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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.



Competition and public procurement

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I. Introduction

Public procurement amounts to approximately 7.5% of GDP in Switzerland. Thus, the potential damage of bid rigging is high. Moreover, several bidding cartels were uncovered in Switzerland in the last years. On these grounds, bid rigging has been a top priority of the Swiss Competition Commission and its Secretariat (together COMCO). In order to better fight this type of unlawful agreement, COMCO has started a long-term project.

II. Legal framework

Regarding public procurement, the Federal Act on Public Procurement and the Federal Act on Cartels and other Restraints of Competition (Cartel Act) are of relevance:

- The *Federal Act on Public Procurement* protects the interest of public procurement authorities, which must spend public funds economically. Furthermore, the Act guarantees a transparent and equal bidding procedure for all tenderers.

On the other hand,

- the *Cartel Act* protects effective competition and is enforced by COMCO.

III. Procedures and Legal consequences

a) *Federal Act on Public Procurement*

According to the Federal Act on Public Procurement, a procurement authority can exclude bidders from the bidding process, if they have concluded agreements that eliminate or significantly restrict effective competition. Such a decision by a procurement office can be appealed to the Federal Administrative Court and finally to the Federal Supreme Court of Switzerland.

If it is revealed only after the closing of the contract that bidders have concluded agreements that eliminate or significantly restrict effective competition, damages might be claimed in civil courts.

b) *Federal Act on Cartels and other Restraints of Competition*

COMCO takes action against bidders which have concluded agreements that eliminate or significantly restrict effective competition. Usually, investigations by COMCO are triggered by evidence submitted by officials of public procurement authorities, by whistleblowers or leniency applicants. An antitrust procedure might also be opened based on an ex-officio analysis of procurement data (see below).

COMCO can fine companies which have concluded agreements that eliminate or significantly restrict effective competition with up to 10% of the firms' revenues in the relevant market(s) in last three years.

If bidders have concluded agreements that eliminate or significantly restrict effective competition, both the Federal Act on Public Procurement and the Cartel Act can be applied simultaneously in parallel procedures.

IV. Project on detecting bid rigging cases

About three years ago, COMCO initiated a long-term project on fighting bid-rigging. The project is based on the following three pillars (1) prevention and information, (2) detection and (3) prosecution.

(1) Prevention and information

The pillar prevention and information aims to raise the awareness of procurement officials, companies and other interested parties concerning bid rigging and to strengthen COMCO's role as a point of contact.

In this context, COMCO has held meetings with the majority of cantonal (regional) governments and their procurement offices and has organized one-day workshops on competition policy aspects of the procurement process. An important factor in improving cooperation with cantonal governments has been to point out that COMCO will not interfere with their competences. Moreover, COMCO staff regularly give talks on «competition and corruption» at training courses for procurement officials, organized by the *Federal Competence Center for Public Procurement*.

Besides the training and information aspect, the discussions and workshops have offered a good platform to exchange experiences and to establish direct and personal contacts with procurement officials. This is valuable because complaints filed by procurement officials are an important way of detecting bid rigging cases.

(2) Detection

In order to detect bidding cartels, COMCO has started to analyze procurement data provided voluntarily by cantonal procurement authorities. It is about screening of procurement data, whereby the analysis mainly concentrates on the offered prices over time. The goal of this analysis is to examine whether suspect patterns in the data, which might be evidence for bid rigging, can be detected.

(3) Prosecution

The pillar prosecution consists of prosecution, destruction and punishment of bidding cartels. Below you will find a summary of COMCO's latest decisions regarding bid rigging.

V. Latest decisions

a) Construction cartel (2011)

In December 2011, COMCO fined 17 construction companies in the region of Aargau for having engaged in unlawful agreements on prices and market allocation. The investigation, which began with dawn-raids in June 2009, showed that the involved companies had rigged bids for at least 100 projects between 2006 and 2009. The total fines amounted to approximately CHF 4m. Seven companies applied for leniency. The first firm that disclosed information voluntarily benefited from a 100% reduction of the fine, the others were granted a cut of up to 50% (decision not published yet). This decision might be appealed to the Federal Administrative Court.

b) Electrician companies (2009)

In 2009, COMCO sanctioned members of a bidding cartel in the region of Berne. Eight electrician companies were found to have engaged in bid rigging by regularly exchanging information on their tenders for both public and private contracts between 2006 and 2008. The relevant evidence was gathered in the course of a dawn raid, triggered by a whistleblower. The fact that all companies involved immediately stopped their anticompetitive behavior and applied for leniency was taken into account in the calculation of fines, which amounted to a total of CHF 1,24m (see enclosed decision; DPC 2009/3, p. 196 et seq.).

c) Pavement cartel (2007)

In 2007, COMCO disclosed a pavement cartel in the region of Ticino. The core of the bidding cartel, which was in place between 1999 and 2005, was a written convention between 17 regional road construction companies. By assigning contracts put out to tender by private and public purchasers, the companies managed to ensure that each would have a certain market share. This was achieved through weekly meetings during which the firms assigned mandates and discussed offered prices. The members of the cartel evaded fines because they terminated the unlawful behavior before the amended Cartel Act allowed COMCO to fine first-time infringements of the law (see enclosed decision; DPC 2008/1, in Italian: p. 50 et seq., in German: p. 85 et seq.).