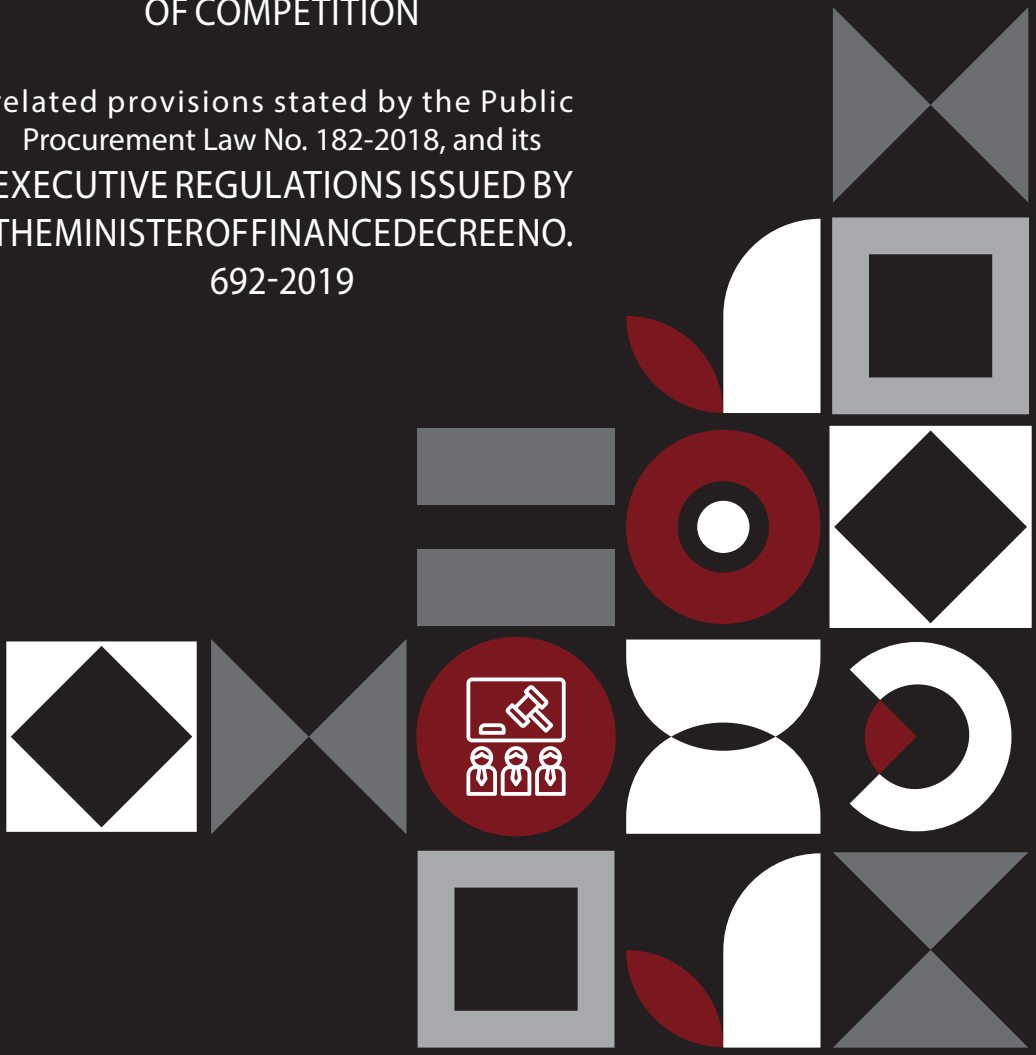
جهاز حماية المنافسة

EGYPTIAN COMPETITION AUTHORITY

GUIDELINESREGARDINGTHEAPPLICATION OF COMPETITION

related provisions stated by the Public Procurement Law No. 182-2018, and its

EXECUTIVE REGULATIONS ISSUED BY THEMINISTEROFFINANCEDECREENO. 692-2019



جهاز حماية المنافسة

EGYPTIAN COMPETITION AUTHORITY

GUIDELINESREGARDINGTHEAPPLICATION OF COMPETITION

related provisions stated by the Public Procurement Law No. 182-2018, and its

EXECUTIVE REGULATIONS ISSUED BY THEMINISTEROFFINANCEDECREENO. 692-2019



Contents

General Objectives of Guidelines 4

Introduction ٦

Part One: Bid rigging/ collusive agreements among competing persons and how to combat collusive/ rigging practices in light of Article (5) of the Executive Regulations of the Contracts Law. How to benefit from Leniency mentioned in article (26) of ECL 12

2.Elements of Bid rigging 16

2. Common Forms of Collusive practices/ Bid rigging 18

3. Ways to reduce bid rigging 20

4. Procedures for notifying ECA and consequences of bid rigging 20

Part Two: The prohibition on the bidder to submit more than one bid for each process, whether personally or in partnership with others, in light of Article (83) of the Executive Regulations of the Contracts Law 20

1. Definition of related persons in accordance with Article (5) of the Executive Regulations of ECL 21

2. Procedures for notifying ECA 22

3. Consequences of violating the prohibition of related persons to submit more than one offer for a single process 22

Part Three: Disclosure Forms and Contact details 22



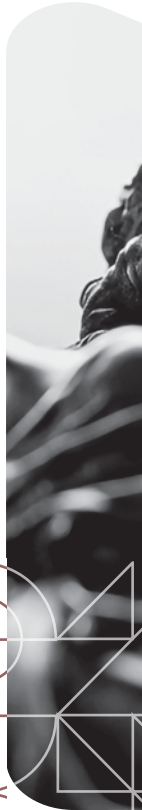
General Objectives of Guidelines

١ The main objective of the public procurement Law No. 182-2018 is to promote competition when the government purchases or rents products and services provided by market players. When there exists competition between the bidders, the government would be able to purchase products at lower cost and higher quality, as well, selling them at the best prices. This contributes to decreasing public expenditure and raising the efficiency of the public service provided by the different public entities.

