



HELP US DETECT BID RIGGING

Malaysia Competition Commission

www.mycc.gov.my

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Introduction

Established in June 2011, the Malaysia Competition Commission or the MyCC is an independent body responsible for enforcing the Competition Act 2010 (the Act). The Act was enacted to promote healthy competition so that consumers would benefit through better quality products at reasonable prices. It covers all enterprises.

The Act expressly prohibits anti-competitive practices such as price fixing, sharing markets, limiting or controlling production and bid rigging. Bid rigging not only manipulates the procurement process but almost always results in economic harm to the agency which is calling for the bids and to the public who ultimately bear the costs as taxpayers or consumers. Therefore it is an important area of focus for the MyCC especially when each year the Federal Government, State Governments, Local Authorities and Statutory Bodies together purchase goods and services through public tender for approximately RM150 billion (equivalent to almost one-fourth of the country's nominal GDP). Moreover, in countries which have a competition law, bid rigging cases make up almost 25% of the cases.

The Act makes it clear under section 4(2)(d) that bid rigging will not be tolerated in Malaysia. If the MyCC finds such an agreement between bidders, the guilty parties will be the bid riggers, NOT the procuring government departments. But the procuring government departments can play an important role in helping the MyCC to detect such activities. Any enterprise found guilty of bid rigging will face a potential fine of up to 10% of its worldwide turnover.

It is against this background that this publication is produced to assist public procurement officers to not only identify and eliminate this practice but also to assist the MyCC in investigating this type of behaviour.

The contents of this booklet are drawn from the experiences of more mature jurisdictions while some of the examples given are from a recently held joint workshop with the OECD.

What is Bid Rigging?

Bid rigging is a form of price fixing and allocation of markets. It occurs when two or more bidders in a tender exercise collude to distort the normal conditions of competition. The bidders agree amongst themselves who should win the tender and at what price. Instead of submitting the best tender, the parties fix the tender.

Bid rigging is done in a number of ways, including the following:

Bid suppression

This occurs when some of those who collude do not make a bid and thus permit a predetermined party to get the tender.

Bid rotation

This occurs when bidders take turns to submit the most competitive tender price, or the lowest bid (and therefore winning the contract). They rotate the winning bid amongst themselves.

European Commission's Pre-Insulated Pipe or Gas Insulated Switchgear Case

This case decided by the European Commission involved a complex European-wide cartel where the parties to the cartel engaged in bid rotation and cover bidding. The participants divided the relevant market on the basis of a quota system and mutually undertook not to interfere with each other's allocated territories.

In these cartels, public and private markets were divided nationally whereby public tenders were allocated to a particular "favourite" domestic company. When there was more than one bidding company active on the national market, the prices that the "favourite" had to quote in the tendering procedure were decided amongst them while the other producers had the task of submitting higher offers to "protect" the "favourite".

Bid withdrawal

This is where colluding bidders deliberately withdraw their bid at the end of the tender period thus leaving their chosen bidder to win the bid.

Cover pricing

This involves colluding bidders who submit a bid price that is deliberately higher than that submitted by the bidder they have determined should get the tender. Such collusive tendering is also known as 'courtesy bidding' or 'complementary bidding'.

Singapore's PestBusters Case

The Competition Commission of Singapore issued its first infringement decision under the Competition Act against six (6) pest control companies for bid rigging in the provision of termite control and treatment services.

The pest control companies already providing pest control services to the customer requested that the other companies submit bids at certain prices to ensure that they do not win.

The other pest control companies either agreed to the request or submitted even higher bids.

Penalties of S\$260,000 were imposed on the companies.

UK's Construction Case

In 2009, the UK Office of Fair Trading imposed fines on 103 construction companies for bid rigging, which had taken place over a period of 6 years.

The case involved "cover pricing", a process by which a bidder who did not wish to bid for a particular contract sought a "cover price" from its competitor which was higher than the competitor's price, thus ensuring the competitor would win the contract. In some cases, compensatory payments were paid to the "losing" bidder.

The Office of Fair Trading found that both the cover pricing and the compensatory payments were breaches of Chapter 1 of the UK Competition Act. Total fines of £129.2 million were imposed.

Non-conforming bids

This is where colluding bidders deliberately submit bids not in accordance with the terms or conditions specified in the tender. This is done except by the bidder who is intended to win the tender.

Almost all forms of bid rigging have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring bidders.

Ways to Detect Bid Rigging

Bid rigging can be difficult to detect for someone not trained to do so as it is usually reached in secret and with only the participants having knowledge of the scheme.

However, when companies circumvent applicable competition rules in the tender procurement process, they often leave signs.

Any odd or peculiar signs about a tender you receive should be looked at seriously. The oddities may suggest that companies have colluded in bid rigging.

