Enhanced "Non-Collusion Clauses"

Frequently Asked Questions

1. What is the reason for enhancing the "Non-Collusion Clauses"?

The Commission firmly believes that severe punishments would increase the risk and cost of participating in a cartel, thus strengthening deterrence. Towards this end, the Commission hopes that enhancing the "Non-Collusion Clauses" (NCC) and highlighting the potential criminal consequences of violations will further combat and deter anti-competitive conduct, including bid-rigging.

On the other hand, there have been cases in the past where companies would lend their tender document templates, email addresses or company chops etc. to other companies, enabling the latter to submit a bid in its name. Such practice can be one of the methods used to implement bid-rigging cartels. In the enhanced NCC, the relevant person of the bidder is required to make a statutory declaration in person. This requirement cannot be met unless the declarant is someone from the actual bidder. The enhanced NCC therefore helps prevent the aforesaid situation whereby a bidder is able to submit bids in the name of other companies.

2. How do bidders make a statutory declaration?

Bidders are required to make a statutory declaration in accordance with the Oaths and Declarations Ordinance. In general, a statutory declaration can be made before and signed by a commissioner for oaths (e.g. at a District Office), a notary public or other persons authorised by law to administer an oath.

3. Who should sign the non-collusive tendering certificate and make the statutory declaration?

Both the non-collusive tendering certificate (NCTC) and the statutory declaration should be signed and made by a person who is authorised to sign the contract on behalf of the bidder, typically company directors or employees holding more senior positions within the company.

4. If the relevant documents are not signed by the senior management of a company, would they escape criminal liability?

Where it is discovered that collusion has taken place, the senior management of the relevant bidding companies are <u>not</u> able to escape criminal liability simply because they had arranged for another person within the company to sign the NCTC. The criminal liability for conspiracy to defraud is not just confined to the signatory of the NCTC. So long as the senior management involved knew that the NCTC would be signed by someone within the company, but they had still engaged in the collusive conduct in breach of the NCTC with a view to deceiving the procurer, even if the senior management were not signatories of the NCTC, they may still be liable for the offence of conspiracy to defraud.

5. **With regard to suspected conspiracy to defraud and false statutory declaration, can the victim directly file a report? What role does the Commission play?**

   The Commission has been in close contact with other law enforcement agencies. If, in the course of its investigation, the Commission comes across any evidence suggesting that a criminal offence has been committed, it will, depending on the circumstances, refer such information to the relevant law enforcement agencies to follow up.

   If procurers suspect that any persons involved in the bidding process may have committed offences such as conspiracy to defraud or false statutory declaration, they may also report the case directly to the relevant law enforcement agencies.

6. **Is it necessary for the Competition Tribunal to make a ruling that a certain undertaking or person has contravened the Competition Ordinance before their conduct can amount to a criminal offence?**

   No. The legal proceedings under the Competition Ordinance and the prosecution under the Crimes Ordinance for conspiracy to defraud and/or false statutory declaration run in parallel and are independent from each other. As long as there is evidence showing that the bidders/declarants who have signed the NCTC or made a statutory declaration had engaged in collusive conduct such as bid-rigging, the relevant law enforcement agencies can commence criminal investigation and prosecution without having to wait for a ruling from the Competition Tribunal.

7. **For tenders of relatively lower value, what can procurers do if they are concerned that the requirement to make a statutory declaration may be too cumbersome for bidders?**

   The Commission's model NCC is intended to act as a general reference for procurers and they may adapt the content in accordance with their actual circumstances. The enhanced model NCC is primarily targeted at building maintenance projects and other high-value tenders. For procurement items which are of lower value or risk level, procurers may adapt the NCC according to their actual circumstances, for example, they may consider not imposing a mandatory requirement for the bidders to make a statutory declaration.