٢ Therefore, among the objectives of the public procurement law is to regulate competition and ensure an effective competitive process. Effective competition between bidders, will lead to less corruption and greater transparency of the procurement process.

٣ Articles 33, 37, 38, 50 of the public procurement law and 5, 83 and 100 of its executive regulations ensure several objectives, namely:

- Effective competition among bidders.
- Submitting competitive bids in terms of quality and prices.
- Efficient distribution of the government's resources, limiting any practices that may facilitate or lead to corruption.
- Protect startups and new investors that might be harmed by their inability to compete as a result of fraudulent or collusive practices by competitors.



4 The main purpose of the guidelines in this circular is to develop mechanisms to ensure the effective application of Articles 33, 37, 38 and 50 of the public procurement law no. 182-2018; as well as Articles 5, 83 and 100 of its executive regulations, in a manner that achieves effective competition.

5 These articles have two main objectives to achieve:

- The first objective is to protect effective competition and ensure that bidders do not manipulate the public procurement process.
- The second objective is to adopt mechanisms that prevent and limit bid rigging.

6 The guidelines cover all aspects of anticompetitive practices that may disrupt effective competition and compromise public funds.

6 The most important objective of the Circular is to highlight the complementary roles of both the public procurement law and competition law in achieving such objectives. This shall be accompanied by an electronic platform linking ECA with different public entities to timely and effectively curb bid rigging, anticompetitive practices or corruption that might diminish the effectiveness and public confidence in the competitive process of public procurement.



Regarding the application of competition related provisions stated by the Public Procurement Law No. 182-2018, and its Executive Regulations issued by the Minister of Finance Decree No. 692-2019

Introduction

1. Public procurement law no. 182-2018 was adopted to achieve several objectives, including: ensuring the efficiency and effectiveness of public expenditure; applying principals transparency, integrity, freedom of competition, equality and equal opportunities; avoiding conflict of interest; providing fair treatment to market players; in addition to, preventing bid rigging, fraud, corruption and anticompetitive practices.

2. Article 33 of the public procurement law states that:
"Bidders are prohibited from submitting, in person or in partnership with others, more than one bid for each process, unless the bidder is a partner with a share that does not allow him to influence the decision-making relevant to the bid.
In case of violating the prohibition stated in the first paragraph of this Article, the administrative authority must exclude the violating bids and transfer the temporary insurance to the administrative authority or terminate the contract or execute on his expense and transfer the final insurance and oblige the contractor to bear any loss incurred if it becomes evident that it has violated such prohibition after contracting.
Administrative authorities must also notify the Egyptian Competition Authority of any violation to the provisions of this law related to the provisions of the Egyptian Competition Law promulgated by Law No. 3 of 2005".



3 This article prohibits bidders from submitting, in person or in partnership with others, whether in terms of ownership or management, more than one bid for each process. In addition, the public procurement law obligates administrative authorities to notify the Egyptian Competition Authority ("ECA") regarding any violations related to the provisions of the Egyptian Competition Law No. 3-2005 ("ECL"). Such violations may lead to several consequences, in accordance with the provisions of Articles 37, 38 and 50 of the public procurement law, notably: that the public procurement process will be cancelled, the price of the document of specifications and terms of reference and the temporary insurance will not be refunded, and conspirators from the register of suppliers will be removed.

4 The executive regulations of the public procurement law issued by the Minister of Finance Decree No. 692-2019 ("executive regulations of the public procurement law") interpreted the provisions of Article 33 as follows:

- Article 5 thereof states in detail the violations related to ECL that must be notified to ECA if the administrative authority discovers that they have occurred.
- Article 83 thereof explains the prohibition on the bidder to submit more than one bid for the same process, whether personally or in partnership with others. In addition, it explains the data and the documents that must be submitted to ECA upon notification.



4 It is evident from the legal provisions and definitions stated in both the ECL and the public procurement law that the Egyptian legislator has adopted complementary legislation to achieve the same goals in order to raise the efficiency and effectiveness of all economic sectors and public utilities.

6 The public procurement law and its executive regulations have always sought to refer to the ECL and ECA to emphasize such integration and interdependence, through the adoption of the same legal concepts, as well as providing complementary provisions to increase the effectiveness of competition policy enforcement and the prevention of anticompetitive practices.

7 The main objective of the ECL is to protect markets against anticompetitive practices that restrict freedom of the consumer to choose among the best products and services, in terms of quality and prices. In addition, most of the objectives stated by the public procurement law consist of protecting various government authorities against anticompetitive practices that threaten the efficiency of the public procurement process and deprive the authorities from obtaining high quality products at the lowest prices.



8 In order to achieve these objectives, Article 33 of the public procurement law states that public entities must notify ECA when it becomes apparent that there are anti-competitive practices related to the ECL. Article 5 of its executive regulations states the most significant anticompetitive practices that threaten the effectiveness of the public procurement process, which are similar to the provisions of Article 6 of the ECL and Article 11/c of its executive regulations.

9 Furthermore, Article 1 of the public procurement law has broadened the scope of practices that harm the public procurement process by adopting the concepts of "collusion" and "fraud", which include all anticompetitive practices stated by the ECL, in particular cartels and abuse of dominant position.







10 In order to ensure adequate deterrence against any anticompetitive practices, Articles 37, 38 and 50 of the public procurement law and Articles 5, 83 and 100 of its executive regulations state the consequences of collusion or fraud. This includes that the public procurement process will be cancelled, the price of the document of specifications and terms of reference and the temporary insurance will not be refunded, and conspirators from the register of suppliers will be removed. This is in addition to the large financial penalties stated in Article 22 of the ECL for all anticompetitive practices, including those that restrict the competition of the public procurement process.

