

Unclassified

DAF/COMP/GF/WD(2010)50



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

01-Feb-2010

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2010)50
Unclassified

Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Chinese Taipei

-- Session V --

This contribution is submitted by Chinese Taipei under session V of the Global Forum on Competition to be held on 18 and 19 February 2010.

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JT03277825

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Chinese Taipei --

1. Chinese Taipei's Fair Trade Act was enacted in 1992. The Act covers a wide range of issues related to antitrust as well as unfair competition. The antitrust part of the Act includes the abuse of dominant market position; mergers; horizontal agreements; resale price maintenance; and vertical restraints which are likely to restrain competition or obstruct fair competition.

2. Based on its enforcement experience, the Fair Trade Commission (FTC) has disposed of over 30 cases involving public procurement complaints from 1994 to 1998, for which the types of violations included bid-rigging and illegal collaborative bidding. After taking into consideration the likelihood that the Government Procurement Act would be enacted in May 1999 by the competent authority, i.e., the Public Construction Commission (PCC), the FTC consulted with the PCC regarding the application of the Fair Trade Act and the Government Procurement Act on competition issues related to government procurement on 21 December 1998, and the results were as follows:

1. Following the enforcement of the Government Procurement Act, any competition issues to do with government procurement that are regulated under the Government Procurement Act are to be handled by the competent authority in regard to the Government Procurement Act or by other regulatory authorities in accordance with the Government Procurement Act.
2. Following the enforcement of the Government Procurement Act, government agencies that plan or authorise infrastructure, such as transportation, energy, environmental protection and travel facilities, shall implement the procedures for selecting bid winners under the Government Procurement Act if the enterprises are given permission by the regulatory authorities to invest in and build such infrastructure. The Government Procurement Act's applications may, however, be excluded in deference to other regulatory authorities when other relevant laws govern.
3. If the actions of the bid winner and other subcontractors related to the competition regulation are not regulated under the Government Procurement Act, such actions should still comply with the Fair Trade Act.

3. In other words, the FTC will intervene in the procurement conduct of government authorities only when the disputes among the bid winner and other subcontractors are related to the Fair Trade Act, following the enforcement of the Government Procurement Act on 27 May 1999. In regard to other disputes related to government procurement, the competent authority in relation to the Government Procurement Act or other regulatory authorities will be responsible for those practices based on the above consultations. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act, which is implemented by the PCC.

1. Size and policy objectives in Chinese Taipei

1.1 What fraction of your economy does public procurement account for? What are the principle policy objectives of public procurement?

4. According to the PCC statistics regarding government procurement awards, the average yearly total of the contract awarding reached 1,275.5 billion New Taiwan Dollars (NTD) from 2007 to 2009, and this amount was about 10% of GDP in Chinese Taipei.

5. Article 1 of the Government Procurement Act provides that “this Act is enacted to establish a government procurement system that has fair and open procurement procedures, promotes the efficiency and effectiveness of government procurement operation, and ensures the quality of procurement.” In other words, the policy objectives of public procurement are fairness, openness, efficiency, quality, and incorruptibility.

2. Corruption

2.1 What factors facilitate corruption? Do some factors appear to be more important than others?

6. The factors that facilitate corruption are mainly incorrect thoughts and strategies of enterprises, and the ethical conduct of each of a minority of public servants.

2.2 How do transparency programmes help fight corruption? What other policies help fight corruption? What methods and techniques seem particularly effective in your jurisdiction?

7. The Government Procurement Act has been launched to establish a government procurement process that is open and transparent. This Act stipulates that information with respect to invitations to tender and awards of contract should be made available on the information network. It also provides a protest and complaint system for bidders, a system to avoid conflicts of interest, as well as penal provisions for illegal acts. All those approaches help fight against corruption. In regard to the details regarding the avoidance of conflicts of interests, Article 15 of the Government Procurement Act provides the following:

“Former procurement personnel and procurement supervision personnel shall be prohibited from contacting the entity that they previously worked for either for their own sake or on a supplier’s behalf for three (3) years following their resignation for matters related to their former duties within five (5) years prior to their resignation.

The procurement personnel and procurement supervision personnel shall withdraw themselves from procurement and all related matters thereof if their spouses, relatives by blood or marriage within three degrees, other relatives who live and share the property with them have interests involved therein.

Upon finding that any of the procurement personnel or procurement supervision personnel failed to withdraw themselves for any cause of withdrawal provided for in the preceding paragraph, the head of the entity shall order such an official to withdraw and reappoint another official for replacement.

A supplier shall not participate in the procurement of a procuring entity in the event that the relationship between the head of the procuring entity, and the supplier itself or its person involves the situation as that mentioned in Paragraph 2. This requirement may be waived provided that the enforcement of it is against fair competition or public interests, and that an approval for such a waiver has been obtained from the responsible entity.

The procurement personnel and the procurement supervision personnel of an entity shall report their properties status pursuant to relevant requirements of the Act Governing the Property-Declaration by Public Officials.”

