act, CartA; SR 101) of 6 October 1995*, which aims to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interest of a liberal market economy.<sup>6</sup> Since the revision of the *Swiss Cartel Act* in 1995, Swiss Competition Authorities have consistently received indications of bid rigging relating to public procurement procedures. In 2001, the authorities intervened for the first time against a bid rigging cartel in what is now known as the "Landesbibliothek" case, where four construction companies colluded on their bids for renovating the facade of the Swiss National Library.<sup>7</sup> Since then, the Swiss Competition Commission has repeatedly commented on bid rigging in the context of public procurement procedures and imposed heavy fines on companies involved. In 2008, the Swiss Competition Commission even declared the prosecution of bid rigging in the public sector to be a priority topic of its activities.<sup>8</sup>

Since the "Landesbibliotheken" case in 2001, around 20 investigations have been concluded, with the establishment of unlawful agreements affecting competition in public procurement procedures. Perhaps the best-known and largest complex of bid rigging cases in the public sector investigated by the Swiss Competition Authorities took place in the canton of Graubünden. Based on tip-offs, the authorities opened an investigation in 2012, which was later expanded to ten separate investigations after receiving several self-reports.<sup>9</sup> The Competition Authorities found that over a thousand construction projects with a total volume of several hundred million Swiss francs had been manipulated through bid rigging. The

last two proceedings concluded in 2019; however, the Competition Authorities then discovered new evidence of further collusion, and thus opened an eleventh investigation in 2020.<sup>10</sup>

The promotion of effective competition is not only a concern under antitrust law, but also one of the four main objectives of Swiss public procurement law. The other three objectives relate to ensuring transparency, the efficient use of public funds and the equal treatment of providers.<sup>11</sup> A functioning public procurement market enables the optimal use of public resources, and a competitive public procurement system serves to achieve this goal. Additionally, in the area of public procurement, it can be assumed that the market mechanism is better able than any other system to maximize the satisfaction of needs with limited production factors and to achieve the best possible allocation of scarce resources. Competition makes it possible to choose the best value for money between different offers and this leads to an economical use of public funds. From a competition policy perspective, the framework should therefore be designed in such a way that there is competition between tenderers, leading in turn to the best price-performance ratio of offers.<sup>12</sup>

In order to promote effective competition, the Swiss legislator has given public contracting authorities the right and duty to take action themselves if tenderers participating in their award procedures participate in bid rigging agreements. They can exclude the offending tenderers from the award process, revoke the award or even abandon the entire award

<sup>6</sup> Art. 1 Cartel Act.

<sup>7</sup> ComCo, LPC/RPW 2002/1, 130 ff., *Landesbibliothek*.

<sup>8</sup> ComCo, LPC/RPW 2008/1, p. 12.

<sup>9</sup> ComCo, LPC/RPW 2019/2, 322 ff., *Hoch- und Tiefbau Engadin I*; ComCo, LPC/RPW 2020/4a, 1661 ff., *Hoch- und Tiefbau Engadin II*; ComCo, RPW 2018/4, 756 ff., *Hoch- und Tiefbau Engadin III*; ComCo, LPC/RPW 2018/4, 801 ff., *Hoch- und Tiefbau Engadin IV*; ComCo, LPC/RPW 2019/2, 302 ff., *Hoch- und Tiefbau Engadin V*; ComCo, decision of 2/10/2017, 22-0463: *Hoch- und Tiefbau Engadin VI*; ComCo, LPC/RPW 2018/4, 820 ff., *Hoch- und Tiefbau Engadin VII*; ComCo, LPC/RPW 2018/4, 736 ff., *Hoch- und Tiefbau Engadin U*; ComCo, LPC/RPW 2018/4, 841 ff., *Hoch- und Tiefbau Engadin Q*; ComCo, LPC/RPW 2017/3, 421 ff., *Hoch- und Tiefbauleistungen Münstertal*; ComCo, RPW 2020/4a, 1721 ff., *Bauleistungen Graubünden*.

<sup>10</sup> See <https://www.weko.admin.ch/weko/de/home/medien/medieninformationen/nsb-news.msg-id-84121.html>, accessed on 22/4/2024.

<sup>11</sup> Art. 2 of the Federal Act on Public Procurement (PPA; 172.056.1) of 21 Juni 2019; Art. 2 of the Intercantonal Agreement on Public Procurement of 15 November 2019 on Public Procurement (IAPP).

<sup>12</sup> See ComCo, LPC/RPW 2006/2, p. 393 ff.

procedure.<sup>13</sup> In the course of the revision of public procurement law in Switzerland, as of January 2021, the legislator expanded the options available to public contracting authorities by enabling them to impose sanctions in addition to the existing measures. These sanctions include fines of up to ten percent of the adjusted bid amount and the exclusion of the offending tenderer from future public contracts for a period of up to five years (so-called award-ban).<sup>14</sup> The extension of instruments under public procurement law underscores the significance of pursuing bid rigging in public procurement law in Switzerland.

### **Are We Acting Competitively in Australia?**

The differences between Australia and Switzerland when it comes to public tenders and anticompetitive bid rigging leads to two conclusions. Either Australians are usually well-behaved when it comes to public bid rigging, or our ability to identify anticompetitive activity in public tenders is insufficient. Looking at the Swiss regime, where public procurement has been at the center of attention, and the recent ACCC's education on detecting cartel behavior directly addressed to public procurement officials, it would suggest that the second conclusion is the correct one.

---

<sup>13</sup> Art. 43 f. PPA/IAPP.

<sup>14</sup> Art. 45 PPA/IAPP.