



INTER-AMERICAN DEVELOPMENT BANK



LATIN AMERICAN COMPETITION FORUM

-- 10-11 September, Panama City--

-- Session IV --

The OECD Project to Reduce Bid Rigging in Latin America

A Progress Report

I. Introduction

1. The OECD Project to Reduce Bid Rigging in Latin America is designed to assist competition and procurement authorities to detect and prevent bid rigging in public procurement. The Project was launched at the Latin American Competition Forum in 2007 with pilot projects in Brazil and Chile. By drawing upon extensive work of the Competition Committee, the Project hopes to increase the number of successfully prosecuted bid rigging cases as well as help deter cartel activity. Ultimately this effort could lead to substantial savings of government funds and in turn it could boost the stature of the competition authority within the government.

2. In many countries public procurement accounts for a large share of public expenditure in the domestic economy. Existing statistics suggest that, on average, public procurement accounts for approximately 15% of Gross Domestic Product (GDP) in OECD countries and even more in many non-OECD economies. Because the primary goal of public procurement is to select suppliers with the lowest quality adjusted price, competition authorities can significantly aid that effort by reducing bid rigging in public procurement.

3. Bid rigging occurs when businesses conspire to raise prices to purchasers who wish to acquire products or services through a bidding process. Bid rigging conspiracies can take a number of forms, all of

which impede the efforts of purchasers - frequently federal, state, and local governments - to obtain goods and services at the lowest possible price. For example, a bid rigging conspiracy among two businesses might involve an agreement for one firm not to bid on a particular tender or an agreement to bid high in order to allow the designated winner's bid to be accepted by the procurement authority.

4. Not surprisingly, many experts feel that the best placed authority to detect signs of unlawful bidding arrangements is the procurement authority itself as it has good knowledge of the relevant industry sector, and can observe patterns in bidding processes that may indicate unlawful collusive activity. Discussions of bid-rigging in the OECD Competition Committee and its Working Party no. 3 (WP3) have emphasised that procurement authorities can play an important role in helping to detect unlawful bid rigging and in reducing the probability of bid rigging through well designed auctions, among other measures. Thus, not surprisingly, the Third Report on the Implementation of the 1998 Recommendation on Hard Core Cartels concluded that to fight bid rigging more effectively more countries should expand their awareness programmes and work more extensively with procurement officials.¹

II. Related OECD Work

5. For quite some time the OECD Competition Committee has examined a variety of issues related to hard core cartels. The initial work in this area led the OECD Council to adopt a Recommendation in 1998 Concerning Effective Action Against Hard Core Cartels.² The 1998 Council Recommendation was followed by the 2005 Best Practices concerning the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations.³ During that time, the Competition Committee and WP3 published numerous reports and best practice documents which followed up on the earlier Recommendation and which examined new topics such as effective leniency and amnesty programs, sanctions against businesses and individuals, and plea bargaining and settlement issues, concessions, and among others.⁴

6. More recently, the OECD Competition Committee focused on competition issues in bidding markets as well as construction markets in particular (as this sector has often seen cartel activity in a number of jurisdictions).⁵ Similarly, WP3 recently examined ways of enhancing competition in public procurement and the types of documents and working methods that competition authorities use to inform procurement agencies of the harm from bid rigging as well as how to detect and prevent it.⁶ As a follow up to this work, WP3 delegates agreed at the June 2008 meeting to create a document that could be used by officials to help detect cartels and design auctions to inhibit cartel conduct. This document, often referred to as a checklist, as well as the prior cartel work by the OECD will undoubtedly help support the goals of the Project.

1 Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, OECD 2005, p. 3.

2 Recommendation of the Council concerning Effective Action Against Hard Core Cartels (25 March 1998 - C(98)35/FINAL)

3 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (October, 2005)

4 See: www.oecd.org/competition

5 See: OECD, Roundtable on Competition in the Bidding Markets, Background Note by the Secretariat (DAF/COMP(2006)27) and OECD, Roundtable on Competition in the Construction Industry, Background Note by the Secretariat (DAF/COMP(2008)15).

