



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

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For Official Use**

**Working Party No. 3 on Co-operation and Enforcement**

**PUBLIC PROCUREMENT/BID RIGGING ISSUES**

**-- Canada (Competition Bureau) --**

**15 June 2010**

*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.*

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## **1. Introduction**

1. Section 47 of Canada's *Competition Act* (the "Act") imposes criminal sanctions where two or more bidders, in response to a call or request for bids or tenders, agree that one or more bidders will refrain from bidding or will withdraw a submitted bid, or agree among themselves on bids submitted, without making the agreement known to the person calling for bids before or at the time the bids are submitted. Firms and individuals convicted of bid-rigging face fines in the discretion of the court and/or terms of imprisonment of up to fourteen years.

2. Combatting domestic bid-rigging is a key priority for Canada's Competition Bureau (the "Bureau"). In addition to vigorous investigation and enforcement, the Bureau actively engages with stakeholders involved in procurement activities to provide them with the tools and expertise necessary to detect and deter bid-rigging conduct.

3. This submission explores the Bureau's collaborations with public procurement agencies to eliminate bid-rigging, including through the use of Certificates of Independent Bid Determination, and interaction between the bidder disqualification policies of public procurement agencies and the Bureau's Immunity and Leniency Programs.

## **2. Collaboration with public procurement agencies**

4. Public procurement officials have a vested interest in detecting and deterring bid-rigging to ensure that the government receives value for money and to maintain the integrity of public procurement processes. These objectives are thwarted by bid-rigging, which undermines competitive processes and results in lower-quality goods and services and higher prices, costing taxpayers millions of dollars annually.

5. The Bureau's outreach activities are aimed at providing procurement agencies at the federal, provincial and municipal levels of government with a better appreciation of the risks of bid-rigging, and encouraging them to adopt measures to effectively prevent and detect bid-rigging in public procurement. Since 2009, the Bureau has conducted approximately 50 outreach presentations to more than 1,700 government officials. These presentations facilitate reporting of suspected bid-rigging by fostering strong relationships between procurement officials and contacts at the Bureau.

6. The federal department of Public Works and Government Services Canada ("PWGSC"), which provides federal government departments and agencies with procurement services, has been a key recipient of the Bureau's outreach presentations. This department is not only the federal government's central purchasing agent, but also Canada's largest public purchaser of goods and services. Purchases by PWGSC account for over 85 percent of the total value of federal government procurement, amounting to, on average, \$14 billion CAD worth of goods and services purchased each year.<sup>1</sup>

7. In 2005, PWGSC contacted the Bureau to express concerns regarding certain bidding processes for information technology services. In response, the Bureau initiated an inquiry that led to the laying of bid-rigging charges against 14 individuals and seven companies in February 2009. Parties were accused of rigging ten bids to obtain Government of Canada contracts worth approximately \$67 million CAD. Two

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<sup>1</sup> 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>.

individuals have since pleaded guilty to one count of bid-rigging each.<sup>2</sup> The case concerning the remaining individuals and companies is currently before the courts.

8. The publicity generated by this case in the media, and outreach activities directed toward major public procurement agencies immediately following the laying of charges, has increased the public procurement community's awareness of the importance of combatting bid-rigging. As described below, the Bureau took advantage of this opportunity to expand its educational initiatives and, in particular, to increase collaboration with government departments.

9. In the Bureau's experience, engagement and commitment from procurement agencies' senior management is essential to move from simple awareness of bid-rigging to long-term effective improvements in procurement processes and training programs. In 2009, the Commissioner of Competition sent letters to senior officials in federal government departments involved in public procurement, outlining how the Bureau could assist them in recognizing and preventing bid-rigging activity. The Bureau canvassed areas of cooperation at high-level meetings and, since February 2009, the Bureau has initiated approximately ten new bid-rigging investigations as a direct result of this collaboration combined with outreach presentations.

10. The Bureau also 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. The Bureau has worked closely with the Treasury Board Secretariat, the federal government department responsible for setting Canada's procurement policy, to incorporate anti bid-rigging material into educational programs designed for federal government employees involved in procurement. In addition, the Department of National Defence has incorporated a chapter on bid-rigging into its Fraud Prevention Handbook, which is distributed to all Canadian Armed Forces.

11. In April 2008, a renewed online anti bid-rigging presentation was launched on the Bureau's website, featuring greater interactivity and enhanced multimedia components, including surveillance video excerpts from an actual cartel in progress.<sup>3</sup> The presentation provides public and private organizations engaged in procurement with information to help them detect, prevent and report suspected incidents of bid-rigging. Since January 2010, the presentation has been downloaded more than 200 times.

12. The Bureau has also implemented other enforcement initiatives, such as a "proactive survey" tool in sectors that are identified as high-risk for collusive behaviour. The purpose of these proactive surveys is to uncover possible offences under the Act, to inform industry participants of our Immunity and Leniency Programs, and to underscore that the Bureau considers bid-rigging to be an important enforcement priority. The Bureau's most recent survey was conducted in connection with infrastructure construction projects for the 2010 Winter Olympics in Vancouver. As a result, several members of the industry reported that they are giving renewed attention to the importance of compliance with the Act.

### **3. Certificates of Independent Bid Determination**

13. Certificates of Independent Bid Determination ("CIBDs") are a key component of the Bureau's collaboration with the public procurement community. To deter bid-rigging activity, the Bureau has developed a model CIBD (attached at 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

<sup>2</sup> One individual was fined \$25,000 and the other fully cooperated with the Bureau's investigation and made a \$5,000 donation to charity. In addition, Prohibition Orders were issued against the companies of these two individuals.

