

## APPRAISING LEGAL MEASURES AGAINST BID RIGGING IN MALAYSIA

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### ABSTRACT

*Bid rigging is an agreement between bidders that may prevent or restrict competition in tendering activities. It has negative consequences for the economy and customers' well-being. In realising its harmful effects, bid rigging is prohibited under the Competition Act 2010 (Act 713)(CA 2010). Under the CA 2010, the Malaysia Competition Commission (MyCC) has investigated more than 3,000 companies for rigging tenders worth RM5.8billion. This shows that bid rigging is prevalent and, if not addressed properly, can have a negative impact on the country's economy. The question arises as to what other legal measures are being implemented in Malaysia to prevent bid rigging apart from the CA 2010. This research adopts a doctrinal approach involving a detailed analysis of the relevant legal provisions, legal documents and scholarly writing related to this area. The research found that through the examination of literatures, in addition to the CA 2010, there are other legal measures relevant to bid rigging in Malaysia. Firstly, the Anti-Corruption Commission Act 2009 (Act 694) (ACCA 2009) that can be used against bid rigging if it involves bribery. Besides, matters relating to bid rigging in government procurement are subject to rules as mentioned in the followings: (i) Treasury Instructions, (ii) Malaysian Treasury Circular - Integrity in Government Procurement (PK 1.6), (iii) Malaysian Treasury Circular - Disciplinary Action against Companies in Government Procurement (PK 8) and (iv) Integrity Pact in Government Procurement.*

**Keywords:** Bid rigging, Competition, Competition Act 2010, Malaysia Competition Commission, Government Procurement

### 1.0 INTRODUCTION

Competition is necessary for a market to operate effectively. The benefits of competition include increased business efficiency, a broader variety of choices for consumers, and help to lower prices and improve quality (European Commission, n.d.). To ensure that businesses compete fairly, many countries, including Malaysia have competition laws that ensure that businesses do not engage in anti-competitive activities that may prevent or disrupt the market (OECD, 2020). In Malaysia, matters relating to competition law are governed by the Competition Act 2001 (Act 72)(CA 2010). The Act aims to promote economic development through the promotion and protection of competition, thereby safeguarding the interests of consumers and providing for matters connected therewith. To achieve this, the Act prohibits certain anti-competitive behaviours that harm competition. One of these is bid rigging. The prohibition of bid rigging is contained in Section 4(1) read together with Section 4(2)(d) of the CA 2010. Under competition law, bid rigging is regarded as a part of cartel (Vadász et al., 2016). Cartel is defined by Connor (2008) as "An association of two or more legally

*independent firms that explicitly agree to coordinate their prices or output to increase their collective profits.*” This implies that cartel which includes bid rigging aims to control the market, thereby restricting competition.

The fight against bid rigging is currently a top priority in many countries including Malaysia and is also a much-debated internationally (Imhof et al., 2018). In realising its harmful effects, MyCC has taken various enforcement strategies to detect and prevent cartel including bid rigging activities in Malaysia (MyCC, 2020). The efforts mobilised by the MyCC have resulted in more than 3,000 companies coming under investigation for rigging tenders worth RM5.8billion (John Bunyan, 2021). This shows that bid rigging is prevalent and, if not governed properly, can have a negative impact on the country’s economy. The aim of this research therefore, is to examine legal measures that can be taken against the parties involved to prevent bid rigging in Malaysia. Hence, the research is believed to provide a better understanding concerning legal measures that can be used against bid rigging in Malaysia.

## 2.0 METHODOLOGY

This research adopts doctrinal research since the research involved a detailed analysis of legal provisions such as the CA 2010, the Competition Commission Act of 2010 (Act 713) (CCA 2010), the Anti-Corruption Commission Act 2009 (Act 694) (ACCA 2009), Treasury Instructions, Malaysian Treasury Circular - Integrity in Government Procurement (PK 1.6), Malaysian Treasury Circular - Disciplinary Action against Companies in Government Procurement (PK 8) and Integrity Pact in Government Procurement. In addition, this research also refers to relevant journal articles, and scholarly writings related to this area. The data collected were examined analytically and critically to examine legal measures that can be taken to prevent bid rigging in Malaysia.

