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LATIN AMERICAN COMPETITION FORUM

Section III - Improving Effective Public Procurement : Fighting Collusion and Corruption

Contribution from Spain - CNC

18-19 September 2012, Santo Domingo, Dominican Republic

The attached document from Spain (CNC) is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III of its forthcoming meeting to be held on 18-19 September 2012 in Santo Domingo, Dominican Republic.

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LATIN AMERICAN COMPETITION FORUM

-- 18-19 September 2012, Santo Domingo (Dominican Republic) --

Session III – Improving effective public procurement: fighting collusion and corruption

-- CONTRIBUTION FROM SPAIN (CNC) --

1. **Activities of the CNC**

- Given the quantitative and qualitative importance of public tendering for the efficient management of a country's economic resources, market competition and ultimately, citizen welfare, the former Competition Protection Tribunal (TDC) and the current National Competition Commission (CNC) have in recent years been pursuing various activities designed to help foster and promote effective competition in public procurement procedures, to the benefit of the contacting administrations, competition, and consumers and users.
- Among the **decisions**² **issued** in various sectors of economic activity, two recent cases relating to public works are worthy of particular note.
 - Asphalt. CNC resolution of 26 October 2011³ imposing sanctions on a price-fixing and market sharing cartel established by asphalt producers⁴. The fines imposed totalled €16 million, distributed among 12 enterprises. The area of influence of the enterprises investigated, determined by the characteristics of the product, in effect facilitated the negotiation of

According to EU data, public procurement amounts to around 15% of GDP in Spain (17% in France and Germany, and as much as the 23% in the Netherlands). Moreover, the losses incurred by the state through fraudulent bidding are estimated at €300 million a year for every percentage point of GDP affected by bidrigging, because of a 20% increase in prices.

² files be consulted at http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx.

Case S/0192/09 Asfalto.

Press releases in Spanish and English.

agreements and the consequent sharing of markets at the local level. The resolution considered it highly likely that this cartel would be expanded to other geographic areas, although the evidence at hand related only to the zones investigated.

This case does not, strictly speaking, represent a cartel vis-à-vis public administrations, as the customers are essentially private firms that act as contractors for public works, both for the account of the administrations and that of private entities (urban developers, etc.).

• **Roadwork**. Resolution 19 of October 2011⁵, concerning competitions for highway paving⁶. A fine of €43 million was imposed, distributed among 46 construction firms, in proportion to their participation in the cartel and the size of each firm, for having negotiated agreements to allocate markets and fix prices for highway rehabilitation works throughout Spain.

This collusion affected essentially tenders called via the restricted procedure. Under such procedures, the administration issues a call for tenders, for which bidding is restricted to firms that have been pre-selected by the administration, in response to an application and after assessing their creditworthiness. In these tendering processes, the administration establishes a benchmark budget and the selected firms must present their bids indicating the extent to which they are prepared to come in under that budget. The firms selected as a result of this procedure maintained mutual contact and held meetings to exchange information on the markdowns they were prepared to offer. On that basis they reached agreement as to which would be the winning markdown, and on the remaining bids. Those markdowns, of between 1% and 6%, were much lower than those observed under competitive conditions (between 15 and 30%).

- 3. With respect to **promoting competition**, Law 15/2007 [the "Competition Act"] reinforces the powers of the CNC in a number of areas, including the production of "general reports on sectors .with proposals for liberalisation, deregulation or regulatory amendment". Moreover, articles 25 and 26 give the CNC an advisory function with respect to issuing "reports on draft or proposed rules that affect competition". When it comes to competition advocacy, article 12.3⁷ of the Competition Act gives the CNC **the power to challenge before the courts** any administrative acts or regulations that give rise to obstacles to free competition.
- 4. The following is a prime example of the Commission's activities within a sector:
 - Reports on tenders for State concessions for inter-city passenger transport by bus. The CNC's 2008 report contained an analysis and assessment of the 2007 Protocol of the Ministry of Development (Ministerio de Fomento, signed with unions, consumers and industry representatives) to establish criteria for these competitions. The report noted that the protocol does not favour competition, and it highlighted some particularly negative aspects.

Two years later, in 2010, the CNC published another follow-up report on the changes introduced in the protocol and in the competitions held by the Ministry in 2009. The CNC concluded that,

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Case S/0226/10 Licitación de carreteras.

⁶ Press releases in Spanish and English.

[&]quot;The National Competition Commission is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived."

while some improvements had been made, protocol was still inadequate, and the tendering processes were still not sufficiently competitive.

