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The HCC Guide on the Detection and Prevention of Collusive Tendering

Lia Vitzilaiou
Lambadarios Law Firm

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I. INTRODUCTION

On September 24, 2014, the Hellenic Competition Commission (“HCC”) published a guide on the detection and prevention of collusive practices in public procurement (collusive tendering), focusing on structural and behavioral screens.

Although the guide is in principle addressed to contracting authorities, it is a useful tool also for undertakings participating in a tender process, since it highlights specific practices that may be considered anticompetitive and draw the associated consequences. In this sense, the guide may be used by tenderers not only to self regulate, but also to scrutinize and denounce the behavior of other candidates and thus assist competition authorities in detecting cartel activity.

II. THE GUIDE

The Guide mainly contains empirical screens and is based on the respective guidance and experience of European and international competition authorities, as well as the OECD. In this sense, its usefulness is not restricted to a national level, but may be widely used by competition authorities and undertakings.

First, the Guide describes the most common forms of collusive tendering; second, it indicates certain market conditions that facilitate collusion; third, it describes some detection methods and indications of suspicious behavior; and fourth, it suggests some deterrent methods.

III. THE MOST COMMON FORMS OF COLLUSIVE TENDERING

According to the HCC, the contractors who engage in collusion usually agree beforehand who shall submit the winning bid and manage to artificially increase the final prices of the tendered contract. These agreements usually provide complementary mechanisms for sharing the profits that arise from these higher contract prices, such as subcontracting, supply agreements, or even virtual billing. And, sometimes, the cartelists apply complex methods of profit sharing, such as allocation of profits through a series of tenders, tender rotation, or market allocation.

Generally, collusive tendering takes four forms, which may appear in isolation or in combination: A) bid-rigging (including cover-bidding, bid-suppression, and bid-rotation); B) market/customer allocation; C) price-fixing; and D) restrictions on quantities.

¹ Lia Vitzilaiou is a Senior Associate in the Competition Law practice group of the Lambadarios Law Firm, where she also practices commercial litigation.

A. Bid-Rigging

Bid-rigging takes place when some or all the participants in a tender agree beforehand who shall win the tender and thus eliminate competition between them. The main methods of bid-rigging are:

1. Cover-Bidding

By this method the competitors agree to submit: (i) higher bids than that of the agreed winner, (ii) bids which contain terms unacceptable to the contracting authority, or (iii) bids lacking the necessary formalities prescribed by the call for tender (“CFT”) in order to ensure that the tender will not be declared void.

This practice was applied in the *Elevators and Escalators* case² where, from 1995 to 2004, the undertakings submitted cover-bids and allocated tenders per Member State in Belgium, the Netherlands, Germany, and Luxembourg. The winner of the tenders was determined by the cartelists according to its market share in each Member State and, accordingly, the remaining tenderers coordinated their prices at very high levels. Furthermore, in Germany and the Netherlands, the cartelists agreed on existing customer maintenance, namely the undertakings already supplying certain organizations were designated to win all tenders of those organizations. The fines in this case reached EUR 922 million.

Cover-bidding was also applied in U.K. tenders for the construction of hospitals, schools, and university buildings during 2000-2006 and also involved virtual-billing.³

2. Bid-Suppression

By this method, certain competitors agree not to submit a bid, or to withdraw their bid, in order to ensure that the tender will be awarded to the undertaking determined by the competitors as a group.

3. Bid-Rotation

By this method, the competitors agree to win tenders by rotation. The contracts may be allocated according to either the volume of the supplied goods or the contract value, either equally or in proportion to the competitors’ market shares.

This method was applied in the *International Removal Services* case,⁴ which concerned nine Belgian companies of international removal services operating as a cartel from 1984 to 2003. These companies allocated contracts among themselves and accordingly presented bogus quotes to clients; then, they compensated each other by amounts already included in the final tender price, which were paid through virtual invoices. The fines imposed exceeded EUR 32.7 million.

²See European Commission, IP/07/209; Commission decision of 21 February 2007, substantially upheld on appeal Cases T-145/07 etc General Technic-Otis v Commission [2011] ECR II-000.

³OFT, Decision CA98/02/2009.

⁴See European Commission, IP/08/415; Commission decision of 11 March 2008, substantially upheld on appeal Cases T-204/08 etc Team Relocations NV v Commission [2011] ECR II-000.

A similar method was used in the *Pre-Insulated Pipes* case,⁵ where ten heating pipe constructors in Germany and Denmark allocated contracts on the basis of respect for “existing traditional customer relationships,” and accordingly submitted higher bids than those of the agreed winner. The relevant fines exceed ECU 92 million.