## 3.0 FINDINGS AND DISCUSSION OF THE RESEARCH

Bid rigging is a widespread issue that can have far-reaching impacts on global markets (Giosa, 2020) affecting various sectors, including construction, pharmaceuticals as well as government procurement (Jones, 2021; Giosa, 2020; MyCC, 2019). Previous research in Malaysia have explored cartels in general, including enforcement, cartel prohibitions, and the use of leniency programmes to detect cartels (Ramaiah & Hussein, 2021; Mohd Rozaimy et al., 2020; Safinaz et al., 2014; Lee, 2014). However, very few studies have specifically focused on bid rigging and its prevention, particularly in the context of government procurement even though bid rigging in Malaysia is a serious issue, given the fact that more than 3,000 companies are currently under investigation worth RM5.8 billion (John Bunyan, 2021). This highlights the need for further research on bid rigging and relevant legal measures to prevent it from escalating in Malaysia.

### 3.1 Definition and Types of Bid Rigging

Before delving into details about bid rigging, it is important to discuss first about its meanings and types. In discussing about this, reference to the CA 2010 is necessary. Neither the term “bid rigging” nor its forms are defined under the CA 2010 (Shila, 2013). That said, the details of bid rigging, which include definition and forms, are elaborated in the Guidelines and its Handbook. The MyCC defines bid rigging in its Handbook as “*An agreement (written or oral) between bidders that may prevent or restrict competition in tendering activity.*” Bid rigging is therefore regarded as an agreement between bidders aimed at undermining the tendering activity through anti-competitive actions. Meanwhile, the Australian Competition & Consumer Commission (ACCC) (n.d.) defines bid rigging as collusion in competitive bidding, where two or more competitors agree that they will not actually compete with each other for tenders so that one of the cartel members wins the tender. The definition suggests that competitors

intentionally do not want to compete with each other to determine the winner of a tender. On the other hand, Carlin & Haans (2006) explained that bid rigging is usually the collaboration of competitors to restrict competition in a tender, regardless of whether the tender is issued by a public authority or a private company. This suggests that the aim of bid rigging is to restrict competition between bidders in tenders issued by either the government or the private sector.

Besides understanding the definition of bid rigging, it is also important to understand its forms. Bid rigging is unique in that there are various forms of bid rigging. The MyCC classifies the forms of bid rigging as (1) cover bidding, (2) bid suppression, (3) bid rotation, (4) bid withdrawal, and (5) non-confirming bids in its Guidelines and Handbook. Cover bidding means where one or more of the parties submit the bid for disguised purposes, knowing that the bid will not be as successful as a bid with too high a price. Bid suppression means where parties agree that only one of them will submit a bid for the contract and the others will not. Then, bid rotation means where the parties to the agreement take turns to win contracts (MyCC, 2012). Bid withdrawal can be understood as one or some of the parties agreeing to withdraw a bid that was previously submitted. Meanwhile, non-confirming bid means parties include terms and conditions that they know will not be acceptable to the procuring authority (ACCC, n.d.).

### **3.2 Legal Framework against Bid Rigging in Malaysia**

This section discusses legal measures that can be used to prevent bid rigging. In general, there are several legal measures that can be considered against bid rigging as follows namely the CA 2010, the Anti-Corruption Commission Act 2009 (Act 694) (ACCA 2009) and other relevant measures against bid rigging in government procurement. The discussion starts with the CA 2010 and is followed by others.

