

There is no winner in bid-rigging

Bid-rigging is not new to Hong Kong. In recent years, the problem of bid-rigging in the residential building renovation and maintenance market has been the subject of particular community concern. In fact, bid-rigging can occur in any market where tender processes are used, depriving consumers and procuring businesses of the benefits of competition. When bid-rigging impacts public procurement, it may cause great harm to the government and taxpayers.

What is bid-rigging?

In a tender process, bidders are expected to compete against one another and the one offering terms best suited to the procurer's requirements wins the bid. Bid-rigging occurs when two or more bidders agree secretly not to compete with one another and collude to pre-determine the tender outcome. Under the Competition Ordinance, bid-rigging is serious anti-competitive conduct.

Bid-rigging takes many forms. For example, one or more bidders may agree that they will not submit a bid or will withdraw a bid submitted already. In some cases, the bidders will take turns at winning the bids on a series of contracts or agree to submit higher bid prices or less attractive terms so that the designated winner could win. Some companies may agree that the winning bidder will offer lucrative subcontracts to compensate the "losing" bidders.

Collusive stall allocation

In 2004, a restricted stall auction held by the Food and Environmental Hygiene Department (FEHD) in Hong Kong was supposed to be the fair solution to relocating some cooked food stallholders from a temporary market to the Tai Po Hui Market. However,

the stallholders secretly allotted stalls among themselves and agreed not to compete in the auction. Each of the bidders involved in the cartel ended up getting the stalls at the reserve price, with no competing bids. This led to the government's loss of rental incomes that could have resulted if the stallholders had bid against each other in a fair auction.



FEHD took the bid-rigging stallholders to court and they were convicted of conspiracy to defraud the department at the Court of First Instance. However, in the absence of competition law, their convictions were later overturned at the Court of Appeal as bid-rigging by itself was not illegal. The government later took the case to the Court of Final Appeal but Hong Kong's highest court upheld the ruling in favour of the stallholders. This is a perfect example of how a tender process can be undermined without competition law.

Big offenders

Not just small businesses will give in to the temptation of bid-rigging. Another bid-rigging case occurred in South Korea involved some of the country's largest conglomerates.

In March 2011, the Transport Ministry held an open bid to select builders for a road construction project. Daewoo, POSCO, Daelim and Hyundai participated in the tender. Prior to the bidding, the companies' executives met and colluded to force the contract price up. Under their illegal scheme, Daewoo, POSCO and Daelim submitted high bid prices knowing they were unlikely to be attractive to the Ministry. This meant that Hyundai, whose price was slightly lower but still inflated, won the contract. Later Daelim and Hyundai confessed to colluding to the Korea Fair Trade Commission and were treated with leniency. Daewoo and POSCO were prosecuted and punished with hefty fines of 70 million won and 50 million won respectively.

Leniency

One of the key tools used by competition authorities around the world to detect cartels, including bid-rigging, is a leniency policy providing protection from prosecution for the first party who notifies the competition authority of the cartel conduct. In 2013/2014, 90% of the European Commission's cartel decisions arose out of applications for leniency.

Under its Cartel Leniency Policy, the Competition Commission Hong Kong (Commission) will offer immunity from pecuniary penalties to the first cartel member who reports the cartel conduct, provided that the member also meets all other requirements of the Policy.

Did you know?

In response to contraventions, the Commission can seek a range of remedies, including issuing warning notices, infringement notices or accepting commitments to change conduct. Additionally cases can be brought to the Competition Tribunal which can impose a fine of up to 10% of an undertaking's Hong Kong turnover and order director disqualification. Those involved in a contravention may also be the subject of "follow-on" claims for damages caused by the contravention.

What happens abroad?

The Hong Kong competition regime is civil in nature. But in some jurisdictions, including the United States, Britain, Germany, Australia and Japan, bid-rigging is a criminal offence and those convicted not only face fines but may also be sentenced to jail.



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