

Bid Rigging in Public Procurement of List of Essential drugs - Kosovo case

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Abstract:

This paper addresses some important issues about bid rigging in public procurement of pharmaceutical products (essential drugs) in Kosovo, importance of transparent and competitive procurement processes for the pharmaceutical sector, strengthening competition, preventing collusion among potential bidders, improved governance in the public pharmaceutical procurement market. The inadequate budget allocated by the Ministry of Health to supply the essential drugs list and failing to update this list causes continued problems in supplying these medicines, providing poor quality of consumable materials with increased costs and simultaneously permitting the possibility of abuse in this sector through public procurement procedures.

Keywords: Pharmaceutical sector, public procurement, bid rigging, essential drugs, competition.

INTRODUCTION:

Bid rigging, is agreements between bidders to eliminate competition in the procurement process, thereby raising prices, lowering quality and/or restricting supply, is a major risk to the effectiveness and integrity of public procurement and deprives the public sector of genuine opportunities to achieve value for money [1]. Bid rigging (or collusive tendering) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money [2]. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. The competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete (i.e., set their terms and conditions honestly and independently). Bid rigging can be particularly harmful if it affects public procurement. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace [3].

AIM AND OBJECTIVE:

Essential medicines, as defined by the World Health Organization (WHO), are the medicines that "satisfy the priority health care needs of the population"[4]. These are the medications to which people should have access at all times in sufficient amounts. The prices should be at generally affordable levels. In Kosovo, public procurement of goods, services and works is over 9.4% of GDP for 2015, the second largest expenditure after wages and salaries [5]. For 2014, public institutions through the procurement process have spent around 488 million Euros, or about 33% of the expenditure of the Kosovo Budget, slightly higher than the average of OECD countries during 2013 which was 29% [6]. But, considering the budget allocated for the Ministry of Health, Kosovo ranks among the countries with the lowest percentage of budget for the health sector (around 2 % of the GDP) or about € 65 per capita on health, compared to the figures in the region that

range from 5-7% of their respective GDP or to EU countries with a 10% or more of the budget dedicated to the health sector [7]. For the calendar year 2018 the general budget of the state is over 2.082 billion, for the Ministry of Health the total budget by economic category is 69.6 million, while for the supply with essential drugs is allocated 7.8 million. This amount of funds intended to consuming essential drugs fulfills only 60% of the needs for these medicines [8]. Thus, the lack of quality services from public health institutions continues to be hostage to the low budget, which does not even cover the minimum needs of about 1.8 million Kosovar citizens [9]. According to the Ministry of Health, the cost per capita of Kosovo for 2015 was 110.00 USD, which is the lowest in the region, where after this value, the lowest in the region for 2013 is that of Albania in the amount of 539.009 USD, which means that Kosovo spends 5 times less than Albania in public health, 7 times less than Macedonia, and 9 times less than Montenegro, Bosnia and Herzegovina and Turkey [10]. By 2013, the Ministry of Health had conducted centralized procurements that had increased the cost of spending, and had bought many drugs that were not essential to the health of the patient [11]. In 2013 was compiled the Essential List of Medicines, and since 2014 the Ministry of Health is purchasing for family medicine centers, and the procured items are delivered to the respective centers by the Economic Operators [12]. The Health Financing Agency will consolidate the estimated needs from hospitals and primary care institutions, which are processed through the Pharmaceutical Division of the Ministry of Health [13]. Prior to processing the requests to the Procurement Division, one of the roles of the Health Financing Agency is to verify the validity of the claim, to ensure that the drugs required are in the Essential Drugs List, and the availability of funds. Public Procurement in Kosovo faces various problems such as inadequate legal provisions, lack of adequate training, poor planning, lack of goodwill and integrity, lack of transparency and accountability etc. and is considered to be the most corrupted and badly managed sector within the Kosovo Public Institutions [14]. In this continuation of developments, procurement within the Ministry of Health continues to be one of the most talked about in the local

