

July 29, 2018

To ASPECT:

I write to provide some general information about the application of the federal Competition Act (the “Act”) to requests for bids or tenders from public bodies.

I caution that the information provided in this communication is not a substitute for legal advice addressed to particular circumstances.

Overview

The Act contains two criminal offence provisions of particular relevance to bidding: Section 47(1) (bid-rigging) and Section 45(1) (conspiracy). [The Act also contains certain non-criminal provisions that might apply to competitor collaborations but I do not address them in this communication].

Violation of either Section 45(1) or 47(1) can carry significant penalties not only for a company that engages in the illegal conduct, but also for individuals who engage in such conduct whether for their own behalf or on behalf of a company. To illustrate,

- a person who is convicted under Section 45(1) faces potential penalties of a fine of up to \$25 million or a term of imprisonment of up to 14 years, or both.
- a person who violates Section 47(1) is liable to pay a fine in the discretion of the court or to a term of imprisonment of up to 14 years, or both.

The Competition Bureau, which enforces the Act, has a policy of pursuing criminal penalties against individuals involved in bid-rigging or conspiracies, especially where those individuals reside in Canada.

The Bureau has been active in recent years in pursuing suspected violations regarding services (or other products) provided to public bodies.

As an example, the Bureau announced in June 2018 that charges were laid against four individuals who allegedly conspired to rig bids for 21 City of Gatineau infrastructure contracts between 2004 and 2008.

<https://www.canada.ca/en/competition-bureau/news/2018/06/criminal-charges-laid-against-four-individuals-for-bid-rigging-in-the-engineering-industry.html>

There is no limitation as to when a violation of Section 45(1) or 47 may be prosecuted. In the above-noted example, charges were laid some 10 years after the end of the contracts alleged to have been rigged.

What is Covered?

Bid-rigging

Section 47(1) involves an agreement or arrangement between two or more persons regarding a call or request for bids or tenders:

- where one (or more) person agrees not to submit a bid; or
- where one (or more) person agrees to withdraw a bid; or
- where the persons agree to fix one or more of the bids submitted,

However, there is no violation of Section 47(1) if a party to the arrangement or agreement makes the agreement or arrangement known to the person requesting the bid or tender **at or before the time** when any bid was submitted.

To illustrate, suppose two unaffiliated companies (A and B) decide to “work together” by agreeing not to submit competing bids against one another for different government projects. That is, Company A bids on Project 1 but Company B agrees not to bid on Project 1; and Company B bids on Project 2, but Company A agrees not to bid on Project 2. In this situation, A and B have most likely violated Section 47(1) **unless** they made their arrangement known to the persons calling for the bids on Projects 1 and 2 at or before the time any bid was submitted.

Conspiracy

Section 45(1) prohibits arrangements or agreements involving two or more competitors for a product (a product includes services) to

- fix the prices; or
- allocate markets or customers; or
- control the production or supply of such product.

Note that the term “competitor” includes a potential competitor.

To illustrate, Section 45(1) could apply where two (or more) competitors make arrangements not to compete by dividing up customers or markets where they will offer their services.

Unlike Section 47(1), it is not a defense to Section 45(1) to make the arrangement or agreement known to the customer(s).

However, Section 45 contains a defence that might allow competitors pursuing a legitimate joint venture or strategic alliance to avoid criminal liability. This defence (known as the “ancillary restraints defence”) could apply where the competitors agree to a term that would otherwise violate Section 45(1) but where that term was “directly related” to “reasonably necessary” to give effect to a broader agreement involving the competitors where the broader agreement itself did not violate Section 45(1).

Conclusion

As may be appreciated, given the risks involved, anyone who seeks to work with a competitor should seek legal advice to structure their affairs so as to reduce the risks of violating the Act.

For more background about bid-rigging and conspiracies, see the Competition Bureau's website, including:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03152.html>

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03693.html>

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>

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