

Gökçe –

Objection!

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COLLUSIVE TENDERING



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A Secret Agreement to Alter the Terms or Price of the Tender

The offense of collusive tendering (also known as bid rigging) is regulated under Article 235 of the Turkish Criminal Law under the title of “collusive tendering”. The second paragraph of the same article provides that acts collusive tendering are and cannot be expanded. Therefore, it can be said that there will be collusive tendering only if one of the acts designated under Article 235 occurred. One of the most common acts of bid rigging is “conclusion of an open or secret agreement among the bidders or those who want to participate in the tender with the intention of affecting the tender terms and especially the price.”

What is meant by “conclusion of a secret agreement to with the intention to affect the tender terms and especially the price?”

This refers to instances of cooperation of two or more bidders in order to undermine the competitive tendering process and gain an unfair advantage. In other words, such a secret agreement among the tender bidders can be defined as cartelisation. The result of such cartelisation is that it prevents the natural competitive bidding process had the bidders not colluded in their bidding in order to inflate the price of the tender. This has a knock-on effect of costing the public significantly more to acquire the tendered goods or services because the same bid would have cost the public less had there been a competitive bidding process instead of a colluded tender. In essence, the parties that are meant to be in competition with the other act in unison and share the profits of the overpaid price of the tender. This may be done either by dividing the profit margin between the tenderer and the non-tenderer, or by paying an amount to the non-tenderer in advance or by payment in full. In practice, these agreements are usually made by the bidders who are preparing to participate in the tender by bidding in an agreed manner or an agreement where they bid in a way to ensure that the tender is won by one person. The perpetrator of this act may only be the party who is participating or willing to participate in the tender. In this context, an agreement between an officer of the tendering public body and the participating tender bidders cannot be considered as a collusive tender. Similarly, such an agreement between a person that either fails to meet the tender requirements or a person that does not make a tender bid and a third party cannot even indirectly affect the tender process. Therefore, it is not possible to assess such an action within the scope of collusive tendering.

The secret agreement between the tender bidders must have affected the tender conditions or the price. Agreements which do not concern the tender conditions will not constitute the crime of collusive tendering. Furthermore, the agreement must include all the elements required to be considered collusive tendering. For example both parties must have an explicit declaration of intent in the same direction. In the event the declarations are invalid due to error, deceit or duress, there will not be a valid agreement, so the crime is not considered to have been committed.

On the other hand, even though Article 17(1)(d) of the Public Procurement Law states that a prohibition on alternate bidding is sanctioned, alternate bidding is not considered within the collusive tendering or making a collusive agreement. For example, a case where all tenders submitted by the same person who is bidding the tender of different companies may result in certain sanctions within the Public Procurement Law but it is not collusive tendering.

What is the Sanction of a Secret Agreement to Affect the Tender Terms and Price?

The sanction is a prison sentence of three to seven years.

Answers. Not theories.

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Gokce Attorney Partnership is an Istanbul-based law firm offering legal services across a broad range of practice areas including mergers and acquisitions, joint ventures, private equity and venture capital transactions, banking and finance, capital markets, insurance, technology, media, telecoms and internet, e-commerce, data protection, intellectual property, regulatory, debt recovery, real property, and commercial litigation. Please visit our web site at www.gokce.av.tr for further information on our legal staff and expertise.

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