

OECD Competition Committee

Working Party No. 3 on Co-operation and Enforcement

Report to Council on the Bid-Rigging Recommendation

Contribution from Peru¹

LAWS AND GOVERNMENT PROCUREMENT PRACTICES IN PERU

In order to make purchases or procurement of goods, services or works contracts more effectively and efficiently, the Peruvian Procurement Law² establishes detailed rules and guidelines to be applied by public sector entities in the process of contracting. As indicated by these regulations, all procurement processes are conducted in the following three phases: a) Programming Phase and preparatory acts, b) Selection Phase and c) Contract Execution Phase.

- a) *Programming Phase and preparatory acts*: includes the definition of needs, the approval of the Procurement Plan, the development of market research and definition of the type of selection process, the preparation and approval of the bases and if appropriate the choice of a Special Committee.
- b) *Selection Phase*: the objective of this phase is the selection of the natural or legal person that submits the best proposal to meet the needs of the entity. Depending on the selection process, the number of stages can differ, but usually it develops in eight stages, which are detailed in Table 1.

The submission of proposals can be done publicly or privately, depending on the selection process. In the case of Public Tenders, Public Bids and Public Direct Awarding, proposals must be public, while in the cases of Selective Direct Awarding or Awarding for Lesser Amounts, the act may be private, at the discretion of the Contracting Entity.

The evaluation and qualification methodology of proposals is established in the Regulations and Basis of the selection process. This evaluation is conducted in two stages: i) technical evaluation, and ii) economic evaluation.

The technical evaluation considers whether the proposal meets the requirements of the Regulations and Basis; if the proposal is accepted, the economic evaluation proceeds, otherwise the proposal is disqualified. The economic evaluation assesses whether the proposal act in accordance with the margins established in the Budget Law of Public Sector. Then, the maximum score is assigned to the lowest bid, while the other proposals receive a score inversely proportional. The total score of each proposal is equal to the weighted average of each evaluation, where the weights are within the ranges set forth in the Regulation.

¹ Elaborated by Jean SANCHEZ and Yamilet GALLARDO, members of the Economic Studies Management of Indecopi.

² Government Procurement Act (Approved by Legislative Decree No. 1017) and Regulation of the Government Procurement Act (Approved by Supreme Decree No. 184-2008-EF).

In relation to the awarding of the contract, this act will be held publicly in all types of selection processes. However, in the cases of Selective Direct Awarding and Awarding for Lesser Amounts, the act may be made in private.

It is important to notice the possibility of using appeals, since allows impugning actions that occur during the selection process. To support the submission of the appeal, the appellant must grant the entity or the Supervising Agency of Government Procurement (OSCE), a guarantee for an amount equivalent to 3% of the estimated value of the selection process, which cannot be less than 50% of the Unit Tax³. If the appeal is declared well founded, the warranty will be returned to the appellant; if the appeal is declared unfounded, unfair or if the appellant withdraws, the security forfeited.

- c) *Contract Execution Phase:* This phase begins with the contract and extends to compliance and payment of services performed (goods and services) or the liquidation and payment (works).

Table 1
STAGES OF THE SELECTION PROCESS, BY TYPE OF PROCESS

Modality	Stage							
	Convocation	Registration of participants	Formulation and answering of inquiries	Formulation and acquittal of observations ^{1/}	Database integration	Proposals ^{2/}	Qualification and evaluation of proposals ^{3/}	Granting the Award
Public tender	X	X	X	X	X	X	X	X
Public bidding	X	X	X	X	X	X	X	X
Direct Awarding ^{4/}	X	X	X		X	X	X	X
Awarding for Lesser Amounts ^{5/}	X	X				X	X	X

^{1/} In the case of Direct Awarding and Awarding for Lesser Amounts, the observations will be presented and will be acquitted simultaneously with the presentation of consultations.

