

BID-RIGGING, AN OFFENCE AGAINST COMPETITION

What is Bid-rigging?

Bid-rigging, also known as collusive tendering, is one of the offences prohibited by the Fair Competition Act. Section 36 makes it illegal for two or more persons, in response to a call or request for bids or tenders, to either: (a) agree not to submit a bid; or (b) submit bids or tenders arrived at by their prior agreement. It is particularly likely to be encountered in the engineering and construction industries where firms compete for very large contracts.

Purchasers, who are often government entities, but who may also include private entities, seek to acquire goods and services by soliciting competing bids. Bid-rigging occurs, for example, when the competing suppliers conspire and agree in advance on the bids to be submitted by each, so as to control the outcome of the bid. By so doing the suppliers effectively raise prices, or keep prices high, and reduce or eliminate competition in the market place.

Like other anti-competitive offences of its kind, bid-rigging is costly to the economy. It costs the purchasers of the bid, as they end up paying far more than they would have had to pay otherwise. This in turn increases the cost to the consumers, as the higher prices are inevitably passed to them. They end up paying far more than the fair market value of these goods and services.

How is the offence committed?

There are myriad ways in which this offence is committed and there seems to be no limit to the forms which it can take. It may range from the simple scenario of a group of friends agreeing not to outbid each other at a small auction, to large companies orchestrating their bids so that a pre-selected supplier wins a large contract.

Bid-rigging is likely to take one of the following forms: Bid suppression, Complementary or “cover” bidding, Bid rotation, Subcontracting and Market Division.

Bid suppression

This is an agreement among the bidders to either refrain from bidding, or withdraw a bid so that a pre-selected supplier’s bid is accepted.

Complementary bidding

In Complementary bidding, there is the appearance of genuine, competitive bidding but, in fact, some suppliers will have agreed to submit bids that are too high or which contain special conditions which will be unacceptable to the buyer. This enables another supplier’s bid to be accepted when a minimum number of bidders is required. Such bids are not intended to secure the buyer’s acceptance, but are merely designed to give the appearance of genuine competitive bidding to conceal secretly inflated prices.

Bid rotation

This is a systematic or random method by which conspirator suppliers allocate tenders among themselves. In Bid rotation schemes all suppliers agree to take turns in submitting the lowest bid and by so doing they all receive an equivalent share of the contracts.

Sub-contracting

In exchange for either not bidding, or for submitting a bid which they know will lose, suppliers sometimes receive lucrative sub-contracts that effectively share among themselves the benefits of the illegally obtained bid. For instance, after conspiring with other suppliers who agree not to submit bids, an office supplies company wins a government contract at a greatly inflated price. The Company then passes on an equally lucrative

sub-contract to a participating supplier as a reward for participating in the scheme.

Market Division

In Market Division agreements, suppliers agree not to compete with each other in specific territories or for specific customers or products. One supplier might therefore be permitted to bid on contracts offered by particular customers and in return, he will refrain from bidding on contracts offered by customers allocated to other suppliers. In other instances suppliers will agree to sell only to customers in certain territories and not to customers in territories allocated to conspirator suppliers. For example, a supplier of janitorial services might agree to bid on contracts offered by government agencies for providing janitorial services to hospitals in the parish of Kingston and Saint Andrew, and refuse to bid on contracts for the provision of those services in hospitals in Manchester and Saint Catherine.