III. Project Implementation

7. This section of the Report describes how the two main stages of the Project were implemented. A key feature of the Project is involving experts from the competition authorities of OECD member countries. The work has been assisted by experts from the Portuguese authority in the case of Brazil and from Canada in the case of Chile. Experts from Canada and Portugal participated in “needs assessment” missions in October and December of 2007. They have been actively involved in subsequent discussions as well as in the writing of various reports, such as those examining issues related to proposed amendments to Brazil’s procurement and competition laws. The OECD is highly appreciative of their contributions to the Project.

First stage - needs assessment

8. The first stage involved assessing the needs of the country in question. During missions, experts spoke to a wide range of players to assess the current situation. For example, experts spoke with officials from the competition authority, the competition tribunal, a variety of procurement agencies, the procurement tribunal, government auditing bodies, a municipal association, an airport regulatory agency and other organizations. In many instances, interviews were conducted in the local language, with interpretation provided as needed, or in English, if it was appropriate.

Second stage - work plan design and implementation

9. Following the needs assessment, a work plan was drawn up in co-operation with the competition authority. Each work plan detailed the steps that were to be taken over the following months and indicated which agencies the experts and the competition authority would interact with when implementing the work plan. While the contents of the work plan depended on the particular circumstances of the country in question, in general both plans focused to varying degrees on work with outside agencies such as procurement authorities, capacity building inside the competition authority itself, and work on legislative changes.

IV. Progress Report on the Project in Brazil

10. The work in Brazil is anchored in the anti-bid rigging unit within SDE, the Ministry of Justice’s competition authority.⁷ During the needs assessment portion of the Project, the OECD experts met with officials from the Ministry of Justice (SDE), the competition tribunal (CADE) and the Ministry of Finance (SEAE). Discussions with these agencies focused on creating an agenda of activities for the anti-bid rigging unit, procurement law reform, outreach to other government agencies, an evaluation of a recent bid rigging case and case prioritization issues. Meetings were held with officials from outside agencies such as the Ministry of Planning, the Ministry of Roads and Infrastructure, the Ministry of Social Security, the Ministry of Health, the Ministry of Education, SABESP (a large water company), CGU (the internal auditors for the federal government), and TCU (the Federal Audit Tribunal).⁸ The meetings with the

7 SDE’s bid rigging unit was established in May 2007.

8 The link between corruption and collusion was well demonstrated in that members of CGU indicated that most corruption cases involved some form of collusion.

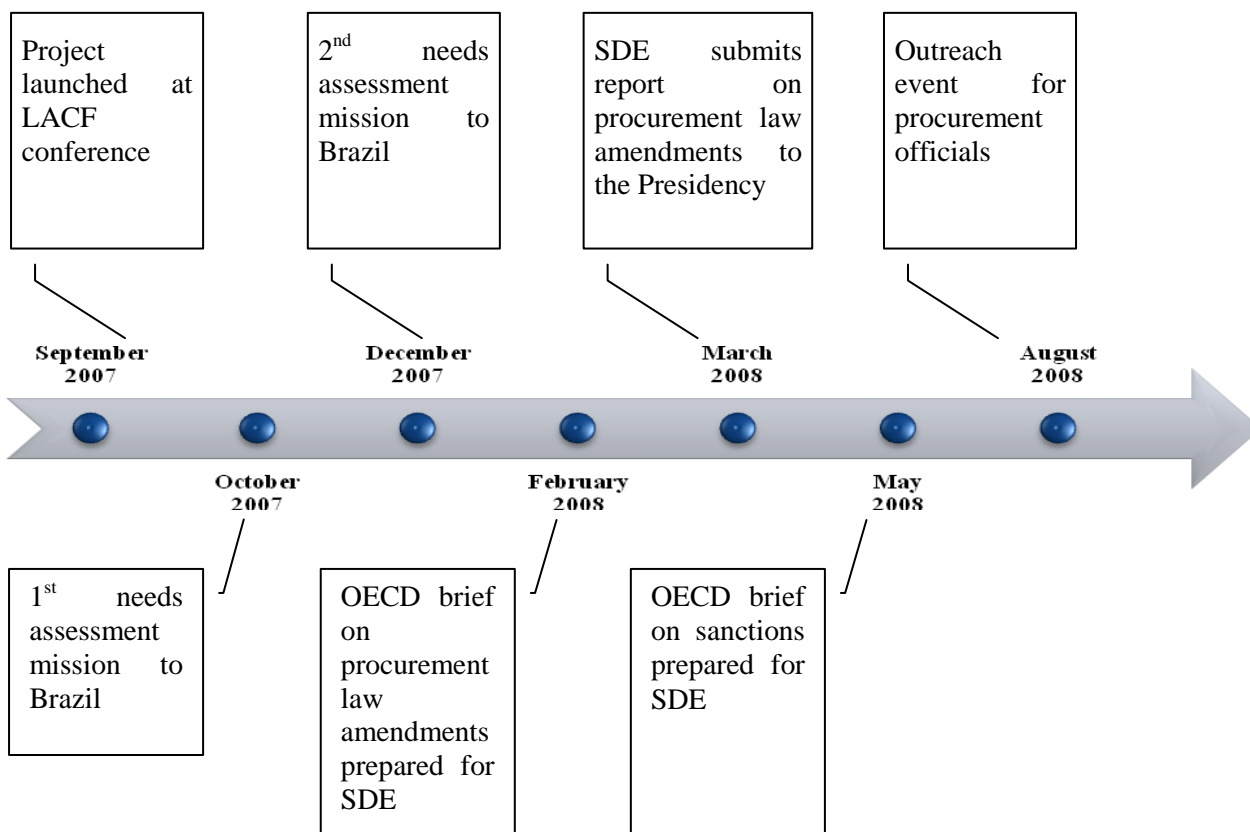
Ministries and other organizations revealed that although no organization systematically attempted to root out bid rigging cartels, they were aware of what bid rigging is and the harm that it causes. Nevertheless, they did not know how to identify the kind of behaviour by businesses and individuals that might indicate that a cartel has formed as well as what efforts they could take to inhibit cartels. In addition to these meetings, the OECD experts also met with assistants to a Brazilian Senator as well as the Ministry of Planning. Those meetings focused upon certain procurement law amendments.

