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Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT: BREAKOUT SESSIONS

Briefing Note by the Secretariat

-- Breakout Session 1 --

This briefing note discusses "Value of Certificates of Independent Bid Determination ("CIBD") and similar tools". It is submitted by the Secretariat under Breakout Session 1 of the Global Forum on Competition to be held on 18 and 19 February 2010.

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CERTIFICATES OF INDEPENDENT BID DETERMINATION

-- Briefing Note by the Secretariat --

I. Introduction

1. One way that governments can try to ensure that they will receive fair pricing for the goods and services they purchase through tenders or bids is to require those who bid for government contracts to submit a Certificate of Independent Bid Determination (CIBD). CIBD rules typically require each company submitting a bid to sign a statement that it has not agreed with its competitors about bids, that it has not disclosed bid prices to any of its competitors and that it has not attempted to convince a competitor to rig bids.

2. Use of CIBDs may help governments save substantial resources and implement efficient procurement strategies. CIBDs may make bid rigging conspiracies less likely because:

- They inform bidders about the illegality of bid rigging and also signal that the procurement officials are alert to the issue of collusion;
- They may make prosecution of bid riggers easier;
- They add additional penalties, including possibly criminal penalties, for the filing of a false statement by the conspirators; and
- They make prosecution of a firm that attempts to rig bids possible, even when other bidders do not agree, or cannot be proved to have agreed, to the proposed scheme.

3. Procurement agencies in Canada, the United Kingdom, and the United States have used CIBDs to seek to reduce acquisitions costs and save taxpayer money. On the other hand, there are a significant number of developed and developing countries that do not appear to use CIBDs.

II. Prosecution or other Consequences for Parties Filing a False CIBD

4. Governments often rely upon statements by firms and individuals to make decisions. Unfortunately dishonest individuals sometimes make statements to the government that they know are false in an attempt to skew the decision-making processes in their favour. In that situation, CIBDs can provide an independent basis for enforcement action often based on existing statutes governing false statements.

5. If a firm can be proved to have falsely certified that it did not share bid price information, it can be prosecuted for the false statement made on the CIBD independently of any prosecution for cartel behaviour. Because false statements made under oath to the government are considered a serious offense in many countries, penalties are often significant.

6. In the United States, penalties for false statements under oath include fines, imprisonment for up to 5 years, or both. In one case¹, two companies paid a total of 300,000 USD in criminal fines for falsely certifying that they had not shared bid price information.

7. In Canada, bidders who make or file a false CIBD may be prosecuted under the forgery provisions of the Criminal Code or, in some circumstances, a variant of the perjury offense may be applied.

8. The criminal law is not the only way that enforcement action could be taken against a party falsely executing a CIBD or similar documentation. For example, bidders could be required to provide a warranty that their CIBD is correct, or directly warrant that their bids have been independently determined.² In that case, civil damages actions may flow under contract law for breach of a contractual term – at least as against the winning bidder. Indeed, such an approach shows that private sector procurement exercises may also benefit from requiring bidders to provide such warranties.

9. Governments may also take independent steps to “suspend” or “disqualify” the company from submitting future bids for government contracts. In essence, procurement agencies or other government bodies determine how long a firm will be unable to sell products or services to the government. The risk of suspension or permanent disqualification, therefore, can be a serious penalty and, as a result, is likely to encourage firms to submit truthful CIBDs where they consider there is a reasonable risk that they might be caught.

10. In addition to these penalties for submitting a false CIBD, firms and individuals may also be prosecuted for any underlying bid rigging or price fixing conspiracy that can be proven where national laws prohibit cartel behaviour. Significant penalties can be an especially strong deterrent to firms and individuals that are engaging in a bid rigging conspiracy or are thinking about entering into one. Many jurisdictions have significantly increased penalties in recent years for cartel and bid rigging conspiracies in order to deter their harmful effects and punish those firms and individuals that engaged in them.

III. Contrasting the Enforcement of CIBD and Enforcing Competition Law

11. It is important to recognise that there is a significant difference between the evidence that is required to prove a false statement in a CIBD, and a substantive breach of competition law. There are both differences:

- In the substantive nature of the prohibition: that a firm lied in its CIBD and the type of evidence required to prove that a firm engaged in a bid rigging cartel; and
- In whether the prohibition is a civil or criminal prohibition.

12. Competition law focuses on agreements to restrict competition. Proving that two or more firms agreed to raise price by rigging bids can be difficult, often requiring significantly more evidence and resources than what is required to show that a firm submitted a false CIBD. Put simply, it may be easier to prove that one firm did something wrong as opposed to showing that two firms agreed to do something wrong.

¹ *US v Maymead Inc* (2002); and *US v Taylor & Murphy* (2002).

