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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- Chile --

15 June 2010

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

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1. The Fiscalía Nacional Económica (hereinafter, 'FNE') with the support of the OECD and the Competition Bureau of Canada started in 2008 an outreach program to fight bid rigging in public procurement aimed at increasing the awareness of procurement officers on this issue¹.

2. Experiences on the topics to be discussed during the meeting are detailed below.

1. Certificates on Independent Bid Determination (CIBDs)

3. During 2009, a deep discussion started within the inter-agency task force² aimed at adopting a CIBD model and requiring it for submitting bids in public procurement tenders. Until now, we can report on the adoption of a model but we are still working on a strategy for its general implementation. However, the instrument was used by one of the members of the inter-agency task force in an important tender with remarkable outcomes. Details are given below.

4. At the beginning of 2009, the privately managed pension funds regulator approached to the FNE because it knew that the competition agency was working with other public procurement bodies in introducing best practices for making tenders more competitive and for preventing and detecting bid rigging. Its main concerns were not particularly with public procurement but with two important tenders that would be conducted in the following months within the sector.

5. One of these tenders (conducted by the regulator) had the purpose of allocating to the corresponding tender winner the new affiliates of the system (new workers) entering into during the two years following the tender (august 2010-july 2012). Winning criteria was the lowest management fee paid by the affiliates. In this tender the CIBD was introduced as a requirement for submitting bids.

6. During the public consultation of the tender conditions, one of the incumbent companies recognized communications with a potential competitor, circumstance reported to the regulator. According to this company, these communications had been related to preliminary negotiations (including confidentiality and non-competition clauses) in order to submit a joint bidding as a consortium. Since the negotiations finally failed the company stopped its search for a potential partner.

7. The tender finished at the end of January and its outcomes were the following:

- 4 companies submitted bids. 3 incumbents and 1 new entrant (the business group related with the software supplying business);
- Before the tender, the lowest management fee in the market was 1.36%;

¹ A brief on the activities performed within this program during 2008-2009 was submitted for the VII OECD/IDB Latin American Competition Forum, Santiago, September 9th and 10th, 2009; available at: http://www.competencia.cl/arch/sessionII_chile_en.pdf.

² 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 modernizing 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 10 work meetings between May 2008 and March 2010.

- The tender was won by the new entrant (AFP Modelo) which bided for a **1.14%** management fee.
- The additional interesting features of the case are the bids of the other three participants, when compared with the actual fee charged at the moment in the market by the same companies:

Company	Bid	Actual fee
AFP Habitat	1,21%	1,36%
AFP Cuprum	1,32%	1,48%
AFP PlanVital	1,19%	2,36%

8. Summarizing, the management fee will be reduced in 24% compared to the average management fee paid by affiliates before the tender. A smart tender design and the use of CIBD contributed to that.

2. Leniency and bidder disqualification

9. Suspension, disqualification or debarment for future government contracts of firms or individuals sanctioned by the Competition Tribunal is not longer an additional sanction in bid rigging cases, since an amendment to public procurement rules in 2009 entered into force in 2010.

10. However, within the period the provision was in force (2004-2009) this reason for disqualification (infringement to the competition law) was never used against a company or individual pretending to supply to the government.

11. Chilean competition authorities understand that disqualification can be a powerful deterrent for bid rigging violations. However, since it also carries the drawback of making markets in which this sanction is imposed more concentrated (hence riskier for collusion), and to disincentive leniency applications in absence of appropriate coordination of provisions, it would be important to use it on a case-by-case basis depending on the context, and not imposing it automatically. Thus, in our system, it would be better to empower the Competition Tribunal with the authority of imposing this sanction.

12. In addition, there is a Tribunal (*Tribunal de Contratación Pública*, ‘Public Procurement Tribunal’) in charge of reviewing arbitrary or illegal administrative actions which may take place in the period between the approval of tender conditions and the award of the contract to the successful bidder. Any procedure before this Tribunal may provide signals to the FNE with regards to the ending of a collusive conduct, which justifies monitoring its proceedings.

3. Incentivizing officials responsible for public procurement to focus on bid-rigging

13. This has been one of the biggest obstacles to confront by the FNE’s bid rigging program.

14. Usually, procurement officers are aware of the likelihood of bid rigging. However, previously to the developments and initiatives of the FNE’s bid rigging program, they were uncertain of its illicit nature, and also of the significant sanctions involved. Many procurement officers had not even heard of the national competition authorities. We have undoubtedly made significant progress in this area.

15. In cases where the procurement officer is involved in a certain way or another with a bid rigging scheme, the General Comptroller Office is a great allied in bid rigging detection. Since the General Comptroller Office reviews the legality of administrative activities, in broad terms –and not just the accounting as it happens in other countries, and this public body has been involved in the FNE initiative to fight bid rigging in public procurement, any involvement of a procurement officer in facilitating or cooperating with a bid rigging scheme would be identified by the selective audits this body performs.

Indeed, these audits have been the source of several referrals to the FNE for investigating a potential bid rigging case (with or without the procurement officer involvement). In addition, the procurement officer can be charged by the FNE for its contribution to bid rigging and if a corruption case is identified, the procurement officer may even be prosecuted criminally.

16. Things do not come so easy where the procurement officer is not involved at all in the scheme. Indeed, since bid rigging has not been traditionally understood as a serious offense, public procurement officer's duties to detect and report are lower. According to civil servant duties rules, they should report to the competent authority any irregularity they know during the performance of their functions. But, as said above, they must first be aware of the illicit character of bid rigging (beyond the conformity of formalities of the tender process) and to know who to report (competition authorities). Besides this, the rules on duty to report are not systematically enforced.

17. We certainly believe that better stimuli are required for public contracting officers towards detection and to align incentives in this area. Many activities carried out, and particularly the contacts with procurement officers, have highlighted, as an obstacle for them to try to prevent or detect bid rigging in their daily practice, their ultimate goal of budget management, that is to say that their main focus is to spend resources according to the public commitments involved. In other words, at that level there are no real incentives for saving public resources or for its efficient spending. And, since the fight against bid rigging entails a more efficient use of public funds, these activities would delay the budget management.

18. At this point of developments it seems that different strategies and expectations of cooperation have to be developed from the work with procurement officers on the one hand, and internal auditors, counsels and other people not directly involved in daily procurement tasks on the other hand.