

The cooperation between competition law enforcement authorities and public procurement authorities in the fight against bid rigging: The case of Vietnam

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ABSTRACT

The cooperation between competition law enforcement authorities and public procurement authorities has been widely recognized as an effective tool in detecting and preventing bid-rigging in the public procurement market. By employing empirical research in the form of in-depth interviews, this paper seeks to examine such cooperation in the Vietnamese context. The findings reveal that neither the Vietnamese public procurement agencies nor the Vietnamese competition authorities have successfully fulfilled their cooperative roles in fighting against bid-rigging. These findings provide valuable lessons for both Vietnamese and international policy-makers by emphasizing the need to examine the relationship between competition authorities and public procurement agencies towards effective anti-bid rigging enforcement.

Keywords: *bid rigging, collusive tendering, competition agencies, public procurement authorities, Vietnam*

1. INTRODUCTION

Collusion in the public procurement market is a multi-faceted phenomenon generally considered falling within the sphere of both competition law and public procurement law. Under competition law, bid-rigging can be defined as a form of hard-core cartel where the bidding companies predetermine the winner among themselves before the tendering process actually begins. Bid rigging may lead to artificial price increases of goods or services purchased by public procurers. Empirical research reveals that such conspiracies may raise prices by more than 20 percent, which is even higher than other cartel behavior such as price-fixing or market-sharing [1 - 3]. Hence, bid-rigging is seen as one of the most pernicious infringements of competition law, injuring not only the public procurer but also the final users of public services and taxpayers generally.

It is claimed that effective bid-rigging control requires not only effective cartel law, leniency programs, enforcement procedures, institutions, and appropriate sanctions but also close cooperation between public procurement agencies and competition authorities [4 - 5]. Exploring the relationship between competition and public procurement agencies is, therefore, necessary as the answer may suggest solutions to enhance the effectiveness of anti-bid rigging enforcement. It is especially important in the Vietnamese context, where government reports [6] and academic studies [7 - 9] claim that bid rigging is pervasive. This article, therefore, investigates and evaluates the extent to which public procurement agencies and competition law enforcement authorities in Vietnam have cooperated to detect and prevent bid-rigging in the public market.

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First, the article identifies its methodology and then examines the literature review on the forms of cooperation between competition law and public procurement authorities in the fight against bid-rigging. It then provides an overview of the competition and public procurement authorities in Vietnam before examining the extent to which the Vietnamese competition authorities interact with public procurement agencies to detect and prevent bid rigging in the public procurement market. By doing so, it offers a number of proposals for enhancing such relationships between these agencies to improve the current anti-bid rigging enforcement mechanism in Vietnam.

2. METHODOLOGY

In addition to primary and secondary documentary resources, this article draws upon a number of in-depth interviews conducted by the authors with stakeholders. They are key government officials holding the top and medium-level leadership positions at the Vietnam Public Procurement Agency (PPA), local Public Procurement agencies in Ho Chi Minh City and An Giang province where all of the bids rigging cases were detected, the Vietnamese Association of Construction Contractors (VACC) and academics. All of the interviews were recorded, transcribed, and translated by the authors. These were then analyzed through narrative analysis. More specifically, the responses from the interviews were sorted and reformulated to non-specifically and non-identifiable quotes in the article to ensure neutrality and objectivity of interviewees' opinions.

3. LITERATURE REVIEW

The fact that the cooperation between competition law enforcement authorities and public procurement authorities leads to a strengthened anti-bid rigging enforcement mechanism has been stressed by the Organization for Economic Co-operation and

Development (OECD), the International Competition Network (ICN), and many international scholars in the field of competition law and public procurement law [10 - 12]. In fact, there exist various forms of cooperation depending on domestic regulation and policy [13]. Such cooperation can be grouped from the perspectives of public procurement and competition authorities, respectively.