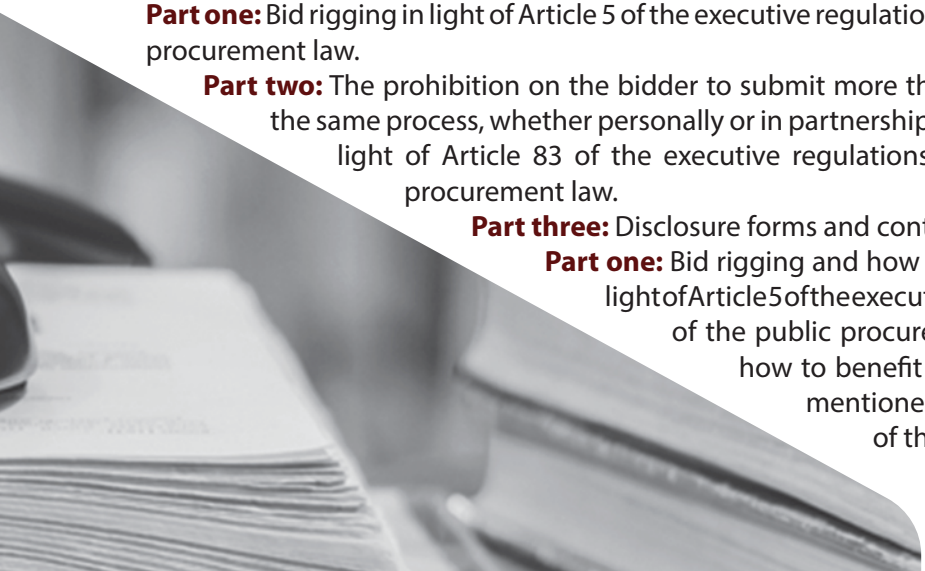
11 In order to ensure that companies do not manipulate and harm the competitiveness of the public procurement process by exploiting the concept of related parties stated by the ECL, Article 33 of the same law prohibits related parties from submitting more than one bid for the same process. Article 83 of its executive regulations states the procedures for notifying ECA of the occurrence of such prohibitions. Article 83 also refers to Article 5 of the executive regulations of the ECL in clarifying the concept of the related parties.

12 In order to guide the administrative entities subject to the public procurement law, the current guidelines provide a detailed description and interpretation of the incidents where ECA must be notified in accordance to Article 33 of the public procurement law and Articles 5, 83 and 100 of its executive regulations, as follows:

Part one: Bid rigging in light of Article 5 of the executive regulations of the public procurement law.

Part two: The prohibition on the bidder to submit more than one bid for the same process, whether personally or in partnership with others, in light of Article 83 of the executive regulations of the public procurement law.

Part three: Disclosure forms and contact details.



Part one: Bid rigging and how to combat it in light of Article 5 of the executive regulations of the public procurement law and how to benefit from Leniency mentioned in Article 26 of the ECL.

1 Article(5) of the executive regulations of the public procurement law mandates administrative authorities to notify ECA in the event of the occurrence of any form of agreement, coordination, or otherwise, as stated in the provisions of the Article which states:

"The administrative authority shall notify the Egyptian Competition Authority in the event that it discovers the existence of an agreement, contract, exchange of information, directly or indirectly, or coordination via third parties, whether such agreement has been between any of the contracting department specialists or other employees of the entity, and the bidder, or among the bidders themselves, auctioneers, or other dealers with the entity, which would lead to:

1. Increasing, decreasing or fixing prices of products subject matter of dealings.
2. Dividing product markets or allocating them on ground of geographical areas, distribution centers, type of customers, goods, market shares, or seasons or periods of time.
3. Coordinating with regard to proceeding or refraining from participating in different public procurement processes. Coordination is determined by several aspects, including:

a) Submitting identical bids, including agreement on common rules to calculate prices or determine bid terms

b) An agreement on the person who will submit the bid, including the prior agreement on the person to whom the bid would be awarded, whether on rotation basis, on geographical basis, or on which administrative authorities it is submitted to or the persons organizing the bid.

c) An agreement to submit cover bids.

d) An agreement to exclude a person from submitting bids.

2 Article ٥ clarifies two forms of collusion. The first takes place between employees of the administrative entity and the bidder. This also falls within the scope of "corruption" stated by Article ١ of the public procurement law. The second form consists of a collusion, which occurs among the bidders. This falls within the scope of "collusion" stated by Article ١ of the public procurement law. This form is similar to horizontal agreements prohibited by Article ٦ of the ECL and Article ١١ of its executive regulations.

3 Article 6 of the ECL states:

"Agreements or contracts between competing Persons in any relevant market are prohibited if they cause any of the following:
a) Increasing, decreasing or fixing prices of products subject matter of dealings.
b) Dividing product markets or allocating them on ground of geographical areas, distribution centers, type of customers, goods, market shares, or seasons or periods of time.
c) Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
d) Restricting processes of manufacturing, production, distribution, or marketing of goods or services. This includes restricting product type or volume or limiting the availability thereof.

4 Moreover, Article ١١/c of the executive regulations of the ECL states:

Coordination is determined by the following aspects:
1. Submitting identical bids, including agreement on common rules to calculate prices or determine bid terms.
2. An agreement on the person who will submit the bid, including the prior agreement on the person to whom the bid would be awarded, whether on rotation basis, on geographical basis, or on which administrative authorities it is submitted to or the persons organizing the bid.
3. An agreement to submit cover bids.
4. An agreement to exclude a person from submitting bids.

5 Horizontal agreements are defined as "the concurrence of wills of two or more persons, considered by law to be competing persons in an economic activity, with the intention of restricting or limiting competition in the market in which they operate, whether such an agreement is written, oral or based on an active or passive activity."[1] In the same context, Article 1 of the public procurement law defines collusion as "an arrangement between two or more parties before or after submitting a bid, to achieve an illegal objective or to infringe the principle of equal opportunities and the principle of freedom of competition, including direct or indirect influencing the actions taken by a third party, with the aim of dividing contracts among bidders or fixing bid prices in a non-competitive manner."

