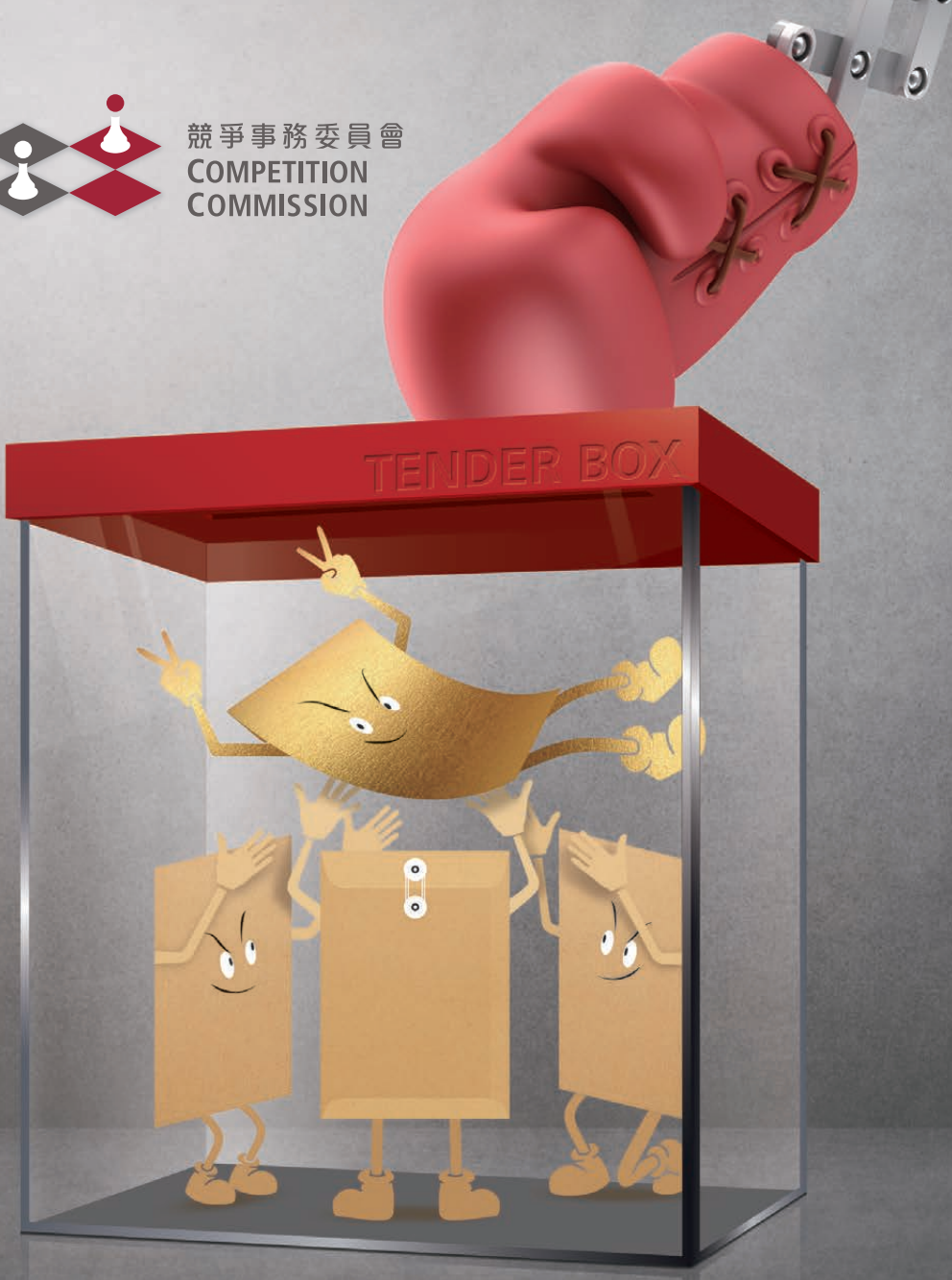
競爭事務委員會
COMPETITION
COMMISSION



FIGHTING BID-RIGGING

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1. BID-RIGGING UNDER THE COMPETITION ORDINANCE

Competition drives business efficiency and innovation. It leads to more choices, better quality products and services at better prices for consumers, including business consumers.