From the public procurement authority perspective, there are two main ways to interact with competition authorities. First, public procurement authorities may act as complainants to report any signs of bid rigging to competition authorities. Given that public procurement entities are best positioned to unearth bid rigging cases, complaints from such entities are essential for competition authorities to initiate an investigation. In some countries like the US, reporting suspected bid-rigging behaviors are the statutory duties of public contracting parties as it is clearly stated in the *Federal Acquisition Regulation* (FAR) that contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offers and contractors.' In addition, public procurement officials should be given adequate incentives to encourage them to report bid-rigging. The US experiences show that commendatory letters issued by the Department of Justice (DOJ) Antitrust Division is often given to procurement officials, who play an important role in reporting bid-rigging and assisting in prosecutions. Second, public procurement authorities may also act as informants to provide bid information and data that are valuable for the screening and intelligence activities of competition authorities. In fact, bidding data are often collected by public procurement authorities, as they are responsible for organizing and managing the tender procedure. Without the

support from such entities, competition authorities would be constrained in their application of screening and getting market intelligence.

From the perspective of competition authorities, they may act as advocates to educate and raise the awareness of public procuring entities of the harms of bid rigging and the importance of competition in the public procurement process. There are a number of different forms of advocacy. First, competition authorities can offer training for public procurement officials. This training is mostly focused on how to form contracts in a way that prevents bid-rigging and the ability to detect bid rigging - which is considered the two essential skills that every procurement official needs to be well-equipped with [14]. The US DOJ is one of the international competition authorities actively offering training sessions for public procurement officials. Over 20,000 federal and state public procurement officials have been trained since March 2009, although these training sessions are optional and depend on public procurement agencies' willingness to participate [15].

Second, competition authorities can publish educational material for public procurement agencies in the form of brochures, newsletters, or guidelines. These educational materials generally include information about bid-rigging, checklists for designing the tender process to decrease the possibility of bid-rigging and checklists for detecting bid-rigging, and measures to be taken when bid rigging is recognized.

These materials have been accepted as a part of the enforcement practice against bid-rigging in the US and the EU. Specifically, the US DOJ has issued a pamphlet, 'Red Flags of Collusion,' which is available on the government website and which it has also distributed to all levels of public procurement agencies. This pamphlet seems to be useful in

raising the awareness of bid-rigging not only among public officials but also among bidding companies. Many Fortune 500 companies have followed this guideline to develop their internal procurement training [15].

Similarly, many EU members have created educational materials dedicated to bid-rigging. In the UK, the Competition and Markets Authority (CMA), in cooperation with the Crown Commercial Service, has recently introduced an e-learning package aimed at educating procurement professionals about bid-rigging [16]. This material includes bid rigging's harm, its suspicious patterns, and the way to mitigate bid-rigging risks. Also, the CMA designed an open letter sent to public procurers to emphasize the importance of detecting and preventing bid rigging. More interestingly, a 60-second summary on how to identify and address bid rigging in public procurement has also been made available to public procurers. In the Netherlands, a guideline called 'Notification Form' for indications of anticompetitive agreements in construction projects tenders was adopted to provide basics of bid-rigging information to public procurers [17].

Third, competition authorities can set up formal meeting with procurement agencies, either regularly or periodically. These meetings are designed not only to enhance the interaction between respective authorities but also to address challenges these authorities face in dealing with bid-rigging. This kind of meeting is held annually in Japan between the JFTC and liaison persons in each central and local public procuring agency [18].

Lastly, competition authorities can sign memoranda of understanding or other formal agreements with public procurement agencies. These agreements aim to share information regarding detecting and preventing bid-rigging and sharing resources. By doing that, these authorities can benefit from each other's

expertise and help achieve the goals of preserving and promoting fair, efficient, and competitive processes.

4. RESULTS AND DISCUSSION

4.1. The cooperation between competition and public procurement authorities in Vietnam

In light of the forms of cooperation between competition and public procurement authorities as essential factors contributing to strong bid rigging enforcement mechanisms, attention in this part turns to an examination of bid rigging enforcement authorities in Vietnam and the cooperation among these authorities.

4.1.1. Overview of anti-bid rigging enforcement authorities in Vietnam

4.1.1.1. Competition law enforcement authorities

According to the 2004 *Competition Law*, there are two enforcement authorities: the Vietnam Competition Authority (VCA) and the Vietnam Competition Council (VCC).