<sup>3</sup> Available online at: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02601.html>.

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, and this may prevent bid-rigging or disrupt long-running schemes.

14. CIBDs can assist with the Bureau's bid-rigging investigation or a prosecution by the Director of Public Prosecutions ("DPP").<sup>4</sup> As described earlier in this submission, a key element of the bid-rigging offence in Canada is that the agreement was not made known to the person calling for the bids or tenders at or before the time the bid was submitted. A signed CIBD stating that bids were arrived at independently may help to establish that the tendering authority was not advised of the agreement. In addition, in the event that an individual or company is convicted of bid-rigging, a signed false CIBD may be considered an aggravating factor during sentencing.

15. A procurement agency may also disqualify a bid if the CIBD is not true and complete. The DPP does not prosecute CIBD violations pursuant to the Act, as such violations do not constitute a separate offence under the Act; however, the bidder could be charged with making a false document under section 366 of Canada's *Criminal Code*.

16. The Bureau's outreach efforts strongly encourage public procurement agencies to adopt the Bureau's model CIBD, or a similar CIBD of their own design, when buying goods or services through a competitive process. In tracking steps taken by procurement agencies to strengthen their processes, the Bureau has determined that a number of procurement agencies in Canada have adopted CIBD principles. For 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.

17. Recently, the Vancouver Organizing Committee ("VANOC") for the 2010 Vancouver Winter Olympics included a "no collusion requirement" – similar to a CIBD – in its tender documents following discussions with Bureau representatives. This "no collusion requirement" stipulated that bidders must arrive at 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.

#### **4. Immunity, leniency and bidder disqualification**

18. In addition to reporting suspected bid-rigging to the Bureau, public procurement departments may impose corrective measures under their own administrative review processes that could result in, among other things, disqualification of the bidder from eligibility to bid in future procurement processes.

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<sup>4</sup> Canada has a bifurcated approach to criminal cartel enforcement that separates investigative and prosecutorial functions. The Bureau investigates complaints and conducts formal inquiries into alleged offences. Once sufficient evidence has been secured, the matter is referred to the Director of Public Prosecutions (the "DPP") who, through the Public Prosecution Service of Canada (the "PPSC"), fulfills the responsibilities of the Attorney General of Canada by prosecuting criminal offences under federal jurisdiction. In practice, there is significant cooperation between the Bureau and the Prosecutor's office at both the investigative and prosecution stages. On May 14, 2010, the Bureau announced that the Commissioner and the DPP had entered into a Memorandum of Understanding ("MOU"), setting out the guiding principles of the relationship between the Bureau and the PPSC, and clearly outlining each organization's respective roles and responsibilities at the investigative and prosecution stages of a case. The full text of the MOU is available online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03227.html>.

The Bureau recognizes that this can be a powerful deterrent, but it is important that such policies not undermine the goals of the Bureau's Immunity and Leniency Programs.<sup>5</sup>

19. The Bureau's Programs have proven to be an important means of detecting covert criminal activity, including bid-rigging. The availability of immunity from prosecution by the DPP and leniency in sentencing provide strong incentives for parties engaged in bid-rigging to disclose the existence of the offence and cooperate fully with the Commissioner of Competition and the DPP.

20. The Bureau's Immunity and Leniency Programs neither impose disqualification / debarment penalties on behalf of procurement agencies, nor do they insulate applicants from such penalties. In this regard, the Bureau acknowledges that a procurement agency's disqualification policy could create a chilling effect on potential applicants who might otherwise come forward under the Bureau's Immunity or Leniency Programs, making it more difficult for the Bureau to investigate such matters. This, in turn, increases the risk to government departments of being victimized by such illegal conduct. Accordingly, the Bureau is working closely with procurement agencies, such as PWGSC, to ensure that processes are developed so as to align incentives to the greatest extent possible in order to enhance the integrity and viability of the Bureau's Programs in detecting and eliminating bid-rigging conduct.

## 5. Conclusion

21. In Canada, the Bureau's active enforcement and outreach activities with respect to bid-rigging emphasize the serious nature of this criminal offence. To effectively detect and deter bid-rigging in public procurement, the Bureau has engaged in numerous collaborative efforts with organizations responsible for public procurement policy, practice and training. Shared responsibility for bid-rigging awareness and prevention has been a key to the Bureau's success in promoting more effective competition in public procurement and reducing the risk and incidence of bid-rigging.<sup>6</sup>

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<sup>5</sup> Under the Immunity Program, the first party to disclose to the Bureau an offence not yet detected or to provide evidence leading to the filing of charges may receive a recommendation from the Bureau of immunity from prosecution by the DPP if the party cooperates with the Bureau's investigation (the Information Bulletin on the Immunity Program under the Competition Act is available online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03155.html>). The Leniency Program complements the Immunity Program by establishing a predictable and transparent process to enable culpable parties to cooperate with the Bureau's investigation in return for a grant of favourable treatment by the DPP, usually in the form of a reduced penalty upon pleading guilty to an offence (The Revised Draft Information Bulletin on Sentencing and Leniency in Cartel Cases is available online at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html>).

<sup>6</sup> See the Management Response to the 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/vwapj/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/vwapj/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 authorized 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 authorized 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 organization, 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 authorized 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.

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(Printed Name and Signature of Authorized Agent of Bidder)

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(Position Title)

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(Date)