Public and private organisations often rely on a competitive bidding process to achieve these outcomes. The benefits of competition are realised, however, only when bidders genuinely compete.

What is a bid-rigging cartel?

Bid-rigging cartels occur when two or more bidders, that would otherwise be expected to compete, secretly agree that they will not compete with one another for particular projects. For example, they might agree among themselves which bidder will be the winner, and the outcome of the process is therefore "rigged".

Bid-rigging cartels are inherently anti-competitive and will contravene the Competition Ordinance (Ordinance).

Common types of bid-rigging cartels

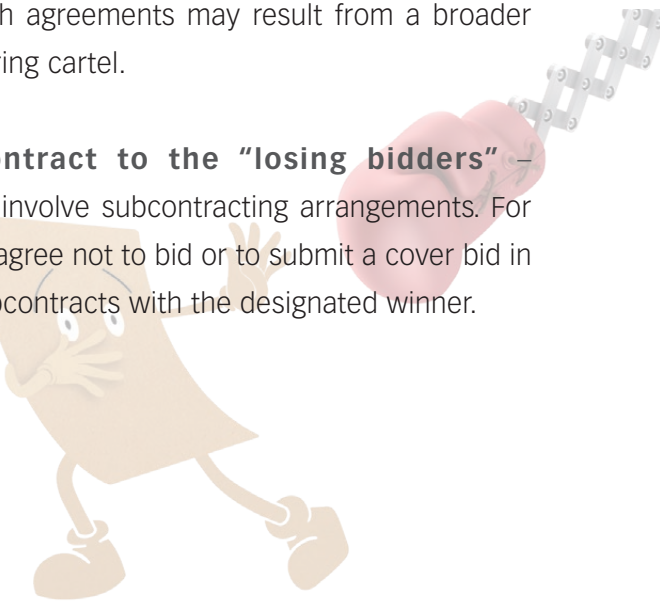
Bid-rigging cartels can take a number of forms. These include:

Bid suppression – one or more competitors agree not to bid, or withdraw a bid submitted previously.

Cover bidding – certain bidders agree to submit bids with higher prices or less attractive (or unacceptable) terms than the bid of the designated winner.

Bid rotation – competitors agree to take turns at being the winning bidder on a series of contracts. The terms of rotation may vary. For example, bidders may allocate contracts according to the size of the cartel members, according to geographic territory or by the type of customer concerned. Such agreements may result from a broader price fixing or market sharing cartel.

Agreement to subcontract to the "losing bidders" – bid-rigging schemes may involve subcontracting arrangements. For example, companies may agree not to bid or to submit a cover bid in exchange for lucrative subcontracts with the designated winner.



Minimum bidding prices and other methods of reducing competition – bidders may take other actions that reduce the competitive tension in the bidding process, such as by agreeing minimum bidding prices or agreeing that the winning bidder will make a payment to "compensate" the "losing" bidders.

Supporting mechanisms for bid-rigging cartels – the role of corrupt officials and consultants

In tenders where not every likely bidder is part of a bid-rigging cartel, cartel members may seek additional means to improve the prospect of the customer selecting the "right" bidder. For example, it is not uncommon for bid-rigging cartels to seek support from intermediaries such as corrupt officials or consultants who, instead of acting in the interests of the customer they work for, act in the interests of the bid-rigging cartelists and themselves. In some cases, such intermediaries might even be the instigator of the bid-rigging cartel.

Bid-rigging cartels hurt us all

Bid-rigging cartels can occur in any market where tender processes are used: all products and services are at risk. Bid-rigging deprives consumers of the benefits of competition, enabling colluding businesses to earn higher profits with less effort. For instance, anti-bid-rigging efforts in Japan resulted in a reduction of up to 20% in the contract price of public procurement* – that is 20% extra that everyone in the community might otherwise have paid to the bid-riggers.