The VCA is a multi-functioning department established under the purview of the Ministry of Trade and Industry (MOIT). It is delegated to implement a broad scope of functions, including competition, anti-dumping, anti-subsidies, self-protective measures, and consumer protection. In terms of competition, the VCA, among other functions, acts as an investigation agency investigating cartels and bid-rigging. It will then present its findings of the investigation to the VCC to hear and resolve the case.

The Government first established the VCC in 2006. Under the Decree No.07/2015/ND-CP on Functions, Duties, Powers, and Organisational Structure of the VCC, the VCC includes from 11 to 15 members appointed for a five-year renewable term and able to be dismissed by the Prime Minister on the recommendation of the Minister of Trade and Industry. In practice,

these members are chosen from various ministries, making the VCC an inter-ministerial council.

While the VCA is in charge of investigating anti-competitive practices including cartels and bid-rigging, the VCC is responsible for hearing and resolving cases investigated by the VCA. Specifically, after receiving investigation reports from the VCA, the VCC will set up a Competition Case Handling Council (CCHC) embodying at least five VCC members to make decisions about the case. The CCHC holds a hearing to listen to presentations from the VCA, the complainants if any, and the parties under investigation and then decides the case by a majority vote of the members. It is noted that the VCC itself does not initiate the case; rather, it only deals with cases brought by the VCA.

According to the 2018 *Competition Law*, the existing VCA and the VCC have been merged to form the National Competition Committee (NCC). The NCC is a body affiliated to the Ministry of Industry and Trade, composed of the President, Deputy Presidents, and members. The Competition Investigation Agency has also been established under the NCC, and it will be responsible for monitoring and investigating breaches of competition law. As of now, the detailed functions, tasks, and organizational structure of the NCC are being formulated in the Draft Decree. Therefore, the VCA is still in charge of the investigation of cartels and bid-rigging until the Draft Decree is adopted.

4.1.1.2. Public procurement law enforcement authorities

Pursuant to Art 73.3 and Art 4.34 of the 2013 Public Procurement Law, the responsibility for imposing administrative sanctions on violators belongs to competent persons, who are entrusted with deciding on the approval of a project or on procurement as prescribed by law. Generally, they include the heads of local

and central administrative authorities, members of boards of directors, and chiefs of State-owned companies.

It is noted that bid-rigging cases are usually brought to competent persons by bid assessing units, which are liable for organizing the assessment of bidder selection. When considering bidder selection process, bid assessing units are obliged to give their opinions about the compliance with public procurement rules, give consensus or different opinions about the bidding result and propose measures for the noncompliance with public procurement rules during the selection of a contractor.

4.2. The cooperation between competition and public procurement authorities in Vietnam

From the perspective of public procurement authorities, the role of Vietnamese public procuring authorities, both as complainants and informants, will be examined in turn.

While complaints brought to the VCA could be used as a basis for commencing bid-rigging investigations, they have gained little attention from the Vietnamese public procuring entities. The author's interviews reveal that there have been no complaints made by public procurers to the VCA since the Vietnam Competition Law (VCL) came into effect.

As one interviewee states: The contact numbers were exchanged between the VCA and the Public Procurement Administration Agency, specifically among functional departments of each entity. Since then, the VCA has received several phone calls from the PPA. However, these calls were mostly to exchange technical issues. No complaints have been brought to the VCA by any public procurers. [Interviewee 3 (Hanoi, 24 August 2016)].

It can be inferred that public procurement entities in Vietnam, either central or local

level, have failed to act on complaints to report any signs of bid rigging to the VCA. There are three likely reasons for this failure. First, according to the current laws, the Vietnamese public procurement bodies are not obliged to report suspicious patterns in the public tender as well as the evidence of bid rigging to competition authorities. Second, unlike the US or some EU members, there is no incentive for public procurers to report such anti-competitive behaviours. Last but not least, the current PPL empowers public procurement authorities to fight bid rigging using their procedures. In other words, the role of public procurement authorities may amount to that of a real competition watchdog, given that they are allowed to put a sanction on bid rigging conspirators via the debarment mechanism. Therefore, it seems to be unnecessary for them to report bid-rigging conspiracies to competition authorities while they can address them.

