

Competition Bureau cracks down on bid-rigging in construction industry

Canada's Commissioner of Competition has publicly stated that the Competition Bureau will continue to intensify its focus on the construction industry, on the basis that the industry is "particularly susceptible to cartel activity." The Bureau's focus is on the prevention and prosecution of both bid-rigging and price-fixing. To assist industry participants, the Bureau has repeatedly emphasized the need for industry participants and related trade associations to develop and implement compliance programs to teach their employees about the Competition Act and keep them on the right side of the law.

Think your company doesn't need a compliance policy? Test your knowledge of competition law issues for construction companies with the questions below.



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- 1** Competition Act compliance programs:

 - (A) Assist in detecting contraventions of the Competition Act
 - (B) Can be drafted by the Competition Bureau at the request of a business
 - (C) Will immunize your company against criminal prosecution
 - (D) Inform the member organization and its employees/members about best practices and potential risk with respect to the Competition Act
 - (E) A, B, and D above
 - (F) A and D above

- 2** A breach of the Competition Act may result in:

 - (A) Administrative monetary penalties
 - (B) Fines
 - (C) Imprisonment
 - (D) All of the above

- 3** Larry owns and operates a tunnelling company. Larry's best friend, Gary, also owns and operates a tunnelling company. Larry and Gary agree that due to their longstanding friendship, they will not undercut each other's prices on jobs. To keep each other honest, they share information about their margins and prices and occasionally bow out of tendering processes.

Larry and Gary say that their activity does not contravene the Competition Act because they are never the only two bidders on any given project.

Larry and Gary are:

 - (A) Correct
 - (B) Incorrect

- 4** Gary's tunnelling company is going through some rough times. Larry does not want to see his friend's company go under, so he looks for ways to help him. Larry agrees with Gary to withdraw his low bid on a big subway project so that Gary will get the job. They agree that Gary will repay the favour in the future, but they are careful not to identify what that future project will be.

 - (A) This is acceptable, so long as they don't identify which future project they've agreed on.
 - (B) This is a violation of the Competition Act, but not a criminal violation.
 - (C) This could result in jail time.
 - (D) None of the above

- 1 (F)** Construction companies and trade associations should consider implementing a Competition Act compliance program. Compliance programs are educational tools designed to ensure that an organization's employees and managers understand their obligations pursuant to the Competition Act. A compliance program will:
- (a) reduce the risk of violations of the act;
 - (b) reduce the financial and reputational costs resulting from an investigation by the Bureau;
 - (c) increase awareness of the Competition Act amongst employees, business associates, customers, and suppliers;
 - (d) reduce the risk of potentially illegal conduct and exposure to civil, criminal, or penal liability; and
 - (e) assist a company and its employees in their dealings with the Bureau, particularly if the company is seeking leniency.

Compliance programs help organizations train their employees to spot potentially risky activity, and can be particularly useful for companies such as road-paving and construction companies that are involved in trade associations frequently involved in bidding and tendering situations, or operating in industries subject to increased Bureau scrutiny.

- 2 (D)** Section 45 of the Competition Act, which prohibits conspiracies to control a market (price-fixing), carries discretionary penalties of fines of up to \$25 million or imprisonment for up to 14 years. Section 47 of the Competition Act, which prohibits "bid-rigging," can attract a fine of an unlimited amount, or imprisonment for up to 14 years. Companies found to have abused their dominant position in the marketplace can be penalized with administrative monetary penalties of up to \$15,000,000.

- 3 (B)** Larry and Gary are incorrect. By sharing their pricing information, Larry and Gary are violating s. 45 or s. 47 of the Competition Act. Regardless of whether Larry and Gary are the only two bidders on a job, their decision not to undercut one another's prices is anti-competitive behaviour. Notably, the Bureau does not need documentary proof of this behaviour to commence an investigation into Larry's or Gary's company — it can commence an investigation based solely on a belief that anti-competitive behaviour has occurred. Once the Bureau discovers that Larry and Gary are aware of sensitive pricing information that will allow the two companies to ensure that they maintain artificially high prices — to the detriment of consumers — either or both companies could be charged under the Competition Act. Larry, Gary, and any other participants from their companies also face fines and prison time for their participation in the conspiracy.

- 4 (C)** In this scenario, Larry and Gary are both guilty of bid-rigging, and could face a prison sentence of up to 14 years. Notably, they also face fines of an unlimited amount. The fact that Larry withdrew his bid to help Gary's company amounts to a violation of the bid-rigging provision (s. 47) of the Competition Act. By withdrawing his bid, Larry is reducing competition for the subway-tunnelling project, to the detriment of the subway owner (and by implication, the taxpayer). Gary, in turn, has agreed to commit the same criminal act in the future. In the meantime, his company is the beneficiary of the anti-competitive behaviour. At no time should companies consider any sort of bidding "strategy" to be acceptable behaviour. Examples of common but illegal bidding practices include bid suppression, complementary bidding, bid rotation, phantom bids, buy-back, and phantom auctions.

YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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