What does bid-rigging mean?

- Consumers pay more for goods and services
- Government and the public sector pay more for goods and services
- Consumers receive poorer quality goods and services
- The entire economy suffers



* Source: *Guidelines for Fighting Bid Rigging in Public Procurement* published by the Organisation for Economic Cooperation and Development (OECD)

Hypothetical example

A large company decided to outsource its catering services and invited four major competing caterers to bid for the new contract. The salespersons of the four caterers met by chance at a charity football match and discussed the tender. They agreed that the first caterer would decline to submit a bid while the second would withdraw a previously submitted bid; the third would submit a higher priced "cover bid". The purchasing company was not aware of these arrangements and proceeded to award the contract to the fourth caterer which, on the face of it, submitted the most "competitive" bid.

The Competition Commission (Commission) will consider this arrangement as Serious Anti-competitive Conduct under the Ordinance. The caterers have sought to artificially pre-determine the outcome of the tender which resulted in reduced customer choice and an inflated service price. All bidders should submit bids independently.

2. WHAT CAN YOU DO WHEN YOU SUSPECT BID-RIGGING?

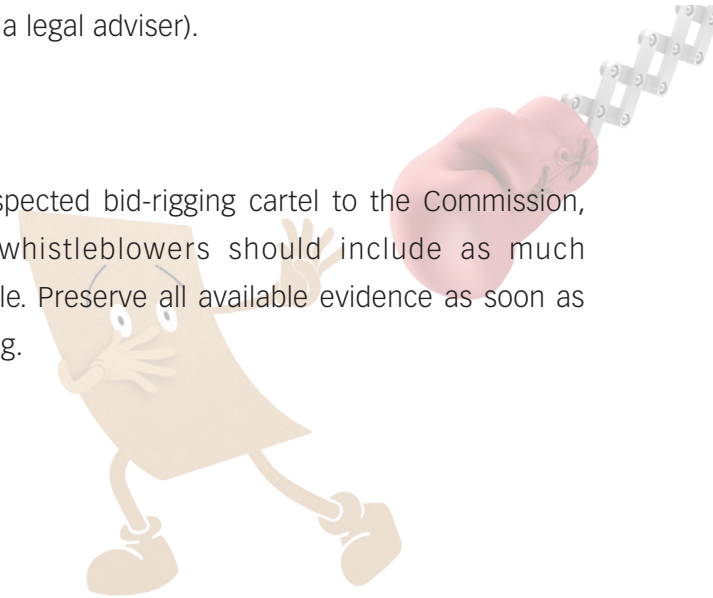
Bid-rigging cartels usually operate in secret and are therefore difficult to detect. Members of the public, employees, individual businesses, trade organisations, Government departments and other public agencies are invited to report to the Commission any suspected bid-rigging cartel.

Do the right thing - report your suspicions

Complainants and whistleblowers are important sources for identifying possible bid-rigging. The Commission will accept complaints and queries in any form, including those provided to the Commission directly and/or anonymously or through an intermediary (such as a legal adviser).

Evidence is king!

When reporting a suspected bid-rigging cartel to the Commission, complainants and whistleblowers should include as much information as possible. Preserve all available evidence as soon as you suspect bid-rigging.



Evidence of a bid-rigging cartel may take many forms – from letters informing you of price changes to notes of telephone conversations, phone messages and records of meetings. Carefully record and document everything including details of any conversations with suspected cartel members. All documents should be preserved in their original state.

Do not indicate to the bid-rigging cartel suspects or make public that you are making a complaint to the Commission. If a bid-rigging cartel is in operation, this will alert the cartel members and substantially reduce the prospect of the Commission securing evidence to support its case, meaning the Commission is less likely to be able to take any enforcement action.

How to report a bid-rigging cartel to the Commission?

