



Hong Kong General Chamber of Commerce  
香港總商會1861

Our Ref: SN/1

17 January 2018

Mr Brent Snyder  
Chief Executive Officer  
Competition Commission  
Room 3601, 36/F, Wu Chung House  
213 Queen's Road East  
Wanchai, Hong Kong

Dear Brent,

**"Model Non-Collusion Clauses and Non-Collusive Tendering Certificate"**

We refer to the above documents, which were published on the Commission's website on 18 December 2017.

We understand that the objective of these documents is to assist in deterring bid-rigging. However, some of our members have expressed concerns that these documents will also deter many legitimate bidding arrangements, due to the overly-broad nature of the drafting. We were unable to put these concerns to you before the documents were published because, as far as we are aware, there was no public consultation on them before publication. In particular:

- The requirement that there should be no communication, arrangement etc. "with any other person"<sup>1</sup> would rule out, in principle, contacts between a bidder and its suppliers, or any other contractors with which the bidder is cooperating to enable it to bid. However, these contacts are essential for many (perhaps even most) bids to take place. Many bidders need to rely on inputs from other parties to be able to make bids, and need to contact these parties before making the bid, to minimise risks and ensure they can deliver the products or services in question. Indeed, the introduction to the model non-collusive tendering certificate itself seems to recognize this, stating that "*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*" But this is not reflected in the drafting of the certificate.

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<sup>1</sup> First paragraph of the model non-collusion wording in an invitation to tender, and in paragraph 2(b) of the model non-collusive tendering certificate.

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- While one of the exceptions is for contacts with a joint venture partner,<sup>2</sup> the term "joint venture" - in a competition law context - normally denotes a jointly-owned corporate entity. However, two or more parties may submit a joint bid as a consortium, without necessarily forming a joint venture company.
- The proposed general requirement that the joint venture arrangements be "notified" to the procuring organisation is inappropriate.<sup>3</sup> In many cases the commercial arrangements underlying consortium bids are highly confidential, and it would be harmful to potential bidders (and unnecessary for the procuring organisation) for these to be disclosed. There may be some cases where the procuring organisation has a legitimate interest in knowing how a project is going to be delivered, but this should be assessed on a case-by-case basis, and the disclosure of information kept to a necessary and proportionate level, to be agreed between the organisation and the parties concerned. Disclosure should not be expressed as the norm.

We appreciate that the model clauses and certificate are not legally-binding, and that procuring organisations are free not to adopt them, or to adopt alternative wording. However, we are concerned that procuring organisations will regard the Commission's suggested drafting as representing the safest "default" position, particularly given the Commission's strong encouragement (in its accompanying Press Release of 18 December 2017) to consider using these model clauses and certificate. The inclusion of this wording in tender documents would preclude many legitimate bidding arrangements, or at least place an unfair and inefficient burden on potential bidders in trying to justify *bona fide* changes to the drafting to meet their legitimate concerns, as expressed above.

Deterring (or placing obstacles in the way of) consortium bids is a particularly serious matter for Hong Kong, where over 98 per cent of businesses are SMEs. By definition, SMEs often lack the scale to bid for major projects, and joining up with other businesses in a consortium is the only way they can compete for them. To deter SMEs from competing not only tilts the playing field against SMEs in favour of larger firms, to the detriment of SMEs, thereby distorting competition, it is also against the public interest by preventing procuring organisations from benefitting from the fullest competition in public bids, resulting in less competitive and innovative goods and services.

These concerns have been explicitly recognised by Ireland's competition authority, the Competition and Consumer Protection Commission (CCPC):

"Excluding efficient SMEs from public procurement could potentially have a detrimental impact on competition. For example, it may have the effect of excluding smaller firms or new entrants with innovative solutions, thereby reducing the value for money that the state can achieve... Consortium bidding

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<sup>2</sup> Paragraph 3(b) of the model non-collusive tendering certificate.

<sup>3</sup> See n 2 above.

offers an opportunity for SMEs to pool their knowledge and submit joint bids that offer higher quality products and more innovative solutions to the purchasing body".<sup>4</sup>

For these reasons, and to encourage SMEs to bid for projects through forming consortia, the CCPC issued a Guide for SMEs on how to engage in consortia while complying with the competition rules.<sup>5</sup>

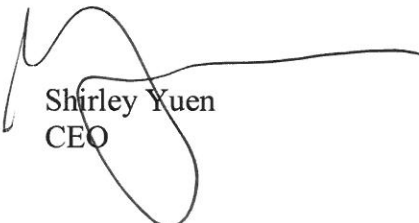
In terms of possible solutions to address the above concerns, we suggest that the Commission considers adopting the following steps:

- Issuing a follow-up amendment to the User Guide cautioning procuring organisations that the sample drafting is not suitable for bidding arrangements where several suppliers of inputs may be involved for the bid to be made (including consortium arrangements), and that alternative wording should be used where such bids are invited. If the Commission is not prepared to issue such an amendment to the User Guide, we recommend that it at least issues a follow-up Press Release to this effect.
- Issuing (with prior public consultation) a guide to SMEs on consortium bidding, similar to the one which the CCPC has produced in Ireland. The Guide would (as in Ireland) serve the dual purposes of encouraging procuring organisations to include SME consortia in invitations to bid, and explaining to businesses how to engage in consortia while complying with the competition rules. Such a Guide would be a useful counterpart to the User Guide that the Commission has issued for procuring organisations.

We welcome a meeting with you and your colleagues to elaborate on our concerns and suggested solutions, if the Commission finds this useful.

I look forward to hearing from you.

Yours sincerely



Shirley Yuen  
CEO

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<sup>4</sup> CCPC "Consortium Bidding: How to comply with competition law when tendering as Part of a Consortium": A Guide for Small and Medium Enterprises" December 2014 p 5.

<sup>5</sup> See n 4 above.