6 Horizontal agreements prohibited by Article 6 of the ECL are considered to be among the most harmful anticompetitive practices. Each economic entity should take its decisions individually without the influence of other entities., This should be in line with the principles of the free market economy, according to which competition among different entities should be based only on supply and demand mechanisms without any influence from third parties. The negative effects of such agreements include: price increase; loss of incentive for companies to reduce cost or to innovate; harming social and consumer welfare; distribution inefficiency; and transfer of wealth from consumers to parties of the horizontal agreement. Accordingly, anti-competitive horizontal agreements harms the principles of a free market economy, which has a negative impact on the structure of the market and the consumer.



1- Cairo Economic Court judgement - Second circuit economic misdemeanour - Misdemeanor No. 1898 of 2016 - issued on February 28, 2018 p. 17

7 The significance of such an offence increases when its bid rigging, as it does not only harm the structure of the market and the consumer, but also harms the effectiveness and efficiency of government spending. Therefore, government entities will not benefit from receiving the best price and quality, which would directly harm public interest.

8 This circular clarifies the elements of bid rigging, how to combat such practice, and how to benefit from the leniency stated by Article 26 of the ECL. This shall be in light of the ECL and the expertise of ECA in combating such practices, as well as in light of the guidelines issued by the Organization for Economic Cooperation and Development (OECD) for fighting bid rigging in public procurement. Accordingly, the following points will be clarified: 1) elements of bid rigging, 2) the common forms of bid rigging, 3) measures to reduce bid rigging, 4) procedures for notifying ECA and consequences of bid rigging.



A. Elements of Bid rigging



1. There are three elements of bid rigging:

First: The existence of an agreement, contract, exchange of information, directly or indirectly, or coordination via third parties, whether such agreement has been between any of the contracting department specialists or other employees of the entity, and the bidder, or among the bidders themselves, auctioneers, or other dealers with the entity.

Second: The agreement, coordination, contract or exchange of information "would cause" any of the factors stated by Article 5 of the executive regulations of the public procurement law, namely:

1. Increasing, decreasing or fixing prices of products subject matter of dealings.
2. Dividing product markets or allocating them on ground of geographical areas, distribution centers, type of customers, goods, market shares, or seasons or periods of time.
3. Coordinating with regard to proceeding or refraining from participating in different public procurement processes.

2. In determining the first two elements of bid rigging, the following must be taken into account:

- The agreement does not have to result or effectively cause, any of the effects mentioned in Article 5 of the executive regulations. Rather, it is sufficient to determine that it may "potentially" lead to any of the effects mentioned in this Article.[2]
- It is not necessary to implement an agreement in order for it to be an infringement; as it is considered to be "a per se violation that does not require proof of its effect, it is considered an infringement even if the anti-competitive agreement is not implemented."[3]

2- Cairo Economic Court judgement, Second circuit economic misdemeanors, Drug Distribution Case, Misdemeanor No. 1898 of 2016, February 28, 2018, p. 17; Cairo Economic Court Judgment, First circuit, Cairo Economic Misdemeanour, Heart valves bid rigging case, No. 168 of 2018 p. 32.

3- Cairo Economic Court judgement, Second circuit, Cairo Economic misdemeanour No. 1898 of 2016, p. 17.

3. With regards to bid rigging it is not necessary to demonstrate its actual or potential effects on the market. An agreement, contract, coordination or information exchange are prohibited if they would cause any of the effects stated by Article 5 of the executive regulations of the public procurement law.

Third: The agreement, contract, coordination or exchange of information occurs among existing or potential competitors in a relevant market:

4. Competitors are persons who currently operate in the same relevant market or those that might potentially operate in the future.

5. Article 3 of the ECL defines the relevant market as follows:

> "The relevant market, in the application of the provisions of this Law, is the market that consists of two elements, namely, the relevant products and the geographic area. Relevant products are products considered to be practical and objective substitutes to each other. The geographic area means a certain geographical territory where competition conditions are homogenous while taking into consideration the potential opportunities for competition."

6. Within the framework of public procurement, the relevant market can be any of the following:

- The public procurement process is a relevant market in itself, whether it is a tender, auction or otherwise.
- If the public procurement process includes more than one item, it is sufficient to define the relevant market as one or more item of the public procurement process. For example, if there is a tender for the supply of three types of medical materials, then each type may be considered a relevant market, not the whole tender.
- All public procurement processes on the same products and their substitutes may be considered a single relevant market. For example, if there bid rigging based on rotation on several tenders regarding the supply of medical masks, these tenders are considered a single relevant market.

B. Common Forms of Bid rigging

1. According to Article 11 of the executive regulations of the ECL, Article 1 of the public procurement law, and Article 5 of its executive regulations; bid rigging may take several forms; including:

-



2. Accordingly, the bidders guarantee that the issuing entity will reject all bids submitted and accept the winner agreed upon by the competitors.

- **Bid suppression:** Bid suppression plans include agreements among competitors; where one or more applicants agree to refrain from submitting bids or withdraw bids after submission, hence the winner agreed upon shall be awarded.
- **Bid rotation:** Rotation means that the conspiring firms continue to submit bids but agree to be awarded in rotation.
- **Market allocation:** The bidders agree to divide the market and agree not to compete with specific clients or in certain geographic areas, or to divide the bids according to their estimated value.
- **Pay for exit:** This is one of the most common forms of bid rigging, as a person gives financial incentives or any other forms of incentive to one of his competitors, in return for the latter not submitting a bid.