A complaint can be made to the Commission by:

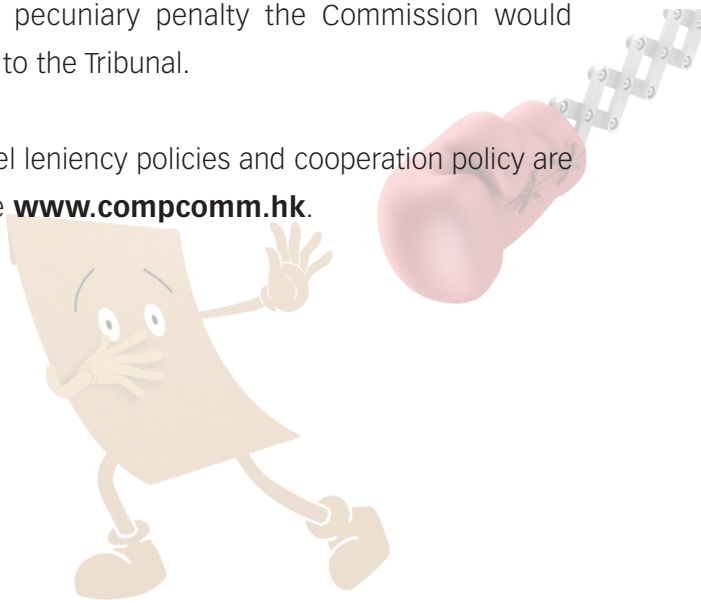
- Visiting the reporting website: www.compcomm.hk/reporting
- Email: complaints@compcomm.hk
- Phone: +852 3462 2118
- Post: Competition Commission
  19/F, South Island Place, 8 Wong Chuk Hang Road
  Wong Chuk Hang, Hong Kong
- In person at the Commission's office (by appointment only).

Apply for leniency or cooperation

Bid-rigging cartel members – or those who support them – may face severe penalties under the Ordinance. However, the Commission will not commence proceedings in the Tribunal against the **first** undertaking or individual who self-reports the cartel conduct to the Commission and meets all other requirements for receiving leniency. This includes **not** seeking a pecuniary penalty or for an order declaring that the successful leniency applicant has contravened the Ordinance. Employees and officers of an undertaking that obtains leniency will also be protected from proceedings if they cooperate with the Commission's investigation.

Cartel members which do not benefit from the leniency policies may also cooperate with the Commission in exchange for a discount of up to 50% off the pecuniary penalty the Commission would otherwise recommend to the Tribunal.

The Commission's cartel leniency policies and cooperation policy are available on its website **www.compcomm.hk**.



How to apply for leniency or cooperation?

- Call Leniency Hotline at +852 3996 8010 between 8am and 6pm, Hong Kong time, Monday to Friday (excluding public holidays)
- Send email to Leniency@compcomm.hk
- In ongoing investigations, contact the relevant Case Manager for cooperation

Confidentiality

The Commission will generally seek to protect any confidential information received which includes:

- The identity of complainants, whistleblowers and leniency/cooperation applicants
- Any confidential information provided by complainants, whistleblowers and leniency/cooperation applicants
- The leniency/cooperation application process, including the respective agreement.

Leniency/cooperation applicants must in turn commit to keeping their contact with the Commission confidential.