^{2/} Includes the technical proposal and economic proposal. Proposals will be made public when the process is a Public Bidding or a Public Direct Awarding. The proposals may be private when it comes to a Selective Direct Awarding or Awarding for Lesser Amounts, where each entity has the power to decide whether the event will be public or private.

^{3/} Includes the evaluation of the technical proposal and the evaluation of the economic proposal, which will be carried out according to the factors set forth in the basis. If the technical proposal does not achieve the minimum score, the proposal will be disqualified at this stage.

^{4/} In the case of works contracts, stages 3 and 4 will be merged.

^{5/} In the case of works contracts, stages 3 and 4 will be merged; while in the case of goods and services, the steps 3, 4 and 5 will not be included.

Source: Government Procurement Act (Approved by Legislative Decree No. 1017) and Regulation of the Government Procurement Act (Approved by Supreme Decree No. 184-2008-EF).

Elaboration: Economic Studies Management of Indecopi.

The processes outlined in Table 1 may be subject to two special types of contracts: Reverse Auction and Framework Agreement (Article 90° and 97° of the Regulation of the Government Procurement Act, respectively).

³ Tax Units (Unidad Impositiva Tributaria - UIT), according to the acronym in Spanish. For 2015, 1 UIT is equivalent to 3 850,00 Nuevos Soles (Source: <<http://www.sunat.gob.pe/indicestajas/uit.html>>).

- a) *Reverse Auction*: this modality implies that entities purchase goods and common services⁴ through a selection process, where the evaluation focuses only in the offered prices, since the technical specifications of the goods and services have been previously approved by the OSCE. This mode can be carried out live or electronically and requires a minimum of two proposals to take place.
- b) *Framework Agreement*: under this modality, the entities must hire mandatory and directly with those suppliers who have previously been selected by the OSCE. The goods and services are registered in the Electronic Catalogue of the Framework Agreement of the OSCE.

It should be noted that public procurement may also be carried out through corporate procurement, which is defined as a contracting mechanism whereby two or more entities may contract together (goods or services) through a single selection process, taking advantage of economies of scale. The executing agency called Central de Contratación Pública - Perú Compras would be responsible for performing the compulsory and optional corporate purchases; however, this body has not yet been implemented. The Table 2 shows the different types of selection processes, and their respective margins established by the Peruvian Budget Law for 2015.

Table 2
MARGINS ESTABLISHED BY THE BUDGET LAW, BY TYPE OF SELECTION PROCESS FOR 2015

Modality	Margins 2015 (Nuevos Soles)		
	Goods	Services	Works
Public tender	=> 400 000	-	=> 1 800 000
Public bidding	-	=> 400 000	-
Public Direct Awarding ^{1/}	< 400 000 > 200 000	< 400 000 > 200 000	< 1 800 000 > 900 000
Selective Direct Awarding ^{2/}	=< 200 000 => 40 000	=< 200 000 => 40 000	=< 900 000 => 180 000
Awarding for Lesser Amounts ^{3/}	< 40 000 > 11 550	< 40 000 > 11 550	< 180 000 > 11 550

Note: Any procurement with an estimated value below 3 UIT is not affected by the Government Procurement Law.

1/ Public Direct Awarding are convened when the procurement value is above 50% of the maximum value established for the Direct Awarding in the Budget Law.

2/ Selective Direct Awarding are convened when Public Direct Awarding does not apply.

3/ Awarding for Lesser Amounts are convened for: a) Procurement of goods, services and works, whose values are below the tenth of the minimum limit established in the Budget Law for Public Tenders or Public Biddings; b) Procurement of independent experts for the Special Committees; and c) Selection procedures not awarded, according to Article 32° of the Law.

