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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Canada

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Canada --

1. Bid-Rigging in Canada

1. Bid-rigging is a serious crime that undermines competitive markets and has significant negative economic consequences for businesses and the public, costing taxpayers millions of dollars annually. It is a form of cartel activity that occurs when bidders secretly agree not to compete, or to submit bids that have been pre-arranged among themselves.

2. Under section 47 of the *Competition Act* (the “Act”), it is a criminal offence for two or more bidders, in response to a call or request for bids or tenders, to agree that one or more will refrain from bidding, to agree to withdraw a submitted bid, or to agree among themselves on bids submitted, without making the agreement known to the person calling for bids. In Canada, firms and individuals convicted of bid-rigging face fines in the discretion of the court and/or imprisonment for up to fourteen years.

3. The Competition Bureau (the “Bureau”) is responsible for the enforcement of the Act, including the bid-rigging provision. In addition to active investigation and enforcement, the Bureau actively reaches out to stakeholders engaged in procurement to provide them with the tools and expertise necessary to detect and deter bid-rigging activities. Corruption does not fall under the purview of the Act, but rather the *Criminal Code* of Canada. As such, this submission will focus on collusion and, more specifically, bid-rigging activities in public procurement.

2. Scope and Scale of Public Procurement in Canada

2.1 *Size of the Public Procurement Market*

4. In Canada, the public sector undertakes a significant volume of procurement, most of which is conducted through competitive processes; however, the overall value of public procurement as a proportion of the Canadian economy is unknown.

5. The federal department of Public Works and Government Services Canada (“PWGSC”) provides federal government departments and agencies with procurement services. It is the federal government’s central purchasing agent and Canada’s largest public purchaser of goods and services. PWGSC’s purchases account for over 85% of the total value of federal government procurement, buying, on average, CAD\$14 billion worth of goods and services each year, through approximately 60,000 transactions.¹

2.2 *Principal Public Procurement Policy Objectives*

6. PWGSC plays a key role in assisting government departments define their requirements or scope of work, and to obtain the goods and services they need at competitive prices. PWGSC must procure goods

¹ Public Works and Government Services Canada's (PWGSC) Report on Plans and Priorities for 2009-2010. Available online at: <http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/svc/svc01-eng.asp>.

and services in a manner that enhances access and competition, treats industry fairly, and obtains the best value for Canadians. Every purchase is subject to Canadian laws, regulations and government policies, and must meet Canada's trade obligations. PWGSC purchases goods and services using a competitive procurement process whenever possible, while retaining the option of non-competitive processes in exceptional circumstances.²

3. Detecting and Prosecuting Bid-Rigging

3.1 Factors Facilitating Bid-Rigging

7. A number of factors facilitate bid-rigging in public and private procurement. In Canada's experience, the industries or industrial structures that are especially susceptible to bid-rigging often exhibit the following characteristics:

- Similar products or commodities: in markets where competitors' products may be readily substituted for one another, price is the most important element of competition and, because of the standardised nature of the product, price is the only variable upon which parties must agree. As a result, it is easier in these markets for firms to form a collusive agreement, such as bid-rigging;
- Products or services that are simple or straightforward, or are not subject to rapid technological advances or change: it is more difficult to maintain an arrangement if a product is rapidly evolving, or where there are features upon which firms may compete other than price;
- Products where there are few or no close substitutes: when purchasers cannot switch to an alternative to the product controlled by the agreement, they have fewer options and cannot turn to outside substitutes;
- A small number of competitors and sparse or no entry: the presence of these factors can make it easier to reach consensus on an agreement and can make it easier to observe whether someone is cheating on the agreement;
- Relatively few customers: in these circumstances, it is easier for suppliers to allocate markets;
- Facilitating organisations: while most trade associations operate legitimately, some provide the opportunity for members to form illegal agreements.³

3.2 Industries at Risk

8. The Bureau recently conducted a review of bid-rigging matters investigated since 1990. The review indicates that, while hardly the only industry trend to be active in criminal bid-rigging, the highest number of allegations of bid-rigging, between 1996 and 2009, related to the construction services sector. This finding is consistent with the experience of other OECD member states.⁴ Approximately 40% of the

² How the Government of Canada Buys Goods and Services. Available online at: <http://www.contractsCanada.gc.ca/en/how-e.htm>.

³ Competition Bureau obtains court order against the Saskatchewan Contractors Roofers Association. Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03085.html>.

