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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT: BREAKOUT SESSIONS

Briefing Note by the Secretariat

-- Breakout Session 2 --

This briefing note discusses "The Usefulness of Guidelines in Public Procurement". It is submitted by the Secretariat under Breakout Session 2 of the Global Forum on Competition to be held on 18 and 19 February 2010.

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USEFULNESS OF GUIDELINES IN PUBLIC PROCUREMENT

-- Briefing Note by the Secretariat --

1. Background

1. The Guidelines for Fighting Bid Rigging in Public Procurement were adopted by the OECD Competition Committee in February 2009. The purpose of the Guidelines is to assist government officials to design tenders to reduce the risks of bid rigging and to detect bid rigging when it occurs. The Guidelines have been translated into nearly 20 languages. They are available at www.oecd.org/competition/bidrigging.

2. Common Forms of Bid Rigging

2. Although firms may agree to implement bid-rigging schemes in a variety of ways, they typically implement one (or more) of several common strategies. These strategies in turn may result in patterns that officials can detect and which can then help uncover bid-rigging schemes.

- Cover bidding. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition;

- Bid suppression. Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner's bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration;

- Bid rotation. In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company;

- Market allocation. Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a certain class of potential customers which are allocated to a specific firm.

3. Industry, Product and Service Characteristics that Help Support Collusion

3. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or of the product involved. Such characteristics tend to support the efforts of firms to rig bids. Some of these characteristics include:

- Small number of companies. Bid rigging is more likely to occur when a small number of companies supply the good or service. The fewer the number of sellers, the easier it is for them to reach an agreement on how to rig bids;

- Standardised or simple products. The chances of bid rigging are greater if the products or services being purchased are standardised and simple, and do not change over time. Under these circumstances, it is easier to work out an agreement and have it last a long time;

- Little or no entry. When few businesses have recently entered or are likely to enter a market because it is costly, hard or slow to enter, firms in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support bid-rigging efforts.

4. The OECD Checklists for Fighting Bid Rigging

4. The Guidelines contain two checklists which officials can use to help design tenders to reduce the risks of bid rigging and to detect it when it occurs. These checklists are briefly described in the next two sections.

4.1 Checklist for Designing Public Procurement Tenders to Reduces the Risks of Bid Rigging

5. There are many steps that procurement agencies can take to promote more effective competition in public procurement and reduce the risk of bid rigging. Procurement agencies should consider adopting the following measures:

4.1.1 Learn about the market

6. Knowledge of the prices that have been submitted in recent tenders for the same or similar products, as well as familiarity with recent trends in the market, help procurement officials identify acceptable bids. It is particularly useful to gather information about potential suppliers' prices and costs, including prices in other geographic areas or for similar products.

4.1.2 Encourage participation by bidders

7. The tender process should be design to encourage participation. Unnecessary restrictions on the size of firms, composition or nature can reduce the number of bidders. Bidders can also be discouraged if the cost of preparing their bid is high. In addition, allowing bidding on a portion of a large contract will permit small and medium-sized firms to participate. Similarly, allowing foreign firms to submit a bid will make collusion more difficult.

4.1.3 Have clear requirements and allow for unpredictability in the tender process

8. Tender specifications should be defined in terms of functional performance, where possible, rather than by reference to specific products. Tenders should allow for alternative or innovative sources of supply. Clear tender requirements encourage additional firms to bid. Predictable purchasing patterns facilitate bid-rigging schemes.

4.1.4 Limit communication among bidders

9. Bid rigging requires bidders to communicate with each other. If the procurement process is designed to make it difficult for potential bidders to identify their competitors, then bid rigging becomes more difficult. Procurement agencies should avoid bringing potential bidders together, avoid disclosing the names of bidders, and allow bidding by mail, by telephone, or electronically.

10. Governments can also require those who bid for government contracts to submit a *certificate of independent bid determination*. Certificate rules typically require a statement under oath from each firm confirming that there has been no collusive behaviour, whether through inappropriate communication between competitors, disclosure of bid prices or encouragement to rig bids.

4.1.5 Evaluate the criteria for awarding contracts

11. The probability of bid rigging increases when there is a small number of potential bidders. It is therefore important to consider the impact of the design of the procurement process on the number of bidders over the long term. Specifications should clearly describe all award criteria to encourage maximum participation. It is important to avoid preferential treatment of certain classes of suppliers, or of firms that currently have contracts up for renewal.

4.1.6 Provide training to procurement staff about bid rigging

12. Appropriate training will help procurement staff to design a procurement process that is less susceptible to bid rigging. Similarly, development of a data base that contains past and present bid results will assist staff to detect potential problems quickly and help to rectify them. The competition agency may be able to assist in these efforts and help to review the data. Informal interviews with bidders who have stopped participating in tenders, or who have lost a number of bids, may also aid in identifying design problems.

4.2 Checklist for Detecting Bid Rigging in Public Procurement

13. Bid-rigging agreements can be very difficult to detect as they are typically negotiated in secret. In industries where collusion is common, however, suppliers and purchasers may be aware of long-standing bid-rigging conspiracies. In most industries, it is necessary to look for clues such as unusual bidding or pricing patterns, or something that the vendor says or does.

4.2.1 Look for opportunities that the bidders have to communicate with each other

14. Bidders need to know and communicate with each other to reach an agreement. Once bidders know each other well enough to discuss bid rigging, they need a convenient location where they can talk. These meetings occur most often at, or in association with, trade association meetings, or other professional or social events. They are also likely to occur prior to the opening of the tender process.

4.2.2 Look for indications that the bidders have communicated with each other

15. Bid rigging requires actual and often repeated communications between the bidders. Procurement officials may hear or come across statements indicating that information may have been shared, such as a bidder having knowledge of another bidder’s pricing, or not expecting to be the low bidder, or perhaps when a bidder refers to “industry” or “standard” practices or prices.

4.2.3 Look for any relationships among the bidders after the successful bid is announced

16. In some cases, bidders may attempt to split the extra profit that is earned through bid rigging. This is especially true if one large contract is involved. Sometimes the winning firm may pay the other bidders directly; however, the ‘profit split’ can also be passed on through lucrative sub-contracts to do some of the work or to supply inputs to the project. Joint bids can also be used as a way to split profits.

4.2.4 Look for suspicious bidding patterns

17. It is important that officials look for bidding patterns. Bidders may have devised a scheme that reveals itself as a pattern over the course of many bids. For example, there may be a pattern to the winner (A, B, C, A, B, C), or it may be that the same bidder always wins bids of a certain type or size, or that some bidders only bid in particular geographic areas. Pricing may be unusual. All bids may be unexpectedly high, or discounts or rebates may be unexpectedly small. Bids may also be different from previous, similar procurements, but the differences are unrelated to any change in the underlying economic conditions. Bid levels may change when a new bidder (i.e. one who has not bid in the past) submits a bid.

4.2.5 Look for Unusual Behaviour

18. Procurement officials expect the winning bidder to accept the contract, so it could be considered 'unusual', for example, if the winner chose not to accept it, or withdrew before the award was made. Submitting a bid without normal detail or required documentation, or without the necessary information from suppliers, may also constitute unusual behaviour, as does a situation where the number of bidders is unexpectedly small, with some normal bidders not participating.

4.2.6 Look for Similarities in the Documents

19. Bid-riggers sometimes have a single person prepare all the bids. Alternatively, a number of people may work on the bids, but they may work closely with each other. If the bid documents are put side-by-side, one may notice the same type of paper, the same postmarks, the same misspellings, the same handwriting, the same wording, the same alterations or changes, the same miscalculations or the same amounts.