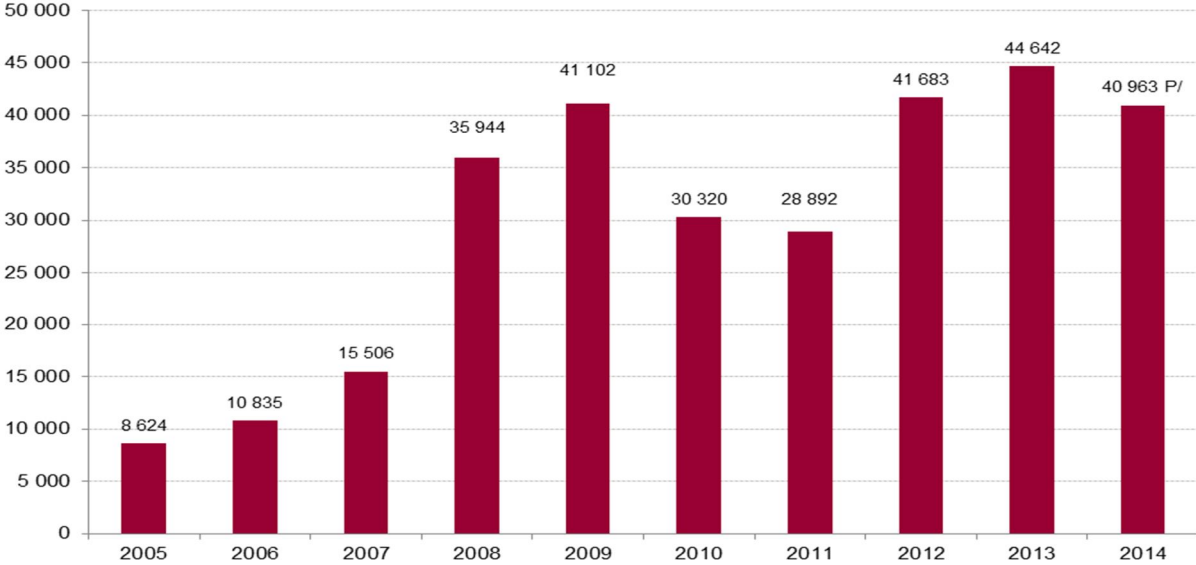
Source: Government Procurement Act (Approved by L.D. N° 1017), Regulations of the Government Procurement Act (Approved by S.D. N° 184-2008-EF) and Act N° 30281, Budget Law of Public Sector for 2015.

Elaboration: Economic Studies Management of Indecopi.

⁴ Common goods and services are those that have more than one provider, they have quality standards and performance characteristics or objectively defined by common specifications on the market or have been standardized as a result of a process of homogenization carried out within the State, so that the differentiating factor between them is the price at which they are traded. (Article 90 of the Regulation of the Government Procurement Act). The list of common goods and services is in: <<http://www.comprasestatales.org/index2.php?Itemid=66>>.

According to the Peruvian Public Procurement Agency⁵ (OSCE), the awarded value of the public procurements increased in 375% between 2005 and 2014.

Figure 1
PUBLIC PROCUREMENT: AWARDED VALUE, 2005-2014
 (Millions of Nuevos Soles)



P/ Preliminary

Source: Supervising Agency of the Government Procurement (OSCE).

Elaboration: Economic Studies Management of Indecopi.

Also, the OSCE shows that during 2014 (Table 3), Peruvian Government made purchases nationwide for S/. 40 963 million including 100 483 procurement selection processes, 70 527 purchase orders and 1 064 exonerations.

The classic procurement selection processes⁶ accounted for 57,20% of the total awarded value, followed by Petroperu processes⁷ with 17,26%, other regimes with 15,14%, exonerations with 5,43%, Framework Agreement with 2,49% and Reverse Auction with 2,48%.

In cases of classic procurement processes, it highlights the relative importance of procurements made through Public Tenders (22,91%) and Awarding for Lesser Amounts (12,29%). Depending on the object of the procurement, the 42,65% relate to goods, 34,85% to works and 22,51% to services.

⁵ "Estadísticas y Resultados". Supervisory Agency of Government Procurement (OSCE). Available in: <http://portal.osce.gob.pe/osce/content/estadisticas>

⁶ The selection processes are: Public Tender, Public Bidding, Direct Awarding (Public and Selective) and Awarding for Lesser Amounts.