C. Measures to reduce bid rigging

1. There are many measures that public authorities can take in order to promote effective competition and reduce attempts of bid rigging in different public procurement processes, as follows:

a) Obtaining necessary information before designing the tendering process

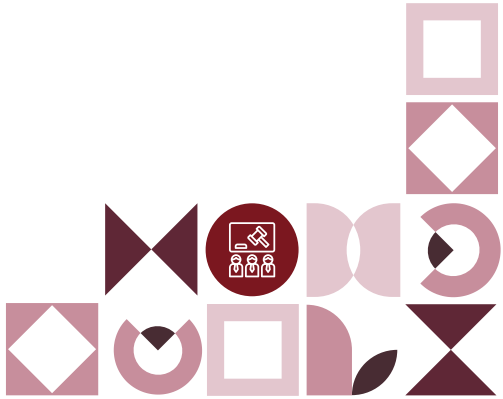
2. The administrative entity shall collect the necessary information regarding the operations subject to the public procurement process beforehand. The entities may use external consultants to help collect and analyze relevant information to estimate prices and costs, provided that they sign a non-disclosure agreement. Article 21 of the public procurement law states that, the administrative entity may request pre-qualification phase to verify availability of technical, financial, administrative and human capabilities.
3. The following includes important information that must be obtained beforehand:
   - Information on the products available in the market that fulfill the entity's requirements and conditions.
   - Information on potential suppliers of these products.
   - Information on recent price changes.
   - Prices in neighboring geographic areas and prices of potential substitutable products.
   - Information on previously submitted bids for the same or similar products.

b) Designing the bidding process in a manner that maximizes participation of genuine competitors

4.

c) Design the tender so as to reduce communication among bidders

5. Transparency is essential in public procurement process, which helps in fighting corruption. However, transparency should not facilitate collusion by publishing confidential information other than the legal requirements:
   - Potential suppliers cannot meet together with the purchasing entity to discuss the technical and administrative specifications, meetings should be done separately with each of them.
   - Communication among bidders should be reduced during the bidding process. Submitting the bid in person provides the opportunity for communication until the last moment and the potential of bid rigging.
   - When opening public bids or when announcing the results of the process, the disclosure of detailed information that might affect competition should be avoided as this might facilitate future bid rigging plans.
   - Bidders are requested to refrain from all communication with competitors; bidders may be requested to sign a declaration regarding this matter.
   - Bidders in the public procurement process must disclose in advance their intention to use subcontractors. Article 25 of the public procurement law gives the bidder the right to grant some items of the process to other subcontractors. However, specific and detailed information regarding the subcontracting conditions or terms must be provided in the bid. Subcontracting could be a way of dividing profits among collusive parties.
   - The administrative entity should set conditions that limit the submission of a joint bid by two or more companies (consortium bids), when there is the ability of at least one of them submitting a single bid, depending on the nature of the process.



D. Procedures for notifying ECA and consequences of bid rigging

1. In the event that the administrative authority suspects a potential bid rigging, it must immediately notify ECA, before taking any of the procedures stated by Articles 37, 38 and 50 of the public procurement law. The notification shall indicate the nature of the anticompetitive practice that has been identified and the supporting evidence, if any, provided that the following documents are to be attached to the notification:
    a. A copy of the document of specifications and terms of reference.
    b. A list of the bidders and how they submitted their bids.
    c. A list of companies that withdrew after submitting the bid.
    d. A copy of the financial and technical offers of the bidders, including those who withdrew after submission, if any.
    e. A copy of the reports of the technical and financial committees.
    f. Clarifying the recurrence of the bid. In the event of recurrence, a copy of the previous bids, including their date and number must be submitted.
    g. The names of the public procurement officials.
    h. The commercial register of all bidders.
    i. Articles of Association of all bidders.



2. When bid rigging is detected before the awarding, Article 37 of the public procurement law states that:
   - ***"Tenders of all kinds shall be cancelled before awarding upon a justified decision of the competent authority if it is no longer required, or if required by public interest, or in the case stated by the first paragraph of Article 12 of the aforementioned Law No. 5 of 2015."***
   - ***The cancellation shall take place upon a justified decision from the competent authority, whether at its own discretion or upon recommendation of the awarding committee, if it becomes evident that there is bid rigging, fraud, corruption or anticompetitive practices, or if it becomes evident that there is a deficiency or error in the documents of specifications and terms of reference (...) In all cancelled cases, the value of the documents of specifications and terms of reference and the temporary insurance must be refunded to the bidders except for those who were found to have engaged in bid rigging, fraud, corruption or anticompetitive practices".***

3. Article 38 also states that: "The auction shall be canceled before awarding authority if it is no longer required, or if required by public interest, if the outcome of the auction does not reach the price or the basic value, or if the administrative authority finds that there is bid rigging, fraud, corruption or anticompetitive practices. The auction may be cancelled if there was only a single offer that meets the conditions."

4. Articles 37 and 38 of the public procurement law states that in the occurrence of bid rigging or any anticompetitive practices before the awarding stage, the relevant administrative authority may take the following actions:
   - Cancel the public procurement process.
   - The value of the document of specifications and terms of reference and temporary insurance will not be refunded to the conspirators.

5. When bid rigging is detected after the awarding stage, Article 50 of the public procurement law states that:
"The contract must be terminated in the following cases:

1. If the contractor himself or via third party used fraud or manipulation in his dealings with the relevant administrative authority or in winning the contract.
2. If bid rigging, fraud, corruption or anticompetitive practices were found.
3. If the contracting party becomes bankrupt or insolvent.

The termination of the contract in the aforementioned cases shall take place automatically, and the name of the contractor shall be removed from the register of suppliers in the two cases stated in points 1 and 2 after consulting the relevant legal opinion department of the State Council. The General Authority for Government Services shall be notified to publish the removal decision in the authority bulletins and on the public procurement portal.

