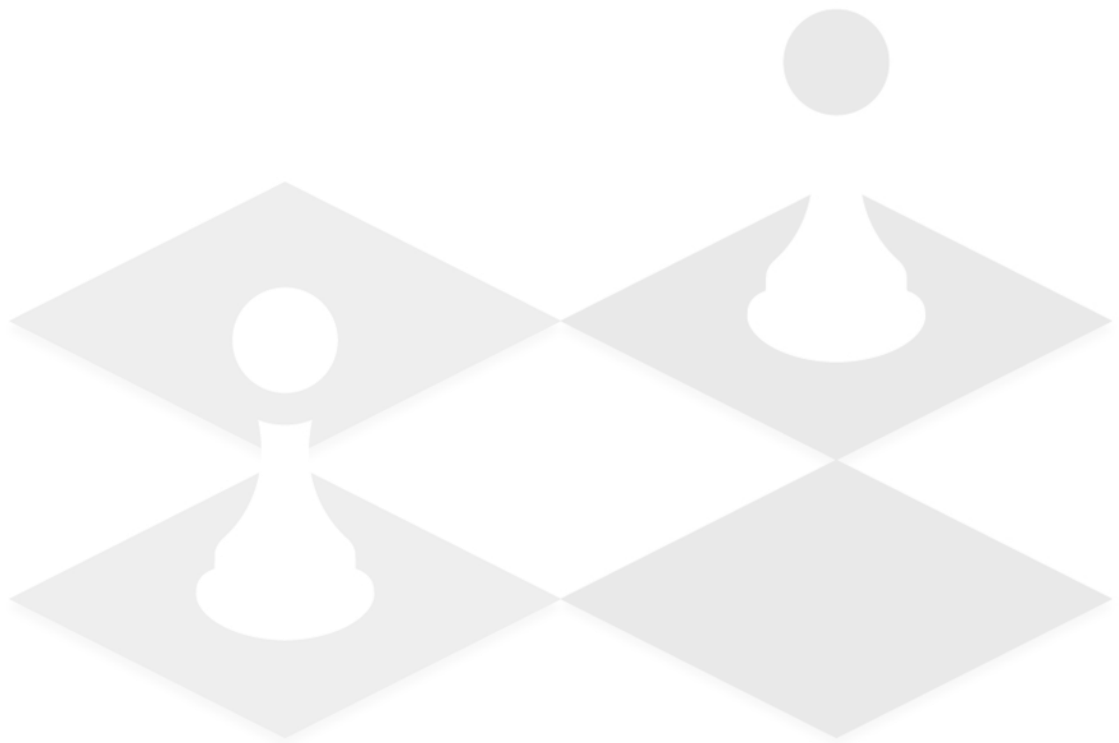


Model Non-Collusion Clauses and Non-Collusive Tendering Certificate



USER GUIDE TO PROCURERS

Why do we need competition?

In a free market economy, businesses compete with each other by offering the best range of goods and services at the best prices to consumers. A competitive market leads to better prices, products and choices for everyone. Competition can also drive efficiency and innovation, and lead businesses to meet consumer demands by providing the right product at the right price and quality.

The Competition Ordinance (the “**Ordinance**”) was enacted to promote competition and prohibit anti-competitive practices by businesses. Cartel conduct, which includes market sharing, bid-rigging, price fixing and output restriction, is generally regarded as a particularly harmful form of anti-competitive conduct which raises prices while reducing choices and innovation – harming consumers, businesses and the economy as a whole.

Bid rigging and market sharing

Bid-rigging generally involves two or more undertakings agreeing that they will not compete with one another in tenders for particular projects. It may take the form of an agreement, arrangement, understanding, promise or commitment, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings.

Bid rigging can also involve other forms of anti-competitive collusive conduct, such as market sharing and price fixing. For example, competitors may have agreed to allocate their tenders as part of the market sharing agreement. In view of the rising public concerns over anti-competitive collusive conduct in Hong Kong, the Competition Commission (the “**Commission**”) has taken steps to provide guidance on how to detect and prevent them.