11. As a result of some of these meetings, the OECD experts began to have some concerns with several proposed amendments to Brazil's procurement law as they seemed to negatively impact competition in the construction sector. As a result, a short brief was submitted to SDE in February, 2008 outlining the specific procurement practices of several jurisdictions as well as further steps that SDE should take in seeking to identify whether the amendments would likely reduce competition. It was also suggested that the authority draft an amendment to the bill which would seek to establish a Certificate of Independent Bid Determination (CIBD) program. Ultimately, SDE submitted a report to the Presidency of the Brazilian Republic in March, 2008 which examined in detail various proposed amendments to the procurement law. Although this report largely focused on amendments which impacted the construction sector, SDE did include a request to implement the CIBD program.

12. In addition to the brief on the procurement law amendments, the OECD submitted to SDE in May, 2008 a brief on a proposed amendment to the competition law which focused upon sanctions. Another part of the overall effort is to establish a network of bodies that will coordinate efforts to fight corruption and bid rigging. The focus of this effort is on the Internal Audit Agency, the Federal Audit Tribunal, and the Ministry of Planning. This effort is at an early stage and takes some of its guiding ideas from other jurisdictions with similar practices. Notably, an interesting feature of this effort is the possibility of using complementary enforcement powers to discover bid rigging and corruption.

Timeline of Work in Brazil

13. The timeline below illustrates the major outputs that have been achieved so far in Brazil. The focus, as highlighted above, has been on legislative work as well as outreach to procurement agencies and other organizations.



Future Work in Brazil

14. Future work with Brazil may continue to focus on strengthening the competition and procurement law. In addition to that work, capacity building inside the authority as well as to other parts of the Brazilian competition law and policy system may be undertaken. The outreach efforts will also continue as a large seminar for procurement officials is currently planned for August, 2008.

V. Progress Report on the Project in Chile

15. During the needs assessment portion of the Project, meetings were held with the heads of the National Economic Prosecutor (FNE) as well as with FNE’s division heads. Discussions focused on FNE’s interest in strengthening enforcement powers through legislative amendments that would establish a leniency program, strengthen sanctions and provide for the ability to conduct dawn raids.⁹ To help that effort, Commissioner Sheridan Scott from Canada’s Competition Bureau addressed members of the Chilean Parliament in October, 2007. Her speech concerned the importance of establishing a well designed leniency program, strong sanctions, and the ability to conduct dawn raids.