The contractor whose name has been removed from the register of suppliers, upon submitting a request shall be re-registered if the reason for the removal becomes void and upon issuing a decision by the Public Prosecution that there is no reason to initiate criminal proceedings against him, to administratively close the case or issue a final judgment acquitting him of what was attributed, provided that The General Authority for Government Services shall be notified of the decision regarding the re-registration to be publish in the authorities bulletins and on the public procurement portal".



6. According to this Article, if it appears that there has been bid rigging, after the awarding stage, in the public procurement process the contract must be cancelled, in addition to removing the conspirators after consulting the relevant legal opinion and Legislation Department of the State Council.

7. In addition to the sanctions stated by the public procurement law, Article 22 of the ECL states significant financial sanctions for those who infringe Article 6 prohibiting bid rigging, as follows:
   "Without prejudice to any harsher penalty provided for in any other law, shall be punished with the following sanctions:
   First: Whoever violates Article 6 of this Law, by a fine of not less than two percent of the gross revenue of the product subject matter of the violation, and not exceeding twelve percent of the aforementioned gross revenue, within the violation period, in case of the unfeasibility of calculating the aforementioned revenues, the sanctions should be a fine of not less than five hundred thousand Egyptian Pounds, and not exceeding five hundred million Egyptian Pounds."



Benefiting from the leniency stated by Article 26 of the ECL:

I. Article 26/1 of the ECL states that: "In case of committing any of the infringements stated by Article 6 of this Law, the criminal lawsuit shall not be initiated against the first violator who takes the initiative to inform the Authority of the infringement and submits the supporting evidence that shall contribute to detecting and establishing the elements of the infringement."

II. In order to encourage applicants to avoid committing cartels and motivate them to report bid rigging, the applicant will be exempted from the criminal sanctions stated by the ECL, when he cooperates with the ECA in accordance to Article 26 and the ECA leniency guidelines, to detect and establish bid rigging. In addition, he shall be exempted from being removed from the suppliers' register, as he will not be referred to the Public Prosecution according to Article 50 of the public procurement law.

Part two: The prohibition on the bidder to submit more than one bid for the same process, whether personally or in partnership with others, in light of Article 83 of the executive regulations of the public procurement law.

1. As previously mentioned, the provisions stated by the public procurement law and its executive regulations aim to enhance competitiveness in public procurement processes. This is in order to get the highest quality with the lowest prices, to ensure efficient public expenditure of and to protect public interest.
2. One of the most important measures to enhance the competitiveness of the public procurement process is to ensure the plurality of bidders and to ensure that such plurality is not artificial or misleading. The public procurement law defines fraud as "any act or refraining to act that leads to misleading the other party with the aim of obtaining financial or material benefit or any other benefit, influencing the process at hand, or to avoid executing the contract".
3. The Companies Law No. 159 of 1981 and its amendments did not prevent the same person from owning shares or stocks in more than one company, or the same person managing more than one company. Accordingly, in order to ensure that bidders do not exploit the Companies Law, the public procurement law and its executive regulations prohibit related parties from applying to the same tender or auction.
4. The first paragraph of Article 33 of the public procurement law states that:
   a. "Bidders are prohibited from submitting, individually or in partnership with third parties, more than one bid for each process, unless the bidder is a partner with others with a share that does not allow him to influence the decision-making related to the bid".

5. The first paragraph of Article 83 of its executive regulations states that:
   a. "The administrative authorities must include in the conditions of the process the prohibition stated by Article 33 of the law, taking into account Article 5 of the executive regulations of the ECL issued by Prime Minister's Decree No. 1316 of 2005. In case of violating the prohibition, the administrative authority must exclude the violating bids and transfer the temporary insurance to the administrative authority or terminate the contract or execute on his expense and transfer the final insurance and oblige the contractor to bear any loss incurred, and notifying ECA regarding any infringement, provided that the notification includes a clarification of the violation that was detected by the administrative authority and the supporting evidence, if any, and the all process documents."

6. It is clear from both Article 33 of the public procurement law and Article 83 of its executive regulations that related persons, according to the definition stated by Article 5 of the executive regulations of the ECL, are prohibited from submitting more than one bid for each process. The administrative authority must exclude the violating bids and transfer the temporary insurance in its favor; terminate the contract; or execute the contract at the expense of the contractor, transfer the final insurance to the administrative authority, charge the contractor with any losses incurred, and notify the ECA of such a violation.

7. In light of the aforementioned, the following will be demonstrated:
   a) Definition of related persons in accordance to Article 5 of the executive regulations of the ECL.
   b) Procedures for notifying ECA.
   c) Consequences of infringement.

A. Definition of related persons in accordance to Article 5 of the executive regulations of the ECL

1. Article 5 of the executive regulations of the ECL states that:"Persons referred to in the first paragraph include the related parties that consistof two or more persons, where each of them has an independent legal personality; and where the majority of stocks or shares of one of them is owned, directly or indirectly, by the other party or owned by a single party.Related parties also include the person or persons who are subject to the actual control of another person, inter alia his spouse or relatives down to second degree; unless absence of that control is clearly established. Actual control means every arrangement, agreement or ownership of stocks or shares, regardless of its percentage, in a manner that leads to the control of the management or decision making".
2. Two or more persons, each with an independent legal personality, are considered related parties, if any of the following two criteria are met:
   - **Criterion of ownership:**
3. Related parties are those who consist of two or more persons, each of which has an independent legal personality, and the majority of the shares or stocks of one of them are owned directly or indirectly by the other party, or are owned by one party; or if a third person owns more than the majority of shares or stocks of both. The majority of shares or stocks are those that exceed 50% of the total.