⁴ OECD Policy Roundtables: Construction Industry 2008. Available online at: <http://www.oecd.org/dataoecd/32/55/41765075.pdf> at page 9.

total number of cases investigated by the Bureau in that period involved the construction industry. By comparison, the next highest sector, transportation, represented only 11% of the cases investigated. The construction industry also ranked highest in terms of penalties imposed during this time period; more than half of the total amount of fines imposed resulted from convictions for participants in that sector. This review of Bureau investigations further revealed that most bid-rigging allegations involved government procurement at either the municipal, provincial or federal level.⁵

9. It is notable that the Bureau has been particularly vigilant since the federal government's announcement, in its Second Report to Canadians on its Economic Action Plan, that it was accelerating and increasing expenditure on infrastructure,⁶ including CAD\$12 billion in new stimulus funding announced in the January 2009 budget.⁷ At the time, the Commissioner indicated that "bid-rigging...[is] an area [where] we reasonably fear [we] may see an up tick in bid-rigging activities in view of the likely significant increase in public infrastructure spending."⁸

3.3 *Recent Case Examples*

10. To take an example from the non-construction context, in February 2009, criminal charges were laid against 14 individuals and 7 companies accused of rigging bids to obtain Government of Canada contracts for information technology ("IT") services. The Bureau's findings supported these charges, indicating that several IT services companies in the National Capital Region had secretly co-ordinated their bids in an illegal scheme to defraud the government by winning and dividing contracts, while blocking out competitors.⁹ The Bureau's investigation had found evidence of criminal activity in 10 competitive bidding processes for contracts worth a total of approximately CDN \$67 million. The contracts all related to IT professional services provided to government departments (the Canada Border Services Agency, PWGSC and Transport Canada).¹⁰

11. In 2008, three construction companies and their presidents were charged with rigging bids submitted for the expansion and refitting of the emergency room at the Chicoutimi Hospital, and finishing

⁵ This may, in part, be attributed to the fact that public procurement agencies are under some obligation to take action where they identify concerns to ensure sound expenditure of taxpayers' dollars. This concern is not as relevant for private entities engaged in procurement, owing to the fact that they may be able to pass on additional expenditures down the distribution chain; or they may simply decide to terminate the relationship with the vendor or vendors in question.

⁶ Canada's Economic Action Plan: A Second Report to Canadians (June 2009). Available online at: <http://www.actionplan.gc.ca/grfx/docs/cap-eng.pdf> at page 111.

⁷ Canada's Economic Action Plan: Budget 2009. Available online at: <http://www.budget.gc.ca/2009/pdf/budget-planbudgetaire-eng.pdf> at page 11.

⁸ Speaking notes for Melanie L. Aitken, Commissioner of Competition to the Northwinds Professional Institute 2009 Competitive Law and Policy Forum available online at: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02994.html> at page 5.

⁹ Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts. Available online at: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02983.html>.

¹⁰ To date, two individuals have pleaded guilty to a criminal charge of rigging bids. The charges against the other accused remain outstanding.

work to be performed at the Alcan smelter in Alma, Quebec.¹¹ After a preliminary hearing, the accused were committed on October 9, 2009 to stand trial on the charges.

3.4 Outreach

12. Procurement agencies have well-established steps that they can take to promote more effective competition in public procurement and to reduce the risk of bid-rigging. The Bureau has been a strong advocate in this regard by actively engaging with procurement agencies at the federal, provincial and municipal levels of government to encourage them to adopt measures to effectively prevent, deter and detect bid-rigging in public procurement.

13. The Bureau's outreach activities are aimed at providing a better appreciation of the risk of bid-rigging and the means to detect and minimise such activities. Over the past year alone, the Bureau has given approximately 50 outreach presentations to more than 1,700 government officials.

14. These activities have been welcomed by PWGSC, among many others. Currently, the Bureau and PWGSC are examining ways to formalise their collaborative efforts.

15. In addition, in association with the Treasury Board Secretariat, the federal government department responsible for setting Canada's procurement policy, the Bureau has been successful in incorporating anti bid-rigging material into educational programmes designed for federal government employees involved in procurement. The Bureau seeks to ensure that all courses relevant to federal procurement officers provide a comprehensive explanation of bid-rigging, are explicit about associated risks and outline the Bureau's bid-rigging mandate.

