

## ComCom targets Christchurch anti-competitive supplier practices

October 2012

*The Christchurch rebuild is a sitting target for bid-rigging and other cartel practices in procurement processes. The Commission will focus on this area, starting with outlining how to avoid the problems. The approach provides tips for all procurement processes.*

The Commission prioritises its resources to focus on key areas. As we have already noted as to Fair Trading Act enforcement, we expect Christchurch will be closely monitored – see *Managing a Fair Trading Act possible breach well*.<sup>1</sup> Now the Commission has made it clear that Commerce Act compliance in Christchurch will be addressed too, as they outline in their press release.<sup>2</sup>

In particular, for reconstruction projects, there's a risk of suppliers clubbing together so that prices are kept high, and supply choice is reduced. That's often called bid-rigging, a type of cartel activity that breaches the Commerce Act, leading to hefty penalties imposed by the Courts. Overseas experience is that there is considerable potential for bid rigging in major reconstruction environments such as in Christchurch. Expect the Commission to prioritise on any bid-rigging allegations in Christchurch.

The press release links to two useful Commission papers on how to detect and deter bid-rigging. Suppliers will have to be particularly careful there's compliance. But the line between legal and illegal can be difficult to draw. For example:

- Suppliers often – legitimately – pitch for work in a JV or teaming type of arrangement. Competitors end up talking to each other for legitimate reasons. What is legal or illegal needs to be carefully assessed.
- Sometimes there really are only a limited number of suppliers, and this can produce high prices in a bidding contest, without explicit bid-rigging or other cartel conduct. The suppliers have little incentive to drop prices as the competition is limited (and lowering bid prices to get the work would

bounce back on the supplier when they'll get their share of the work anyway over time). The classic example is a duopoly. This is a variation on what is called tacit collusion: the prices remain high even though the bidders are not talking to each other to rig the bids. Often the cartel part of the Commerce Act will not bite in that scenario. Suppliers may be able to exploit this legitimately.

Where there are few suppliers, buyers should look at ways to overcome the problem. But often this does not happen, leading to poor pricing and services. Solutions include:

- Using a different way to set the price than a competitive process such as an RFP. Not easy but far better than sticking with what won't work.
- Defining the required goods and services to encourage more suppliers: a common problem is an RFP that defines according to technical specification (where this produces solutions based on one brand/product type) rather than functional specifications.

<sup>1</sup> <http://www.wigleylaw.com/assets/Uploads/Managing-a-Fair-Trading-Act-breach.pdf>

<sup>2</sup> <http://www.comcom.govt.nz/media-releases/detail/2012/commerce-commission-to-educate-businesses-about-potential-competition-issues-in-christchurch-rebuild>

*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

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