

Unclassified

DAF/COMP/GF/WD(2010)56

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

09-Feb-2010

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 02 February 2010

Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT: BREAKOUT SESSIONS

-- Country Experiences --

This document is a compilation of country experiences received from the Delegations of Australia, Canada, Chile, Ireland, Japan, Latvia, Papua New Guinea, Singapore, South Africa, Tunisia and the United States for the Breakout sessions of the Global Forum on Competition to be held on 18 and 19 February 2010.

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JT03278323

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BREAKOUT SESSIONS ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- Country Experiences --

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-- Australia --

1. The Australian Competition and Consumer Commission (the ACCC) has developed an extensive education and advocacy program for government officials involved in public procurement.

2. This paper discusses the experiences of the ACCC in seeking to promote greater awareness of competition issues amongst procurement officials. It focuses, in particular, on the ACCC's recent advocacy initiatives in relation to cartel conduct. It also highlights the importance of having an integrated compliance program, which includes a mix of education, advocacy and enforcement action, to promote awareness of the obligations of businesses to comply with the *Trade Practices Act 1974*.

Public Procurement in Australia

3. In Australia the principles which apply to the Commonwealth in respect to public procurement are set out in the Commonwealth Procurement Guidelines¹ (CPGs). The CPGs establish the core procurement policy framework and articulate the Australian Government's expectations for certain Commonwealth departments and agencies (agencies) and their officials, when performing duties in relation to procurement.² The Commonwealth Department of Finance and Deregulation is responsible for administering the Commonwealth's procurement policy framework.

4. The CPGs define procurement in the following way:³

Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.

5. The core principles which apply to procurement under the CPGs are:

- Value for Money
- Encouraging Competition
- Efficient, Effective and Ethical Use of Resources
- Accountability and Transparency

¹ A copy of the CPGs is available at <http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>.

² Australia's state and territory governments operate their own separate public procurement frameworks. These frameworks are determined on a state-by-state / territory-by-territory basis.

³ Commonwealth Procurement Guidelines (December 2008), p. 3.

6. Competition is a key element of the Australian Government's procurement policy framework. It enhances value for money, the core principle underpinning Australian Government procurement. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes.

7. The Commonwealth procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and be treated equitably based on their legal, commercial, technical and financial abilities. Equitable treatment of suppliers enables business to be conducted fairly, reasonably and with integrity.

8. Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

9. The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.

ACCC Compliance Initiatives

10. The ACCC is Australia's national competition regulator. It is responsible for administering the *Trade Practices Act 1974* (the Act), including by educating Australian consumers, businesses and governments about their trade practices rights and responsibilities. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Act and the state/territory application legislation.

11. The ACCC has actively engaged with procurement officials across all levels of government to alert them to the issues and risks that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- Risks for government
- The law in Australia
- Procurement design
- Detection tips
- Deterrence tips
- Do's and don'ts in public procurement

12. In 2005 the ACCC launched its first specific compliance program for procurement officials. The primary objective of this program was to alert officials on how to detect possible cartel activity in the procurement process. The material released by the ACCC provided guidance to officials on how to detect the warning signs of cartel conduct.

Consultation with Procurement Officials

13. The ACCC compliance program was developed with the benefit of advice and information provided by officials directly involved in Commonwealth procurement. The ACCC conducted extensive consultation with a range of procurement officials, including the Commonwealth Department of Finance.

14. The ACCC also undertook a number of trial seminars with the draft material to determine whether the guidance was appropriate and would achieve the desired outcomes.

Education Material

15. The central component of the ACCC's compliance program was a multi-media CD-ROM which was provided to public sector procurement agencies, as well as private companies involved in procurement. In developing this material, the ACCC was able to draw on the experience of the Canadian Competition Bureau and the United States Department of Justice, Antitrust Division.

16. The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information. This information included: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity.

17. In addition to the CD-ROM, the ACCC developed guidelines for procurement officials on cartel conduct.

18. The material also contained a short video presentation from ACCC Chairman, Graeme Samuel, outlining the importance of detecting cartels in public procurement.

Presentations & Seminars

19. The initial roll out of the ACCC's procurement strategy included over 50 presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments. Importantly, a number of these seminars were delivered to national and state conferences for procurement officials.

Advocacy

20. In addition to the educational aspects of the compliance program, the ACCC wrote to Commonwealth Government Ministers and the Premiers and Chief Ministers of each of Australia's states and territories. The purpose of this was twofold. Firstly, to seek support for the ACCC's education and compliance program at a high level within each Government. This support was received from all Governments.

21. The second purpose was to request all Governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines. This proposal had mixed results with only some government agencies introducing measures to deal with cartel conduct.

Investigations and Litigation

22. As a result of the initial procurement compliance program, the ACCC received various reports from procurement officials identifying activity which may breach competition laws. Whilst there were

some investigations as a result of these reports, none of these have led to enforcement action by the ACCC to date.

Review of Procurement Compliance Program

23. In 2007 the ACCC reviewed and updated its compliance program, and developed a DVD which was sent to Chief Financial Officers in 23 Commonwealth agencies. Unlike the initial roll-out of the program, the ACCC did not undertake the same extensive presentations and seminar series to educate procurement officials. One of the reasons for this was pending court action in the Baxter⁴ case.

Baxter Case – Derivative Crown Immunity

24. The ACCC took these proceedings following a complaint from a medical practitioner that exclusivity agreements between the government and Baxter Healthcare Pty Ltd (Baxter) limited the choice of treatment which would best meet the needs of their patients requiring dialysis.

25. The ACCC alleged that Baxter had entered into long-term, exclusive, bundled contracts with state purchasing authorities (SPAs) which tied the supply of sterile fluids to the supply of peritoneal dialysis products. It claimed that bundling all sterile fluids and peritoneal dialysis products in this way amounted to exclusive dealing in breach of section 47 of the Act, and that Baxter had taken advantage of its substantial market power in sterile fluids to structure the terms on which it offered to enter into the contracts.

Federal Court Decision

26. On 16 May 2005 the trial judge, Justice Allsop, handed down judgment applying a line of judicial authority based on the High Court's decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*⁵ (Bradken). This authority provided that where the Crown enjoys immunity from the Act (which was not contested in the case), this immunity should extend to corporations with which the Crown deals, where the application of the Act would interfere with the proprietary, contractual and/or other legal interests of the Crown (known as derivative Crown immunity). Applying this authority, Justice Allsop held that the Act did not apply to either Baxter's contracts with the SPAs or its other conduct.

27. But for the existence of Crown or derivative Crown immunity, Justice Allsop said he would have found that Baxter had committed one breach of section 46 and a number of breaches of section 47 of the Act.

28. The ACCC appealed the decision on the basis that Justice Allsop had incorrectly held that the Act did not apply to Baxter's conduct.

Full Federal Court Decision

29. On 24 August 2006 the Full Federal Court handed down its decision, holding that Justice Allsop's finding on the Crown immunity issue was correct.

30. The Court made the following observations about the possible implications of its decision:

⁴ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) available at <http://www.austlii.edu.au/au/cases/cth/FCA/2005/581.html>.

⁵ [1979] HCA 15 (5 April 1979) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1979/15.html>.

It is one thing to exempt the executive government from legislative prohibition as to conduct... It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers.

31. The ACCC sought special leave to appeal the decision to the High Court and, on 29 August 2007, the High Court upheld the appeal, finding that the Act applied to Baxter's conduct. The High Court was of the view that:⁶

The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business.

32. Baxter would therefore be liable for penalties, injunctions and other sanctions (to be determined by the Full Federal Court on remittal⁷).

Implications of the Baxter Case

33. Following the Federal Court and Full Federal Court decisions in Baxter, the ACCC was concerned that Crown immunity may pass through to businesses involved in cartel conduct if a bid was submitted for a government tender. However, the High Court's decision confirms that the Act *will* apply to collusive practices in the context of government procurement.

Procurement Outreach Program

34. The Baxter case was significant in that it removed any uncertainty that collusive practices involving Government tenders would be subject to the cartel provisions under the Act.

35. Following the High Court's decision, the ACCC trialled a new education and advocacy approach for public procurement. The trial program commenced in the state of South Australia and following its initial success was implemented nationally.

36. The trial program involved extensive consultation and liaison with state and local government entities, including over 70 presentations by ACCC staff. In addition to these presentations, an ACCC Outreach Officer was specifically tasked to liaise directly with these government entities, focusing on education and advocacy for procurement reform.

37. The ACCC also updated its guidelines for procurement officials on cartel conduct to reflect the decision in Baxter, and pending commencement of the new criminal cartel regime.⁸

38. In April 2009 the ACCC released a new guidance publication for procurement officials: "*Cartels: deterrence and detection — a guide for government procurement officers*".⁹

⁶ *Australian Competition and Consumer Commission v Baxter Healthcare* [2007] HCA 38 (29 August 2007), at para 74. The decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2007/38.html>.

⁷ *See Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (11 August 2008) available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html>.

⁸ New laws criminalising cartel conduct came into effect in Australia on 24 July 2009. More information about the new criminal cartel regime is available at: <http://www.accc.gov.au/content/index.phtml/tag/cartels/>.

39. During the four years following the release of the ACCC's compliance program, the ACCC did not bring any bid-rigging case to court. However, in 2009 this changed when the ACCC instituted proceedings against American-based company, DRS C3 Systems¹⁰ (DRS), for alleged market sharing in the international military defence training systems industry.

40. The conduct relates to an alleged agreement between DRS and another company, that DRS would withdraw from a proposed procurement for an air combat manoeuvring instrumentation system, conducted by the Australian Government. The case is ongoing.

41. Whilst the DRS case is an important step in highlighting anti-competitive conduct in the public procurement sector, a more recent investigation into the construction sector in the state of Queensland has had a more significant impact in raising public awareness of the economic harm of bid-rigging, especially amongst government Ministers.

42. The ACCC commenced legal proceedings on 21 September 2009 alleging that three construction companies¹¹ engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland. The alleged conduct involved the exchange of cover prices (a practice referred to in the building industry as "cover pricing") for the construction of a school, rail facilities and an airport refurbishment.

43. As the conduct covers a wide range of government tenders, this case has significantly raised awareness of the risks of cartel activity within the public procurement sector.

ACCC – Lessons Learnt from Public Procurement Outreach Programs

44. In the course of implementing our compliance programs, the ACCC has learnt that to successfully achieve our compliance objectives, particularly with respect to public procurement, it is necessary to have a mix of strategies and approaches. For example, education and advocacy messages (while necessary) will not be successful in raising awareness about the economic harm associated with bid-rigging for government tenders, or in preventing breaches of the law, without strong enforcement action.