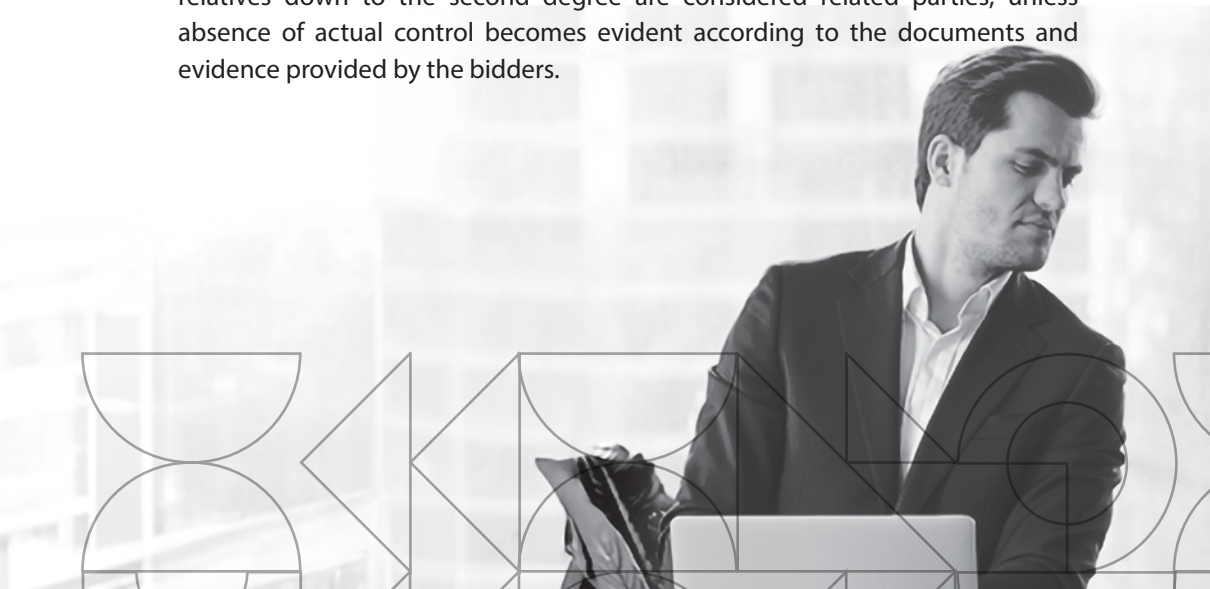
4. This criterion is applied by referring to the articles of association of companies, and specifically the provisions clarifying the shareholder structure.
   - **Criterion of ownership:**

5. According to the actual control criterion, related persons consist of a person or persons under actual control of another person, including his spouse and relatives down to the second degree, unless absence of such control is clearly established. Actual control means every situation, agreement, or ownership of stocks or shares, whatever their percentage, in a way that leads to control over management or decision-making.

6. This criterion takes into account the actual situation of the bidders and does not require a certain percentage in the ownership of stocks or shares as previously explained in the ownership criterion. This means that the entity can rely on any situation, condition or agreement which it deems has an impact on the decisions of the bids.

7. The most common cases that demonstrate actual control is when the person responsible for the management is the same in two or more companies. The person responsible for management in joint stock companies is the "Chairman" or the "Managing Director" and in general partnerships, limited partnerships and limited liability companies, it is the" Manager". In such cases, the commercial registers of the bidding companies need to be reviewed.

8. Article 5 of the executive regulations of the ECL took into account the criterion of kinship in order to assess the extent of actual control. The person, his spouse and relatives down to the second degree are considered related parties, unless absence of actual control becomes evident according to the documents and evidence provided by the bidders.



9. Articles 36 and 37 of the Civil Code clarified how to assess degrees of kinship. Article 36 states that: "In assessing the degree of direct kinship, each branch is taken into account as a degree when ascending to the origin with the exit of such origin, when estimating the degree of dependents, degrees are estimated ascending from the common origin, then descending therefrom to the other branch. Each branch except for common origin, is considered a degree". Accordingly, first-degree relatives of a person are his children and parents, and second-degree relatives of a person are his siblings, grandchildren, and grandparents.

   Article 37 states that "relatives of one of the spouses are considered to be of the same kinship and degree with respect to the other spouse." Accordingly, first-degree relatives of a person are his parents-in-law and stepchildren, and second-degree relatives of a person are siblings-in law, grandchildren and grandparents of his spouse.

11. It is possible to ascertain whether there is a kinship between the bidders by reviewing the commercial registers or the articles of association. The bidders must fill out Form (A), namely the related parties disclosure form, which the bidder is obligated to complete in order to be able to determine the degrees of kinship of the bidders (Part Three).



B. Procedures for notifying ECA

1. When the administrative authority suspect that related parties have submitted more than one bid for the same process, it must immediately notify ECA, before taking any of the measures stated by Article 33 of the public procurement law. This is in order to take ECA's technical opinion regarding whether the bidders are related parties.
2. Article 83 of the executive regulations of the public procurement law stated the data and documents that the administrative authority must provide to ECA upon notification:
   a. A copy of the document of specifications and terms of reference.
   b. A copy of the advertisement or bidding invitation.
   c. A copy of the decision of the relevant authority to form bidding committees.
   d. A list of the names of those who purchased the document of specifications and terms of reference.
   e. A list of all bidders including those who withdrew or were excluded.
   f. A copy of the submitted bids.
   g. A copy of the reports of the committees.
   h. A list of the names of public procurement officials.
   i. Clarifying the recurrence of the bid. In the event of recurrence, a copy of the previous bids, including their date and number must be submitted.
3. In order to verify the existence of a relation between the bidders, the administrative authorities must also provide ECA, upon notification, with the data and documents that enable ECA to verify and prove this relationship:
   a. The commercial registers of the bidders.
   b. Articles of Association of the bidders.
   c. Form (A): disclosure of related parties.