² See “Cartels: Deterrence and Detection, A Guide for Government Procurement Officials”, *Australian Competition and Consumer Commission*, 2009 (page 17). Available at www.accc.gov.au.

13. In contrast, CIBDs focus on practices that help firms rig bids, but filing a false CIBD is not usually itself generally a violation of the competition law.

14. Evidence that a company lied in its CIBD may trigger prosecution efforts under statute provisions related to false written statements, rather than the competition law. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors (perhaps through a telephone call, in a meeting or by mail) or attempted to convince its competitors to rig bids. Firms may be prosecuted under false statement statutes even though they did not actually agree on prices or on who would win the project, as would be required under the competition law.

15. On the other hand, it is possible that in some circumstances the reverse may be the case. In many countries cartel prohibitions are of a civil not criminal nature and this document elaborates on each possibility below.

16. Depending on the facts of the case, in such jurisdictions, it may be more difficult to prove both mental and physical elements of a criminal violation for a false CIBD than it is for a civil prosecution to be undertaken (or administrative decision reached) at a lower evidentiary threshold and when the relevant mental element is merely agreement rather than wrongful intention.³

17. In some cases, where a country has only civil competition prohibitions but criminal prohibitions against executing a false CIBD, commencing to use CIBDs may be a way to transition towards increasing the penalties for hard core cartel conduct.

IV. Text of a CIBD

18. In the US, the Federal Government requires the use by its procurement officials to require the following CIBD to be provided by bidders in procurement processes:

Box 1. An Example from the United States

Each bidder must certify for each bid that:

1. The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices;
2. The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law; and
3. No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

Source : Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 52.203-2.

³ It is noteworthy that in the cases referred to above (*US v Maymead* and *US v Taylor & Murphy*) both defendants agreed to a joint submission following fact: "At the time that the corporate officer signed the bid form, he did *knowingly and wilfully* make and cause to be made a materially false, fictitious and fraudulent statement and representation in a matter" which the prosecution was not then required to prove at trial.

19. The italicised terms in the CIBD example above indicate that the standard of proof necessary to prosecute a false CIBD is generally lower than that required to prosecute firms for rigged bids or fixed prices. Note this model is not limited to requiring firms to certify the absence of an “agreement” on price. If a CIBD focused only on agreements, it would likely not significantly aid enforcement efforts or strengthen the competitive process, as that prohibition is likely to be embedded in the competition law already.

20. The above CIBDs require a firm to certify that its bid price has not been *knowingly disclosed* to any competitor before the bid opening. Thus, any firms that exchange bid prices prior to the opening of a bid may potentially be prosecuted for falsely certifying that they did not share bid information.

21. In addition, although some countries’ competition laws prohibit both collusion and attempted collusion⁴, others only prohibit actual collusion. In countries where attempted collusion is not actionable under competition law, a CIBD can broaden the range of prohibited conduct to include attempt. The sample CIBD above requires that each firm certify that it has not and will *not attempt* to induce a competitor to restrict the competitive process, by increasing bid prices or encouraging other competitors not to bid, for example. Thus, a firm that falsely certifies that it made no attempt to solicit a competitor to rig bids may be prosecuted for a false CIBD even if the competitor did not agree to rig the bid and the firm cannot be prosecuted for bid rigging. These requirements are intended to provide additional safeguards for the competitive bidding process for government contracts beyond the deterrence provided by traditional cartel enforcement.

22. The text of a Canadian CIBD is attached to this paper. It is notable that while there are many common concepts, it is also the case that the text differs significantly. One possible reason for this is that in Canada there is a limited statutory exception to collusive bid rigging where enterprises that have entered into an arrangement have notified the procurement agency of the arrangement at or before the time the bid is submitted.⁵ Two observations flow from this comparison and the possible explanation for it. First, exceptions of the sort referred to in Canada are reasonably common in competition laws of other countries and have direct implications for the drafting of CIBDs. Second, there is the more general point country’s competition laws can vary in ways that may make for differently worded CIBDs.

V. CIBD can Help Uncover Cartels and Bid Rigging Conspiracies

23. Evidence that a firm submitted a false CIBD can be highly probative evidence of the existence of a bid-rigging conspiracy or in justifying the imposition of a higher penalty for cartel behaviour. A false certification concealing contacts with competitors can provide evidence of consciousness of guilt and be very persuasive in proving the underlying cartel offence.

24. In addition, firms caught making false statements to the government may be willing to co-operate with investigators and provide assistance in the underlying cartel investigation in exchange for receiving a more favourable sentencing recommendation for having co-operated with the Government. This is especially true if the penalties for making false statements exceed those for cartel offences. Co-operation by a firm can lead to additional evidence that can be used to prove the bid rigging conspiracy against many conspirators, and, possibly, uncover other conspiracies.