45. In the ACCC's experience it is necessary to have an integrated approach, which includes:

- Enforcement of the law, including resolution of possible contraventions, both administratively and by litigation
- Encouraging compliance with the law by educating and informing both businesses and officials involved in procurement about their rights and responsibilities under the *Trade Practices Act 1974*, and
- Developing ongoing and effective partnerships with other government agencies to implement these objectives.

⁹ The guide is available at: <http://www.accc.gov.au/content/index.phtml/itemId/869010>.

¹⁰ *ACCC v DRS C3 Systems, Inc* [NSD588/2009](#).

¹¹ *ACCC v T F Woollam & Son Pty Ltd & Ors* [QUD236/2009](#).

-- Canada --

1. Certificates of Independent Bid Determination (“CIBD”)¹

1. To deter bid-rigging activity, the Competition Bureau (the “Bureau”) has developed a model Certificate of Independent Bid Determination (“CIBD”)², 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.

2. 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 example, the federal department of Public Works and Government Services Canada (“PWGSC”), which provides federal government departments and agencies with procurement services, has incorporated CIBD-type concepts in its Code of Conduct for Procurement, although it does not make use of a stand-alone CIBD.

3. Another example is the Vancouver Organizing 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.

4. 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 realized the enhanced scrutiny that procurement agencies are applying to bidders’ activities.

¹ On February 19, 2010, Canada will be making a presentation on CIBDs as part of the Global Forum on Competition’s breakout sessions on collusion and corruption in public procurement.

² Available online at : <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html>

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.

(Printed Name and Signature of Authorized Agent of Bidder)

(Position Title)

(Date)

2. The use of guidelines, such as the OECD Guidelines for Fighting Bid Rigging in Public Procurement, in fighting bid-rigging in public procurement

5. The OECD Competition Committee has devoted significant time and resources to studying the issue of public procurement, resulting in the release in May 2009 of the OECD's Guidelines for Fighting Bid Rigging in Public Procurement ("OECD Guidelines") and related brochures. These documents indicate that, while public procurement agencies often require governments to rely on a tendering process to obtain best value for taxpayers' money when purchasing goods and services, the lack of flexibility created by detailed administrative regulations and procedures can limit the public procurement agency's ability to react strategically when confronted with a suspected bid-rigging situation. As a result, public procurement can become an attractive vehicle for collusion and bid-rigging.

6. In addition to active enforcement, in an effort to increase deterrence, the Competition Bureau (the "Bureau") is actively engaged in a wide range of anti bid-rigging initiatives - outreach presentations and proactive engagement with public procurement agencies - that draw heavily from the OECD Guidelines. The Bureau has also posted a copy of the OECD Guidelines on its website and references them regularly in its outreach activities.

7. The Bureau provides anti bid-rigging presentations to provide businesses and all levels of government with the means to detect, deter and report bid-rigging. The Bureau's anti bid-rigging outreach activities focus on educating public procurement officials on how to better detect and prevent bid-rigging. In the Bureau's view, procurement officials are in a prime position to detect bid-rigging, given their knowledge of the relevant sector and their ability to observe the often subtle patterns that may indicate the existence of a secret bid-rigging scheme.

3. Working with other parts of government to fight bid-rigging

8. The Competition Bureau (the "Bureau") is actively engaged with other parts of government to promote the detection, deterrence and reporting of bid-rigging. In addition to its enforcement efforts in this area, the Bureau has conducted extensive outreach activities, including presentations to all levels of government.

9. By way of example of how collaboration can enhance our common interests, in 2005, the federal department of Public Works and Government Services Canada ("PWGSC"), Canada's central purchasing agent and largest public purchaser of goods and services, contacted the Bureau to express concerns regarding bidding processes for information technology services. As a result, the Bureau initiated an inquiry that led to the laying of bid-rigging charges against 14 individuals and 7 companies in February 2009. The parties were accused of rigging ten bids to obtain Government of Canada contracts worth approximately CAD\$67 million. Two individuals have since pleaded guilty to one count of bid-rigging each. The case concerning the other individuals and companies is currently before the courts.

10. As a result of the publicity generated by this case in the media and outreach activities directed towards major public procurement agencies immediately following the laying of charges, the public procurement community's awareness of the importance of combating bid-rigging has been raised. The Bureau took advantage of this opportunity to expand its educational initiatives and, in particular, to increase collaboration with government departments. The Commissioner of Competition sent letters to the most senior officials in federal government departments involved in public procurement, outlining how the Bureau could help them recognize and prevent such illegal activity from occurring in the future. Possible areas of collaboration were discussed during high-level meetings. Since February 2009, the Bureau has initiated 10 new bid-rigging investigations as a result of this collaboration.

11. In terms of outreach initiatives, the Bureau has proactively engaged with nine federal government departments, offering to contribute to procurement renewal initiatives by identifying adjustments to existing processes that are designed to deter bid-rigging. Two departments have incorporated bid-rigging material into the training they provide to their procurement officers. The Bureau is also exploring the possibility of offering an online course for government procurement officers.

12. The Bureau continues to work with other federal departments that reach out to small and medium-sized enterprises to encourage pro-competitive bidding on government contracts. In this context, the Bureau provides anti bid-rigging material for distribution at seminars, trade shows and booth exhibits.

13. The Bureau is also actively examining possible ways to better align incentives under its Immunity Program with public procurement agencies' policies on disqualification from future tendering in cases of vendor malfeasance.

14. Finally, the Bureau is in the process of examining a renewed national outreach strategy and has revamped the Bureau's online presence with a multimedia anti bid-rigging awareness toolkit and speaker presentation to increase the reach of our anti bid-rigging message.

-- Chile --

1. The FNE (Chilean Competition Agency) has been actively involved in fighting bid rigging since it was invited by the OECD to participate in a joint programme with the support of the Canadian Competition Bureau, in 2008.

2. As to the technique “Working with other parts of government to fight bid rigging”:

The Anti-Bid Rigging Interagency Taskforce

3. In May 2008, the FNE brought together several public bodies and an association of public procurement officers, to a work team which was named *Comité Anti-Colusión entre Oferentes en Licitaciones de Abastecimiento Público* (hereinafter, the Interagency Taskforce). This team included representatives of the Bureau of the General Comptroller of the Republic (constitutionally independent body in charge of controlling –ex-ante and ex-post- the legality of the Administration’s acts), the (E-)Public Procurement Bureau (body in charge of modernising the public contracting through electronic purchases), the Ministry of Public Works, the Council for the Internal Auditing of Government and Redaba (an association of officers and staff in charge of procurement areas of different public bodies). Delegates of the Department of Housing and Urban Planning, the Transport supervisor and the Pensions regulator later joined the group. This Interagency Taskforce has held 9 work meetings between May 2008 and December 2009.

4. Among others, the work of this Taskforce has achieved the following outcomes:

- Inclusion of bid rigging questions in the certificate exams to be rendered by public procurement officers (November 2008);
- Cooperation and exchange of information agreement signed between the FNE and the Bureau of the General Comptroller of the Republic; (2008)
- Cooperation and exchange of information agreement signed between the FNE and the Ministry of Public Works; on the basis of this agreement, the Ministry set up a Competition and Anti-Collusion Unit within the Ministry (2009)
- Adoption by the Bureau of the General Comptroller of the Republic of the OECD bid rigging detection criteria in its auditing processes methodology (January 2009);
- Implementation of seminars and training activities, as a result of bilateral links with the taskforce members and also as a byproduct of installing the risk of collusion among bidders in the agendas of such bodies. Nearly 1000 public procurement officers have attended these activities. (2008-2009).

5. As to the technique “The use of guidelines”, since the involvement of the FNE in the programme for fighting bid rigging, two guidelines have been issued at the national level and OECD guidelines have been broadly disseminated.

6. At the national level, the interagency taskforce drafted, printed and distributed a *Detection Checklist* to be used by procurement officers (November 2008);
7. The Public Procurement Bureau issued the Directive of Public Contracting Nr. 11 containing **“Instructions for preventing bid rigging in public procurement”** (January 2009)
8. The criteria for bid rigging detection considered in the OECD guidelines have been adopted by the Bureau of the General Comptroller of the Republic in its auditing processes methodology. This public body has sent several cases to the FNE for initiating an investigation.
9. More actively use of these guidelines has not been reported at this stage of the programme development.
10. As to the technique “CIBD”, during 2009 and within the Interagency Taskforce, the proposal of incorporating a Certificate of Independent Bid Determination has been discussed. Even though no general agreement for the introduction of the instrument has been attained, one of the members of the Taskforce (the Regulator for Private Managed Pension Funds) included the CIBD model drafted by the FNE as a requirement in an important tender. (A headline of the corresponding news highlights the CIBD, see it in attached file). In the next months it is likely that CIBD will be included as a requirement in amendments to the Regulations of Public Works Contracts and maybe in public e-procurement.

ANNEX 1: ARTICLE FROM LA TERCERA AND FREE TRANSLATION

LA TERCERA Sábado 21 de noviembre de 2009 57

Negocios

Inversión & Finanzas

Bases de licitación de cartera de AFP fijan boletas de garantías, plazos y servicios para postulantes

La Contraloría tomó razón del documento el 2 de noviembre, pero la Superintendencia de Pensiones aún no confirma la fecha en que hará el llamado a licitación.

La estricta declaración de los oferentes

Uno de los principales objetivos de la licitación de la cartera de afiliados es dar mayor competencia al sector, obligando a que la comisión que se descuenta a los trabajadores por el manejo de sus ahorros (de 1,36% a 2,5% del sueldo bruto) baje. Por ello, las exigencias de calidad de servicio son inferiores a las actuales y si el oferente que gana es una AFP actual, deberá extender esa comisión

6 meses
tendrán los
postulantes para
formar la AFP.

al resto de sus afiliados. Por ello, en las bases se incluye una "declaración jurada de independencia de la oferta" donde el postulante debe informar si se comunicó con algún competidor, definido éste como cualquier individuo u organización además del oferente, relacionado o no con él. Se advierte incluso que de falsear información, puede haber pena de cárcel. Si el oferente reconoce haber entablado consultas, comunicaciones, acuerdos o convenios con uno o más competidores, se le exige detallarlos, informando nombres y cargos. "Es para evitar la colusión", opina el ex superintendente Julio Bustamante.