#### **3.2.1 Competition Act 2010**

The CA 2010 aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. To achieve this goal, several practices are prohibited because they are anti-competitive. Among these prohibitions is that enterprises must not enter into horizontal or vertical agreements which have as their object or effect the prevention or restriction of competition, as stated in Section 4(1) of CA 2010 (Mohd Safri et al., 2019). Based on the reading of Section 4 of the CA 2010, bid rigging is one of the examples of cartel. The term “cartel” is not found or defined in the CA 2010. However, it is defined by the MyCC in Paragraph 1.1 of the Leniency Guidelines as “*A horizontal agreement between enterprises with the object of significantly preventing, restricting or distorting competition in any market for goods or services.*” With reference to the definition provided, it can be inferred that cartels are prohibited under Section 4(1) and is read together with Section 4(2) of the CA 2010. Section 4(2) of the CA 2010 is a deeming provision, where a horizontal agreement (a horizontal agreement refers to an agreement between enterprises operating at the same level (business competitors) in the production or distribution chain) between enterprises that has the object to bid rigging is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

The word “deeming” means that the MyCC will not have to conduct a detailed analysis, including taking into consideration the marketing aspect of an enterprise because it is considered as restricting competition. In other words, the MyCC only needs to prove the existence of the cartel which includes bid rigging. The reason is that the existence of bid rigging itself is sufficient to prove the existence of the object of significantly preventing, restricting, or distorting competition in any market for goods or services. Upon finding infringements, the MyCC may impose orders as outlined in Section 40(1) of the CA 2010 which include (c) the power impose a financial penalty on any enterprise who is a party to the bid rigging. This is

subject to Section 40(4) of the Act to the effect that a financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred. In determining the amount of financial penalty in a specific case, reference can be made to the Commission's Guidelines on Financial Penalties at paragraph 3.2 which among others include the seriousness (gravity) of the infringement; turnover of the market involved; duration of the infringement and impact of the infringement.

It is worth noting that the MyCC is an independent body established by the CCA 2010 to enforce the CA 2010 (MyCC, n.d.). The MyCC was established with the purpose of safeguarding and preserving the competition for the benefit of businesses, customers, and the economy (Safinaz et al., 2014). The MyCC's duties include enforcing the provisions of CA 2010 to ensure compliance. Enforcement duty is critical to protect the competitive process for the benefit of businesses, customers, and the economy (MyCC, n.d.). It has a number of function and powers which include the power to enforce the CA 2010 (Section 14 of the CA 2010), power to conduct market review (Section 11 of the CA 2010). The MyCC's power to take enforcement action arises from Section 14 of the CA 2010, which provides that the MyCC may conduct investigations if it has reason to believe that an enterprise has infringed or is infringing a prohibition in CA 2010. Generally, the MyCC may conduct the investigation when it is suspected that there is an infringement by any enterprise or arising from complaints made by the public (Section 15 (1) of the CPC) as well as upon instruction by the Minister charged with the responsibility for domestic trade and consumer affairs (Section 14 of the CA 2010). To discover bid rigging actions in Malaysia, the MyCC has used a variety of enforcement techniques. As a result of the MyCC's actions, more than 3,000 companies have been investigated for rigging tenders worth RM5.8 billion. So far, as recorded on the MyCC's website, pursuant to Section 40 of the CA 2010, the MyCC found that eight (8) enterprises have infringed Section 4 of the same Act, prohibition by participating in a series of anti-competitive bid-rigging agreements and/or concerted practices concerning several projects at the National Academy of Arts, Culture and Heritage of Malaysia (MyCC, 2022).

### **3.2.2 Anti-Corruption Commission Act 2009 (ACCA 2009)**

Bid rigging may be associated with other unlawful activities such as bribery. In this instance, it is subject to the application of the ACCA 2009. The ACCA 2009 is a specific law for the prevention of corruption. There are several sections that can be used on parties involved in bid rigging if there is an element of corruption such as Sections 16 and 20 of the ACCA 2009.

The first provision is Section 16(a) and (b). Under Section 16(a), it explains that any person corruptly soliciting or receiving or agreeing to receive for himself or another person any gratification as inducement for or reward for doing or not doing anything. Whereas Section 16(b) states that any person who corruptly gives, promises, or offers to any person either for the benefit of himself or others any gratification as an inducement for or reward for doing or not doing anything. The term "gratification" under Section 2 of the ACCA 2009 is given a broad definition not only to mean money, but also includes reward, valuable security, or property. For example, if one party offers or give gratification to another party so that the latter does not make a bid (bid suppression), an offence under Section 16 of the ACCA 2009 has been committed. This is because gratification given is intended to discourage the other party from making a bid. Furthermore, the Section is also violated when one party gives gratification to another party as an inducement for the latter to submit excessively high price for disguised purposes, knowing that the bid will not be accepted (cover bidding).

