

Fight to stop bid-rigging in Hong Kong recognised internationally

The much publicised 'Fight Bid-rigging Cartels' campaign of the Hong Kong Competition Commission has recently been named a winner in the category Engaging through results: Successful experience in planning, implementing and monitoring advocacy strategies in the Competition Advocacy Contest organised by the International Competition Network. The network is an informal, virtual network that seeks to facilitate cooperation between competition law authorities globally.

The objective of the Campaign is to advocate and educate the public in the topic of bid-rigging, to eliminate the practice of submitting "dummy" bids to harm and defraud consumers, and to promote fair competition.

The commission's resolve to combat bid-rigging cartels is evident not only by the high standards of the campaign but also by its first ever enforcement action against bid-riggers in the Hong Kong Competition Tribunal.

The facts

In July 2016, the Young Women's Christian Association (the "YWCA") issued a tender for the supply and installation of a new information technology server system. In the first round of tenders, the YWCA only received one bid, but the minimum number of tender required was five. In a subsequent round, the respondents to the enforcement action submitted bids for the tender. The tender applications submitted by the respondents allegedly contained "a high degree of consistency in substance and format", including identical responses, identical misspellings and missing of the same key information. The high degree of consistency caused YWCA to suspect bid-rigging and made a complaint to the Hong Kong Competition Commission. The commission initiated a formal investigation within eight days. During the investigation, the commission discovered that one of the respondents sent its pricing details and tender to the other respondents through email. That explained the high degree of consistency in the tender applications.

The commission alleged that the respondents were involved in anti-competitive arrangements contravening the First Conduct Rule under the Competition Ordinance Cap 619, namely that respondents had colluded to submit "dummy" bids to meet the minimum number of tenders required under the procurement policy of the YWCA and secure the contract.

The commission relies on evidence, including correspondence, WhatsApp messages, statements and interview transcripts, to support the case. One of the respondents allegedly said during his interview with the commission that the submission of "dummy" bids was a common practice in the information technology industry. The commission has exercised its power to bring the enforcement action without issuing a warning notice. It demonstrates the readiness of the commission to enforce where there is serious anti-competitive conduct.

The commission seeks remedies for pecuniary penalties against all the respondents and a declaration that the respondents have contravened the First Conduct Rule.

The maximum penalty for a single contravention of the First Conduct Rule is 10 percent of the company's turnover for each year the contravention occurred, up to a maximum of three years.

According to section 6(1) of the Ordinance Cap 619, the First Conduct Rule means "an undertaking must not make or give effect to an agreement, engage in a concerted practice, or as a

member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong". To put it in simple terms, the First Conduct Rule prohibits agreements which result in concerted practices having the object of harming competition. Key examples of prohibited agreements often seen include bid-rigging practices, price fixing agreements and output agreements.

On 28 March 2017, the Competition Tribunal handed down its first written decision on treatment of confidential information in the Originating Notice of Application filed by the Commission in the Tribunal regarding (1) the prices submitted in the tenders to YWCA; (2) the identities of the individuals employed or formerly employed by the YWCA and the respondents; and (3) the identity of the complainant.

Mr Justice Godfrey Lam granted the confidentiality treatment application on the following grounds. The tender prices are commercial information which is not generally in the public domain. The current and former employees are not parties to the proceedings and disclosure of their identities may cause them unnecessary harm. The identity of the complainant is of little significance to the proceedings and unnecessary disclosure may become a disincentive for potential complainants. The trial of the enforcement action is likely to be heard in May next year.

The decision of the Competition Tribunal to protect the confidentiality will encourage people to come forward to make complaints and give evidence. The commission Chairperson, Ms Anna Wu, said: "Bid-rigging is one of the most blatant and harmful forms of anti-competitive conduct. The commission takes this type of conduct very seriously because of its potential to cause significant harm to consumers and the economy as a whole."

Bid-rigging in construction industry

The problem of bid-rigging in renovation projects for residential buildings has caused much concern in the community as such problem penetrates into daily life. In 2016, the commission looked into renovation and maintenance projects provided by the Urban Renewal Authority and the Housing Society to

analyse tender data in response to complaints regarding alleged collusive activities. In May 2016, the commission concluded that there was "no conclusive proof of collusive activities having actually taken place". However, that was before the full commencement of the ordinance. The commission may take a very different view if similar tender data and patterns are detected today.



In September 2016, the District Court sentenced Yau to 35 months imprisonment after he pleaded guilty to offering an advantage to the management agents in order to rig renovation tenders at Ravana Garden and Garden Vista, for which contracts were secured to the value of HK\$30 million and HK\$17.6 million. Yau and members of the bid-rigging cartel allegedly offered HK\$45 million in bribes to the management agents of the housing estates. In an interview with the newspaper, Yau warned the public to be aware of bid-rigging practices. Yau revealed that bid-rigging in building repair works was a persistent problem. He said that he was motivated to turn himself in because he felt that the bid-riggers were too greedy in hiking costs of the Garden Vista renovation project to more than HK\$200 million, when the project could have been completed at HK\$120 million. Yau said that he felt under a duty to admit his wrongdoing in order to raise awareness of the prevalence of bid-rigging practices in Hong Kong.



Conclusion

There is much interest in the outcome of this first enforcement action before the tribunal, and if successful, it will consolidate the position of the commission as an effective regulator in eliminating anti-competitive behaviour. The commission has a lot to do if it is serious about eliminating bid-rigging which appears to be prevalent across sectors.

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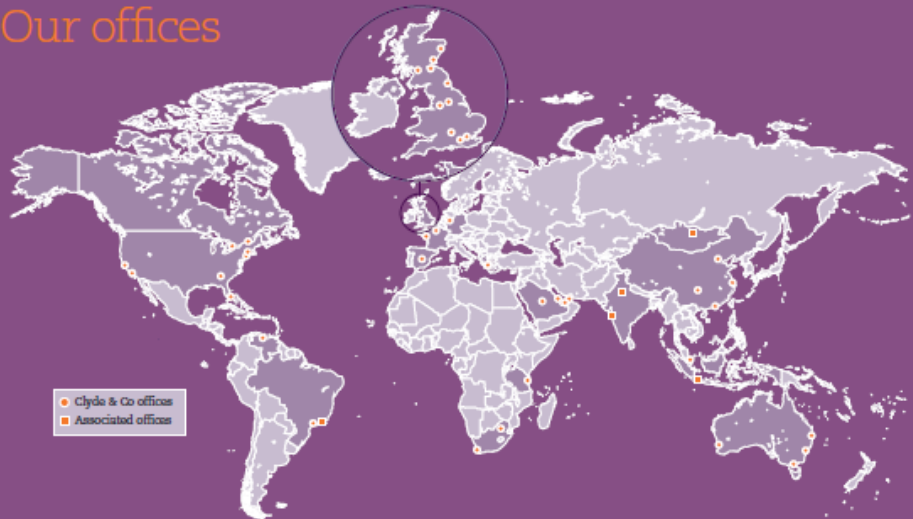
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