2.3 *Are firms required to certify during the procurement process that they have not bribed an official? What sanctions can be applied to firms and individuals who have engaged in corruption or bribery in your jurisdiction.*

8. The PCC formulated and published the “Sample Declaration for Suppliers Participating in a Tender.” Paragraph 2 of Article 59 of the Government Procurement Act provides the circumstance regarding whether or not a supplier did, does, or will induce the procuring entity to sign a contract by giving others a commission, percentage, brokerage, kickback, or any other benefits. The Public Construction Commission had this circumstance listed in the sample declaration as one of the items that must be reported when a supplier participates in a tender.

9. With regard to illegal acts that affect the fairness of procurement, such as corruption, the Government Procurement Act includes provisions on punishments against these acts. The relevant provisions on punishments are Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), and Articles 101 to 103 (Refusal of tenders involving offending enterprises).

10. Moreover, Article 122 of the Criminal Law and Article 11 of the Anti-Corruption Statute provide imprisonment and fines for any person who offers, promises, or gives a bribe or other improper benefits.

2.4 *Who are the competent authorities for prosecuting corruption cases? Does the competition authority have any power in this area?*

11. The judicial authorities are responsible for prosecuting corruption cases in Chinese Taipei. However, the FTC has no jurisdiction in this area.

3. Collusion

3.1 *What factors facilitate collusion in procurement? What industries seem especially vulnerable to bid rigging?*

12. The main factor that facilitates collusion in procurement is that, in cases involving large amounts of money and high profits, enterprises may attempt to use improper means to bid. Therefore, cases involving the construction industry seem especially vulnerable to bid rigging.

3.2 *What sectors in your jurisdiction were affected by bid rigging conspiracies in public procurement? What experience has your agency had in helping design procurement systems in order to minimise the risks of bid rigging?*

13. With respect to the procurement systems that guard against collusion (bid rigging), there already are relevant provisions in the Government Procurement Act. These provisions include: Article 27 (Publishing a Notice of invitation to tender), Article 31 (Bid bonds shall not be refunded), Articles 48 and 50 (Tenders may not be opened or awarded), Articles 87 and 92 (Punishments of acts involving bid rigging), Article 93-1 (Electronic receipt of tender documentation and submission of tender), and Articles 101 to 103 (Refusal of tenders against offending enterprises).

3.3 *Does your country employ certificates of independent bid determination? When firms have engaged in collusion, should they be prohibited from bidding in public procurement auctions for a period of time?*

14. We all know that the bidders are required to disclose Certificates of Independent Bid Determination when they submit a bid or tender. The bidders declare relevant information in this document, such as they bid independently, and had no contracts, agreements, or other forms of mutual understanding with other competitors. In Chinese Taipei, to draw the attention of bidders to these things and prevent disputes from occurring, the PCC formulated and prepared documents regarding “Possible Legal Responsibilities for Participation in Public Construction Projects by Enterprises” and the related format of affidavit. In addition, the PCC sent letters and informed each government agency that the agency was to provide these items to enterprises as it handles bids. This approach allows enterprises to state by themselves that they have already understood relevant legal liabilities, such as criminal and civil liabilities, and that they are willing to comply with laws with certainty.

15. If a procuring agency finds that the enterprises meet one of the circumstances provided in each subparagraph of Paragraph 1 of Article 101 of the Government Procurement Act and the results of said circumstances, it will refuse tenders against those enterprises, and these enterprises may be prohibited from participating in tendering, or being awarded or subcontracted for a period of one to three years. The circumstances, for example, are where “the supplier allows any others to borrow its name or certificate to participate in a tender” (Subparagraph 1); “the supplier borrows or assumes any other’s name or certificate or uses forged documents or documents with unauthorised alteration to tendering, contracting, or performing a contract” (Subparagraph 2); “the supplier has committed any of the offenses prescribed in Articles 87 to 92 hereof, and has been sentenced by a court of the first instance” (Subparagraph 6); or a contract is rescinded or terminated by the procuring agency (Subparagraph 12).

4. *Fighting collusion and corruption*

4.1 *What methods and techniques for fighting corruption would aid the fight against collusion?*

16. Information regarding invitation to tenders and awards of tenders in government procurement should be open and transparent. Such an approach can assist in combating corruption and collusion.

5. *Advocacy*

5.1 *In what ways can competition authorities work to improve the efficiency of public procurement?*

17. Through the establishment of the special law, the Government Procurement Act, public procurement procedures are regulated in detail in regard to the invitation to tender, awards of contracts, administration of contract performance, inspection and acceptance, and protest and complaint procedures. It also stipulates punishments for illegal acts, such as unfair contracts; jointly monopolised bids through mutually binding actions; bid rigging; and where the bidder lends (borrows) a license to participate in the bidding project. The enforcement of the Act reduces abuses in public procurement, and improves the efficiency of public procurement through clear regulations.

5.2 *What steps have been taken to improve the efficiency of the public procurement process in your jurisdiction? What specific measures (if any) have been adopted to reduce collusion and corruption in public procurement? If so, what has been the experience to date? Have other approaches to reduce collusion and corruption been tried in your jurisdiction and what have been the results?*

18. Chinese Taipei adopts relevant measures to improve the efficiency of the public procurement process, including electronic procurement, the information network, and cooperative supply contracts. Please refer to the explanations in Part II and Part III mentioned previously for relevant measures concerning the reduction of collusion and corruption in public procurement.