**THE BASES OF BIDDING REGARDING AFP (PENSION FUND MANAGERS) SET
GUARANTEES, DATES AND SERVICES FOR THE CANDIDATES**

The “Controlaría” (Treasury inspector’s office) approved the document on 2nd November but the Pensions supervisor has not yet confirmed the date when the call for tenders will take place.

The strict declaration of the bidders

One of the main objectives of the bidding is to offer better competition to the sector, forcing to lower the commission which is deducted from the workers for looking after their savings (between 1.36% and 2.5% of their gross salary). That is why the quality requirements for services are inferior to the current ones and if the winning bidder is an existing AFP, they will have to extend their commission to the rest of their members.

That is why the document includes a “sworn statement of independence of the offer” (=Certificate of Independent Bid Determination) where the candidate must indicate whether he/she has been in touch with another competitor, that is to say an individual or an organisation who is not the bidder, and who is connected or not with him. The candidates are also warned that falsifying information can lead to a jail sentence. If the bidder admits that he/she has entered into consultations, has been in touch with one or more competitors, or has reached agreements with them, he/she will have to provide details including the names and functions of said competitors. “This is to avoid collusion” says ex-Supervisor Julio Bustamente.

(This is a free translation prepared by the OECD Secretariat from the Article above published in LA TERCERA on Saturday 21 November 2009 – original language: Spanish)

-- Ireland --

1. Value of Certificates of Independent Bid Determination (CIBD) and similar tools

1. Since October 2008, representatives of the Competition Authority and the National Public Procurement Policy Unit (NPPPU) of the Department of Finance (the government department which oversees public procurement activities within Ireland), have been engaged in periodic discussions about public procurement and cartel detection. They collaborated on comments and suggestions for the OECD Bid Rigging publications.

2. During the course of these discussions, the prospect of introducing a certificate of independent bid determination (CIBD) into Ireland's tendering process has been explored generally. We will continue to pursue that possibility in 2010.

3. The Competition Authority is of the view that such a certificate has a number of related benefits. First, a CIBD can serve as a continuous reminder of the obligation in public tenders to comply with both the procurement rules and the applicable competition laws. Second, properly crafted so as to require signature by an officer or director of an undertaking, a CIBD serves as a commitment by the undertaking and its principals about the bona fides of their tender. Third, a CIBD provides an added incentive for undertakings and their principals to ensure that all managers and employees are made aware of competition prohibitions through regular compliance training programmes and understand that their actions and violations may be imputed to the undertaking. Fourth, for those undertakings or individuals who would compound anticompetitive collusion by falsifying their CIBD, evidence of such activities if adduced at trial would tend to be additional proof of culpability in respect of the underlying bid rigging offence.

2. Discussion on the usefulness of guidelines in Public Procurement

4. As a member of the EU, Ireland has implemented the two EU Directives on procurement (the European Communities (Award of Public Authorities' Contracts) Regulations 2006, S.I. No. 329 of 2006 implemented Directive 2004/18/EC. The European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 implemented Directive 2004/17/EC) by way of statutory instruments. The Department of Finance Public Procurement Guidelines-Competitive Process provide at paragraph 3.8:

- Contracting authorities should watch for anti-competitive practices such as collusive tendering. Any evidence of suspected collusion in tendering should be brought to the attention of the Competition Authority: telephone (01) 804 5400.

5. We believe that the inclusion of such a paragraph in the guidelines used by public procurement authorities both at the national and local level in Ireland is very useful.

3. Experiences working with other parts of the government to fight bid rigging

6. As noted above, the Department of Finance in its Procurement Guidelines has provided clear guidance about contacting the Competition Authority in instances where suspected collusive tendering has taken place. That advice has resulted in procurement agents reporting allegations of bid rigging and

collusive tendering to the Authority. Three cases presently before the Central Criminal Court alleging collusive behaviour in relation to a public tender resulted from an agency referral.

7. In the past year the Competition Authority has increased its outreach activities to make government departments, agencies and procurement officers aware of the Competition Authority and collusive tendering. The Authority has been asked to present a module on cartels and bid rigging as part of an eight day public procurement training course sponsored by Public Affairs Ireland, an organisation dedicated to on-going training and education about the public sector in Ireland. The Authority has developed a “Bid Rigging Road Show”, which is designed to alert contracting officers to bid rigging schemes and collusive practices. To date, the Road Show has been presented to approximately 90 individuals involved in procurement from over 40 departments, agencies and local authorities in Ireland. We intend to increase the number of presentations in 2010.

8. In February 2009, the NPPPU sought input from the Competition Authority in order to respond to a questionnaire from the EU Advisory Committee on Public Contracts within DG Internal Markets concerning Public Procurement and Antitrust Law.

9. As a result of our regular meetings with the NPPPU and with individuals involved in various committees of the Department of Finance, the Authority has been consulted on specific issues surrounding competition in public contracts. A dialogue has been initiated which we intend to pursue in greater depth in 2010. Government agencies contemplating issues that might arise in respect of public procurements have consulted with staff of the Advocacy and enforcement Divisions of the Competition Authority in advance of their tenders. Whilst such consultations are undertaken with the clear caveat that the Competition Authority does not provide legal advice or give advisory opinions, the consultations have permitted agencies to explore the types of questions or issues that might arise in respect of competition from certain proposed courses of action.

10. Significantly, as a result of the Competition Authority’s continuing liaison with the NPPPU, the Authority was asked to nominate a representative from the Authority to be a member of the Government Construction Contracts Committee, a sub-committee of the NPPPU. The Manager of the Cartels Division serves in that capacity.

11. We believe that each of these avenues will increase the capacity of the Competition Authority, government departments, local authorities and procurement officials to more effectively identify collusive tendering and to ensure that the procurement rules and competition laws are enforced.

-- Japan --

Efforts by the JFTC to prevent bid rigging

I. Use of guidelines as preventive measures against bid rigging

1. *Objective and background*

1. In view of the frequent recurrence of bid rigging, it seemed that understanding of the Antimonopoly Act (“AMA”) in related industries was still insufficient. The Japan Fair Trade Commission (“JFTC”) regarded it needed to show its views concretely on what kind of activities of firms and trade associations are seen as problematic under the provisions of the AMA, based on the past experiences of the JFTC in enforcing the AMA. In July 1994, the JFTC published the “Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids” (“Public Bids Guidelines”)¹⁴. They were revised in January 2006 in accordance with the amendment of the AMA.

2. *Summary of the Public Bids Guidelines*

2. Part I, “Outline of the Provisions of the AMA Regarding the Activities of Firms and Trade Associations in Connection with Bids,” outlines the provisions of the AMA by introducing what kind of conduct by firms or trade associations is prohibited by the AMA in connection with bids, and by describing the legal action against such violations.

3. Part II, “The AMA and the Actual Activities of Firms and Trade Associations in Connection with Bids,” provides an outline of the JFTC’s viewpoint in interpreting the actual activities of firms or trade associations in connection with bids, in light of the provisions of the AMA with reference to the past experiences of the JFTC in enforcing the Act. In addition, examples classified into “Conduct in principle constituting violation,” “Conduct suspected to be in violation” and “Conduct in principle not constituting violation” are given for four categories of conducts such as those related to the selection of conduct awardees, those related to bid prices, those related to contractual quantity and those collecting and offering information and management guidance (see Appendix for examples of the conduct).

- a) For “Conduct in principle constituting violation,” examples of the conduct are given on the basis of the past JFTC rulings and surcharge payment orders. In addition, some points to be noted are described for the purpose of preventing bid rigging in relation to examples for “Conduct in principle constituting violation.”
- b) For “Conduct suspected to be in violation,” examples of the conduct are given on the basis of violation and facts relating to violation in the past JFTC rulings; this conduct includes that which tends to accompany violation or that which may lead to violations.
- c) For “Conduct in principle not constituting violation,” examples of the conduct, which in itself is not deemed as violation in principle, are given.

¹⁴ <http://www.jftc.go.jp/e-page/legislation/ama/publicbids.pdf>.

3. *Dissemination and enlightenment of the Public Bids Guidelines*

4. The JFTC has actively disseminated the Public Bids Guidelines by holding seminars and dispatching its staff members as lecturers to the seminars, etc., held by procurement institutions. In addition to this, the JFTC has been making efforts for dissemination and enlightenment of the Public Bids Guidelines through seminars for procurement officers of procurement agencies and local governments.

5. In addition, the JFTC published the “Guidelines Concerning the Activities of Trade Associations under the AMA”¹⁵, to show the relationship between their general activities and the AMA.

II. *Coordination and cooperation with procurement agencies for preventing bid rigging*

1. *Coordination and cooperation with procurement agencies*

6. Procurement agencies’ efforts are essential for the prevention of bid rigging.

7. From this point of view, the JFTC has held the “Meetings among Liaison Officers with the JFTC Concerning Public Bids” since FY 1993 to meet with liaison officers designated in the procurement agencies of the central government and has promoted building communication and cooperative relationships between the JFTC and the liaison officers.

8. Also, to prevent bid rigging, the JFTC has held seminars for procurement officers of local governments and public corporations, and in addition, the JFTC dispatches lecturers to the seminars held by procurement agencies and receives consultations from them at any time.

Meetings among Liaison officers with the JFTC concerning public bids

9. “Meetings among Liaison Officers with the JFTC Concerning Public Bids” are held for the purpose of facilitating procurement agencies of the central government to provide information on activities suspected to be AMA violations for the JFTC. Both the JFTC staff and directors of accounting affairs and other equivalent officers who have been designated as liaison officers in each procurement agency attend the meetings to exchange their opinions and information. Such meetings are held between the JFTC and liaison officers not only at the headquarter level but also at the local branch level.

Trainings for procurement officers to prevent bid rigging

10. To prevent bid rigging concerning procurement not only by the central government but also by local governments and public corporations, the JFTC has held training sessions for procurement officers of these procurement institutions. In addition, the JFTC is willing to dispatch its staff as lecturers to the workshops held by procurement organisations for the purpose of preventing bid rigging.

11. Information provision based on the Act for Promoting Proper Tendering and Contracting for Public Works

12. Article 10 of the Act for Promoting Proper Tendering and Contracting for Public Works, which was enforced in April 2001, requires that all procurement institutions tendering and contracting for public works, such as the central government, local governments and public corporations, etc., report the fact to the JFTC where there are facts leading to sufficient suspicion of bid rigging. Accordingly, the JFTC

¹⁵ <http://www.jftc.go.jp/e-page/legislation/ama/tradeassociation.pdf>.

receives a lot of information every year. The number of reports based on this Act was 23 in FY 2008 (33 in FY 2007).