A violation under the same section can also occur if one party offers or gives gratification to the other party as an inducement for the latter to withdraw a previously made bid (bid withdrawal). Whether Sections 16(a) and (b) should be read with A or B depends on the suspect's status. If the suspect is not an officer of a public body, it is read together with A. However, if it involves a suspect who is an officer of a public body, it is read with B. Although there is a difference in the status of the suspect as mentioned in A and B, the punishment

provided if convicted of an offence remains the same, which must be read with Section 24(1) of the ACCA 2009 which is imprisonment for a term not exceeding twenty years; and a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence. To understand the meaning of officer of public body, reference to Section 2 of the ACCA is necessary. The term “officer of a public body” is given a broader definition to mean any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation, includes the person who is incorporated as such.

Next, reference can also be made to Section 20 of the ACCA 2009. It is a specific provision that deals with corruption in procuring withdrawal of tender. Offences under this Section can take two forms. The first refers to a person who intends to obtain a contract from any public body who offers any gratification to any person who has bid for the contract, as an inducement or a reward for his withdrawing the tender. Secondly, an offence is committed if a person solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such contract. In short, this Section is applicable only if the alleged corruption relates to a contract from a public body and it concerns the withdrawal of tender that has already been made due to the specificity of the application of this Section in the aforementioned circumstances only.

### **3.2.3 Other Relevant Measures against Bid Rigging in Public Procurement**

It is important to note that, although bid rigging can occur in both public and private sectors, it is more harmful in the former sector due to its detrimental effects such as causing great harm to taxpayers, eroding public confidence, and undermining the benefits of a competitive marketplace (Jones, 2021). Public procurement allows the government to foster transparency, competition and provide better public services (Sitti Hasinah et al., 2021). These benefits, however, will not be realised unless the system is adequately protected against distortion caused by corruption and collusion. (Jones, 2021).

Realising this and the need to ensure that government procurement is managed effectively and properly, matters pertaining to public procurement in Malaysia are subject to rules as mentioned in the followings: (i) Treasury Instructions, (ii) Malaysian Treasury Circular - Integrity in Government Procurement (PK 1.6), (iii) Malaysian Treasury Circular - Disciplinary Action Against Companies in Government Procurement (PK 8) and (iv) Integrity Pact in Government Procurement (Rohana et al., 2010; MyCC, 2022).

#### **(i) Treasury Instructions**

Treasury instructions are produced by the Treasury under the authority of Section 4 of Financial Procedure Act 1957 (Act 61) on matters pertaining to financial and accounting procedures in Malaysia. Based on instruction 167.1 clearly puts the responsibility on the civil servant in charge of procurement to reimburse any losses suffered by the government especially if he has received any bribe for not disclosing the bid rigging activity to the authorities. Therefore, the government can take a legal action against the officer responsible to obtain such reimbursement for any losses incurred due to the bid rigging activities. The repercussion of bid rigging is clearly spelt out in Instruction 167.2 as a measure to combat corruption among the civil servants. It highlights the offences of bribery and bid rigging in the same paragraph since the officer in charge of procurement will in most cases, gain something at the expense of the government through bid rigging.