A number of common signs are likely to appear when there is collusion. Familiarity with these signs will assist procurement officers to identify potential bid rigging activities which should be notified to the MyCC.

Some of the warning signs are set out below. This is a non-exhaustive list found in documents, pricing, statements, correspondence and behaviour and you will in time be able to identify other ways of identifying bid rigging.

Suspicious Statements or Behaviour

While bidders who collude try to keep their arrangements secret, occasional slips or carelessness may alert you to potential collusion. In addition, certain patterns of conduct or statements by bidders or their employees may suggest the possibility of collusion. Be alert for the following situations:

- The proposals or bid forms submitted by different vendors contain irregularities (such as identical calculations or spelling errors) or similar handwriting, typeface, or stationery. This may indicate that the designated bidder may have prepared some or all of the bids;
- Bid or price documents contain white-outs or other physical alterations indicating last-minute price changes;
- A company requests a bid package for itself and a competitor or submits both its and a competitor's bids;
- A company submits a bid when it is incapable of successfully performing the contract;
- A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding and;
- A bidder or salesperson makes:
 - any reference to industry-wide or association price schedules.
 - any statement indicating advance (non-public) knowledge of competitors' pricing.
 - statements to the effect that a particular customer or contract "belongs" to a certain vendor.
 - statements that a bid was a "courtesy," "complementary," "token," or "cover" bid.
 - any statement indicating that bidders have discussed prices among themselves or have reached an understanding about prices.

Canada's Hotels Case

This case involved tenders for hotel rooms used by the Canadian government employees travelling to Ottawa and for guests of the Canadian government.

Officials from six (6) of the largest hotels met in one hotel to fill in the tender documents together. All of them submitted identical rates for the different types of rooms. They put their bids in individual envelopes but then put all of the envelopes in the same courier package for delivery to the government procurement agency.

The officer who received the package was suspicious and alerted her superior who later spoke with the courier delivery person. The Canadian Competition Bureau used this information to obtain search warrants. All of the hotels then pleaded guilty to bid rigging charges.

Bid or Price Patterns

Certain patterns of bidding or pricing conduct seem at odds with a competitive market and suggest the possibility of collusion:

- The same company always wins a particular procurement tender. This may be more suspicious if one or more companies continually submit unsuccessful bids;
- The same persons submit bids and each company seems to take a turn being the successful bidder;
- Some bids are much higher than published price lists, previous bids by the same firms, or cost estimates;
- Fewer than the normal number of competitors submits bids;
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity;
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project and;
- A company withdraws its successful bid and subsequently is given subcontracted work by the winning contractor.

If any of the above sounds familiar or if you as a procurement officer come across any of these signs, take the following steps:

- Do not discuss any of this with the suspected bidders;
- Keep all documents including correspondence and even envelopes in a safe place;
- Recall and record any suspicious behavior during the tender process;
- Discuss internally with your superior the next course of action and;
- Contact the MyCC for assistance.

How To Reduce The Risk Of Bid Rigging

There are many ways in which procurement agencies can reduce the risk of bid rigging. Here are some suggestions to promote effective competition in public procurement.

- Be well informed of the products or services required before a tender is open to the bidders.
- Collect as much information as possible on the potential bidders, their products, their prices as well as their costs. Information on past tenders for the same or similar products should also be recorded.
- Design the tender process by inviting a sufficient number of credible and potential bidders. Unnecessary restrictions should not be imposed as this may reduce the number of qualified bidders.
- Make it possible for a company to submit a tender for a separate lot of the contract. Avoid making the number of lots equal to the number of companies that are expected to bid in the tender procedure or making the lots of equal value.
- If it is necessary to meet the companies, meet individually. Avoid meeting the companies before the deadline to submit tenders.
- Compare tenders from previous tender procedures with the current one and with tender procedures conducted in nearby geographic areas. Look for patterns that may suggest the existence of a bid rigging cartel.

- Vary the conditions of the tendering procedure when a contract expires; for example, by changing the geographic scope and the terms of the contract. This will make it harder for the companies to have an arrangement to divide the market by taking turns to win the contract.
- Discussions with other contracting authorities purchasing similar goods and services should be held from time to time as this will help in making comparisons and assessments.
- Consider stating explicitly in the contract documents that bid rigging is a prohibition under the Act and that suspected bid rigging will be reported to the MyCC.

Tip Us Off

We encourage you to contact us at the MyCC if you have any questions or suspect irregularities in a tendering procedure. You are entitled to remain anonymous if you give us a tip-off.

Please call the MyCC at +603 2273 2277, or e-mail us at complaints@mycc.gov.my. Anonymous callers can also use the same channel.

For more information visit www.mycc.gov.my.



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