2. *Details on the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc. (“Involvement Prevention Act”) and its Amendment in 2006*¹⁶

13. This act was established in July 2002 based on a lawmaker-initiated bill in order to prevent central government or local government employees from becoming involved in bid rigging (so-called “government-initiated bid rigging”) and was enforced in January 2003. When the JFTC recognises that the officials of procurement agencies have been involved in bid rigging, etc., as specified in the Act ((1) Express indication for bid rigging; (2) Indication that a specific party is preferred as the counter party to the contract; (3) Disclosure of secret information about ordering; and, (4) Aiding a specific act of bid rigging, etc.), it will implement elimination measures against companies based on the AMA and at the same time, it will demand that the heads of the procurement agencies implement improvement measures based on the Involvement Prevention Act. When the procurement agencies receive the demand from the JFTC, they shall perform the necessary investigations and implement improvement measures to eliminate the involvement.

14. However, even after the enforcement of this act, many so-called government-initiated bid rigging cases continued to occur at both the central government and local government level. Considering such circumstances, the Involvement Prevention Act was amended in December 2006 (1) to make employees of the ordering organisations subject to criminal punishment, (2) to enlarge the scope considered as involvement in bid rigging, etc., and (3) to increase the number and type of ordering organisations to which the act applies (The Involvement Prevention Act as amended was enforced on March 14, 2007).

15. In addition, in order to disseminate the amendment, the JFTC prepared and distributed leaflets and other materials to explain the details of the amended act. Moreover, it held extraordinary sessions of the “Meetings among Liaison Officers with the JFTC Concerning Public Bids,” explained above, and held seminars for the procurement officers of public corporations. Furthermore, the JFTC dispatched its staff members as lecturers to explanatory meetings for prefectures and municipalities that were hosted by 47 prefectures (at 58 locations) all over the country.

16. So far, there have been 6 cases where the JFTC has demanded the heads of the procurement agencies implement improvement measures. Recently, the JFTC demanded improvement measures respectively to the mayor of the City of Sapporo and the Minister of Land, Infrastructure, Transport and Tourism. (For further details of the 6 cases, please refer to Japan’s contribution to the Roundtable on “Collusion and Corruption in Public Procurement.”)

¹⁶ For further details about the Act Concerning Elimination and Prevention of Involvement in Bid Rigging, etc., see <http://www.jftc.go.jp/e-page/legislation/ama/aepibr.pdf>.

**APPENDIX: CATEGORIES OF CONDUCTS IN RELATION TO
THE ANTIMONOPOLY ACT (AMA) IN PUBLIC BIDS GUIDELINES**

Type of activities	Conduct in principle constituting violation (And Important Notes)	Conduct suspected to be in violation	Conduct in principle not constituting violation
1. Conduct Related to the Selection of Conduct Awardees	1-1 Predetermining an expected bid winner (Important Notes) 1-1-1 Exchange of information concerning interest in being awarded a contract 1-1-2 Collating and offering information regarding the number of times designated and past record of contracts awarded 1-1-3 Adjustment of bid prices 1-1-4 Distribution of benefits to others such as participating firms 1-1-5 Inviting or compelling firms to participate in the predetermination of an expected bid winner	1-2 Reporting the fact of designation and planned participation in bids 1-3 Exchange of information concerning combination of partners in a joint venture 1-4 Levying of special membership-fees or charges	1-5 Expression of interest in participation in a bid to the contract awarding public agency 1-6 Declining to participate in a bid on one's own judgment
2. Conduct Related to Bid Prices	2-1 Predetermining a minimum bid price (Important Notes) 2-1-1 Exchange of information concerning bid prices	2-2 Exchange of information concerning price levels of goods or services subject to a bid	2-3 Study concerning computation criteria 2-4 Formulation of general rule of computation
3. Conduct Related to Contractual Quantity	3-1 Predetermining quantities or shares of contracts		3-2 Publishing rough aggregate of past public procurements
4. Collecting and Offering Information and Management Guidance	(Important Notes) (Points to be noted concerning conduct of predetermining an expected bid winner) Exchange of information concerning interest in being awarded a contract (same as 1-1-1) Collating and offering information regarding the number of times designated and past record of contracts awarded (same as 1-1-2) (Points to be noted concerning conduct of predetermining a minimum bid price) Exchange of information concerning bid prices (same as 2-1-1)	4-1 Reporting the fact of designation and planned participation in bids (same as 1-2) 4-2 Exchange of information concerning combination of partners in a joint venture (same as 1-3) 4-3 Exchange of information concerning price levels of goods or services subject to a bid (same as 2-2)	4-4 Collecting and offering general information concerning bids 4-5 Publishing rough aggregate of past public procurements (same as 3-2) 4-6 Formulating and offering average management indicators 4-7 Collecting and offering information concerning the content of a bid and the required level of technical capabilities 4-8 Offering information concerning combination of partners in permanent joint venture 4-9 Collection of information for selection of partners in a joint venture 4-10 Expression of interest in participation in a bid to the contract awarding public Agency (same as 1-5) 4-11 Formulation of general rule of computation (same as 2-4) 4-12 Formulating and offering guidelines for the operation of permanent joint ventures 4-13 Study concerning computation criteria (same as 2-3) 4-14 Activities for the propagation of general knowledge relevant to the AMA 4-15 Activities for the enlightenment of firms on the necessity of the fulfilment of contractual obligations 4-16 Expression of opinions or requests to the national and local governments 4-17 Giving technical information to contract awarding public agency

-- Latvia --

1. Brief description on legal provision prohibiting bid rigging (Competition Law) and evidences for disclosing infringements

1. Prohibition of bid rigging is included in Competition Law¹ Article 11, prohibiting certain agreements:

Article 11. Prohibited Agreements and Agreements which are Considered to be in Effect

(1) Agreements between market participants, which have as their object or effect the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into, including agreements regarding:

1) the direct or indirect fixing of prices and tariffs in any manner, or provisions for their formation, as well as regarding such exchange of information as relates to prices or conditions of sale;(..)

3) the allocation of markets, taking into account territory, customers, suppliers, or other conditions;(..)

5) the participation or non-participation in competitions or auctions or regarding the provisions for such actions (inactions), except for cases when the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition;

2. In “procurement cases” Competition Council of Latvia (CCL) has applied both point 1 and 5 of Art.11.(1). Point 5 of Art.11.(1) is directly applicable to public procurements, however as bid participants often concert on participation in procurement (including choosing the eventual winner, exposing also their financial offers, allowing other participants to adjust their offers) it is also possible to apply point 1 of Art.11.(1). Point 3 of Art.11.(1) has not been applied (in procurement cases) yet, however it would be the case if partitioning of *markets, taking into account territory, customers, suppliers, or other conditions* in procurements would be established.

3. Procedure for public procurement is determined by Public Procurement Law.

4. Certificates of Independent Bid Determination are not required to be used by Law. In 2009 CCL initiated proposal for amendments in Public Procurement Law requiring all procurement participants to declare that application for the tender has been prepared independently from other participants. However this proposal was not supported by Saeima (parliament). Nevertheless CCL invited purchasers (contractors) to elaborate this requirement in the criteria for tenders.

5. Amendments in Public Procurement Law including particular proposals initiated by CCL came into effect in 2009. These amendments concretise the regulation regarding exclusion of market participant

¹ http://www.kp.gov.lv/?object_id=605.

essentially infringing Competition Law from procurement procedures. Such exclusion will last for 12 months and will start from the day when decision of CCL comes into effect (becomes final).

6. CCL has dealt with bid rigging infringement (collusion) cases since 2005 as the rights to make surprise inspections-dawn raids were granted to CCL in 2004.

7. According to the statistics the majority of infringements occurred in the construction, road construction and road up-keeping markets. Results of anonymous poll² show that 44% respondents confirmed their participation in collusive riggings in the bids. Also contractors are more or less responsible for creation of the favourable environment for collusion. It seems that in one third of the established bid rigging cases probably existed also some indications on corruption, including situations when contractors somehow were not able to espy self-evident evidences of collusion, that offers of different pretenders were not prepared independently.

The statistics on bid rigging (collusion) cases in 2002-2009:

Year	2002	2003	2004	2005	2006	2007	2008	2009
Number of investigated bid rigging collusion cases	1	1	1	1	4	3	5	1
Number of established infringements	0	0	0	1	3	3	3	1
Number of penalised market participants	0	0	0	3	9	10	19	2
Volume of fines Ls/EUR	0	0	0	76 672/ 109 095	403 670/ 574 374	77 750/ 110 629	197 081/ 280 423	69 733/ 99 222
Industries	Road construction	Construction	Road construction	Construction	Supply of oil products, construction	Marketing services, supply of equipment for metal works, road up keeping	Road construction, up keeping, landscape services	Road up keeping

8. The main sources of initial information on the possible infringements are applications received from the public authorities and undertakings organising public procurement or controlling the legality of tenders (see also point 2).

9. Direct evidences mostly are obtained during the dawn raids³ at the premises of the undertakings concerned. Direct evidences for disclosing of infringements are documents (including electronically prepared), which witness that exchange of sensitive information has occurred. For example the estimate of one bid offer is found in the premises of other bid pretender (usually found in computers), which is its competitor. The estimations most frequently are saved electronically and from the file properties it may be established that the estimation has been prepared by competing undertaking.

10. Indirect evidences may be very different and they are analyzed jointly. Actually the most cases are built on indirect evidences, which often are identical grammatical, syntactical and other mistakes in the offerings of different (independent) bid pretenders.

² Performed within the framework of survey on competition in construction market (2006).

³ Dawn raids are performed by CCL with the court order and in presence of police.

11. The public procurement procedures develop and now it is allowed for the procurement organiser to prepare unitary application forms and send to the bidders electronically for filling in their data. It is comfortable for procurement organisers and bidders, as well as provides transparency; saving resources. Nevertheless the new procedure decreases the possibility for CCL to distinguish the features of the bid rigging (diminished opportunity for identical mistakes, identical document designs as evidences for bid rigging to arise).

12. Undertakings now are more aware of CCL's professional activities including evidences used, which means the bidders will spend more attention and time for checking eventual mistakes and preparing different designs of application forms and documents in case of collusion.

