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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- Lithuania --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.

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1. Certificates of Independent Bid Determination (CIBDs)

Please describe any experience you have had with CIBDs. Have you prosecuted CIBDS violations, in connection with antitrust violations or as stand-alone offenses? Were these prosecutions, or the possibility of prosecutions, helpful in obtaining settlements? What other benefits of CIBDs in deterring collusive procurement practices have you seen?

1. In 2009 the Competition Council initiated an inter-institutional discussion on the protection of fair competition in public procurement. The Council has raised the problem of possible competition restriction when the affiliated undertakings participated in the same public tender as competitors.

2. This problem has occurred during an investigation of prohibited agreements in 2008 when the Council established a parent company and its two subsidiaries together participating in public tender as competitors. The Council has found evidence that these companies were bidding a beforehand agreed prices and thus no real competition between these companies existed.

3. According to the competition law these companies were considered as being one economic unit and an agreement between them was not an object of competition rules. Therefore the Council suggested an amendment of the Law on Public Procurement by precluding the affiliated undertakings to participate in the same public procurement as competitors submitting different bids.

4. At that time the same problem was an issue of interest to the European Court of Justice too.

5. In *Michaniki EA* case the Court noted that: "a national provision, such as that at issue in the main proceedings, which establishes a system of general incompatibility between the sector of public works and that of the media, has the consequence of excluding from the award of public contracts public works contractors who are also involved in the media sector on account of a connection as owner, main shareholder, partner or management executive, without affording them any possibility of showing, with regard to any evidence advanced, for instance, by a competitor, that, in their case, there is no real risk of the type referred to in paragraph 60 of this judgment (see, by analogy, *Fabricom*, paragraphs 33 and 35)."[1]

6. In another case, *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano,* the Court has expressly stated that "Community law precludes a national provision which, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts, lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure."[2]

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1 Judgment of the Court of 16 December 2008 Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*. Paragraph 62.

2 Judgment of the Court of 19 May 2009 Case C-538/07 *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*. Paragraph 33.

7. In the light of these decisions it was established another than suggested by the Council provision of the Law on Public Procurement according to which the procurement contract documents include the requirement to submit the supplier's declaration what undertakings the supplier is related with under the Article 3 of the Law on Competition and to confirm that if one or more of the specified undertakings, to which he refers to, participate in the same tender and provide an independent proposal (proposals), the supplier for this tender acts independently from them and they are considered as competitors; also that the supplier does not participate in the infringement established by the Article 5 of Law on Competition (prohibited agreements) and does not infringes principles of public procurement established by the Article 3 of the Law on Public Procurement.

8. However, to the Council's opinion, such a declaration hasn't precluded the possibility of competition restriction.

9. When two (or more) affiliated undertakings participate in the same public procurement as competitors, they submit their declarations according to which they act independently from each other and the contracting authority does not examine the justice of such statements for it has no tools and interest to do it. Nonetheless if contracting authority suspects possible bid rigging, it may notify the Council about it. Consequently the Council might start an investigation and carry out surprise inspections. However such a suspicion of bid rigging has to be reasonable.

10. On the other hand the undertaking can suppress an exhaustive list of undertakings he is related with and the contracting authority won't check these data for its main purpose is to perform procurement.

11. If the Council would establish an agreement on prices between companies in this public procurement these companies would be considered as independent undertakings responsible for their own actions according to the Law on Competition regardless their mutual interdependence. The companies would hold liability under the Law on Competition and under the Law on Public Procurement and the infringements would be assessed by separate authorities – the Competition Council and the Public Procurement Office.

12. However it should be noted that these are only theoretical assumptions of the case for the Council hasn't assessed any possible infringement on the basis of incorrect information in tender declaration yet and it is difficult to say whether such interpretations of competition and public procurement rules would be approved by the court.

13. Therefore there still exists a bid rigging gap that the declaration doesn't fill and the simplest solution – an absolute prohibition of participation for affiliated undertakings in the same procurement as competitors – was precluded by the European Court of Justice.

2. Leniency and bidder disqualification

Are firms and/or individuals who have violated laws against bid-rigging subject to bidder disqualification/debarment for future government procurement programs in your jurisdiction? If so, how does your jurisdiction handle leniency applicants: are they disqualified, suspended, or punished in any way along with other members of the price-

fixing agreement, or does your leniency program insulate them from disqualification/debarment penalties?

14. According to the Article 33 of the Law on Public Procurement, "the contracting authority may establish in the contract documents that a request or a tender shall be rejected if the supplier has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify. The concept of "professional misconduct" means an infringement of competition, labour, employees' health and safety, environment regulations for which the supplier was imposed an administrative fine (if he is a natural person) or an economic sanction (if it is a legal person), established by the laws of the Republic of Lithuania (...). If the supplier is a legal person which had infringed Article 5 of the Law on Competition, such an infringement is considered as professional within the meaning of this Article when the economic sanction under the Law on Competition was imposed less than 3 years ago."

15. It should be noted that this provision is not compulsory to the contracting authority and thus the authority may not include it in the contract documents. Besides if the leniency applicant is wholly exempted from fine, it means that the economic sanction was not imposed to it and there are no obstacles for submitting a tender even when such a provision is established.

3. Incentivizing Officials Responsible for Public Procurement to Focus on Bid-Rigging

What options are available to align the incentives for officials responsible for public procurement with those of antitrust officials in the effort to eradicate anticompetitive bid-rigging and collusive tendering practices? Are training programs alone sufficient, or should they be supplemented with other employment awards or incentives, or special recognition for defense of taxpayer interests? How can competition enforcers develop positive relationships with public procurement officials and address possible anxieties about additional oversight of the procurement process?

16. The positive relationships between competition enforcers and public procurement officials can be developed through training programmes by explaining the harm of bid rigging to the competition, the state and the contracting authority itself and by instructing the procurement officials to detect bid rigging when it occurs (analyze relationships between bidders, suspicious bidding patterns and pricing patterns, unusual behavior, clues in documents submitted by different bidders and etc.). These programmes should be sufficient tools for fighting against bid rigging. If the procurement officials would be alert for all these possible ways of bid rigging, more competition infringements would be uncovered and consequently more undertakings would be deterred from making such infringements in the future.