C. Consequences of infringement

1. Article 33 of the public procurement law and Article 83 of its executive regulations state the consequences of the submission of related parties to more than one bid for a single process:
   - If the administrative entity detects and infringement in the phase prior to awarding, it is obligated to exclude the violating bids and transfer the temporary insurance.
   - If the infringement has been detected after awarding, the administrative entity must terminate the contract, or execute the contract at the expense of the contracting party, transfer the final insurance, and charge the contracting party with any losses incurred.
2. As submission of more than one bid by related parties is considered fraud, in light of the definition stated by Article 1 of the public procurement law; the sanctions stated by Articles 37, 38 and 50 of the public procurement law are applicable. They state many actions, notably: that the public procurement process will be cancelled, the price of the document of specifications and terms of reference and the temporary insurance will not be refunded, and conspirators from the register of suppliers will be removed
3. In addition, it may constitute an abuse of a dominant position according to Article 8 of the ECL, which states:

"A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:

a. Undertaking an act that leads, fully or partially, to the non-manufacturing, or non-production or the non-distribution of a product, for a certain period or certain periods of time.
b. Refraining to enter into agreements or contracts regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person's freedom to access, continue or exit the market at any time.
c. Undertaking an act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among Persons with vertical relationships.
d. To impose as a condition, for the conclusion of a contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement.
e. Discriminating in agreements or contracts, between sellers or buyers whose contractual positions are similar, whether this was discrimination in the prices, the quality of the products, or other terms of transaction.
f. Refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible.
g. Dictating on Persons dealing with him not to permit a competing person to have access to their utilities or services, despite this being economically viable.
h. Selling products below their marginal cost or average variable cost.
i. Obliging a supplier not to deal with a competitor.

The Executive Regulations shall set out the conditions and procedures for implementing the provisions of this Article."

Part three: Disclosure Forms and Contact details.
Company owners and Chairpersons applying to public procurement processes subject to Law 182 of 2018 must fill out this form separately as one of the documents required to submit bids

First: Data about bidders

Company Name:

Company Activity:

Address:

Telephone:

Commercial Register #:

Names of board member / Manager in charge:

Second: Details about related persons

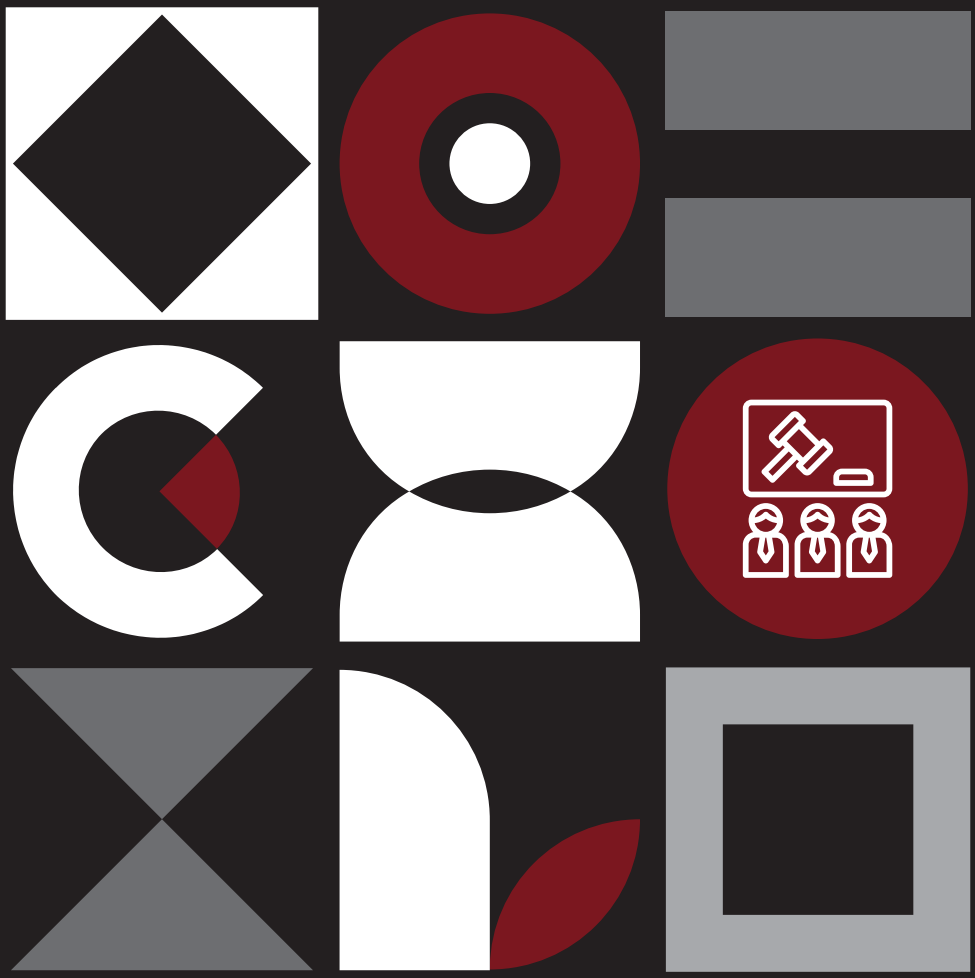
Name of applicant:
Names of children:
Names of parents:
Names of siblings:
Names of grand parents:
Names of grand children:
Name of spouse:
Names of stepchildren:
Names of parents-in-law:
Names of siblings-in-law:
Names of spouse grandparents:
Names of spouse grand children:

Signature

Remark: to be stamped with the seal of the bidding company

جهاز حماية المنافسة
EGYPTIAN COMPETITION AUTHORITY

Building B19, 1 st floor, smart village,
KM 28 Cairo-Alexandria.
Tel.: (202+) 35351900
Fax: (202+) 35370437
E-mail: info@eca.org.eg
www.eca.org.eg
facebook.com/EgyptianCompetitionAuthorityECA
twitter.com/EgyCompetition



جهاز حماية المنافسة

EGYPTIAN COMPETITION AUTHORITY