13. In its practice CCL has met the problem when bidders were *de facto* or *de jure* one undertaking (related companies). Such situations create a fiction, misinformation for the procurement organiser, to make an impression that the competition exists. Neither the Public Procurement Law nor the Competition Law provides a direct prohibition for such situations. CCL have tried to initiate provisions that would require to disclose the participation of related entities in one procurement, however also this proposal was not supported by the parliament.

14. It has to be admitted that the number of public procurement procedures (most of them arranged within the house and road construction sectors) where the bid rigging cases were found correlates to overall economical situation in the state. The sector inquiry for road and water supply infrastructure 2008 – 2009, showed a decrease of the number of procurement procedures meanwhile the average number of bidders per procurement increased from 2 in previous years to 14 in 2009. Economic crisis and decreased public funding leads to increased competition in tenders.

15. Therefore it is possible to suppose that in construction procurements where public funding is insufficient there will be less bid rigging cases, however in areas where public funding doesn't significantly decrease like supply of medicines, there still maintains high risk of bid rigging. The existing economical situation may increase the number of corruption cases in the public procurements.

2. Cooperation with other authorities

16. Public procurement is supervised by 3 authorities:

- Competition Council of Latvia (CCL) investigating prohibited agreements between suppliers;
- The Corruption Prevention and Combating Bureau (KNAB) combating corruption also in public procurements;
- Procurement Surveillance Bureau (IUB) surveying procurements procedure correspondence to regulatory enactments.

17. From 17 investigated cases in 7 cases investigation was initiated in result of application submitted by the relevant supervisory institutions (Procurements Surveillance Bureau (3), Corruption Prevention and Combating Bureau (1), Ministry of Economics (2), Investment and Development Agency of Latvia (1)). Applications were submitted also from contracting state enterprises and municipalities' institutions. In one case complaint was submitted by competitor who had lost in the bidding. Other case was initiated by CCL on the basis of information made public by KNAB as a result of their investigation. On request of CCL KNAB gave CCL access to the evidences in this criminal case initiated for the investigation of a corruption case. The transcripts of overheard phone conversations, taken by KNAB, were also used as evidence in the competition case. From the phone conversation it was clear that the official of a municipality gave instructions to the

representatives of the undertakings concerned how to participate in the planned bid for supply of oil products and that the representatives agreed, on prices that should be included into the financial offers of each bidder, the sum of procurement and remuneration for each pretender after the bid. Three undertakings were involved into the bid rigging. The phone conversations were between natural persons, two of them formally were not related to the companies they represented. CCL had to prove the link between relevant natural persons and according bidders. While analyzing the offers CCL also established that the prices mentioned in the phone conversations and prices shown in the offers were the same. Besides the information on the bidders transactions on oil product supply market were analysed and it was established that the “planned winner” in the relevant bid offered a price that was approximately by 10% higher than other his prices in similar supplies. Other bidder at the time of procurement did not deal with supplies of oil products at all. CCL established the infringement and imposed fine. This is the only case when CCL used the information (transcripts of the overheard phone conversations) from the criminal case investigated by other authority. Investigation of this case was a good example of good cooperation between competition and corruption prevention authorities fighting against bid rigging in public procurement.

18. To rise the awareness of the other surveillance authorities as well as contracting authorities on possible antitrust violations in procurement several educational seminars were provided for the main contracting state and municipalities enterprises and authorities, however these measures were not enough to significantly increase awareness and educational work regarding possible antitrust violations in procurement in future has to be continued and extended in respect of all contractors in the state and municipalities level.

19. At this moment negotiations with IUB are continuing on access to the data bases of all procurement results for CCL allowing also a search function according to the certain given criteria.

4. Application of OECD guidelines

20. Already before OECD Guidelines for Fighting Bid Rigging in Public Procurement were issued CCL made an investigations according to the publication Combating Fraud in Public Purchasing. (Eliot Spitzer, Attorney General of New York State, Antitrust Bureau 2003, prepared by Bob Hubbard and Ling Feng Fu of the Antitrust Bureau).

21. OECD Guidelines for Fighting Bid Rigging in Public Procurement is a very useful recommendation for purchasers, state and municipality institutions as well as competition and procurement surveillance authorities. CCL has referred to this document during the discussions on possible amendments in Public Procurement Law. Link to the English and Russian version of the guidelines is made available in homepage of CCL and we hope that during the next year it will be possible to provide their translation in Latvian.

22. However as Latvia is a small country with a small economy and relatively small public funding, there are differences that are to be taken into account:

1. Objects for the tenders that are big for Latvia may be regarded as small for international market. Therefore possible profit of participation in regional or national level procurements may be not sufficiently attractive in comparison with the necessary input. All this leads to the situation when due to the lack of foreign competitors local companies feel themselves very comfortable regarding the participation in procurements.
2. Many top managers of competing companies have graduated the same universities and know each other. Corporate and even private contacts are very strong. This creates comfortable conditions for collusion, when nothing is agreed in writing, and therefore no direct evidences can be found.
3. Identification of bid rigging on the basis of identical grammatical mistakes, reference to the competitors fax number or other similarities are very primitive methods suitable only for small

companies participating in small procurements. Big companies have enough resources to act more sophisticated. For investigation of bid rigging in big procurements other methods and resources requiring systematic analysis of procurements and their results are needed.

4. Procurement organisers are quite passive participators in investigations, which indicates that they are not interested in reducing the costs (feature of economical growth period) and probably could indicate on possible corruption.
 5. Small contractors like municipalities often have not sufficient resources for elaboration of high quality procurement provisions and assess possible features of bid rigging. Mostly all of the bid riggings found by CCL have occurred in small procurements.
23. All at the above-mentioned shows the need for continuous improvement of prevention and fighting with bid rigging.

-- Papua New Guinea --

1. Size and Policy Objectives

1. Papua New Guinea has a relatively small economy in global terms and is very much a developing economy and society. The Papua New Guinea population is one of the least urbanised in the world, with a large proportion of the people living in small and often isolated village locations.

2. Accordingly, government involvement in the economy and in the supply of goods and services beyond the village subsistence economy is very significant, much more so than in richer, developed economies. It is estimated that about 70% of the procurement of goods and services in Papua New Guinea is government procurement of one sort or another. This procurement activity is undertaken by all three levels of government, at the national, provincial and local level.

3. Because of its significance in the overall domestic economy in PNG, government procurement and how it is organised is of critical importance. Many firms in many industries throughout the country are heavily dependent on government customers, in some cases government being their only major customer. This may have positive effects in requiring firms to be cautious that they do not alienate their government customers through trying to charge higher prices by colluding with competitors, but at the same time there may be negative effects with the close commercial relationship between private firms and government, and the dependence on government as a customer, leading to corruption between the supplier and the acquirer of goods and services.

2. Corruption

4. Papua New Guinea has significant problems with corruption; it ranks poorly in international comparisons made in the Transparency International Corruption Index. Anti-corruption measures and institutions are operating widely throughout Papua New Guinea (the Ombudsman Commission, in particular, is very active and has a high profile) but these efforts have not been able to stem the occurrence of corrupt practices. Not surprisingly, that is particularly so in government procurement, where the sums of money involved can be significant. The Ombudsman Commission has in recent years frequently been frustrated, through blocking or delaying legal action or otherwise, in its efforts to prosecute corruption. The Independent Consumer and Competition Commission (ICCC), the national competition regulator, has no direct role in investigating or prosecuting corruption matters.

5. Corruption in PNG can arise, or remain unchecked, for a number of social, cultural and economic reasons. As far as corruption in government procurement is concerned, the strong social custom of “wantok” can provide opportunities for unscrupulous persons to subvert the procurement process through corrupt conduct. The wantok system is a longstanding tradition of mutual assistance for extended family or village groups, whereby a person is obligated to assist his family member, or wantok, to the maximum extent that he can, and in whatever way, while the wantok has a similar obligation to other family members. This cultural tradition, very important in traditional village life where outside support may be unavailable, has not translated well to a modern economy where it can lead to nepotism or corruption.

6. Corruption in the form of political patronage can also occur in the use of government funds. Most government infrastructure projects and other major government spending is required, by law, to be arranged by competitive tender through the Central Supply and Tenders Board (CSTB) or Provincial Supply and Tenders Board (PSTB), whose procedures are designed to be transparent and avoid corruption. However,

each member of the National Parliament is given a substantial amount of money each year, which has increased dramatically in the last couple of years, to be spent on projects benefitting the member's electorate.

7. While those funds are supposed to be acquitted fully and openly to the national government and, in respect of amounts over 300,000 kina (about US\$110,000) to be allocated through the CSTB or PSTB tender processes, this acquittal often does not occur; the funds are allocated personally and directly by the Member of Parliament to individuals or firms within the electorate. There is anecdotal evidence of such funds being used corruptly, as would inevitably be the case where the allocation of money is within the personal gift of an individual, and proper procedures for fairness and transparency are bypassed.

8. Further opportunities for corruption occur in the procurement of goods and services by provincial and local level governments, who are supposed to use CSTB procedures and processes, but frequently do not. With such a lack of transparency, it is difficult to conclude that those procurement contracts are fair and provide value for money.

3. Collusion

9. In an economy the size of that of Papua New Guinea, most sectors of the market have either very small businesses (e.g. in retailing and distribution) or a relatively small number of larger firms participating in the market. Often that may be limited to three firms or less competing in a particular market, which makes collusion much more likely than in a vigorously competitive market with many participants. The range of firms that are large enough to tender for government goods or services is likely to be even further limited.

10. Also, where CSTB processes are not followed in government procurement (see above), the opportunity for collusion to go undetected or unremarked is greater. In such situations there is often no great desire to ensure that the government is getting the best value for money from that procurement.

11. The ICCC, when it identified the likelihood of collusion and bid rigging in government procurement, engaged with the CSTB to make the CSTB and its staff aware of the risks of collusive bid rigging and how it can occur. The CSTB, as part of that process, sought the ICCC's assistance to introduce in the CSTB's Standardised Bidding Documents (SBD) mention of corruption and collusion in government procurement. The SBD contract conditions (which are still in draft form) specify clearly to contractors that where corrupt, fraudulent, collusive, coercive or obstructive practice is detected, the contract will be terminated by the procuring agency. The ICCC's discussions with the CSTB are ongoing.

12. Papua New Guinea, through the CSTB, does not require a Certificate of Independent Bid Determination (CIBD), though the current tender documents require certification of no conflict of interest. Following the discussions at the 2010 Global Forum on Competition, the ICCC will consider the desirability of introducing a form of CIBD into the tendering process.