**(ii) Malaysian Treasury Circular - Integrity in Government Procurement (PK 1.6)**

PK 1.6 aims at upgrading the integrity of public administration through the prevention of corruption. Integrity is of utmost importance to prevent money leakages in government spending. It also increases the integrity of companies involved in the government procurement through the practice of healthy competition (Sariha & Suzalina, 2022). The statutes referred to in PK 1.6 include; the Malaysian Anti-Corruption Commission Act 2009 (Act 694), the Official Secrets Act 1972 (Act 88); and the Competition Act 2010 (Act 712). PK 1.6 states that, to ensure the integrity of public procurement, government agencies must pay close attention to the issue of cartels/bid rigging in government procurement and report any signs of bid rigging to the Malaysian Competition Commission (paragraph 2.3(iii)). Besides, the government agencies must also insert a warning clause to remind the civil servants about the corruption offences related offences in all government procurement documents (paragraph 2.5). Furthermore, the government agencies must include a clause on non-collusion declaration during the preparation of the procurement offer document, acceptance letter and contractual documents in order to combat cartels/ bid rigging (paragraph 2.6). Last but not least, is the implementation of the Integrity Pact whereby all bidders and civil servants involved in any government procurement must make a self-declaration on non-corruption at certain stages as required by the circular (paragraph 3.2). The details of this will be explained in 3.2.3(iv).

In short, PK 1.6 provides a rather comprehensive measures during all the stages of the procurement process to preserve the integrity in the public administration in their effort to combat corruption and bid rigging.

**(iii) Malaysian Treasury Circular - Disciplinary Action against Companies in Government Procurement (PK 8)**

PK 8 aims to provide information on disciplinary actions that will be imposed on individuals, companies, consultants, or bodies registered with Ministry of Finance (MoF) due to non-compliance in public procurement. It also specifies the types of offences that can lead to disciplinary actions which include bid rigging as prescribed in paragraph 1(i)(b)(4) of the PK 8. Pursuant to the paragraph, bid rigging occurs when a company or firm collude with another company or firm to determine the price when participating in government procurements such as tender or quotation price with the aim of obtaining a high price or guarantee that only a certain company or firm will win the tender or quotation price. This shows the government’s commitment in its effort to curb bid rigging in government procurement.

Furthermore, paragraph 2 of PK 8 provides the types of disciplinary actions or penalties that can be taken if the companies or firms involved in the offences listed in PK8 which include bid rigging. The disciplinary actions or penalties are listed as follows:

**Table 1. Disciplinary actions or penalties under paragraph 2 of PK 8**

No.	Disciplinary Actions or Penalties
1	Issuance of warning letters
2	Cancellation of approved field code
3	Suspension of Ministry of Finance’s registration for a maximum period of up to five (5) years and prohibition from receiving or participating in future tender or quotation
4	Cancellation of registration for a maximum period of up to five (5) years and removal from the Ministry of Finance registration record
5	Blacklisting owner and / or board member of company for a maximum period of up to five (5) years
6	Cancellation of Bumiputera status for a maximum period of up to five (5) years

To decide appropriate disciplinary actions or penalties for offences committed as mentioned in Table 1, a Disciplinary Action Committee (Committee) has been established.

The Committee will decide the appropriate action to be taken against the companies or other bodies registered with the MoF. The Committee will exercise its power to decide the types of offences committed, whether they relate to a violation of the terms of the registration, a violation of tender or contractual terms, or criminal offences such as bribery and fraud, and the types of disciplinary actions or penalties to be taken.

#### **(iv) Integrity Pact in Government Procurement**

Integrity Pact in Government Procurement is contained in Treasury Circular Letter no. 10 of 2010 (Circular). This Circular aims to inform all Ministries, Departments and Statutory Bodies (Agencies) on the Guidelines for the Implementation of the Integrity Pact in Government Procurement. The implementation of the Integrity Pact is a concept introduced by the Transparency International to assist the government, business institutions and the general public in curbing corruption in government procurement. The implementation of Integrity Pact is expanded in government procurement to include:

- (a) Implementation of the Integrity Pact for civil servants involved in government procurement;
- (b) Implementation of integrity pact for procurement-related committee members;
- (c) Implementation of integrity pact for board members/ procurement committee;
- (d) Implementation of integrity pact for bidders; and
- (e) Implementation of integrity pact for the appointment of consultants.