The Commission's relevant publications

The Commission has published a number of brochures and educational videos in relation to anti-competitive collusive conduct. These include a “Fighting Bid-rigging” brochure which outlines common types of bid-rigging and guidance on what to do should bid-rigging be suspected; and a “Getting the most from your tender” brochure which is designed to assist procurers in ensuring open and effective competition by preventing and detecting possible bid-rigging cartels; and a “Combat Market Sharing” brochure which outlines key concepts of market sharing with hypothetical examples. The abovementioned brochures as well as educational videos on bid rigging and market sharing are available on the Commission's website. They provide useful guidance to procurers in tender context.

Non-collusion clauses and non-collusive tendering certificate

As stated in the “Getting the most from your tender” brochure, procurers may consider including non-collusion clauses and a non-collusive tendering certificate in tender documents to alert tenderers to the potential concerns and consequences of bid-rigging. Procurers may also want to be alert to other forms of cartel conduct, such as agreements between competitors to fix prices, share markets or restrict output.

Non-collusion clauses may be included in invitations to tender. Such clauses should generally:

- (a) Require the bid be prepared without any anti-competitive collusive conduct; and
- (b) Note the consequences of engaging in bid-rigging or other anti-competitive conduct, in particular that such conduct contravenes the Ordinance and potentially attracts enforcement action by the Commission. The clause may also empower the procuring organisation to invalidate the submitted bid and may provide for the recovery of damages or other redress.

Furthermore, procurers may sometimes receive bids that appear to be independent but are actually submitted by tenderers which have a common beneficial owner. Depending on relevant procurement policy, procurers may decide whether or not such bids should be accepted. To address this situation, a non-collusion clause should also include a requirement for the provision of information that identifies tenderer's beneficial ownership.

Non-collusion clauses in invitations to tender may require tenderers to sign a non-collusive tendering certificate as part of their tender submission. This certificate acts as written confirmation from the tenderer that the bid was developed independently. The tenderer may be required to certify that they understand the consequences of non-compliance and the certificate may contain other undertakings.

In addition to the above, procurers may also consider including non-collusion clauses in formal contracts entered into with the successful tenderer. These can provide for specific redress (such as termination of the contract) where it is subsequently discovered that the tenderer engaged in bid-rigging or other forms of anti-competitive collusive conduct during the tender process.

Use of the model clauses and certificate

Different businesses may want to set different requirements in their tender documents and there is no standard non-collusion wording. Nevertheless, the Commission understands that businesses may benefit from having recourse to reference material in formulating such wording in their tender documents. Therefore, the Commission has provided, in Appendices 1 and 2, model non-collusion clauses comprising model non-collusion wording for incorporation in invitations to tender, guidance on non-collusion clauses in formal contracts as well as a model non-collusive tendering certificate to members of the public for reference.

Features of the model non-collusion clauses include:

- (a) A clear statement that anti-competitive collusive conduct contravenes the Ordinance;
- (b) Warranties from tenderers stating that they have not colluded with each other in preparing the bids;
- (c) An express right of the procuring organisation to be informed about subcontracting arrangements
- (d) An express right of the procuring organisation to be informed about controlling entity or beneficial ownership of the tenderer; and
- (e) An express right of the procuring organisation to provide information related to the tender and the tenderer to the Commission.

With respect to (a) and (b), the benefit of the statement and warranties relating to collusion should be self-explanatory and clear.

With respect to (c), transparency in relation to sub-contracting arrangements may help the detection of bid-rigging. This is because sub-contracting is sometimes used to implement a bid-rigging arrangement (e.g. a bidder may agree to lose a tender on the understanding that another bidder (intended to be the winning bidder) will sub-contract to it.

With respect to (d), transparency in relation to controlling entity or beneficial ownership may help the procuring organisation understand how many genuinely independent bids they have received. Requiring tenderers to disclose their corporate beneficial ownership would help the procuring organisations to have a greater understanding of any impediment to competition between the bidders.