4. Fighting Collusion and Corruption

13. Over the years there have been quite a number of investigations into alleged corrupt practices, by politicians and others, though only a proportion of them relate to government procurement. These investigations have been carried out by, typically, the Ombudsman Commission, the police Fraud Squad and, on occasion, by specially created commissions of inquiry or Royal Commissions. Such inquiries are strongly transparent, with public hearings which are widely reported. Some of these investigations have resulted in prosecutions, while others have not.

14. Investigations into corruption have typically concentrated on that issue and have not also examined possible collusion as well. The ICCC has alerted the CSTB to the tell-tale signs of bid rigging, but to date the CSTB has not brought forward any particular matters to the ICCC for investigation.

15. The ICCC has been trying to publicise the dangers and destructive effects of collusive conduct and the broader issue of cartel behaviour, without limiting this to government procurement, but for the whole of industry. Part of that publicity has been to highlight the detriment such conduct can cause to the victims of collusion or cartel conduct, requesting them to report their suspicions to the ICCC for investigation. This publicity is an ongoing process which may last for a long time.

5. Advocacy

16. In 2009 the ICCC, and the CSTB, in conjunction with a number of government departments, conducted a series of Joint Central Supply and Tenders Procurement Forums in selected urban areas in Papua New Guinea. These forums brought a measure of awareness to departmental procurement officers around the country and highlighted the harm which collusive tendering and bid rigging can cause. This will form a basis for the ICCC's continuing advocacy for stamping out collusive bidding and anti-competitive behaviour generally; this advocacy will always continue as an important part of the ICCC's charter.

17. As part of its recognition of the detriment caused by collusion and corruption in public procurement, the Papua New Guinea Government's Procurement Manual identified corruption, fraud and conflict of interest as three main areas of concern. "Conflict of interest" should probably be broadened to include all collusive practices, which have a seriously bad effect on trying to have government procurement as transparent, fair and producing value for money. These efforts to stamp out such corruption and collusion will continue for the foreseeable future.

-- Singapore --

Introduction

1. The Singapore Government procures a substantial amount of goods and services annually. In 2008, the Singapore Government purchased S\$10 billion (approximately 5 billion Euros) worth of goods and services, amounting to a 4% share of GDP (S\$257 billion). Singapore recognises the dangers and harms of collusion and corruption in the sphere of public contracting and adopts clear and comprehensive laws to address this. Singapore is party to the World Trade Organisation's 1994 Agreement on Government Procurement ("WTO-GPA") and implements the WTO-GPA in the form of the Government Procurement Act, Government Procurement Regulations, Government Procurement (Challenge Proceedings) Regulations and the Government Procurement (Application) Order (the "GPA Laws"). In this regard, a multi-pronged approach has been adopted to complement and enhance the legal framework and Singapore's public procurement framework is aligned with the OECD Guidelines for Fighting Bid Rigging in Public Procurement; for instance in the use of performance specifications in tender requirements, training programmes on bid rigging detection for procurement officials and the deployment of an electronic bidding system for the whole of government.

Processes and procedures: GeBIZ -- A common framework to manage procurement

2. All public procurements are done electronically for the whole of government through a single web portal, namely the government electronic business (GeBIZ) website (<http://www.gebiz.gov.sg>). The portal allows government procuring entities (GPEs) to appoint and manage contracts through inviting suppliers to quote for the required services. Suppliers registered with GeBIZ can gain access to all procurement opportunities in the public sector and to thereafter submit their quotations, proposals and invoices through the portal. (Please refer to Annex 1 and 2)

3. Procurement procedures via GeBIZ will be made transparent as information on the procuring entity, description of products, services, or works to be procured, dates of tender opening and closing, and venue for the collection of tender documents, are published on the portal. This will enable the GPEs to exercise vigilance and have proper oversight of submitted contracts to prevent and combat bid-rigging behaviour. All procurement procedures, starting from the announcement of a tender to the final award of the contract, are made through GeBIZ. Unsuccessful tenderers are also able to request for a review of the results and the evaluation process.

4. By reducing the burden of sourcing on procurement officers, GeBIZ encourages more open competition by widening the supplier base to both local and international bidders, hence enabling suppliers to compete on a level playing field through equitable access opportunities. This results in GPEs enjoying potentially more competitively priced contracts and hence, better value for money for the required procured services. Demand aggregation and bulk purchases also allow GPEs to enjoy reap the benefits of economies of scale through bulk discounts.

5. In addition to the establishment of a procurement framework, combined with comprehensive regulations to ensure that public procurement is conducted in a rigorous and transparent manner, government bodies also work closely together in the fight against collusion.

People: Working with other government agencies

6. The Competition Commission of Singapore (CCS) recognises that it is crucial to educate public procurement officers about the dangers of bid rigging in the public procurement domain and the important role that these officers can play in helping to uncover these cases. As a result, CCS actively engages other government agencies by conducting a regular series of monthly seminars and workshops that is compulsory for all new public procurement officers, aimed to raise their awareness of bid-rigging practices in their scope of work and how to spot such activities. Some of the recommendations which CCS proposes to procurement officers are:

- Keeping a record of bids
- Having a wider scope in tender requirements for more potential bidders to qualify
- Increasing the pool of potential bidders by having open rather than limited tenders
- Seeking information from bidders on their associated companies and subsidiaries
- Making a contemporaneous note of conversations with suppliers.
- Keeping copies of the relevant documents, e.g. records of a tender and all communications with the tenderers.
- Contacting CCS as soon as possible should an irregularity be detected.
- Refraining from discussing the issue with anyone other than one's immediate superior.

7. Further, it is recognised that often both collusion and corruption can occur concurrently in the public procurement process. As a result, CCS maintains close working relationships with the Corrupt Practices Investigation Bureau (CPIB), the agency which investigates and aims to prevent corruption in the public and private sectors in Singapore. CCS has established a protocol with CPIB that addresses case allocation and administration between the two agencies and ensures clarity and efficiency in case management. In cases where it appears that both competition and corruption laws may be infringed, both CCS and CPIB will collaborate to handle the case.

ANNEX 1: TENDERS AND QUOTES FOR SUPPLIERS

GeBIZ Partner : Tenders and Quotations - Listing - Microsoft Internet Explorer

Address: http://www.gebiz.gov.sg/scripts/main.do?sessionid=0011LHhKtCdLTfY2wYTyQLT2nL5pnFPp3Pt24qA7RfE3D1-2969247731195411905?sourceLocation=openarealselect=tenderId

Tenders and Quotations

Business Opportunities

- Tenders & Quotations
- Qualifications
- Auctions
- Request for Information

Past Opportunities

- Tenders & Quotations
- Qualifications
- Auctions
- Request for Information

Change Airport Group - Business Opportunities

- Tenders & Quotations
- Qualifications
- Auctions
- Request for Information

Change Airport Group - Past Opportunities

- Tenders & Quotations
- Qualifications
- Auctions
- Request for Information

Instructions

- The following shows all available tender and quotation notices.
- Please click on the respective hyperlinks to view the details of the tender and quotation notice.
- Please be informed that you need to be a registered GeBIZ Trading Partner before you can respond to electronic tenders and quotations.
- Registration by ACRA-registered supplier will be approved immediately. Suppliers who are not registered with ACRA will require 3 to 5 working days upon submission of the required documentation.
- You can search for all available tender and quotation notices by indicating any of the search conditions below and then click on the GO button.
- To view the details of the tender and quotation notice, you will need to click on the respective document hyperlinks.
- Click [here](#) to view a quick guide on using the search engine.

Search Conditions

Document Type: All Tenders / Quotations

Calling Entity: All Calling Entities

Supply Head: All Supply Heads

Date: Closing Date: From dd/mm/yyyy To dd/mm/yyyy

Document No.:

Reference No.:

Keyword:

Sort by: --Select-- Descending

Hint: Specifying more conditions will help narrow down your search.

S/No.	Document No.	Tenders and Quotations	Publication Date	Closing Date / Time	Status
1	Quotation: PAS000ETQ09001249 Quotation Ref: COPD-ITQ05/09	Invitation To Quote For The Designing And Printing Of Five-Year Pocket Calendars And Post-It Pads For People's Association Staff And Grassroots Leaders Calling Entity People's Association	14/12/2009	18/12/2009 11:59 PM Electronic Submission	Open
2	Quotation: MOESCHETO09025396 Quotation Ref:	We would like to invite quotation for 1 coach for our Track & Field CCA. If selected, you will be offered an agreement/contract from Jan 2010 - 31 Dec 2010 (School will decide the starting date) with an option of extending to 01/01/2011 - 31/12/2011. Please see the attached Annex A for the scope of requirement for CCA Coach/ Instructor. Calling Entity Ministry of Education - Schools	14/12/2009	16/12/2009 11:59 PM Electronic Submission	Open
3	Quotation: MOESCHETO09025399 Quotation Ref:	We would like to invite quotation for 1 coach/ instructor for our Archery CCA. If selected, you will be offered an agreement/contract from Jan 2010 - 31 Dec 2010 (School will decide the starting date) with an option of extending to 01/01/2011 - 31/12/2011. Please see the attached Annex A for the scope of requirement for CCA Coach/ Instructor. Calling Entity Ministry of Education - Schools	14/12/2009	16/12/2009 11:59 PM Electronic Submission	Open

ANNEX 2: PERIOD CONTRACTS FOR GPES PURCHASING NEEDS

Government Electronic Biz - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Address http://intranet.gebiz.gov.sg/scripts/welcome.do

Instructions :

1. Please specify the search criteria and click to search for the product or service required. [Help](#)

Search By

Item Description : [Tips](#)

Search within Attachments

Contract Title Keyword :

Supplier Name :

Tender/Quotation Ref. No. :

Period Contract No. :

Purchase Type :

[E-Catalogue](#) >> [All Catalogue](#) >> Event Organising, Food & Beverages -> Catering Services