As outlined earlier, in addition to acting on complaints, public procurers also play an essential role in detecting bid-rigging as they can act as informants. However, in the Vietnamese context, the availability of public tender information is very limited. Public procurers are unwilling to provide information to the VCA, even when asked to do so. One interviewee affirmed this fact:

Some newspapers previously reported some signs of bid-rigging. For instance, there were identical spelling errors or similar formulas to estimate the costs. However, when the VCA contacted the public procurer to access the bidding documents, they refused to provide information. Even when the VCA requested in writing, it was answered that these bidding documents are confidential... Therefore, it is very difficult to access the bidding information. That is the reason why the VCA has not detected any bid-rigging cases although the VCA is very interested in anticompetitive

behaviors in public tender. [Interviewee 2 (Hanoi, 26 August 2016)].

While the availability of public tender information depends on the diligence of public procurers, current regulations under the PPL are also an obstacle preventing public procurers from providing information. Specifically, Art 89.7 of the PPL stipulates that divulging relevant information and documents in the contractor selection process must be prohibited except for certain circumstances where information disclosure is required upon the request of the competent person, the inspection, or examination body, and the state public procurement administration agency. Unfortunately, the Vietnam competition enforcement authorities (as competent authorities for addressing bid rigging) have fallen outside the scope of this regulation. In other words, unless the PPL is amended to empower the Vietnam competition enforcement authorities as competent persons to request tender information, public procurers can hardly fulfill their roles as informants in the fight against bid rigging.

From the perspective of competition authorities, the role of the Vietnam Competition enforcement authorities as competition law advocates also warrants examination.

As outlined earlier, acting as competition law advocacies, the Vietnamese competition authorities are expected to offer training, publish educational materials, organize formal meetings and sign memoranda of understanding with public procurement agencies to help enhance public procurers' awareness of bid rigging practices. These activities are essential, given that there are thousands of respective public procurement bodies throughout Vietnam, and their procurement capacity and consciousness of public procurement rules are uneven and generally limited in remote provinces [19].

However, there have been no training programs offered by the Vietnamese competition authority to educate public procurers about bid rigging. Neither Guidelines nor specific educational materials were introduced to address bid-rigging conspiracies. To date, there have been no memoranda of understanding signed between the VCA and the PPA, although it is revealed by one interviewee that these memoranda have been signed between the VCA and other agencies.

The only bright spot in this relationship is that the VCA has organized several workshops regarding bid-rigging in public procurement at both international and domestic levels, and they also invited the representatives of the PPA to attend and express their voices. However, these workshops were not held annually, and they are not the formal channel for these agencies to share knowledge and exchange information. The failure of the Vietnamese competition authorities as competition law advocates likely stems from the challenges associated with their structure and operation.

On balance, neither the Vietnamese public procurement agencies nor the Vietnamese competition authorities have successfully fulfilled their cooperative roles in fighting against bid rigging. To deal with this failure, it is time for Vietnamese legislators to consider codifying the cooperation mechanism between these agencies under the law. The right to access confidential bidding documents of the VCA under the PPL should be recognized while providing incentives for public procurers to report signs of bid-rigging. From the perspective of the VCA, challenges from its operation and function should be dealt with so that they can enhance their performance as competition law advocates.

4.3. Recommendations for enhancing the cooperation between competition and public procurement authorities in Vietnam in the fight against bid-rigging

While the cooperation between competition and public procurement authorities is vital to strengthen anti-bid rigging enforcement mechanisms, this paper argues that neither the Vietnamese public procurement agencies nor the Vietnamese competition authorities have successfully fulfilled their roles in cooperating to fight against bid rigging. In particular, the Vietnamese public procurement entities have failed to act as both complainants and informants in reporting any signs of bid rigging, nor actively providing information for competition authorities while they are in the best position to do so. In the similar vein, Vietnamese competition authorities have failed to act as competition law advocacies towards educating and raising the awareness of bid rigging to public procurers. To foster such a cooperative relationship, efforts need to be made from the both sides - competition authorities and public procurement authorities.

