

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE COMPETITION COMMISSION OF MAURITIUS

AND

THE PROCUREMENT POLICY OFFICE

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The Aim and Coverage of the MoU

1. In certain aspects of public procurement, the Competition Commission of Mauritius (CCM) and the Procurement Policy Office (PPO) have overlapping powers. This is because collusion among bidders or between a bidder and a public official, which is prohibited under sections 52 (3) and 53 (1) of the Public Procurement Act 2006 ('the Procurement Act'), may also infringe the Competition Act 2007 ('the Competition Act').

2. The PPO has, inter alia, powers under the Procurement Act to suspend or debar a potential bidder or supplier from participating in public procurement exercises on the ground, inter alia, of collusion.

3. The CCM has the powers to investigate and take enforcement action against suspected breach of the prohibition of restrictive agreements which fall within sections 41 to 43 of the Competition Act and investigate any matter that is subject to review under sections 44 to 48 of the Competition Act. Section 42 covers one form of collusive agreements, namely bid rigging, which involves agreements among bidders

on the terms and conditions of bids or tenders. Sections 44 to 48 cover those agreements which have the effect of preventing, restricting or distorting competition or resulting in a substantial lessening of competition.

4. The CCM and the PPO have therefore agreed in this Memorandum of Understanding to:

- promote co-operation and coordination between the CCM and the PPO when dealing with bid rigging cases in public procurement ;
- facilitate the treatment of cases of bid rigging within the public sector;
- minimize the duplication of activity, wherever possible; and
- improve understanding of the respective roles of the CCM and the PPO.

5. The MoU includes:

- a description of the roles of the CCM and the PPO;
- arrangements between the CCM and PPO for the day-to-day handling of competition cases involving public procurement;
- provisions for dealing with cases involving bid rigging in public procurement; and
- arrangements for the implementation of the MoU and its review.

The Role of the CCM in relation to this MoU

6. The CCM is established as an independent body corporate under the Competition Act. Its goal is to make markets work well in the interests of consumers and the economy of Mauritius. To this end, the CCM has a number of powers under the Competition Act, which include power to

- keep the operation of markets in Mauritius and the conditions in those markets under constant review ;
- investigate collusive agreements, monopoly and mergers;

- take action against identified anti-competitive practice ; and
- undertake general studies on the effectiveness of competition in individual sectors of the economy in Mauritius.

The Role of the PPO in relation to the MoU

7. The PPO is established under the Procurement Act, as an independent procurement policy making and monitoring body within the Ministry of Finance and Economic Development. The functions of the PPO include, inter alia:

- formulate policies relating to procurement, including directives, procedures instructions, technical notes and manuals, for the implementation of the Procurement Act;
- recommend, and facilitate the implementation of, measures to improve the functioning of the procurement system, including the introduction of information and communications technology and the dissemination of publications and the setting up of websites dedicated to procurement;
- prepare and conduct training programmes for public officials, contractors and suppliers concerning procurement;
- solicit the views of the business community on the effectiveness of the procurement system; and
- disqualify, debar or suspend a supplier on specified grounds.

Potential Overlap of powers under the Competition Act and the Public Procurement Act

8. Under the Procurement Act, collusion among bidders designed to allocate procurement contracts, establish bid artificial prices and artificial non-competitive levels or otherwise deprive a public body of the benefit of free and open competition is subject to sanctions by the PPO. Collusive Agreements which include bid rigging is also prohibited and subject to sanctions under section 42 of the Competition Act.

9. As is the case within other regulated sectors with sector-specific legislation, a decision will need to be taken whether the alleged conduct should be investigated under the Competition Act or the Procurement Act.

10. The factors that the CCM and PPO would expect to take into account in deciding which of them will investigate an alleged case of collusion involving bid rigging under the Procurement Act will include:

- whether the subject matter of the complaint suggests that there may be a breach of the prohibitions of section 42 of the Competition Act;
- which organization is able to provide the more effective solution, taking into account the route by which any final action can be determined;
- which organisation is in a position to conduct the most efficient investigation, taking into account their relative powers (including their powers to gather information and to impose interim measures);
- any views or preferences expressed by the complainant; and
- whether either organisation has particular knowledge or experience that is relevant to the issues raised by the complainant.

11. Without prejudice to the powers of the Director of PPO under the Public Procurement (Suspension and Debarment) Regulations 2008, the decision as to which of the CCM or PPO should deal with a particular case would normally be taken soon after receipt of a complaint or before the beginning of a formal investigation or shortly after launching an informal review to identify whether there are reasonable grounds that the Competition Act has been infringed to determine whether any matter should be investigated. However, it may not always be possible to make such a decision in the early stages as there may be instances where the decision on how best to proceed can only be made once significant progress has been made in considering a complaint or in an own-initiative investigation. This will require close cooperation between the CCM and the PPO until sufficient information is obtained for

a decision to be taken. The CCM and PPO would expect the decision on who will deal with a case to be made at an appropriate time, and where possible, before a formal investigation is launched by either of them.

12. Where the CCM and the PPO decide that it is more appropriate for the CCM to proceed under the Competition Act in relation to a competition issue, the CCM will seek to coordinate its approach with that of the PPO, so far as this is compatible with meeting the PPO statutory duties.

13. Where the PPO is in receipt of a complaint or identifies any matter which it considers might infringe the Procurement Act or the Competition Act, it may request the CCM to launch a formal investigation. The CCM shall, within three weeks, inform the PPO whether there are reasonable grounds to institute an investigation under the Competition Act. The CCM shall share its expertise with the PPO on competition analysis, during the public procurement investigation.

The responsibilities of PPO under the MoU:

14. The PPO will:

- inform the CCM of formal complaints it receives from any person regarding collusion under the Procurement Act or the Competition Act;
- inform the CCM of any course of action decided upon for breach of section 52(3) of the Procurement Act;
- share information with the CCM when notified of an investigation under the Competition Act that directly involves a bidder in public procurement;

The responsibilities of the CCM under the MoU:

15. In relation to public procurement, the CCM will:
- inform the PPO when the CCM decides to begin an investigation under the relevant sections of the Competition Act or before launching a market study;
 - consider any views of the PPO when an investigation or study under the Competition Act involves public procurement. The CCM will also further inform the PPO if minded to disagree with certain aspects of the views;
 - inform the PPO of cases in other markets which it believes may have consequences for public procurement; and
 - inform the PPO of any decision taken by the Commission in respect of an infringement of section 42 of the Competition Act.

Disclosure of confidential information

16. Each party will respect the confidentiality and/or secrecy of information exchanged which has been obtained as a result of the other party's statutory powers or other legal obligations and relates to the affairs of any individual, business or undertaking. Each party will comply with any non-disclosure obligations that are binding on the other, in particular those set out in section 70 of the Competition Act or section 54 of the Procurement Act.

17. It is agreed that the CCM shall publish its decisions with reasons and as such may have to disclose information exchanged between the two parties. However, in no event shall any party disclose any information which is protected as confidential under the Competition Act or the Procurement Act.


Review and Implementation

18. The practices set out in the MoU are now in operation. They will be reviewed as and when the need arises, or by written request of either party. Any change, will be subject to the agreement of both parties.

Made in two originals on 24 August 2011

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