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Bid-Rigging in Hong Kong

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Targeting Bid-Rigging

Enforcement priority for the Competition Commission

Enforcement

- investigations in sectors such as building maintenance, construction and IT consultancy
- issued requests for information on tendering processes
- dawn raids of key businesses in IT consultancy firms

Outside enforcement

- undertaken a study on bid-rigging practice and cartels in the construction and building management sectors

Defining Bid-Rigging

TENDERING PROCESS

- Independently articulated bids formulated by contractors
- Generate competing offers from different bidders
- Award of business activity in works, supply or service contracts



BID-RIGGING

- Competitors covertly agree among themselves that they will not compete with one another for particular projects
- Common forms:
 - Cover bidding
 - Bid rotation
 - Bid suppression/withdrawal

Defining Bid-Rigging

Section 2(2) of the Competition Ordinance provides a specific definition for the purposes of determining whether there is Serious Anti-Competitive Conduct.

“bid-rigging” (圍標) means—

(a) *an agreement—*

(i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement; or

(b) *a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement—*

(i) that is made between or among 2 or more undertakings; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement

Enforcing Bid-Rigging

If the Commission has reasonable cause to believe that a person has engaged in bid-rigging, it may either:

- issue an infringement notice against the person, offering not to bring proceedings (on condition that the person makes a commitment to refrain from the conduct and/or admit its contravention of the Ordinance); or
- apply to the Competition Tribunal for a pecuniary penalty or other orders to be imposed on the person.

Competition Tribunal

- pecuniary penalty of up to 10% of the turnover of the company involved for each contravention
- broad discretion to make other orders (e.g. disqualifying a person from acting as a director)

Leniency Policy for Undertakings Engaged in Cartel Conduct.

- The Commission will agree not to bring proceedings in the Competition Tribunal against the first member of a bid-rigging cartel who reports the cartel conduct and meets the requirements for leniency.

Sit Kam Tai v Gammon Iron Gate Co Ltd HCA 779/2006

- Stainless steel gate suppliers approved by Housing Authority for its housing projects
- Cartel agreement:
 - One member would be the potential supplier and submit a tender at a pre-fixed minimum tender price.
 - Other members would also submit tenders but at higher prices.
 - Profit collected by the awarded supplier would then be distributed to the members equally.
- One of the cartel members sued another for unpaid profits.
- High Court rejected the claim
 - The cartel conduct was **against public interest** and should be **discouraged** in strong terms.
 - “...*the Housing Authority and the main contractors were **cheated into believing that the tendering system was working and the market forces were at play**. They also thought that the prefixed minimum tender price was a **genuine lowest bid** given by a tenderer. The Housing Authority in the end had to **pay what the cartel had decided rather than what the market dictated**, and it still **thought that the market was working** through the tendering process.”*

Garden Vista Case

2010

Incorporated Owners (IO) obtained approval from the owners for the renovation of Garden Vista

- The chairman of the IO and others including Yau Shui-tin (former director of an engineering firm) had a discussion
- Agreed on a bid-rigging arrangement

2015

Yau was charged with conspiracy to offer an advantage to an agent under the Prevention of Bribery Ordinance and Crimes Ordinance.

- Bribes: \$45m (Garden Vista and two other projects)
- Homeowners were presented with a HK\$260 million renovation contract, requiring each of the about 800 households to pay around HK\$350,000. Those who refused to pay received death threats.

2016

Yau Shui-tin pleaded guilty

District Court Judge:

- Bid-rigging was rampant and people need to be more aware of it
- Set up a statutory body to regulate building renovations

Development Bureau:

- No intention to set up new statutory body – regulatory overlap

Competition Commission

- Grave public concern
- Enforcement priority

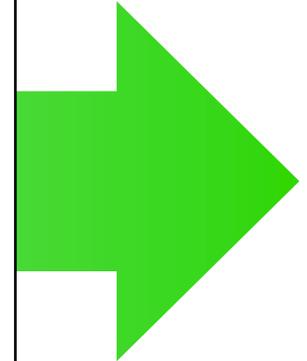
Competition Commission

2016 - MARKET STUDY

- ‘Report on study into aspects of the market for residential building renovation and maintenance’
- Revealed that bid-manipulation practices were prevalent in the local residential building renovation and maintenance market
- More than 65% of bids submitted by consultants were below the minimum cost estimate
- The results are used to inform the regulator’s enforcement and advocacy activities

2017 – FIRST CASE

- Sued IT companies for suspected bid-rigging in the supply of hyperconverged infrastructure system
- Allegedly conspired to submit cover bids in relation to a tender that was issued by YWCA in July 2016
- Cover bids are not intended to win a tender but to reduce the number of competitive bids and thereby restrict competition in respect of a particular tender
- Substantive hearing in mid-2018



June 2017 – Non-Binding Motion Passed in LegCo

■ **Add resources and manpower to the bodies such as Competition Commission and ICAC**

■ **Set up a new building maintenance authority**

■ **Impose “cooling-off” periods for the tendering and appointment procedures for large-scale maintenance works**

■ **Add resources of the Lands Tribunal to enhance efficiency of handling legal disputes**

■ **Plug loopholes on the Building Management Ordinance**

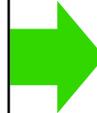
“Combating bid-rigging to defend the rights and interests of property owners”

November 2017 – Evaluating the Smart Tender System

2016

Urban Renewal Authority launched “Smart Tender” system

- Allows homeowners to invite bids from **contractors** for renovation projects through an electronic platform
- Keeps the identity of bidders confidential until bid opens
- Provides homeowners with access to independent professional advice on cost estimates



2017

LegCo: Is the system sufficient?

- Many notorious contractors were still submitting bids under the latest scheme
- Current scheme only focus on choosing contractors – should also cover consultants
- Cartels were suspected of operating as early as during the selection of consultants

Challenges faced by companies

Theoretically	In Reality...
Offers trainings to educate staff on bid-rigging cartels	 “Customary practice” vs “the lawyer says...”
Be vigilant when communicating with competitors	 People moves around. Employees have personal contacts with employees at competing firms.
Ensure good documentation of bidding decisions Apply checks and balances	 Small, and often under-resourced, teams handle numerous tenders on a daily basis.
Implement internal whistle-blowing mechanism	 Limited resource to conduct internal investigation; Often lack of evidence to form concrete conclusion; Internal investigations affect morale.



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