Issues concerning the Competition Commission’s Model Non-collusion Clauses and Non-Collusive Tendering Certificate

Introduction

In the January 2018 newsletter, we wrote about the Model Non-collusion Clauses and the Non-collusion Tendering Certificate developed by the Competition Commission (the “Commission”) and published on 18 December 2017. The two model documents are intended to assist procuring organisation to deter bid-rigging and other collusive behaviours during the tendering process and for early identification of such anti-competitive behaviours.

Effects of the Model Clauses and Certificate

In gist, the use of the Model Non-collusion Clauses and the Non-collusion Tendering Certificate deters anti-competitive behaviours by requiring the tenderers to provide the procuring organisation with:

1. a clear statement that anti-competitive collusive conduct contravenes the Competition Ordinance;
2. warranties stating that they have not colluded with each other in preparing the bids;
3. an express right of the procuring organisation to be informed about subcontracting arrangements; and
4. an express right of the procuring organisation to provide information related to the tender and the tenderer to the Commission.

The Commission advises that procuring organisation should seek to incorporate these model clauses in the invitation to tender and repeat them in the contracts for supply of goods or services.

Overseas Practice

The Commission’s initiative is actually consistent with the increasing international trend to protect procuring organisation and minimize anti-competitive behaviours by way of contractual mechanism.

In 2009, the Organisation for Economic Co-operation and Development (the “OECD”) developed and published a similar set of model clauses as part of its Public Procurement Toolbox with the purpose to assist procuring organisation to detect suspected bid-rigging in a timely manner, to communicate to suppliers that bid rigging is an unacceptable practice in
public procurement, and to support competition authorities to investigate suspected cases of bid rigging.

The OECD model clauses suggest procuring organisation to incorporate the following terms:

1. an explicit right of the procuring authority to report all suspected instances of bid-rigging and share otherwise confidential tender information with the relevant competition authority;
2. an explicit right of the procuring authority to receive information and approve any subcontractors;
3. an implicit guarantee that a bid has been developed independently and that no consultation, communication, contract, arrangement or understanding has been made between the supplier/bidder and any competitor; and
4. an obligation of the supplier/bidder to report if they, or any organisation or person associated with their tender, including directors and senior managers, have ever been subject to proceedings related to anti-competitive conducts, domestically or overseas.

The use of such clauses is commonplace in the United Kingdom. There is also a strong drive towards helping procuring organisation detect collusion amongst suppliers, and the United Kingdom’s competition authority, the Competition and Markets Authority, has even launched software tools for procuring organisation which uses algorithms to detect unusual bidder behaviour and pricing patterns which may indicate the presence of bid-rigging.

**Concerns and Issues**

However, suppliers of goods and services have raised the following concerns, in response to the introduction of the model clauses and certificate by the Commission:

1. no public consultation was held prior to publication;
2. the model clauses and certificates may deter legitimate bidding arrangements due to the overly-broad nature of the drafting;
3. whether the Commission’s suggested drafting as representing the “default” position is fair; and
4. the model clauses and certificates create unfair and inefficient burden on potential bidders.

The need to communicate with third parties during the bidding process

In particular, the model clauses suggest the inclusion of the following words to invitation to tender:
“The tenderer must ensure that the bid is prepared without any agreement, arrangement, communication, understanding, promise or undertaking with any other person.”

Suppliers are concerned that legitimate bidding arrangements may be deterred due to the overly-broad nature of the drafting of this clause. However, paragraph 3 of the model non-collusion tendering certificate does provide for a list of exceptions for communication with:

1. the procuring organisation;
2. a joint venture partner, where joint venture arrangements relevant to the bid exist and which are notified to the procuring organisation;
3. consultants or sub-contractors, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular consultancy arrangement or sub-contract;
4. professional advisers, provided that the communications are held in strict confidence and limited to the information required for the adviser to render their professional advice in relation to the tender;
5. insurers or brokers for the purpose of obtaining an insurance quote, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular insurance arrangement;
6. banks for the purpose of obtaining financing for the Contract, provided that the communications are held in strict confidence and limited to the information required to facilitate that financing.

A broad contractual term restricting arrangement, communication, understanding, promise or undertaking with any other person may indeed prevent legitimate contacts between the bidder and third-parties. For example, this may preclude bidders from contacts with its own suppliers which are essential for the bid to take place.

However, whether any communication between bidder and third parties falls foul of the model clauses is ultimately an issue of intention. For example, communication with suppliers with proper confidentiality protocols, is unlikely to breach the model clauses.

**Joint-tenders and consortium bids**

One of the exceptions for communication identified in paragraph 3 of the model non-collusion tendering certificate is a joint venture partner, but only where joint venture arrangements relevant to the bid exist and which are notified to the procuring organisation.

The definition of “joint venture partner” is unclear as to whether the model clauses shall only include joint venture companies or joint ventures in unincorporated forms. Potentially, there
may be situations where several companies form unincorporated joint ventures such as a consortium, and the requirement to notify the procuring organisation of the existence of such commercial arrangements may be inappropriate.

For example, the Hong Kong General Chambers of Commerce (the “HKGCC”) noted that the obstacles in the way of consortium bids may have serious consequences for small and medium-sized enterprises (“SMEs”) who lack the scale to bid for major projects and can only do so by joining with other business in a consortium. Citing a similar concern by the Irish Competition and Consumer Protection Commission, the HKGCC suggested the Commission to (1) consider issuing an amendment cautioning procuring organisation that the model clauses and certificate may not be suitable for bidding arrangements where several suppliers of inputs may be involved for the bid to be made, and that alternative working arrangement should be used where such bids are invited, and (2) issue a guide to SMEs on consortium bidding.

Conclusion

The Model Non-collusion Clauses and the Non-collusion Tendering Certificate are not legally binding and can be voluntarily tailored by procuring organisation to fit specific needs. Notwithstanding the potential impact of these model documents on potential bidders and suppliers of goods and services, they are consistent with the 2009 OECD model clauses and thus, any potential concerns with the applicability of the model clauses locally is negated by a clear international trend to minimize anti-competitive behaviour.

Lastly, accepting these clauses may have legal implications. Businesses are advised to seek legal advice in case of doubts.