The Search took 0.00 Seconds

Listing

S/No.	Item Description	Tender / Quotation Ref. No.	Period Contract No./ Expiry Date	Supplier Name	UOM	Indicator	Unit Price	Qty.
1	MEETING RECEPTION-REFRESHMENT 1 (SELF-COLLECT):\$50.60 PER HEAD:FROM 500 MIN PAX PER ORDER TO 3000 PAX. Caterer is closed for any catering on 3 Apr to 8 Apr 09.	TD2200800113	05T000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH PURCHASE		0.6000 SGD	<input type="text" value="0"/>
2	MEETING RECEPTION-REFRESHMENT 3 (SELF-COLLECT): \$51.20 PER HEAD:FROM 500 MIN PAX PER ORDER TO 3000 PAX. Caterer is closed for any catering on 3 - 8 Apr 09.	TD2200800113	05T000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH PURCHASE		1.2000 SGD	<input type="text" value="0"/>
3	VALUE BUFFET 3: (LUNCH / DINNER):\$7.00 PER HEAD: 3% DISCOUNT FOR ORDER GREATER THAN \$2000.DELIVERY CHARGE \$560/ORDER FOR NOT MEETING MIN PAX.. MIN PAX ORDERED MUST NOT BELOW 60%. DELIVERY CHARGE \$80/TROP BTWN MIDNIGHT TO 7AM	TD2200800113	05T000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH PURCHASE		6.7900 SGD	<input type="text" value="0"/>
4	PREMIUM BUFFET 2: (LUNCH / DINNER):\$30.00 PER HEAD: FROM 25 MIN PAX TO 1500 PAX. DELIVERY CHARGE \$560/ORDER FOR NOT	TD2200800113	05T000ECN09000013 09/01/2011	REVADA FOOD & SERVICES PTE LTD	EACH PURCHASE		30.0000 SGD	<input type="text" value="0"/>

Zone Local intranet

-- South Africa --

1. This paper sets out the techniques used by the Competition Commission to tackle collusion in public procurement. The paper does not deal with corruption as the Commission's mandate is confined to competition matters and corruption in government or state owned entities is dealt with by other authorities and law enforcement agencies such as the Public Servants Commission, the National Treasury's contracts management divisions, the Special Investigations Unit, and the police.

2. The following techniques have been used by the Commission for tackling collusion in public procurement:

I. Internal workshops

3. In 2007, the Commission held a 3-day workshop with its staff to build on their skills in investigating suspected cartel activity with specific focus on collusive tendering. The workshop was facilitated by two staff members of the United States Department of Justice, Antitrust Division using a case study methodology with cases adapted to the South African context.

4. There are plans to create a dedicated cartels division within the Commission with the capacity to deal with increased workload arising from an increase in the number of corporate leniency applications. This division will also deal with cases of collusion public procurement. New staff recruited into this division will require further training in 2010.

II. Certificates of Independent Bid Determination ("CIBD")

5. The Commission has made submissions to the National Treasury proposing that its procurement processes be changed to include a requirement for suppliers to provide CIBDs when tendering. The National Treasury is keen to adopt this proposal and has indicated that it will include it in its procurement policy in 2010.

6. In addition, the Commission has also held 3 workshops/presentations with the state owned entity electricity supplier Eskom, which has identified bid rigging as one of its key concerns. Eskom is building power stations to increase its capacity to meet the electricity needs of the country. The Commission recommended *inter alia* that Eskom use the CIBD in its tender requirements. Eskom has subsequently incorporated this into its tender policy.

III. The use of guidelines, such as "The OECD Guidelines for fighting bid rigging in public procurement"

7. The Commission developed a pamphlet on "Bid Rigging" drawing heavily from the OECD's guidelines. This pamphlet is distributed to procurement officials at all Commission workshops on bid-rigging.

IV. Working with other parts of government to tackle collusion in public procurement

8. In July 2009, the government established a Ministerial Task Team to “scrutinise public expenditure trends and propose cost-cutting measures as part of the government’s response to the economic meltdown and the negative impact of the current recession on the national fiscus.” This task team is tasked with *inter alia* preventing fraud and corruption in public procurement, although it makes no specific mention of bid-rigging. The task team includes representatives from the National Treasury, Receiver of Revenue, Auditor General, Special Investigations Unit, and the Financial Intelligence Centre. The Commission will interact with the task team and advocate for special measures with respect to collusion in public procurement.

9. The Commission is committed to working with the National Treasury which is the custodian of public procurement policy. Several workshops have been held addressing approximately 250 procurement officials from national and provincial government departments. These workshops are as follows:

- The Commission presented to the National Treasury’s Contract Management Division (former State Tender Board) in August 2008.
- The Commission held a workshop on tackling bid rigging for national government departments in November 2008. The target audience for this workshop was the government procurement practitioners as well as the chairpersons of Adjudicative Committees.
- In response to the National Treasury’s request that the Commission cascade the workshops to their provincial treasury departments, the Commission held provincial workshops on tackling bid rigging in the Western Cape; the Eastern Cape; KwaZulu Natal and Gauteng.

-- Tunisia --

Présentation de deux cas pratique de PAC**A. Marché public : Approvisionnement d'un établissement public en pain (Lycée)****I L'Indice**

- Source de l'indice: Direction régionale du commerce,
- Objet de l'indice: offres de couverture
- Les parties concernées : les 3 soumissionnaires (boulangeries) dans l'appel d'offre

II L'Enquête

- Le marché pertinent : Fourniture du pain pour les besoins d'un lycée.
- Les pratiques relevées :
 - Offres de couverture établis en concertation afin de faire croire à l'acheteur public qu'il existe une concurrence réelle et d'orienter l'établissement public vers l'offre voulue (pré-désignée).
- Les preuves :
 - les preuves documentaires : concernent les offres financières émanant des candidats :
- Au niveau de la présentation de l'offre : utilisation de la même écriture et le même police de caractère (documents remplis par la même personne)
- Au niveau du contenu de l'offre : le contenu des offres se présente comme suit:
 - Une soumission qui propose une offre des prix inférieurs aux deux autres soumissions (soumissionnaire pré-désigné),
 - Deux offres identiques et plus élevées que l'offre du soumissionnaire pré-désigné,

Les offres	Prix unitaire (dinars tunisien)	
	Gros pain (250g)	Baguette (250g)
L'offre la "moins-disante" (pré-désignée)	0,210	0,190
Offre de couverture 1	0,220	0,200
Offre de couverture 2	0,220	0,200

- les déclarations (PV d'audition): le résumé du contenu des PV d'audition des parties concernées se présente comme suit :

Les soumissionnaires	Contenu des déclarations
Soumissionnaire (1) pré-désigné	<ul style="list-style-type: none"> • Ancienneté dans l'approvisionnement de l'établissement concerné (depuis environ 3 années consécutives), • élaboration du contenu des offres des autres candidats,
Soumissionnaire (2)	<ul style="list-style-type: none"> • La non rédaction du contenu de l'offre, • Son intervention se limite à la simple signature de l'offre et à l'apposition du cachet de l'entreprise,
Soumissionnaire (3)	<ul style="list-style-type: none"> • La non rédaction du contenu de l'offre, • Son intervention se limite à la simple signature de l'offre et l'apposition du cachet de l'entreprise, • l'absence d'intention de participer à l'appel d'offre,

III Saisine du conseil de la concurrence

- Requête :

1. Le 16 décembre 2002 le ministre chargé du commerce a saisi le conseil de la concurrence contre ces trois soumissionnaires pour entente illicite ayant pour objet la présentation d'offres de complaisances et de couvertures afin de fausser le libre jeu de la concurrence.

IV Décision du conseil : Décision n° 2145 du 25 décembre 2003

2. Sur la base de l'article 34 de la loi n° 91-64 relative à la concurrence et aux prix, le conseil de la concurrence a infligé des amendes à l'encontre des trois parties concernées par la pratique d'entente illicite:

- Le principal acteur (soumissionnaire pré-désigné) : 4 % du chiffre d'affaire,
- Les deux autres soumissionnaires : 2% du chiffre d'affaire,

V Les suites de l'affaire

- Recours en appel de la décision du conseil de la concurrence

3. La décision du conseil de la concurrence a fait l'objet d'un recours en appel sur la base de l'article 21 de la loi n° 91-64 relative à la concurrence et aux prix,

4. Le tribunal administratif en tant que cour d'appel a rendu son jugement le 15 novembre 2006 en confirmant la décision du conseil de la concurrence. (Décision n° 24898 du 15 novembre 2006).

B. Marché public : Approvisionnement d'un Établissement public en viande rouge

I L'indice

- Source de l'indice : Direction Régionale du Commerce.
- Objet de l'indice: Pratiques des prix d'éviction et offres de couverture par des soumissionnaires dans les appels d'offre publics relatifs à la fourniture de viandes rouges pour des établissements d'enseignement pour l'année scolaire 2006-2007.

- Parties concernées: Trois soumissionnaires (commerçants de viandes rouges)

II L'enquête

- a) La délimitation du marché pertinent:

5. Dans les marchés publics, l'objet de l'appel d'offre est le marché pertinent. Il s'agit ici de l'approvisionnement d'un établissement d'enseignement en viande.

- b) Caractéristiques du marché pertinent:

6. Au niveau de la demande :

- Besoins annuels des Établissements publics d'éducation
 - Bovines: 86 Tonnes
 - Ovines : 13 Tonnes
- Nombre d'appels d'offre:

	2004	2005	2006
Nb d'appels d'offre	35	36	12

- Au niveau de l'offre: L'ensemble des soumissions présentées par les candidats:

	2004	2005	2006
Nb des offreurs Participants	7	6	6
Nb des titulaires des marchés	3	4	2

7. Aspects juridiques et réglementaires:

- La loi n° 91-64 du 29 juillet 1991 relative à la concurrence et aux prix telle que modifiée et révisée par les autres lois.
- Code de la comptabilité publique.
- Décret n° 2002-3158 du 17 décembre 2002, portant réglementation des marchés publics telle que modifiée et révisée.

c) Les pratiques relevées:

- Abus de position dominante du soumissionnaire 1(S1) sur le marché pertinent,
- Collusion entre soumissionnaires: offres de couverture des soumissionnaires 2 et 3 pour tromper l'acheteur public sur le niveau et l'intensité de la concurrence.
- Échange d'information entre les trois soumissionnaires.
- Détermination de l'abus de la position dominante sur le dit marché :

La position dominante:

	2004	2005	2006	Total
Nb d'appels d'offres	35	36	12	83
Valeur totales des offres (DT)	576760	687677	682703	1947140
Nb des AO obtenues par le S1	33	31	11	75
Valeur totales des offres obtenues par S1 (DT)	534085	612662	680183	1826930
Part du marché en valeur (%)	92,6	89	99,6	93,8
Pourcentage des offres obtenues	94,2	86,1	91,6	90,3

8. Manifestation de l'abus de la position dominante:

- Pratique de prix d'éviction dans les appels d'offres concurrentiels (plusieurs soumissionnaires) et la compensation par la pratique d'un prix plus élevé (allant jusqu' au double) lors de la soumission dans les appels d'offres non concurrentiels,

9. Moyens de preuve:

- Comparaison des prix proposés et pratiqués par S1 dans les divers marchés qui montrent des écarts importants entre ses soumissions allant jusqu'au double dans la viande bovine,
- Pratique des offres de prix très bas : acte répétitif durant une période de 3 ans.