16. A meeting was also held with the Tribunal de Defensa de la Libre Competencia (the Competition Tribunal). Officials during these meetings pointed out the need for stronger enforcement power so as to

⁹ Staff retention and complaint prioritization and handling (FNE currently receives more than 200 annually) were also sighted as important issues affecting their anti-cartel enforcement efforts.

enable a higher standard of proof to be provided to courts (rather than indirect evidence) and the need to help members of the Chilean Parliament understand why competition law reform is needed.

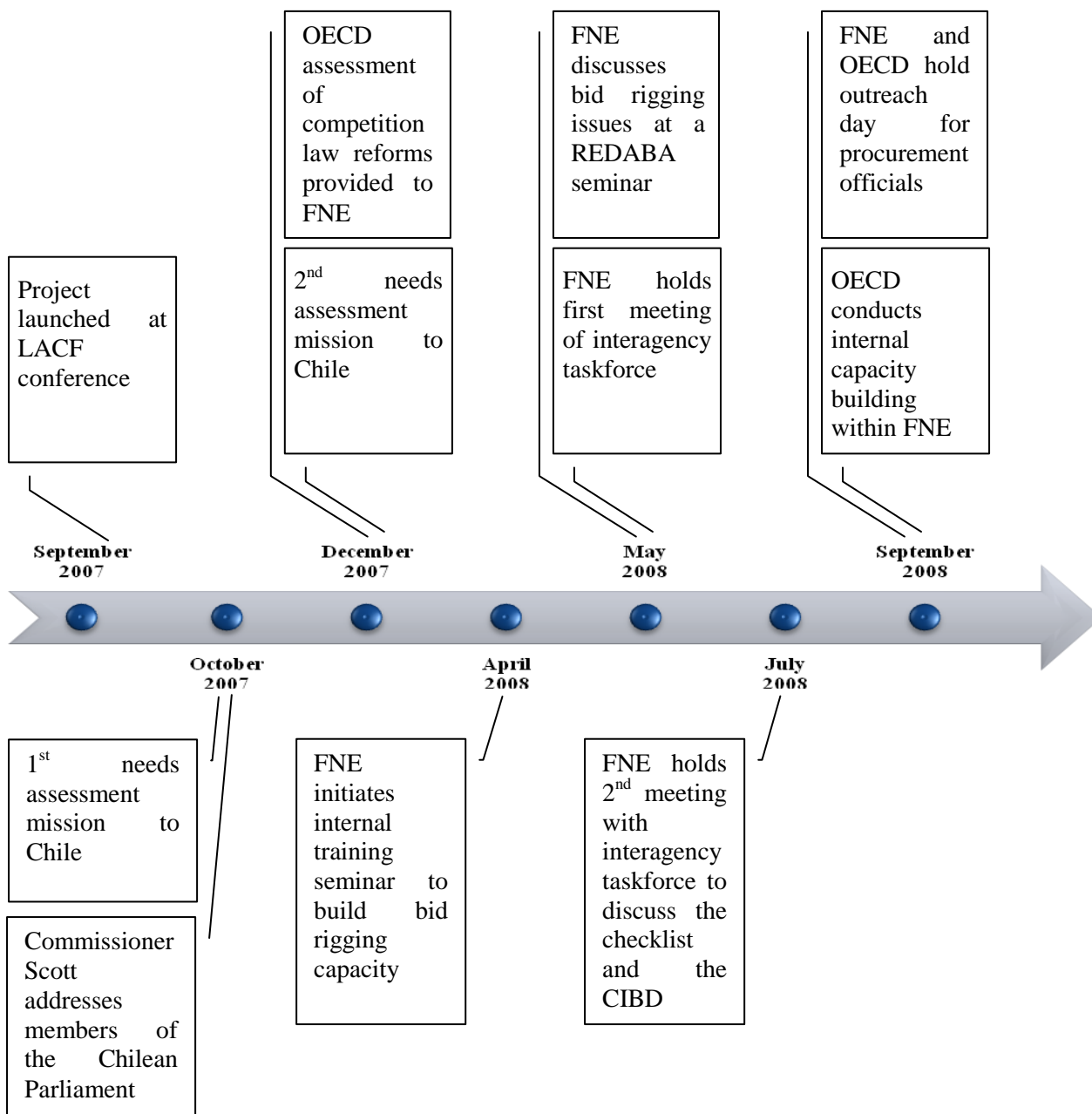
17. In addition to the above, meetings were held with the Dirección de Compras Públicas (a web-based procurement authority), the Tribunal de Compras y Contratación Públicas (the procurement tribunal), Junta Aeronáutica Civil (an airline transportation authority), Cenabast (an agency that handles auctions for medical supplies), the Asociación de Municipalidades (a municipal association), the Ministry of Public Works, and the Controller of the General Republic (the federal auditing body). Most of the representatives from procurement organizations seemed to understand the importance of fighting bid rigging. Many officials were interested in receiving training on identifying bid rigging cartels and in receiving advice on how to best design tender offers so as to reduce the likelihood of collusion.