In relation to both sub-contracting and common beneficial ownership, it is the procuring organisation's discretion to determine whether they would accept bids submitted by bidders where these concerns arise. The key question is whether the subcontracting arrangement/common beneficial ownership mean that the affected bids are insufficiently independent such that there is little, or no, genuine competition between them.

As noted above, when deciding to adopt these clauses, procuring organisation may wish to consider how they will respond should concerns be identified. This is a matter for their own procurement policy and is not a matter on which the Commission can give specific advice.

The model non-collusion clauses are intended as general references only and may not be in part or in full appropriate for all tenders or all sectors. Procurers may also consider requiring other undertakings to be made in their non-collusion clauses.

For the avoidance of doubt, the Commission makes no express or implied warranties of accuracy, fitness for use, or enforceability of the model non-collusion clauses and the certificate in relation to any specific tender. Parties should seek independent legal advice if they have any doubts regarding their rights or responsibilities.

If in any case the procuring organisations suspect that their tenders have been subject to bid-rigging or other anti-competitive conduct, they should report this to the Commission immediately.

More information

To learn more about the Competition Ordinance and the Competition Commission's work, please visit our website www.compcomm.hk.

APPENDIX 1

MODEL NON-COLLUSION CLAUSES

This document should be used in conjunction with the User Guide to Procurers.

Users are reminded that the appropriate wording to be used to address bid-rigging will depend on the specific project and tender, and that the wording set out below is intended to act as a general reference only.

Model non-collusion wording in invitation to tender

The following is an example of wording that may be included in an invitation to tender:

“The tenderer must ensure that the bid is prepared without any agreement, arrangement, communication, understanding, promise or undertaking with any other person (except as provided in paragraph 3 of the Non-collusive Tendering Certificate referred to below), including regarding price, bid submission procedure or any terms of the bid. In the event of any breach of this clause by any tenderer, the (procuring organisation) reserves the right to invalidate the bid submitted by that tenderer and seek damages.

Bid-rigging is inherently anti-competitive and is considered serious anti-competitive conduct under the Competition Ordinance (Cap.619). Tenderers who engage in bid-rigging conduct may be liable for the imposition of pecuniary penalties and other sanctions under the Competition Ordinance.

Upon tender submission, the tenderer shall submit to the (procuring organisation) a Non-collusive Tendering Certificate (in the form set out at Schedule [•] to this [invitation to tender]) duly signed by an authorized person on the tenderer’s behalf.”

Guidance on non-collusion clauses in formal contracts

In addition to including wording to address bid-rigging and other anti-competitive collusive conduct in the invitation to tender and requiring the submission of a non-collusive tendering certificate, procurers should consider including clauses in their formal agreements with successful tenderers that provide contractual protections in the event that it is discovered that the tender process was subject to collusion. Such contract clauses may include:

- (a) Wording to state that the formal agreements are entered into in reliance of the statements made by the tenderer in the non-collusive tendering certificate and conditional upon the effectiveness and veracity of the certificate;
 - (b) The right for the procuring organisation to terminate the contract with the successful tenderer and recover damages where it is discovered that the tender process was subject to collusion; and
 - (c) Exceptions to any confidentiality undertakings that allow the procuring organisation to report and provide documents and information regarding the anti-competitive collusive conduct to the Commission (and other authorities as relevant).
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APPENDIX 2

MODEL NON-COLLUSIVE TENDERING CERTIFICATE

This document should be used in conjunction with the User Guide to Procurers.

Users are reminded that the appropriate wording to be used to address bid-rigging will depend on the specific project and tender, and that the wording set out below is intended to act as a general reference only.

This certificate should be signed by a person who is authorized to sign the relevant Contract on behalf of the tenderer. Where the bid is submitted jointly by two or more parties (e.g. multiple persons or companies acting in a joint venture), all such parties should sign the certificate.

To: (Name of the procuring organisation) (the "Procurer")

Dear Sir/ Madam,

Non-Collusive Tendering Certificate for [Contract No. ()] (the "Contract")

1. We, (name(s) of the tenderer(s)) of (address(es) of the tenderer(s)) refer to the tender for the Contract (the "Tender") and our bid in relation to the Tender.

