The Competition Commission formulated the Model Non-collusion Clauses and Non-Collusive Tendering Certificate to help procurers reduce their risk of being exposed to bid-rigging

Introduction

The Competition Ordinance (Cap. 619 of the Laws of Hong Kong) (the “Ordinance”) came into effect on 14 December 2015, which aims to promote competition and curb anti-competitive practices by businesses. Bid-rigging is a matter of public concern and an anti-competitive conduct, the Competition Commission (the “Commission”) has been taking active steps to combat bid-rigging cartels.

Procurers aim to procure the best value for money and to attain the highest quality of goods or service at the cheapest price by tendering. This may not be possible when there is bid-rigging, where the tenderers collude with one another, agreeing that they will not compete genuinely with each other. This often results in the procurer paying an exorbitant contract price while the quality of the services or goods is not guaranteed. The prevalence of such anti-competitive conduct may severely disrupt market operations.

On 18 December 2017, the Commission published the Model Non-Collusion Clauses and encourages procurers to include such model clauses in their tender documents and contracts and for tenderers to give a non-collusive tendering certificate to help procurers reduce their risk of being exposed to bid-rigging in the procurement process.

Bid-rigging

Bid-rigging occurs when two or more undertakings (tenderers) agree that they will not compete genuinely with each other, hence to enable one of the designated cartel members to “win” the bid. In practice, bid-rigging can be manifested in various forms, such as undertakings agreeing to:

1. Refrain from submitting a bid or withdraw a bid submitted previously, known as bid suppression;
2. Take turns at being the designated winner of the bid, known as bid rotation;
3. Submit a bid on less attractive terms than the designated bid winner, known as cover bidding; or
4. Refrain from submitting a bid or submit a cover bid in exchange for subcontracts with the designated winner.
Bid manipulation can arise in the form of horizontal agreement or collusion between competitors at the same level of the production or distribution chain and thereby influencing the outcome of the tender to their favour. Alternatively, similar agreements can also be formed vertically between undertakings at different levels of the production or distribution chain. An example of such is where a consultant conspires with a contractor by agreeing that if the consultant wins the bid to oversee the project, they will facilitate the allied contractor to win the ancillary bid to provide services or goods for the project.

These anti-competitive arrangements enable the undertakings to win the contract at an inflated price, at the expense of the procurer, in exchange for potentially lower quality goods or services. The pervasion of such non-competitive conduct is not conducive to the development of a healthy market.

The Law

Undertakings (which includes a natural person engaging in economic activity) are prohibited from making or giving effect to agreements that may prevent, restrict or distort competition in Hong Kong under section 6(1) of the Ordinance (the "First Conduct Rule"). Bid-rigging can be regarded as serious anti-competitive conduct, however, a bid-rigging need not be a serious anti-competitive conduct to contravene the First Conduct Rule. Bid-rigging contravenes the First Conduct Rule as long as it aims to harm or harms competition.

Bid-rigging is inherently anti-competitive and it has the object or effect of harming competition, therefore it contravenes the First Conduct Rule. Those who violate the competition rule may be subject to pecuniary penalties.

The Model Non-Collusion Clauses and Non-Collusive Tendering Certificate

There is no standard wording for non-collusion clauses, businesses can develop their own wording. Nevertheless, the Commissioner has formulated the Model Non-collusion Clauses for inclusion in the invitation to tender and the formal contract and the Non-Collusive Tendering Certificate as reference materials for the public.

Invitation to tender

It is important to include non-collusion clauses in invitation to tender, they serve as an alert to tenderers of the consequence of engaging in bid-rigging and provide safeguards to procurers if tenderers engaged in bid-rigging in breach of the non-collusion clauses.

The model non-collusion clauses suggested to be included in invitation to tender contain four parts. First, there is a clear statement that the procurer requires tenderers to ensure their bids are prepared without any prior agreement with other undertakings, with respect to the price, bid submission procedure or any other terms of the bid. Second, it contains a warning
to tenderers that bid-rigging is inherently anti-competitive which might be regarded as a “serious anti-competitive conduct” under the Ordinance and those who violates the competition rule will be subjected to the imposition of pecuniary penalties and other sanctions under the Ordinance. Third, it provides express rights to procurers to invalidate the bid and seek damages if the tenderer breached the non-collusion clause. Fourth, it requires tenderers to submit a non-collusive tendering certificate duly signed by an authorised representative of the tenderer together with its tender.

Non-collusive tendering certificate
As required under the Model Non-collusion Clause in invitation to tender, tenderers have to submit a non-collusive tendering certificate. In the Model Non-collusive Tendering Certificate, tenderers would need to represent and warrant to the procurer that the bid was developed genuinely and independently and was not be prepared with agreements with any person (including other tenderers) with respect to the price, the formulas used to calculate the prices, the decision of whether to submit a bid or withdraw a bid and the details and terms of the bid.

In addition, by signing the Model Non-collusive Tendering Certificate, the tenderer agrees to disclose all its intended sub-contracting arrangements, including those entered into after obtaining the contract from the procurer. This may help procurers to detect bid-rigging conducts.

Most importantly, the Model Non-collusive Tendering Certificate serves as a written confirmation from the tenderers that they understand the consequence of engaging in bid-rigging and give express rights to procurer to invalidate the bid, terminate the contract and/or seek damages in the event of any non-compliance with their non-collusion undertakings.

Formal contract
Non-collusion clauses are not only important in the tender process, but also important in the formal contract with the successful tenderer. By incorporating the Model Non-collusion Clause in the formal contract, it provides contractual protection to the procurer in case they later discovered there were bid-rigging activities in the tender process.

The formal contract should emphasize that such contract was entered into in reliance on the warranties made by the tenderer in the non-collusive tendering certificate. The formal contract should also contain clauses that empower the procurer with the rights to terminate such contract and sue for damages if the procurer later discovered the contract was tainted by anti-competitive collusive conduct.

In the event of breach of the non-collusion clause, it would be in the procurer's interest to facilitate the Commission’s investigation of the anti-competitive collusive conduct by providing relevant documents and information. Potential claims of breach of confidentiality
can be prevented by including the non-collusion condition as an exception to the confidentiality undertakings.

**Conclusion**

The Commission strongly encourages procurers to include non-collusion clauses in their tender documents to strengthen their defence against cartel conducts. However, as stated in the guide published with the Model Non-collusion Clauses, procurers are reminded that the Model Non-Collusion Clauses and Non-Collusive Tendering Certificate are for reference only and might not be appropriate for all procurers in different sectors. Procurers are reminded to modify the wording of the non-collusion clauses and/or add other undertakings to ensure they can address the potential bid-rigging in their tender process and industry.

Last but not least, procurers should stay vigilant and may report any suspected cases to the Commission directly and/or anonymously or through an intermediary (such as a legal advisers).

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**Important**: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.