From the perspectives of competition authorities, the Vietnam competition enforcement agencies need to act as advocates to educate and raise the awareness of public procuring entities of the harms of bid rigging and the importance of competition in public procurement process. A number of activities should be carried out.

First, more training sessions should be designed and offered to public procurement officials at central and local levels. As analysed above, these training sessions should focus on how to form contracts in a way that prevents bid rigging and on how to detect bid rigging - two essential skills that every procurement official needs in order to be well-equipped.

Second, bid rigging guidelines should be published as part of the enforcement practice

against bid rigging. These guidelines could be modelled on the OECD guidelines, which have been widely applied by many countries around the globe. Essential information in such guidelines should include: information about bid rigging (definition and forms of bid rigging, its impact on public tenders and the economy, checklists for designing the tender process to decrease the possibility of bid rigging and checklists for detecting bid rigging, and measures to be taken when bid rigging is recognised).

Third, the Vietnam competition enforcement agencies could enhance their relationship with public procurement agencies by co-signing memoranda of understanding or other formal agreements. The MOUs would be a platform for competition and public procurement agencies to fulfil their roles in the fight against bid rigging in Vietnam.

From the perspectives of public procurement agencies, the Vietnamese public procurement bodies at central and local levels should act as active complainants and informants. First, the public procurers should be obliged to report any signs of bid rigging to competition authorities. This obligation should be stipulated not only in any MOU but also in the public procurement rules. Also, more incentives should be provided to public procurers to encourage them to fulfil this obligation. Second, the interaction between the two will be enhanced if public procurers are more active to provide bid information and data which are valuable for the screening and intelligence activities of competition authorities.

5. CONCLUSION

The strong relationship between public procurement and competition authorities has been considered the key factor contributing to the success of anti-bid rigging enforcement. On the one hand, public procurement authorities

are in the best position to detect and inform competition authorities about the signs of bid rigging. On the other hand, competition authorities play their part in enhancing awareness about competition issues and supporting public procurers with instructions so that they can be vigilant about bid rigging. Unfortunately, this paper's analysis reveals that public procurement and competition authorities in Vietnam detect and investigate bid rigging as separate watchdog agencies without any cooperation among these agencies. This is the main reason why competition authorities have not received any complaints

and reports from the public procurers. A number of recommendations for a better cooperation between such agencies have been made. Experience from Vietnam should sound an alarm for other countries, especially developing and transitioning ones to assess the cooperation between competition authorities and public procurement authorities towards an effective bid rigging enforcement mechanism.

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Sự hợp tác giữa cơ quan thực thi pháp luật cạnh tranh và cơ quan quản lý đấu thầu trong hoạt động phòng chống hành vi thông thầu: Trường hợp của Việt Nam

Trần Thanh Tâm

TÓM TẮT

Sự hợp tác giữa cơ quan thực thi pháp luật về cạnh tranh và cơ quan quản lý đấu thầu đã được công nhận rộng rãi như một công cụ hữu hiệu trong việc phát hiện và ngăn chặn hành vi thông thầu trên thị trường mua sắm công. Bằng cách sử dụng nghiên cứu thực nghiệm dưới hình thức phỏng vấn chuyên sâu, bài báo này tìm cách xem xét sự hợp tác giữa hai cơ quan này trong bối cảnh Việt Nam. Kết quả cho thấy cả cơ quan quản lý đấu thầu của Việt Nam và cơ quan quản lý cạnh tranh của Việt Nam đều không hoàn thành tốt vai trò hợp tác của mình trong việc chống hành vi thông thầu. Những phát hiện này mang đến bài học cho các nhà hoạch định chính sách Việt Nam và quốc tế bằng cách

nhấn mạnh sự cần thiết phải kiểm tra mối quan hệ giữa cơ quan cạnh tranh và cơ quan mua sắm công để thực thi chống thông thầu hiệu quả.

Từ khóa: *thông thầu, cơ quan cạnh tranh, cơ quan mua sắm công, Việt Nam*

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