media for mismanagement, as well as for mismanagement and scheduling of tenders. During the tender's examination such as: tenant evaluation reports, contract award notices, contract notices, tender dossiers, bidders of economic operators, public contracts, decisions of the Public Procurement Review Body, expertise's reports, complaints of operators will be able to check the status of the procurement with the list of essential barriers [15]. Active procurement monitoring, accurately matching needs for essential medicines and good projects will improve the overall performance of high budget / risk institutions, and the involvement of different stakeholders in this process will bring benefits to all parties involved in the process. Business Participant (who did not win the tender), NGOs, media research journalists, members of the Committee on Public Financial Supervision, Contracting Authorities, Public Procurement Regulatory Commission, Auditor's Office will affect and reduce the potential for procurement malpractice in this sector and thereby increase the quality of their barriers, their quantity, reduce prices and improve health in general [16].

Legislative framework in procurement

Public procurement in Kosovo is regulated by Law No. 04/L-042 on Public Procurement of Kosovo, amended and supplemented by the law No. 04/L237, law No. 05/L-068 and law No. 05/L-092 and the relevant secondary legislation. Public Procurement Law of Kosovo adopted for the first time in 2003 was amended in 2007 aiming to bring procurement activities closer to EU provisions, simplifying some of the legal requirements, clarifying issues and introducing new definitions. Increased flexibility and the establishment of the independent Procurement Review Body were the most significant transformations introduced [17]. The law contains the main principles of good governance such as the principle of accountability, transparency, non-discrimination, integrity etc. The legislation is generally in line with the EU *acquis* [18]. It also reflects the principles of public procurement: value for money, free competition, transparency, equal treatment, mutual recognition and proportionality. However, Public Procurement Law has a legal vacuum for the public procurement related to the defence sector. Following the recent amendments of the law (2016), it is expected to have a review process of the secondary legislation that is affected by the changes and as well in 2017 revise the overall Procurement Law [19].

Institutional framework

The institutional framework for public procurement, responsible for policy development, enforcing and monitoring the implementation of legislation is established and is functioning [20]. The main institutions that play a key role in the Kosovo public procurement are: the Public Procurement Regulatory Commission (regulatory body), Procurement Review Body (review of complaints) and Central Procurement Agency (central procurement). Other institutions that have a role in public procurement are: Kosovo Institute for Public Administration, Office of the

Auditor General, Anticorruption Agency, Treasury in the Ministry of Finance.

Electronic procurement – is the use of information technology for the public sector, in particular for the procurement system is an incentive element for increasing efficiency during the enforcement of the procurement law [21]. By 2016, the E-procurement system has begun to apply in Kosovo. Electronic procurement will have multi-dimensional effects such as increased transparency; prevent abuse, increased competition and increased accountability and confidence during the implementation of the procurement procedures. Electronic procurement, among others, in future, will also assist in facilitating the monitoring since the data for the contracting authorities performance can be extracted from the system. Through this we will have a clear overview of the public procurement procedures from the beginning to the end, through which will be seen all the traces, whether good or unwanted, in the procurement process of pharmacovigilance [22].

Common forms of bid rigging in pharmaceutical procurement

Bid-rigging conspiracies can take many forms, all of which impede the efforts of purchasers - frequently national and local governments - to obtain goods and services at the lowest possible price [23]. Often, competitors agree in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process. A common objective of a bid-rigging conspiracy is to increase the amount of the winning bid and thus the amount that the winning bidders will gain. Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them. However, long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. Although individuals and firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one or more of several common strategies. These strategies in turn may result in patterns that procurement officials can detect and which can then help uncover bid-rigging schemes.

Cover bidding: Cover (also called complementary, courtesy) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (a) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (b) a competitor submits a bid that is known to be too high to be accepted, or (c) a competitor submits a bid that

contains special terms that are known to be unacceptable to the purchaser.

Bid suppression: Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration [24].

Bid rotation: In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

Market allocation: Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement [25].

Steps for more effective competition in pharmaceutical procurement

There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging [26]. Procurement agencies should consider adopting the following measures:

Be informed before designing the tender process: Collecting information on the range of products and/or services available in the market that would suit the requirements of the purchaser as well as information on the potential suppliers of these products is the best way for procurement officials to design the procurement process to achieve the best "value for money".