⁷ Petroperu is a State-owned enterprise, dedicated to the exploration, exploitation, transport, refining, distribution and marketing of fuels and other petroleum products.

Table 3
AWARDED VALUE, BY MODALITY AND OBJECT, 2014
(Millions of Nuevos Soles)

Modality		Goods	Services 1/	Works	Total	%	
Procedures under scope of the Law	Public Tender	2 138,90	-	7 247,40	9 386,30	22,91	
	Classic Selection Process	Public Bidding	-	3 565,70	-	3 565,70	8,70
		Selective Direct Awarding	478,60	477,20	1 109,90	2 065,70	5,04
		Public Direct Awarding	1 022,10	1 057,70	1 298,20	3 378,00	8,25
	Awarding for Lesser Amounts	1 389,60	1 839,90	1 806,70	5 036,20	12,29	
	Reverse auction	Live	594,10	6,50	-	600,60	1,47
		Electronic	413,10	1,30	-	414,40	1,01
	Framework Agreement 2/	996,90	23,80	-	1 020,70	2,49	
	Exonerations	1 561,00	632,40	29,00	2 222,40	5,43	
	Petroperú 3/		6 118,70	950,30	2,20	7 071,20	17,26
Other Regimes 4/		2 756,20	665,10	2 780,70	6 202,00	15,14	
Total		17 469,20	9 219,90	14 274,10	40 963,20	100,00	

1/ Information obtained from the "Framework Agreement" module. It considers purchase orders from the following states: Published, accepted with pendant delivery, delivered with pending conformity.

2/ Information obtained from the "Agreement" module, where the public entities registered the procurements derived from Donations, International Loans, commissions to International Organizations and by Resource Management, which develop under different norms to Peruvian Public Procurement Law.

3/ Includes direct purchases (89,55%), increased competition (9,38%) and less competition (1,08%).

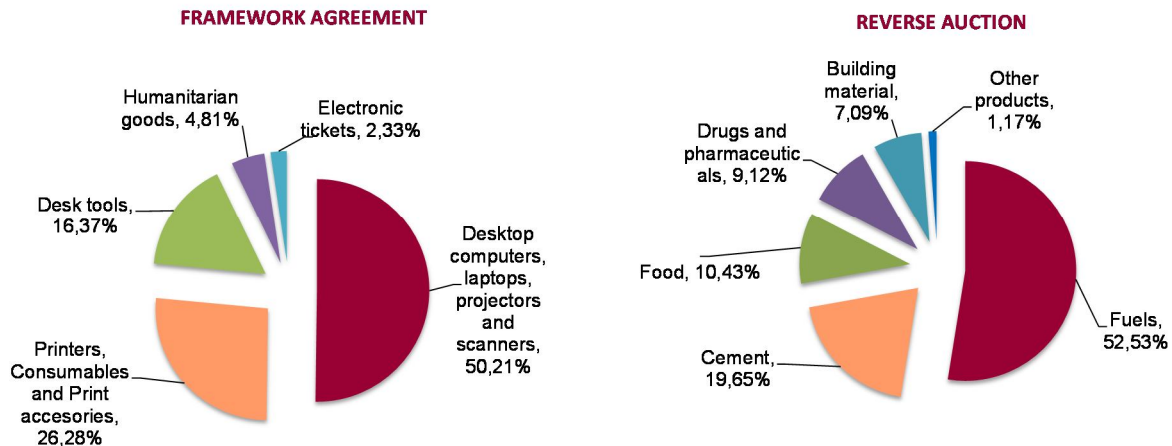
4/ Includes purchases by agreement (36,97%), international contracts (31,71%) and other special norms (31,33%).

Source: Supervising Agency of the Government Procurement (OSCE).

Elaboration: Economic Studies Management of Indecopi.