Non-collusion

2. We represent and warrant that in relation to the Tender:
 - (a) Our bid was developed genuinely, independently and made with the intention to accept the Contract if awarded;
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- (b) Our bid was not prepared with any agreement, arrangement, communication, understanding, promise or undertaking with any person (including any other tenderer or competitor) regarding:
- i) prices;
 - ii) methods, factors or formulas used to calculate prices;
 - iii) an intention or decision to submit, or not submit, a bid;
 - iv) an intention or decision to withdraw a bid;
 - v) the submission of a bid that does not conform with the requirements of the tender;
 - vi) the quality, quantity, specifications or delivery particulars of the products or services to which this tender relates; and
 - vii) the terms of the bid,

and we undertake that we will not, prior to the award of the Contract, enter into or engage in any of the foregoing.

3. Paragraph 2(b) of this certificate shall not apply to agreements, arrangements, communications, understandings, promises or undertakings with:
- (a) the Procurer;
 - (b) a joint venture partner, where joint venture arrangements relevant to the bid exist and which are notified to the Procurer;
 - (c) consultants or sub-contractors, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular consultancy arrangement or sub-contract;
 - (d) professional advisers, provided that the communications are held in strict confidence and limited to the information required for the adviser to render their professional advice in relation to the Tender;
 - (e) insurers or brokers for the purpose of obtaining an insurance quote, provided that the communications are held in strict confidence and limited to the information required to facilitate that particular insurance arrangement; and
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- (f) banks for the purpose of obtaining financing for the Contract, provided that the communications are held in strict confidence and limited to the information required to facilitate that financing.

Disclosure of subcontracting and beneficial ownership

4. We understand that we are required to disclose all intended sub-contracting arrangements relating to the Tender to the Procurer, including those which are entered into after the Contract is awarded. We warrant that we have duly disclosed and will continue to disclose such arrangements to the Procurer.
5. We understand that we are required to disclose our beneficial ownership to the Procurer.
(please enter “✓” in the appropriate box)
- (For a company other than a listed company or exempted company¹) We will disclose the significant controllers register, as defined in the Companies Ordinance, Cap. 622.
 - (For a sole proprietorship or partnership) We will disclose details of our beneficial owner(s) (if any), including their name and the nature of their control over the firm;
 - (For listed company) We are a listed company in Hong Kong and our corporate ownership has already been disclosed in the public domain.
6. We understand that the Procurer may request us to disclose further details regarding our shareholders or parent companies, or any other related, associated or controlling entities, to the Procurer. We agree to disclose such details to the Procurer if so requested, subject to such requests being reasonable in the circumstances.

1. An exempted company is one which is not required to keep a register of its significant controllers (see further sections 653A (definition of "applicable company") and 653H of the Companies Ordinance.)

Consequences of breach or non-compliance

7. We understand that in the event of any breach or non-compliance with any warranties or undertakings in this certificate, the Procurer may, at its discretion, invalidate our bid, exclude us in future tenders, pursue damages or other forms of redress from us (including but not limited to damages for delay, costs and expenses of re-tendering and other costs incurred), and/or (in the event that we are awarded the Contract) terminate the Contract.

8. Under the Competition Ordinance, bid-rigging is serious anti-competitive conduct. We understand that the Procurer may, at its discretion, report all suspected instances of bid-rigging to the Competition Commission (the “**Commission**”) and provide the Commission with any relevant information, including but not limited to information on our bid and our personal or corporate information.

Signed for and on behalf of (tenderer)²:

Signature:

Name:

Position:

Date:

2. Additional signature blocks will need to be used where the tenderer is comprised of multiple parties.



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Disclaimer

The information provided in this pamphlet is for general reference only. It does not provide an exhaustive guide to the application of the Competition Ordinance (Ordinance). For a complete and definitive statement of the law, refer to the Ordinance itself. The Competition Commission (Commission) makes no express or implied warranties of accuracy or fitness for a particular purpose or use with respect to the above information. The above suggestions will not affect the functions and powers conferred on the Commission under the Ordinance.