⁴ For example, see the section 80(1)(b) of the *Commerce Act (New Zealand) 1986*.

⁵ See section 47(1) of the *Competition Act*.

VI. Extensions of the Basic CIBD Concept to Enhance the Effectiveness of Tenders and to Fight Corruption in Public Procurement

25. As well as the central concept of a CIBD discussed above, there are also examples of procurement exercises that have extended the use of the concept into other areas.

26. For example, in some cases, bidders were required to certify that they were not connected to other bidding companies (for example that there were no common ownership links between two competing bidders) and, indeed, prosecutions have followed.⁶

27. Similarly, to fight corruption, certifications have been asked⁷:

- From procurement officials that they did not improperly release procurement information to bidders; and
- From the competing bidders that they have not received or solicited procurement information.

28. The latter point will not be a topic for discussion in the specific CIBD break-out session but is relevant in the broader plenary discussion that will follow on the same afternoon concerning public procurement more generally including a discussion of the linkages between corruption and collusion.

VII. Discussion Points for the CIBD Breakout Session

29. At the breakout sessions, countries may wish to discuss:

- What different types of laws could be used to take enforcement action against a false CIBD? The examples cited in this paper are from common law countries. Is there any relevant distinction for countries with a civil law system?
- Is it common internationally that:
 - Knowingly making a false CIBD would breach the law; and
 - That CIBDs would enhance the ability to deter cartels, detect cartels or effectively punish cartel behaviour?
- Are there any relevant differences between countries based on the state of development of the country's competition regime? For example, if competition law is new to a country and if the enforcement agency is in the early stages of educating the business community and taking their first enforcement activities:
 - Might cartels may be more common and easier to detect suggesting that the value of a CIBD may be less?
 - Might introducing and explaining a further new legal instrument such as a CIBD before competition law itself is well understood, be impractical or confusing?

⁶ *US v LaDURON (2008)*.

⁷ OECD: "*Bribery in Public Procurement, Methods, Actors and Counter-Measures*", 2007.

- Might other innovations (eg the introduction of a leniency policy) be of higher priority?
- On the other hand, is a CIBD valuable in that the standard required of businesses can be even simpler to understand than avoiding cartel conduct and could a CIBD simplify the considerable initial enforcement challenges facing a new agency?
- Competition law enforcement agencies face varying reactions from procurement decision makers on the desirability of adopting CIBDs. What impediments exist (if any) in your country to the adoption of CIBDs?
- Would it be of value if there was an international model or template CIBD available, or are the laws relied for CIBDs sufficiently different that this would not be useful? If a model or template is not useful, would it be useful to set out principles or considerations which countries can apply in preparing the text of their own CIBD?

APPENDIX: CANADIAN CERTIFICATE OF INDEPENDENT BID DETERMINATION⁸

I, the undersigned, in submitting the accompanying bid or tender (hereinafter “bid”) to:

(Corporate Name of Recipient of this Submission)

for: _____

(Name and Number of Bid and Project)

in response to the call or request (hereinafter “call”) for bids made by:

(Name of Tendering Authority)

do hereby make the following statements that I certify to be true and complete in every respect:

I certify, on behalf of: _____ that:

(Corporate Name of Bidder or Tenderer [hereinafter “Bidder”])

- ① I have read and I understand the contents of this Certificate;
- ② I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;
- ③ I am authorised by the Bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the Bidder;
- ④ each person whose signature appears on the accompanying bid has been authorised by the Bidder to determine the terms of, and to sign, the bid, on behalf of the Bidder;
- ⑤ for the purposes of this Certificate and the accompanying bid, I understand that the word “competitor” shall include any individual or organisation, other than the Bidder, whether or not affiliated with the Bidder, who:
 - (a) has been requested to submit a bid in response to this call for bids;
 - (b) could potentially submit a bid in response to this call for bids, based on their qualifications, abilities or experience;
- ⑥ the Bidder discloses that (check one of the following, as applicable):
 - (a) the Bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
 - (b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this call for bids, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;
- ⑦ in particular, without limiting the generality of paragraphs (6)(a) or (6)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
 - (a) prices;
 - (b) methods, factors or formulas used to calculate prices;
 - (c) the intention or decision to submit, or not to submit, a bid; or
 - (d) the submission of a bid which does not meet the specifications of the call for bids; except as specifically disclosed pursuant to paragraph (6)(b) above;
- ⑧ in addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates, except as specifically authorised by the Tendering Authority or as specifically disclosed pursuant to paragraph (6)(b) above;
- ⑨ the terms of the accompanying bid have not been, and will not be, knowingly disclosed by the Bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (6)(b) above.

(Printed Name and Signature of Authorised Agent of Bidder)

(Position Title) (Date)

⁸ See www.competitionbureau.gc.ca.