B. Market/Customer Allocation

Market/customer allocation takes place when competitors agree to share markets or customers, usually according to customer categories or geographical areas. In order to do so, competitors configure their bids in such a way to ensure that the contract will be awarded to the undertaking to which the products and/or the customers and/or the area have been allocated beforehand.

This method was used in the *Gas Insulated Switchgear* case,⁶ concerning 11 groups of companies, which had formed a cartel from 1998 to 2004 in the switchgear market. They exchanged information in order to coordinate their bids and allocate markets as per their shares and place of establishment. The fines imposed exceeded EUR 750 million.

Similarly, in the *Industrial Bags* case,⁷ from 1991 to 1997 sixteen undertakings had formed a cartel in the market of plastic industrial bags, operating in Belgium, Germany, Spain, France, Luxembourg, and the Netherlands. They shared markets; allocated sale quotas; assigned customers, deals, and orders; exchanged information; and fixed prices. The relevant fines exceeded EUR 290 million.

At a national level, in 2007 the HCC fined two security companies for customer allocation, which involved cover-bidding.⁸

C. Price-Fixing

Price-fixing is the practice where competitors agree on a certain price and/or a price increase or otherwise affect the price of a product or service. Price-fixing may take the form of (i) setting minimum prices, (ii) abolishing or restricting rebates, (iii) applying price calculation methods, (iv) increasing prices, or (v) maintaining prices at a certain level.

D. Restrictions on Quantities

Restrictions on quantities is the practice of competitors agreeing to reduce or restrict the offered quantities of a product or service, in order to restrict their availability and thus increase the contract price of the tender.

⁵See European Commission IP/98/917; OJ [1999] L24/1, [1999] 4 CMLR 402, substantially upheld on appeal Cases T-9/99 etc HFB Holding v Commission [2002] ECR II-1487, [2001] 4 CMLR 1066.

⁶See European Commission, IP/07/80; Commission decision of 24 January 2007, upheld on appeal Cases T-110/07 etc Siemens v Commission [2011] ECR II-000, [2011] 4 BCMLR 1335.

⁷See European Commission, IP/05/1508, Commission decision of 30 November 2005, Case COMP/38354, Commission v BPI PLC and others, C(2005)4634, substantially upheld on appeal (see cases C-50/12 et seq and ECJ Judgment of 26 November 2013 No. C-50/12P)

⁸See HCC decision of 11 January 2007, No. 325/V/2007.

IV. MARKET CONDITIONS WHICH FACILITATE COLLUSION

Although collusion can in principle appear in any market, there are some market conditions that generally facilitate collusion. Such conditions may be:

1. A limited number of market players, since this makes communication and coordination between competitors easier.
2. Uniqueness of the products tendered, or the particular specifications thereof, since this reduces interchangeability.
3. Standardized character of the products tendered, since this facilitates price agreements.
4. Familiarization of competitors with tender procedures, since, when tenders of the same products or of similar value are repeated, competitors become accustomed both to each other and the procedure, while the prospect of similar contracts in the future constitutes a motive for cooperation.
5. Familiarity between competitors due to social relationships and/or legal business cooperation and/or participation in a professional association and/or a trade union, since this can facilitate collusion.

V. DETECTION METHODS AND INDICATIONS OF SUSPICIOUS BEHAVIOUR

The detection of collusion is generally difficult due to the inherent secrecy of the negotiations between competitors. However, there are some behavior patterns that are generally regarded suspicious and could constitute cause for concern:

1. Suspicious patterns of bid submission include:
 - a) a specific pattern of successful bidders (e.g. a specific sequence of winners between competitors, an award of tenders of the same type or of the same value to the same competitors over time, etc.);
 - b) submission of relatively high bids in certain tenders and relatively low bids in similar tenders by the same undertakings;
 - c) repeated participation of an undertaking in tenders without ever being successful; and
 - d) a high percentage of winning bids for an undertaking which rarely participates in tenders but, when it does so, it succeeds.
2. Suspicious behavior concerning the submission of bids includes:
 - a) regular candidates do not submit a bid;
 - b) certain bids are suddenly withdrawn;
 - c) different bids by different competitors are simultaneously submitted and have similar formats and postal stamps;
 - d) different bids by different competitors have similar wording, especially when such wording is unusual;
 - e) different bids by different competitors have similar errors;