18. Although the work in Chile has proceeded more slowly than in Brazil, a work plan has now been agreed with the National Economic Prosecutor. That work plan puts its primary emphasis on building capacity within the authority and working with outside agencies. One initiative focuses on building a guide to help case officers and external agencies detect bid rigging. Another part of the project focuses on establishing an interagency taskforce focused on reducing bid rigging. The initial partner agencies for this effort include the Association of Public Procurement Officers (REDABA), the Ministry of Public Works (MOP), the General Comptroller (CGR), the Internal Government Comptroller (CAIGG) and Chile Compras (the federal online procurement system). The first meeting of the interagency task force took place in May, 2008 and the second meeting will occur on July 10, 2008.¹⁰ On May 15, 2008, FNE gave a presentation on bid rigging to members REDABA. At that meeting more than 200 procurement officers attended. This will be followed up with additional presentations to procurement officials as well as a survey of the procurement practices of the members of REDABA. Ultimately, tailored training programs that target these agencies will likely be developed to help them better identify bid rigging and institute practices that enable a trail of evidence to be obtained. To help aid this effort, an investigative techniques workshop for FNE is planned for late September, 2008. This seminar will follow-up on an earlier capacity building seminar that was completed in April by FNE). Finally, a seminar for procurement agencies is planned for September as well.

Timeline of Project Work in Chile

19. The timeline below illustrates the major outputs that have been achieved so far in Chile. The focus so far has been on capacity building within the authority, outreach to procurement agencies and other organizations, and legislative work.

10 An official from MOP attended WP3's roundtable discussion on bid rigging as well as the Competition Committee's discussion of competition issues in the construction sector.



Future Work in Chile

20. Future work in Chile is likely to focus on aiding FNE's efforts to strengthen investigatory powers. This will be accomplished by providing FNE with briefs which examine issues raised by various lawyer associations concerning leniency programs, dawn raid powers and wire tapping. The work could also aid the formation of a cartel unit in FNE as well as building capacity within that unit. Outreach efforts are likely to be focused on helping procurement officials to detect bid rigging as well as to prevent it. For example, one effort is likely to involve placing a checklist document on FNE's website and on the procurement websites for Chile Compras and REDABA. In addition, members of the interagency

taskforce are likely to incorporate the checklist into their manuals into order to help educate their officials on how to identify bid rigging. Another effort could potentially involve establishing an online system for reporting potential cartels and a dedicated phone number so procurement officials or others could report suspicious behaviour. Finally interagency taskforce members are likely to assess the ability to establish a Certificate of Independent Bid Determination Program in Chile in the near future. In September, 2008, the results from the first workplan will be assessed and a new workplan will likely be drafted.

VI. Feedback from Brazil and Chile

21. Reviews by both Brazil and Chile indicate that they deem the Project to be a success so far. For example, in its submission to WP3 at the June 2008 roundtable discussion, Brazil indicated that the “OECD was a very important partner” and the “assistance already given to SDE by the OECD has been of immense value.” Chile, too, has greatly appreciated the effort by the OECD.

VII. Summary

22. The OECD Project to Reduce Bid Rigging in Latin America is nearly one year old. Progress within Brazil and Chile has been steady. Both of the initiatives in Brazil and Chile have emphasized outreach to procurement agencies and other government bodies as the natural way to combat bid rigging. Those initiatives corroborate the findings of the OECD Competition Committee and WP3 which have emphasized the importance of establishing a close working relationship with procurement bodies. More is called for, but the effort is surely taking hold.