First and foremost, every civil servant who is involved directly or indirectly in the government procurement process shall be required to sign a Declaration by Civil Servant Involved in Government Procurement form. Secondly, every individual appointed to any Procurement Related Committee shall be required to sign a Declaration by Members in Procurement Related Committee. Thirdly, every individual appointed as member or alternate member to the Procurement Board shall sign a Declaration by Procurement Board Members form. The declarations need to be adhered to by the signer of the declarations to abstain from any corrupt practices with any person directly or indirectly engaged with any procurement; and to lodge a report at the Malaysia Anti-Corruption Commissioner's (MACC) office or at the nearest police station if there is any attempt of bribery such as bid rigging involving elements of bribery from any party.

Fourthly, the integrity pact for the bidders. Every government agency must ensure a copy of the Bidder's Declaration is attached together with the tender or quotation documents when the documents are made available to bidders. Every bidder upon submission of tender or quotation documents must ensure the Bidder's Declaration is duly completed and signed and is attached with the tender or quotation submitted. Every government agency is required to ensure that the provision on corruption in the Bidder's Declaration Form is included in all contract documents. The provision states that if there is/are any individual(s) representing bidder's company, is offering or giving any bribes to any individual(s) as an inducement to be selected in the tender or quotation, these actions can be taken against them which are revocation of the contract offer for the tender or quotation, or termination of the contract for the tender or quotation, and other disciplinary actions according to the Government procurement rules and regulations currently in force.

Last but not least, the integrity pact with the consultants. Every government agency shall ensure a Declaration of Interest By Consultant form is attached with the Letter of Intent from the government to the consultant. The government must ensure that the clause on corruption is included in all consultancy agreements. If there is any attempt of bribery such as bid rigging involving elements of bribery from any party, they shall lodge a report at the MACC's office or at the nearest police station.

In short, the Integrity Pact implementation is intended to increase awareness among civil servants and parties involved in government procurement on corruption offences and subsequently eradicate corrupt practices in government procurement. One of the main objectives of this Integrity Pact is to provide a greater transparency when dealing with government procurement and enhanced access to information. This could lead to greater confidence and trust in public decision and at the same time allowing more bidders to compete for government contracts.

#### 4.0 CONCLUSION AND RECOMMENDATION

In light of the above discussions, it is undeniable that bid rigging has a negative effect on competition. In recognising the dangers of bid rigging, it is prohibited under the CA 2010. If bid rigging involves an element of corruption, the ACCA 2009 will apply, especially Sections 16 and 20. It is worth noting that although bid rigging can occur in both public and private sectors, bid rigging is more harmful in the former sector due to its detrimental effects such as causing great harm to taxpayers, eroding public confidence, and undermining the benefits of a competitive marketplace. The recognition of the dangers posed by bid rigging is vital, as it undermines fair competition and leads to anti-competitive outcomes as discussed in section 3.2.3. Thus, to prevent bid rigging in public sector and to ensure that government procurement is managed properly and transparently, matters pertaining to it are also subject to (i) Treasury Instructions, (ii) Malaysian Treasury Circular - Integrity in Government Procurement (PK 1.6), (iii) Malaysian Treasury Circular - Disciplinary Action against Companies in Government Procurement (PK 8) and (iv) Integrity Pact in Government Procurement.

Although the government's efforts to provide legal measures against bid rigging are laudable, it is worth noting that the CA 2010 which is the main law governing the issue of cartels, including bid rigging, does not criminalise bid rigging specifically bid rigging in public procurement. While the Act prohibits bid rigging, it is not considered an offence under the Act unless it involves an element of bribery which triggers the application of the ACCA 2009. Consequently, despite the detrimental effects of bid rigging in public procurement, no criminal actions can be taken against the parties involved. Furthermore, instructions and circulars are only administrative directives which although subject to administrative actions as discussed in 3.2.3 (iii), they are not criminally punishable in nature which can have a deterrent effect on those involved. Therefore, this research proposes that, in addition to the existing legal measures, the CA 2010 be amended to criminalise bid rigging particularly in government procurement. By adding a credible threat of criminal sanction, it is likely to provide a sufficient deterrent against bid rigging. This will send a clear message to the public that bid rigging, especially in public procurement, is unacceptable and will not be tolerated. As a result, not only taxpayer's money can be saved, it could also improve the efficient delivery of public works as well as foster public trust in the tendering process.

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