- f) certain bids are less detailed and comprehensive than required by the CFT;
 - g) bids submitted by different competitors have similar amendments; and
 - h) bids of different competitors are submitted by the same person or have the same contact details.
3. Suspicious pricing includes:
- a) certain competitors submit unexpectedly high bids;
 - b) almost all competitors submit unjustifiably high bids or unjustifiably low rebates;
 - c) different competitors submit similar prices;
 - d) the same competitors sometimes bid high and sometimes low for the same contract without objective justification;
 - e) the bids of almost all competitors significantly exceed those submitted in previous tenders without objective justification (e.g. cost increase);
 - f) the bid of a new competitor is significantly lower than those of regular candidates (i.e. indication of collusion between regular candidates); and
 - g) prices fall dramatically after the bid of a new competitor.
4. Suspicious market allocation includes:
- a) successful bidders rotate according to geographical area or type of works/services;
 - b) competitors charge different prices in different geographical areas, which are unjustified by transport costs;
 - c) competitors refuse to participate and/or allege that another competitor should not participate in certain tenders due to “relevant agreements;”
 - d) competitors refuse to participate in tenders concerning certain geographical areas alleging that they “do not wish to interfere in somebody else’s business;” and
 - e) competitors wait until the last minute to submit their bids and are interested to know whether a certain competitor has submitted a bid.
5. Other suspicious indications include:
- a) a successful bidder declines its appointment or withdraws its bid before the award, without objective justification;
 - b) a successful bidder appoints another candidate as its subcontractor;
 - c) competitors use terms such as “sectoral” or “usual” prices or practices;
 - d) competitors are aware of each other’s bids or of information disclosed only to a certain candidate; and
 - e) different competitors are represented by the same natural or legal person.

When such suspicious indications come to the attention of contracting authorities, the HCC suggests that they:

1. request clarifications from the candidates (e.g. about their pricing, their reluctance to participate in a tender, etc.);
2. review carefully the tender file and that of previous tenders for similar indications;
3. continue with the tender process and ensure that the candidates do not become suspicious; and
4. inform the HCC.

However, the contracting authorities should not directly accuse the candidates of collusion, since this could lead to destruction of evidence and, if the accusations prove unfounded, to actions against the contracting authorities for defamation.

VI. DETERRENT METHODS

Finally, the HCC Guide indicates some methods by which collusion could be deterred, relating both to the drafting of the CFT and the tender procedure *per se*.

A. The Call for Tender

The HCC proposes that the CFT is drafted in such a way to ensure:

1. a differentiation of the contract value and the object of the tender, since predictability facilitates market allocation. Also, contracts of lower value may attract small companies that are not members of a cartel, while contracts of higher value may achieve better prices and deter bid rotation;
2. a large number of candidates, since collusion is impeded when new participants constantly appear. For this purpose, the CFT should have simple and rational participation requirements, avoid unnecessary restrictions, and refrain from continuous time extensions or automatic renewals of tender contracts; and
3. the secrecy of the candidates' identity, since this will impede communication and coordination among competitors.

It is also advisable that the CFT explicitly mentions that any suspicion of collusion will be reported to the HCC. Further, the CFT should require the candidates to submit a written statement affirming the independent drafting of their bids and lack of communication with their competitors, and include a statement that they will notify the contracting authority of any anticompetitive behavior that comes to their attention during the tender process.

B. The Tender Procedure

Finally, the HCC Guide indicates that the contracting authorities should:

1. Have a good understanding of the relevant market and the value of the items tendered (e.g. information about the products, suppliers, market conditions, prices and costs in the national market and abroad, information from previous tenders etc.) since this will impede overpricing and price-fixing attempts;
2. Have performed an independent evaluation of the procurement items before the publication of the CFT, since this will facilitate the detection of overpricing;

3. Ensure that its personnel has received relevant training, since this will facilitate the detection of suspicious indications and the appropriate treatment thereof; and
4. Analyze the bids in previous tenders to detect any suspicious patterns, since this may disclose certain patterns over time that are not evident in the short term.

VII. EPILOGUE

Detecting and fighting cartels is one of the most challenging issues of competition authorities, especially due to cartels' inherent secrecy and the measures taken by cartelists to conceal their behavior. In their mission against cartels, the use of screens by competition authorities, such as those described herein, can prove a valuable tool for the detection and deterrence of collusion, especially within the frames of tender procedures.

Furthermore, the publication of such screening methods by competition authorities not only assists contracting authorities in detecting suspicious behavior, but also raises awareness. This has the added benefit that tender candidates who do not participate in a cartel can assist competition authorities in exposing it; indeed, they have every reason to do so. In this aspect, the initiative taken by the HCC to not only draft, but also to publish the guide in question should certainly be praised.