In the case of procurements made under the Framework Agreement modality, the Figure 2 shows that the most demanded products were desktop computers, laptops, projectors, and scanners (50,21%) and printers, consumables and print accessories (26,28%). Under Reverse auction, the more demanded products were fuels (52,53%), and cement (19,65%).

Figure 2
FRAMEWORK AGREEMENT AND REVERSE AUCTION: MORE DEMANDED PRODUCTS, BY AWARDED VALUE, 2014
(Millions of Nuevos Soles)



Source: Supervising Agency of the Government Procurement (OSCE).
Elaboration: Economic Studies Management of Indecopi.

The New Peruvian Law on Public Procurement, and Actions Leading to the Identification of Suspicious Collusion Activities in Public Procurement

On July 11th, 2014, the Government Procurement Act (Law N° 30225) was published in the official gazette El Peruano. This new regulatory framework for public procurement in Peru introduces changes from the previous Law (Legislative Decree No. 1017) that could help to reduce cases of collusion in public procurement. The main changes are presented below:

l) Article 2°, about "*principles governing procurement*" includes the following principles related to competition:

"a) *Freedom of concurrence*. The entities promote free access and participation of suppliers in procurement processes that they perform, and should avoid costly and unnecessary requirements and formalities. The adoption of practices that limit or affect the free competition of suppliers is prohibited.

b) *Equal treatment*. All suppliers must have the same opportunities to develop their offers, being prohibited the existence of privileges or benefits and, consequently, the overt or covert discrimination. This principle requires to not treat differently situations that are similar, and to not treat identically situations that are different, unless that there is an objective and reasonable justification, that encourages the development of effective competition.

c) *Transparency*. Entities must provide clear and consistent information for the recruitment processes that should be understood by suppliers, guaranteeing the competition, and developing conditions of equal treatment, objectivity and impartiality. This principle respects the exceptions of the law.

d) *Advertising*. The recruitment process should be advertised and disseminated in order to promote free concurrence and the effective competition, facilitating the monitoring and control of recruitment.

e) *Competition*. The recruitment processes include requirements that establish conditions for effective competition and to get the most advantageous proposal to satisfy the public interest underlying the contract. The adoption of practices that restrict or affect competition is prohibited."

- II) Article 14° about "*protection and promotion of competition*" includes the following points related to the competition:

"14.1 When the entity, the OSCE or the Court of Contracting of the State verifies the existence of evidence of anticompetitive conduct in a selection procedure, under the terms of Legislative Decree 1034, the Peruvian Competition Act⁸, or other legislation, must send all relevant information to the Defence of Free Competition Commission of Indecopi to initiate the administrative disciplinary proceedings against the suspects.

14.2 When the OSCE notes that a requirement established in the documents of the selection process might affect competition, in contravention of the principles of freedom of concurrence and competition, should instruct to the Entity to sustain it or delete it as appropriate. If, additionally, the OSCE notes the existence of evidence of collusion, under the terms of Article 384 of the Criminal Code, the OSCE must submit all relevant information to the Public Prosecutor."

- III) Article 16°, about "*requirements*", points out the following:

"The user area must require the goods, services or works to be contracted. That area is responsible for formulating the technical specifications, terms of reference or technical dossier and confirmed the public purpose of recruitment. The goods, services or works required should be aimed at fulfilling the functions of the entity.

The technical specifications, terms of reference or technical dossier should be made objectively, providing equal access to the procurement process, without creating obstacles that harm the competition. Unless otherwise provided in the regulations, the requirement does not refer to a specific manufacturing or a specific origin, or a

⁸ In Spanish: Ley de Represión de Conductas Anticompetitivas.

specific procedure used to distinguish goods or services offered by a particular supplier, or a trade marks, patents or types, or an origin or a certain production with the aim of favouring or eliminating certain suppliers or certain products.”