Design the tender process to maximize the potential participation of genuinely competing bidders: Effective competition can be enhanced if a sufficient number of credible bidders are able to respond to the invitation to tender and have an incentive to compete for the contract. For example, participation in the tender can be facilitated if procurement officials reduce the costs of bidding, establish participation requirements that do not unreasonably limit competition, allow firms from other regions or countries to participate, or devise ways of incentivising smaller firms to participate even if they cannot bid for the entire contract.

Define your requirements clearly and avoid predictability: Drafting the specifications and the terms of reference (TOR) is a stage of the public procurement cycle which is vulnerable to bias, fraud and corruption. Specifications/TOR should be designed in a way to avoid bias and should be clear and comprehensive but not discriminatory. They should, as a general rule, focus on functional performance, namely on what is to be achieved

rather than how it is to be done. This will encourage innovative solutions and value for money. How tender requirements are written affects the number and type of suppliers that are attracted to the tender and, therefore, affects the success of the selection process. The clearer the requirements, the easier it will be for potential suppliers to understand them, and the more confidence they will have when preparing and submitting bids. Clarity should not be confused with predictability. More predictable procurement schedules and unchanging quantities sold or bought can facilitate collusion. On the other hand, higher value and less frequent procurement opportunities increase the bidders' incentives to compete.

Design the tender process to effectively reduce communication among bidders: When designing the tender process, procurement officials should be aware of the various factors that can facilitate collusion. The efficiency of the procurement process will depend upon the bidding model adopted but also on how the tender is designed and carried out. Transparency requirements are indispensable for a sound procurement procedure to aid in the fight against corruption. They should be complied with in a balanced manner, in order not to facilitate collusion by disseminating information beyond legal requirements. Unfortunately, there is no single rule about the design of an auction or procurement tender. Tenders need to be designed to fit the situation [27].

Carefully choose your criteria for evaluating and awarding the tender: All selection criteria affect the intensity and effectiveness of competition in the tender process. The decision on what selection criteria to use is not only important for the current project, but also in maintaining a pool of potential credible bidders with a continuing interest in bidding on future projects. It is therefore important to ensure that qualitative selection and awarding criteria are chosen in such a way that credible bidders, including small and medium enterprises, are not deterred unnecessarily.

Raise awareness among your staff about the risks of bid rigging in procurement: Professional training is important to strengthen procurement officials' awareness of competition issues in public procurement. Efforts to fight bid rigging more effectively can be supported by collecting historical information on bidding behaviour, by constantly monitoring bidding activities, and by performing analyses on bid data. This helps procurement agencies to identify problematic situations. It should be noted that bid rigging may not be evident from the results of a single tender.

CONCLUSION:

The Essential List of Drugs needs to be refreshed (updated) and enriched in a way that reflects the latest news in the medical world. The Ministry of Health should ensure that the Essential Drug List includes up-to-date specifications of medicines and consumables in order to meet these standards when purchasing them;

Providing transparency in public procurement is an obligation rather than an issue of individual will. In this regard, the Ministry of Health should provide increased transparency; allow free and effective access to official documents of the Ministry of Health, in accordance with

the deadlines provided for in the Law on Access to Public Documents;

Planning of e-Procurement of the essential drugs in the essential drugs list and creating a registration system, the electronic records of patients and consumer information shall improve procurement archive, and maintain a database for all procured items based on relevant contracts; Special attention should be paid to the friction of the products under patent, to be purchased with the contract negotiation procedure with the producer in order to obtain the most favorable price without paying for the benefits of intermediation, saving time and expediting the purchase procedures and delivery. While purchasing through local distributors will only be realized when this is impossible for objective reasons;

Create a list of products that are under patents that are part of the essential drug list and the duration of the patent so that the claims are not linked to longer deadlines than the expiration of the patent;

Given the numerous changes in the market, prior to the opening of procurement procedures, the market should be explored in order to have a rough reflection on the offer that companies may have for certain products and to be protected from the fixation of price.

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