16. The Department of National Defence has also incorporated a chapter on bid-rigging into its Fraud Prevention Handbook, which is distributed to all Canadian Armed Forces.

17. Finally, a renewed online anti-bid-rigging presentation was launched in April 2008 on the Bureau's Web site, featuring greater interactivity and enhanced multimedia components, including surveillance video excerpts from an actual cartel in progress.¹² The presentation provides public and private organisations engaged in procurement with information to help them detect, prevent and report suspected incidents of bid-rigging.

3.5 Independent Bid Determination

18. To deter bid-rigging activity, the Competition Bureau (the "Bureau") has developed a model Certificate of Independent Bid Determination¹³ ("CIBD"), attached as Appendix A, for use by tendering authorities when calling for bids, tenders or quotations. This document requires bidders to disclose, to the tendering authority, all material facts regarding any communications and arrangements between the bidder and its competitors in respect of a specific call for tenders. Accordingly, bidders are explicitly advised that the procurement agency is monitoring the bid process for any signs of collusion.

19. The Bureau strongly encourages public procurement agencies to adopt a CIBD, or a similar one of their own design, when buying goods or services through a competitive process. Take up is growing; for

¹¹ Quebec Construction Companies Charged with Bid-rigging Following Competition Bureau Investigation. Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02748.html>.

¹² Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html>.

¹³ Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html>.

example, PWGSC has incorporated CIBD-type concepts in its Code of Conduct for Procurement, although it does not make use of a stand-alone CIBD.

20. Another example is the Vancouver Organising Committee (“VANOC”) for the 2010 Vancouver Winter Olympics. VANOC included a “no collusion requirement” similar to the CIBD in its tender documents following discussions with Bureau representatives. The “no collusion requirement” stipulated that bidders must arrive at their bids independently and that communications with other bidders must be disclosed. VANOC also reserved the right to request a CIBD in addition to the “no collusion requirement” if it had reason to suspect that bids were not arrived at independently.

21. The Bureau has recently begun to track steps taken by procurement agencies to strengthen their processes in light of the Bureau’s outreach activities. While data is only preliminary, it is nonetheless interesting to note that a number of procurement agencies in Canada have recently adopted CIBDs. The Bureau has also learned that implementing CIBDs has, in some cases, stopped bid-rigging in its tracks, as parties have realised the enhanced scrutiny that procurement agencies are applying to bidders’ activities.

3.6 Immunity Programme

22. The availability of immunity from prosecution by the Crown under the Bureau’s Immunity Programme provides a powerful incentive for parties engaged in bid-rigging to disclose the existence of the offence and to fully co-operate with the Commissioner and the Crown, who are in charge investigating and prosecuting the illegal activity. Accordingly, while challenging in practice, consistency between a jurisdiction’s competition law immunity policy and public procurement policies pertaining to disqualification from future bidding (because of vendor malfeasance) should be given due consideration.

4. Collusion and Corruption

23. As noted previously, corruption does not fall under the Bureau’s mandate as a competition law enforcement agency. However, in response to allegations of corruption and bid-rigging in the construction industry, police forces in the province of Quebec recently announced the creation of a unit comprised of 40 officers from various law enforcement agencies, including the Bureau, dedicated to investigating corruption and bid-rigging allegations. The Bureau’s role is to provide advice and expertise on aspects falling within its enforcement responsibilities, such as bid-rigging.

5. Conclusion

24. In Canada, the Bureau’s active enforcement and outreach activities with respect to bid-rigging demonstrate how serious we consider this criminal behaviour to be. To effectively detect and deter bid-rigging in public procurement, the Bureau has engaged in numerous collaborative efforts with organisations responsible for public procurement policy, practice and training. Shared “ownership” has been a key to success in promoting more effective competition in public procurement and in reducing the risk of bid-rigging.¹⁴

¹⁴ See Management Response to IC Mid-Term Evaluation of the Competition Bureau’s Anti Bid-rigging Activities recommendation 2. Available online at: [http://www.ic.gc.ca/eic/site/ae-ve.nsf/vwapi/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf/\\$FILE/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf](http://www.ic.gc.ca/eic/site/ae-ve.nsf/vwapi/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf/$FILE/Management_Response_Competition_Bureau_Mid-Term_Evaluation_of_Anti_Bid-Rigging_Activities-eng.pdf).

APPENDIX A

CERTIFICATE OF INDEPENDENT BID DETERMINATION

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)