In relation to the application of tools to assess, measure and monitor the impact on competition of the Law on Government Procurement, it is worth mentioning that according to the ninth provision of the new Law on Government Procurement (which would take effect in the coming months), it is planned that the Ministry of Finance submit annually to Congress a report on the impact of this Act procurement. This report will be prepared on the basis of information submitted by the OSCE and the Central Public Procurement - Peru Compras.

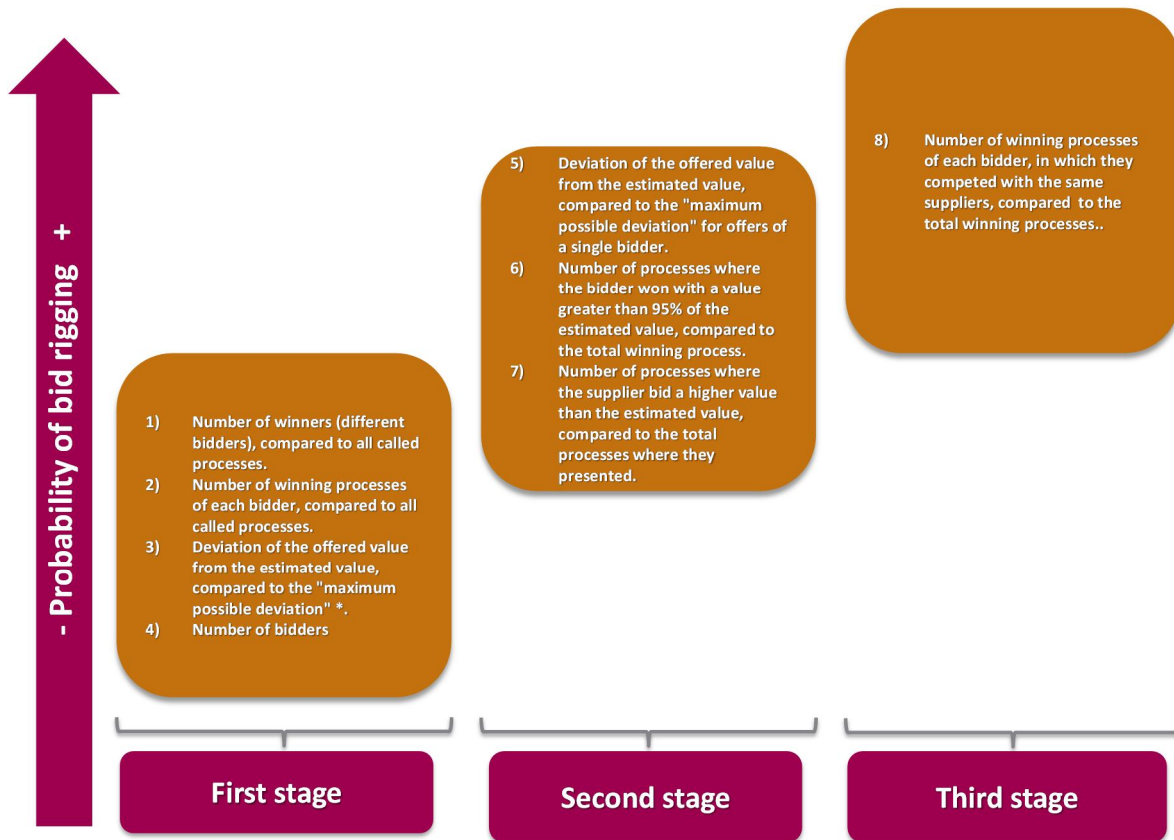
Currently the Economic Studies Management of Indecopi is developing a working paper about indicators for the detection of *bid rigging* in the procurements of liquid fuels between the years 2007 and 2013. The objective of the working paper is to develop a methodical proposal of preliminary indicators for the detection of *bid rigging* in public procurements of different goods and services, based on economic criteria and the available information provided by the OSCE.

The preliminary methodical proposal seeks to identify those public procurement processes of goods and services or bidders that, based on economic theory, could show signs of *bid rigging*.