Relying on the arguments put forth by the CNC, the firm Globalia Autocares SA lodged five successful appeals before the courts, which ruled that the bidding documents used by the Ministry did not allow access to government contracts under conditions of equality, and must therefore be annulled. As a consequence of this "combined pressure", the Ministry of Development changed its approach in the bidding documents last fall, giving greater importance (although still only 25%) to the price variable and eliminating the limitations to obtaining high scores.

- Report on the extension of concessions for passenger transport by bus at the regional (autonomous) levels. In 2010 the CNC argued that these extensions violated the principles and spirit of Community Regulation 1370/2007, with effects highly prejudicial to competition, by directly impeding competitive access to concessions, to the disadvantage of final users of the service.
- During the first half of 2010 the CNC made use for the first time of its **powers of judicial challenge**, filing complaints against the rules adopted by two Autonomous Communities (Valencia and Galicia) with respect to the extension of certain concessions granted in the transportation area that had the effect of closing the market to competition during a long period of time. Previously, the CNC had filed numerous suits to have those Regions revoke acts contrary to free competition. Both Autonomous Communities failed to revoke those requirements within the legal time limit, and consequently the CNC filed appeals with the corresponding courts, which are still pending decision.
- 5. Since then, although no new challenges have been presented against public contracts, the instrument has been consolidated while maintaining its selective character. We expect this innovative instrument to be singularly effective for challenging administrative acts that restrict free competition.

2. Guide to Public Procurement and Competition

2.1. Introduction

- 6. Recognising how important public bidding is in securing the welfare of the citizenry, and drawing upon its experience with enforcement, promotion and legal challenges in recent years, the CNC approved and published a Guide to Public Procurement and Competition⁸ in 2011.
- 7. This guide is intended for public sector entities that operate in the market as buyers of goods and services through public procurement procedures.
- 8. The guide does not pretend to make proposals for amending public procurement regulations nor to establish interpretative criteria of a legal nature for enforcing those regulations. Rather, it offers recommendations on the basis of which the options most favourable to competition can be identified and selected within the possibilities offered by those regulations.
- 9. The innovative feature of this guide in terms of Spanish competition legislation is that it considers two areas that tend to make bidding competitive. On one hand it contains a series of

Guía sobre Contratación Pública y Competencia (Español and English)

recommendations to public administrations on how to undertake procurement procedures that are favourable to competition, and on the other hand it offers a series of indicators to prevent and detect bid rigging among firms, adapting to Spanish circumstances the existing national and international recommendations in this area.

2.2. Conclusion, design, procedure and performance of contracts

- 10. When it comes to the conclusion, design, procedure and performance of contracts in the process of public tendering, the following decisions are considered particularly likely to cause damage to competition:
 - **Decision on whether or not to conclude a procurement contract:** The alternatives to public contracting are to rely on agreements (*convenios*) or on force account ("own resources"), and the CNC has repeatedly spoken out about the risks of these two approaches.
 - Choice of the contracting procedure: The CNC recommends the open procedure, as a general rule.
 - **Design of bidding documents:** The rules governing access to and adjudication of bids must allow for the greatest possible competition and avoid any discrimination among bidders.
 - **Decisions during the procedure** concerning access of firms to bidding information, rectification of errors, and publicity and transparency in the processes.
 - **Decisions subsequent to the award:** If amendments must be made because of unforeseen circumstances, the CNC recommends a restrictive interpretation to this possibility.

2.3. Indicators of possible collusion

- 11. These indicators of possible collusion can be looked for in:
 - The bids: sudden withdrawals, lower than normal number, consistent submission of losing or winning bids, subcontracting with other firms.
 - Prices: similarity in prices, different prices, price reductions in the face of a new bidder, unjustified increases.
 - Documentation submitted: common features, similar calculation errors, etc.
 - Behaviour of firms: reference to a possible agreement, similar terminology for justifying price increases, etc.
- 12. Contracting agency personnel have a crucial role to play in preventing and detecting bid rigging agreements in the process of awarding public contracts, and it is therefore essential to train personnel in the techniques of detecting and preventing such collusion.
- 13. Public administrations can foster competition by following the recommendations of section 3.2 of the Guide and using the indicators described there. They can also take certain preventive measures to discourage collusive conduct, such as for example varying the design of the tenders, safeguarding the information provided, or designing lots with special care to reduce predictability and strategic behaviour as far as possible.

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14. In addition to the recommendations in the Guide, in order to facilitate the detection of indicators of practices in restraint of competition in the various processes of public tendering, the CNC has proposed a series of measures under the draft Act on Transparency, Access to Public Information and Good Government. This draft calls for the creation of a public information portal that will contain specified information on bidding procedures of the various public administrations, and the CNC has proposed that the statistical information compiled by the entity responsible for managing the portal (even if it is not all publicly released) should be of greater depth and scope.