

DON'T TURN THE BOOM INTO A BUST: AVOIDING THE CRIMINAL CONSEQUENCES OF PUBLIC PROCUREMENT

In a recent interview with the *Globe and Mail*, Canada's Commissioner of Competition, John Pecman, said that the Competition Bureau is planning to double the number of training workshops that it offers to public procurement officials on ways to prevent fraud. These workshops will help assist officials to identify the bid-rigging tactics that have become increasingly common in the infrastructure sector.

The Bureau's focus on the construction industry is not new. Since 2012, the Competition Bureau has been intensifying its scrutiny of the industry, including trade associations and the public bidding process. Despite the increased scrutiny, the industry as a whole is still generally unaware of the reach of the *Competition Act*, and the ways in which anti-competitive behaviour can arise. Most industry participants aren't even aware of what it means to "be a competitor". Since the penalties applicable to an offense such as bid-rigging can include fines of an unlimited amount, or up to 14 years in prison, compliance needs to be a priority.

'Bid-rigging' is the colloquial term for an offense described under s. 47 of the *Competition Act*. The offense arises when there is an agreement or arrangement between two or more parties in which one or more of them agrees not to submit a response to a call for bids or tenders, or agrees to withdraw a bid or tender, in favour of a would-be competitor. Bid-rigging can also refer to situations in which artificially high quotes are submitted by way of agreement or arrangement between two or more bidders.

A few years ago, the Bureau made headlines by obtaining plea agreements in relation to bid-rigging in the auto parts industry. The fines in those cases were record-setting - \$30 million and \$5 million, respectively – and signalled that the Bureau intends to be harsh in punishing parties involved in bid-rigging activities. Recent reports on bid rigging in the condo refurbishment market show that the Bureau's focus on this industry is not just talk; criminal investigations are underway in this industry, and it is therefore vital that contractors stay abreast of their legal obligations and rights.

Regardless of whether a party is found to be criminally liable for an offense under the *Competition Act*, civil litigation may follow the criminal investigation/charges. "Follow-on" litigation, as it is known, sees plaintiffs who have paid more (directly or indirectly) due to bid-rigging seeking damages from the party or parties suspected of the anti-competitive behaviour that led to the overpayment. Damage awards in such litigation can be crippling, especially if the losing defendant has already paid costs or fines in the criminal proceeding.

While the Bureau runs workshops to help public officials spot anti-competitive behaviour, it is important for the industry to similarly prepare itself to avoid such behaviour. It is not enough for senior management to be aware of the application of competition laws to business practices, because even an entry-level employee could inadvertently engage in anti-competitive behaviour and put the whole company at risk of criminal charges and civil liability. To avoid such situations, the Bureau has repeatedly recommended the use of *Competition Act* Compliance Programs. The most recent Bureau bulletin on compliance programs can be found here: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>

A well-designed compliance program will:

- a) reduce the risk of violations of the *Competition Act*;
- b) reduce the financial and reputational costs resulting from an investigation by the Bureau;
- c) increase awareness of the *Competition Act* amongst employees, business associates, customers and suppliers;
- d) reduce the risk of potentially illegal conduct and exposure to civil, criminal or penal liability; and
- e) assist a company and its employees in their dealings with the Bureau, particularly if the company is seeking leniency.

It is never too late to implement a compliance program. Every company that is regularly involved in bidding and tendering should be aware of its rights and obligations under the *Act*. Companies should be prepared to take advantage of the infrastructure boom without getting busted by the Bureau.

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