As shown in Figure 3, the proposal consists in three stages. At each stage, indicators for all public procurement processes are recommended, showing the most rigorous indicators in the third stage, all according to the good or service under analysis. As a result, it would be expected that those processes or suppliers with a higher score in the indicators of the third stage, may be more likely to bid rigging practice.

Figure 3

STAGES OF THE PRELIMINARY METHODOLOGICAL PROPOSAL FOR DETECTION OF BID RIGGING IN PUBLIC PROCUREMENT



Elaboration: Economic Studies Management of Indecopi.

According to the preliminary results, shown in Table 4, fuel procurement processes (acquired under the modality of goods and services) present characteristics related to possible *bid rigging* practice (low number of suppliers, high concentration, high price dispersion of bidders, among others). Likewise, winning bidders whose prices were very different from the estimated value, or that usually compete with the same suppliers and always win, were identified.

Table 4
PRELIMINARY RESULTS OF THE METHODOLOGICAL PROPOSAL

Stage	Indicator	Unit of measure	Criteria	Preliminary Results
1	11 ^{a/}	Percentage	Identifies products where the number of winning bidders equals the number of processes. High values can be related to market allocation or bid rotation.	Eleven products with more than a 50% rate ^{1/}
	12 ^{a/}	Percentage	It allows identifying products where bidders have a high market share in	Eight products with suppliers that have a

Stage	Indicator	Unit of measure	Criteria	Preliminary Results
			comparison to the number of called processes . High values could evidence the existence of a recurrent bidder.	higher rate than 50% were identified. ^{1/}
	13 ^{a/}	Percentage	Identifies products with a relative high deviation between the offered value and the estimated value. High values show that the difference between the offered and the estimated value is close to the maximum difference found in the data. This result may indicate cover bidding and/or bid suppression ^{2/} .	Three products with percentages greater than 95% were identified ^{1/3/}
	14 ^{a/}	Number de bidders	It allows identifying products where the number of bidders ^{4/} is “relatively” low. A low value would indicate a small number of possible competitors.	Three products with no more than two possible bidders were identified ^{1/} .
2	15	Percentage	Identifies those bidders with a high average deviation between the offered value and the estimated value. High values would indicate the possibility of bid suppression or cover bidding.	Eight bidders with percentages above 95% were identified.
	16	Percentage	It allows identifying those winning bidders with relative high prices that win more often. High values would indicate how often processes have higher prices, showing possible evidence of bidders with higher earnings.	Seven bidders with percentages above 50% were identified.
	17	Percentage	Identifies those bidders that offered (more often) values higher than the estimated value. High values can relate to the possibility of cover bidding or bid suppression.	Four bidders with percentages above 40% were identified.
3	18	Percentage	Shows the winning bidders compared to the same competitors. High values would indicate the possibility of cover bidding or bid suppression.	Three suppliers were detected at a rate of 100%, all with participation in more than one process.

a/ The indicators were applied at product level.

1/ It considers fuel and gasohol like different products.

2/ It has been considered like feasible maximum variation +/- 10% of the estimated value, as established in the Law. However, some exceptional cases showed a higher value.

3/ It does not consider “Others”

4/ Based on the number of bidders.

Elaboration: Economic Studies Management of Indecopi.

The results obtained with this methodology, like any other detection instrument based on indicators, must be complemented with further investigation. However, these results are a first step to reduce uncertainty in detection of *bid rigging*.

It is noteworthy that Indecopi is currently working on Guidelines for Fighting Bid Rigging and Promoting Competition in Public Procurement. The Guidelines will contain several general recommendations to public entities, in order to help them promote competition in public procurement processes and to detect collusive indications in those bidding processes. The Guidelines will follow the basis and objectives of the OECD Guidelines for Fighting Bid Rigging in Public Procurement and will expand them to cover several aspects regarding the Peruvian public procurement regulations and the provisions of the Peruvian Competition Act. We are expecting to issue the Guidelines in the second semester of 2015.