Bid-rigging across the Globe

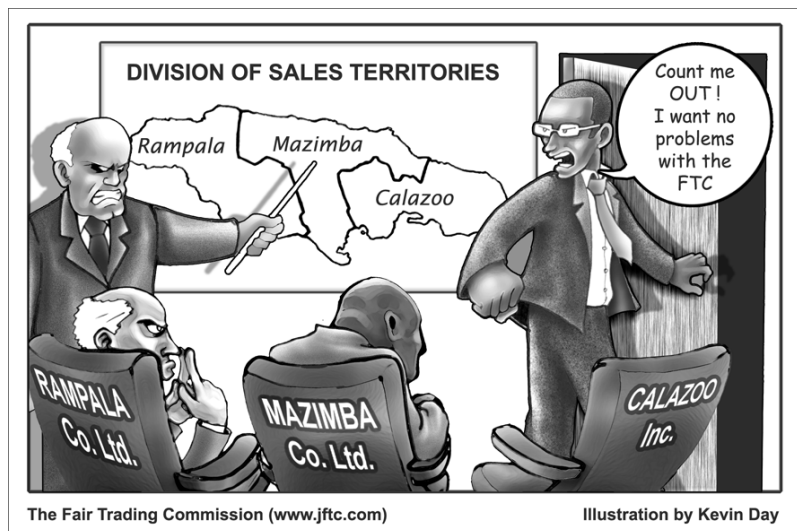
Bid-rigging has occurred with frequency across the globe and is a criminal offence in some jurisdictions.

In the United States of America, in the state of Washington, 63 corporations and 57 individuals were convicted in 1994 and approximately US \$60 million in fines were imposed in respect of cases involving the rigging of bids in supplying dairy products to public school districts. In one case, the former manager of a Dairy Company, in a conspiracy from 1986 to 1990, intentionally submitted high bids on some contracts to help the other conspirators win school dairy contracts. That Company pleaded guilty to five milk bid-rigging cases and has paid a total of U.S. \$4 million in fines and penalties, while twenty-seven individuals were sentenced to 6 months imprisonment. In the United States

individuals found guilty of bid-rigging are subject to a maximum fine of US \$250,000 and/or three years imprisonment, while corporations are subject to a maximum fine of U.S. \$10 million.

In Canada, bid-rigging is also a criminal offence and firms and individuals convicted face fines at the discretion of the Court or imprisonment for up to five years.

Bid-rigging in Japan is an offence under the Antimonopoly Act and in 1994 the Japanese Fair Trade Commission took legal steps in 19 cases involving bid-rigging. In one of these



cases, seven major Japanese electrical equipment manufacturers pre-determined the bid-winner based on the coordination among bidders in the public bid for large-scale colour projection equipment for use in sports stadiums. The sanctions there are both civil and criminal, and the Company was forced to pay huge fines.

In Jamaica, bid-rigging is a civil offence and an enterprise that is found guilty of bid-rigging may be fined a penalty of up to 5 million dollars. Section 48 of the Fair Competition Act allows individuals to recover damages for any loss caused as a result of the offence.

What do I look for?

In an effort to assist the public in detecting this form of collusion, the Fair Trading Commission (FTC) highlights certain general patterns which may indicate the possibility of collusion. Some of these are:

- The same company always wins a particular bid.
- The same suppliers keep submitting bids for particular contracts and each supplier seems to get a turn at being the successful bidder.
- Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates.
- A smaller number of competitors than usual, submits bids.
- A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity.
- Bid prices drop whenever a new or infrequent bidder submits a bid.
- A successful bidder sub-contracts work to competitors that submitted unsuccessful bids on the same project.
- A company withdraws its successful bid and is subsequently sub-contracted by the company whose bid becomes the winning bid upon the other's withdrawal.

What can I do?

Purchasers soliciting bids must be alert in detecting any of the above patterns of behaviour and should create effective policies

which reduce the likelihood of bid-rigging operations. The following steps, recommended by the Office of Fair Trading (OFT) in the United Kingdom, will help purchasers tackle bid-rigging:

1. Make any bid qualifications as broad as possible so that they can be met by the widest range of suppliers.
2. Advertise widely and shop around for suppliers when inviting bids.
3. Ask for bids to be broken down into as much detail as possible.
4. Keep records of bids for comparison purposes.
5. Insist that main contractors assign sub-contractors through a competitive process.
6. Seek information from bidders about their affiliated companies.

The offence of bid-rigging can be difficult to detect. The patterns of collusion mentioned earlier, while arousing suspicion are not, without more, conclusive proof of collusion. Once these indicators of collusion are brought to the attention of the FTC the matter will be investigated to determine whether collusion exists or whether there is a legal rationale for the behaviour in question.

If you suspect that you are the target of a bid-rigging operation, contact the Fair Trading Commission. It needs your help in ensuring that the rules of fair competition are adhered to by all.