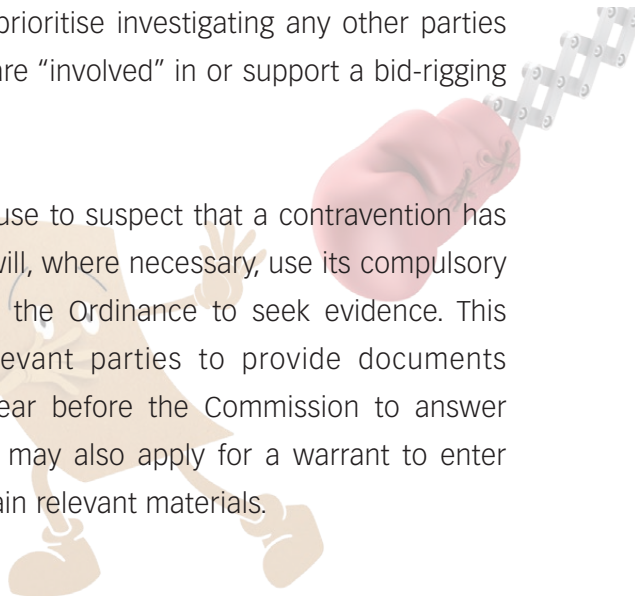
3. COMBATING BID-RIGGING CARTELS IS A COMMISSION PRIORITY

Apart from considering conduct brought to the Commission's attention through complaints, or referrals from other agencies, the Commission may rely on other forms of intelligence to initiate investigations to identify and take action against bid-rigging cartels.

Cartels are Serious Anti-competitive Conduct under the Ordinance. The Commission takes bid-rigging cartels very seriously and accords priority to such conduct in its investigations and enforcement. The Commission may conduct an investigation into a case if it has reasonable cause to suspect that businesses have engaged in a bid-rigging cartel.

The Commission may also prioritise investigating any other parties (including individuals) who are "involved" in or support a bid-rigging cartel.

Where it has reasonable cause to suspect that a contravention has occurred, the Commission will, where necessary, use its compulsory investigation powers under the Ordinance to seek evidence. This may include requiring relevant parties to provide documents and information or to appear before the Commission to answer questions. The Commission may also apply for a warrant to enter and search premises to obtain relevant materials.



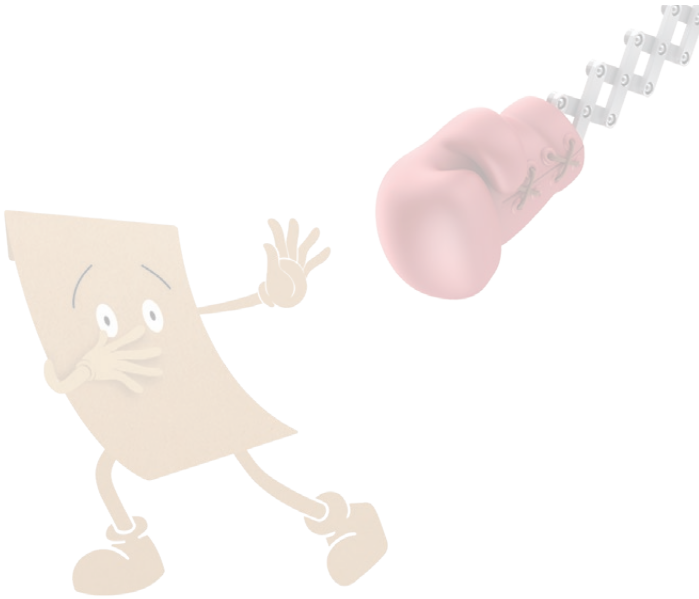
If the Commission considers that bid-rigging cartel conduct has occurred and that the Ordinance has been contravened, it may commence proceedings in the Competition Tribunal (Tribunal). Such proceedings may include an application seeking remedies to be imposed on parties who have contravened the First Conduct Rule or have been "involved" in the contravention under Section 91 of the Ordinance*. Maximum penalties include fines of up to 10% of an undertaking's annual local turnover for a maximum period of three years and disqualification of directors from managing a company for up to five years. Fines can also be imposed by the Tribunal on individuals involved in cartels under Section 91 of the Ordinance. Victims of a cartel who can prove that they suffered damage as a result of the cartel can also pursue "follow-on" claims for damages.

The Commission will work closely with other law enforcement agencies to ensure a coordinated approach to tackling bid-rigging cartels in Hong Kong.

* Under Section 91 of the Ordinance, a person being involved in a contravention of a competition rule means a person who - (a) attempts to contravene the rule; (b) aids, abets, counsels or procures any other persons to contravene the rule; (c) induces or attempts to induce any other person, whether by threats or promises or otherwise to contravene the rule; (d) is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or (e) conspires with any other person to contravene the rule.

4. MORE INFORMATION

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



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Disclaimer

The information provided in this booklet 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.

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