Viande Bovine	Offre des Prix du soumissionnaire (1) D/KG	
	Absence des concurrents	Plusieurs concurrents
Année :		
2005	7,5	5,2
2006	7,1	4,9

- Absence de justification économique des prix très bas offerts et pratiqués par S1 qui se situent à environ 65 % de la moyenne des prix de gros sur les marchés de bestiaux durant cette période. Sachant que le S1 n'est ni éleveur ni producteur,
- Les déclarations de S1 dans lesquelles, il a avoué que ces offres de prix ne couvrent pas ses couts (achat, transport, stockage...)

10. Collusion entre soumissionnaires :

a) Objet:

- La présentation d'offres de couverture par les S2 et S3 a permis au soumissionnaire S1 de remporter le marché pour 6 appels d'offres concernant l'année 2004,
- Échange d'information lors de la présentation des offres financières.

b) Les moyens de preuve:

- L'analyse des offres financières révèle un écart très important entre les prix de S2 et S3 et celui de S1,
- Prix très élevés dans les six marchés objet de la collusion par rapport à la moyenne des prix du marché.

- Déclarations des soumissionnaires S1 et S2 et S3,
- Liens familiaux entre les soumissionnaires.

III Décision du C.C n 81159 du 31/12/2008:

11. Le conseil a infligé des sanctions pécuniaires s'élevant au total à 25 milles dinars (environ 14,7 Milles Euros) et se répartissant de la manière suivante :

- 15 000 dinars pour S1,
- 5 000 dinars pour S2,
- 5 000 dinars pour S3.

-- United States --

Outreach and Training Programmes

1. In the United States, attorneys at the U.S. Department of Justice Antitrust Division (DOJ) have for many years spent considerable time conducting outreach and training programmes for public procurement officials and government investigators, including investigators who work for other government agencies that solicit bids for various projects. These outreach programmes help develop an effective working relationship between the DOJ officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. DOJ officials advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and DOJ attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

2. This paper provides an overview of the Antitrust Division's public procurement outreach and training programmes. Part 1 sets forth the purposes of these programmes. Part 2 describes the use of publications – brochures, newsletters – as tools of outreach programmes. The key features of an effective outreach presentation are laid out in Part 3. Part 4 describes the Certificate of Independent Price Determination, a critical tool in preserving competition in public procurement, and Part 5 notes the relationship between corruption and bid-rigging violations. Part 6 describes a recent DOJ training initiative aimed at safeguarding the ongoing economic stimulus programme, and Part 7 concludes.

1. Purposes of Public Procurement Outreach and Training Programmes

3. Public procurement outreach and training programmes serve a number of purposes. First, these programmes help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers.

4. Second, outreach programmes help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, resulting in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 15 below.

5. Third, outreach programmes educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Antitrust agency officials provide advice about

techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract. DOJ attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 17-18 below.

6. Fourth, outreach programmes help develop a close working relationship between public procurement officials, government investigators, and antitrust agency officials. This is a critical goal of an outreach programme. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for its occurrence on their watch. During outreach programmes, antitrust agencies should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy that was carried out in secret without their knowledge; procurement offices and antitrust agencies have the same interest in trying to prevent and prosecute bid rigging. The statistics indicate that the joint efforts of public procurement officials, government investigators, and DOJ attorneys have reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the proportion and total number of bid-rigging prosecutions has declined.

7. Finally, as will be discussed more fully below in paragraphs 19-20, sometimes public procurement officials are in fact involved in bid rigging and other illegal conduct that undermines competition, in the form of kickbacks or other remuneration received from companies that submit bids. Outreach programmes serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

2. The Use of Publications to Make an Outreach Programme More Effective

8. Brochures – In the United States, DOJ attorneys provide brochures to public procurement officials and government investigators to make outreach programmes more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) “Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For” (“Bid Rigging Brochure”) can be found at <http://www.justice.gov/atr/public/guidelines/211578.pdf>; and “An Antitrust Primer For Federal Law Enforcement Personnel” can be found at <http://www.justice.gov/atr/public/guidelines/209114.pdf>.

9. Newsletters – Offices within the Antitrust Division publish newsletters that discuss certain cases that have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. For example, a four-page, colour newsletter published by the Chicago Field Office in the fall of 2008 was distributed to about 1,700 recipients, including federal, state, and local public procurement officials and government investigators.

3. Key Features of an Effective Outreach Presentation

10. Explain the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the *agreement* to rig bids is the crime. In other countries, the legal standard may be

different, but it is important for antitrust agency officials to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand this, they will not know what to look for and report to the authorities. In U.S. outreach programmes, DOJ attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

11. Explain how antitrust investigations are conducted – During outreach programmes, antitrust agency attorneys explain the procedures used to conduct an investigation. In the United States, these procedures include taping conversations with the assistance of co-operating witnesses, using search warrants and wiretaps, conducting unannounced “drop-in” interviews, and using grand jury subpoenas for documents and testimony. Also, DOJ attorneys discuss the Corporate Leniency Policy which may enable a co-operating company to avoid prosecution.

12. Discuss Penalties for Bid Rigging and Other Antitrust Violations – Outreach programmes provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

13. Discuss Indicators of Bid Rigging – A key part of U.S. outreach programmes is a discussion of factors suggesting that bid rigging may be taking place. For example, a pattern where company A wins a contract one year, and company B wins the next year, with each taking turns in subsequent years, may reveal that the companies are engaged in a bid-rotation scheme. Another indicator of bid rigging occurs when the same errors (misspelled words and typographic or arithmetic errors) are evident in bids submitted by allegedly competing companies. This, of course, suggests the companies prepared the bids in concert. Yet another indicator involves the situation where a new company enters the bidding unexpectedly, and at a much lower price than the bids of the other companies that traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging their bids and winning contracts at high, non-competitive prices.

14. Encourage procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report their suspicions that illegal conduct is occurring. Antitrust agency officials should encourage procurement officials and investigators to contact them if procurement officials or investigators have *any* concerns that bid rigging or other procurement violations may be occurring. Antitrust agency officials should also assure procurement officials that they are always willing to talk about procurement concerns. Sometimes antitrust agency officials will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

15. Give examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of public procurement officials. This will demonstrate to procurement officials that action will be taken when they report their suspicions. Each country will have its own examples to use, but in the United States, DOJ attorneys have used the following examples in outreach programmes:

- Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies co-ordinated their bidding such that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their

concerns, and after an investigation by the DOJ, the companies and their executives were successfully prosecuted for bid rigging;

- Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: “Please give us a call **us** if you have any question.” The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations;
- The government sought to buy four types of gloves: 1) women’s dress gloves; 2) women’s outdoor gloves; 3) men’s dress gloves, and 4) men’s outdoor gloves. The government intended to award four contracts, one for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. Following a DOJ investigation, the companies and culpable individuals were successfully prosecuted for bid rigging.

16. Discuss Other Crimes Which May Be Prosecuted – In U.S. outreach programmes, DOJ attorneys explain to public procurement officials and government investigators that the DOJ prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the procurement process, such as kickback schemes, may not be violations of U.S. antitrust laws; such conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when the DOJ investigates these schemes it may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement is discussed in more detail below in paragraphs 19-20.

4. Certificate of Independent Price Determination – What It Is and Why It Is Important?

17. A Certificate of Independent Price Determination has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Basically, this document requires each company that submits a bid to sign a statement under oath that it has neither agreed with its competitors about the bids which it will submit nor disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids. The key part of the certificate states:

- The offeror certifies that :
 - The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered,
 - The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law, and
 - No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

18. Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on who would win the project for which bids were submitted.

5. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials

19. In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may not be clear whether the companies involved are also engaged in bid rigging. However, in a number of cases DOJ attorneys have developed evidence that corrupt procurement officials were paid off to facilitate a bid-rigging scheme.

20. It is important to determine whether corrupt procurement officials are assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official. These types of cases are important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is legitimate.

6. Proactive Initiative to Safeguard Large Government Expenditures: Antitrust Division Programme to Protect Economic Recovery Stimulus Programmes from Fraud, Waste, and Abuse

21. In May 2009, the Antitrust Division announced the details of an initiative aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009. The Recovery Act, a multi-billion dollar economic stimulus programme, was signed into law by President Obama on Feb. 17, 2009 as an effort to jumpstart the economy and to create or save jobs. The Antitrust Division's Recovery Initiative involves training procurement and grant officials, government contractors, and agency auditors and investigators, on techniques for identifying the "red flags of collusion" before stimulus awards are made and taxpayer money is unnecessarily wasted. The initiative makes available to agencies Antitrust Division competition experts who can evaluate procurement and programme funding processes. These Division experts make recommendations on "best practices" that may be adopted by the agencies to further protect processes from fraud, waste and abuse and maximise open and fair competition. Finally, the initiative commits the Antitrust Division to playing a significant role in assisting agencies to investigate and prosecute those who seek to or succeed in defrauding the government's efforts to maximise competition for stimulus funds.

22. The Antitrust Division's Recovery Initiative has had a significant impact. Since March 2009, in partnership with agency Inspector Generals handling stimulus funds, the Antitrust Division has already assisted in training thousands of federal and state procurement, grant and programme officials nationwide, with thousands more scheduled to be trained in the coming months. The Antitrust Division has also launched a Recovery Initiative Web site through which consumers, contractors and federal, state and local agencies, can review information about the antitrust laws and the Division's training programmes, request training, and report suspicious activity. The Web site is located at http://www.justice.gov/atr/public/criminal/economic_recovery.htm. This Web site is linked to www.recovery.gov, the official website of the Recovery Accountability and Transparency Board. The board is responsible for overseeing federal agencies to ensure that there is transparency and accountability for the expenditure of Recovery Act funds.

7. Summary and Conclusion

23. A comprehensive outreach and training programme for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist antitrust agencies in investigating and prosecuting bid rigging. In order for that to happen, antitrust agency attorneys need to educate procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Antitrust agency officials also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

24. The ultimate goal of an outreach and training programme is to encourage public procurement officials, government investigators, and antitrust agency attorneys to work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programmes.