



香港電器工程師商會有限公司

HONG KONG ELECTRICAL CONTRACTORS' ASSOCIATION LIMITED

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香港機電工程師商聯會創會成員 A Founding Association of The Hong Kong Federation of Electrical and Mechanical Contractors

Our Ref: GO/EY/420

27 March 2012

Clerk to Bills Committee
Bills Committee on Competition Bill
Legislative Council Secretariat
Legislative Council Complex,
1 Legislative Council Road, Central, Hong Kong

Dear Sir/Madam

Competition Bill

We would like to submit our comment of the Competition Bill.

“The Government’s competition policy is to enhance economic efficiency and the free flow of trade through promoting sustainable competition to bring benefits to both the business sector and consumers.” This may be universally applicable in business to consumers (B to C) transactions but the latter may not be universally applicable in business to business (B to B) transactions unless “sustainable competition” is clearly defined. This is especially the case if the weaker lower tier entities are competitively dealing with a much stronger upper tier single entity.

In the construction sector, overwhelmingly contracts are secured through competitive tendering. The tender documents (including but not limited to conditions of contract, instruction to tenderers, specifications, pricing document, etc.) are decided by the upper tier issuer. Each tenderer separately prepares and submits his tender within the stipulated time period. The upper tier issuer then vets the tender submissions by all tenderers and is free to conduct post-tender negotiations (including Dutch auctioning tactics, etc.) with any of the tenderers individually. Intrinsicly the playing field is not that level and the upper tier entity always has the upper hand. This scenario permeates down the subcontracting and supply chain.

Whilst hardcore anti-competition behaviours like price fixing, bid rigging, etc. are to be condemned, often tenderers in the trade tend to communicate through the trade association or among themselves when “unreasonable” contract terms or specification requirements are discovered. Examples are unreasonably short tendering/contract period, specified service or product (e.g., insurance policy, proprietary product) not competitively available in the market, even tight resources/manpower supply, etc. Such communications will pre-empt unconscious tenderers from falling in contractual pitfalls and/or succumbing to unreasonable pressure in excessive competition. In effect this helps competition “sustainable” and enhances economic efficiency.



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It is submitted that the Bill should introduce differentiation between B to C and B to B transactions. For B to C transactions, the Bill may place priority of consumer protection over economic efficiency. For B-to-B transactions, the Bill should include an **exhaustive** (not non-exhaustive) list of anti-competitive conducts to enhance the certainty and clarity of the law. As the Bill only outlines the conduct rules preventing, restricting & distorting competition and empowers the Competition Commission to investigate & bring proceedings, small & medium enterprises (SMEs) will feel threatened and muffled in enquiring/exchanging market information when dealing with strong upper tier entity. SMEs must be wary of the potential legal costs when complaint could be brought to the Competition Commission. The same will happen to trade associations whose volunteer office-bearers will be hamstrung to speak out for the industry's interests and rights. We take the liberty to attach the overview of our Association and underline the activities that might breach the proposed Competition Bill.

Furthermore, to facilitate the continuance of the trade functions of trade associations, waiver should be granted to activities such as

- Collective negotiation of contract terms such as payment, extension of time, ...etc.
- Discussion of collective market information – including commercial terms, labour benchmarking, ...etc.
- Discussion of consultation survey which includes commercial terms

The competition regime in B to B transactions should be built up progressively without crippling the SMEs/trade associations at one blow and the exhaustive list of anti-competitive conducts can be enriched in future in light of business reality after the enactment of the Bill. Please avoid the caveat (矯枉過正); over-regulation of anti-competition will overkill economic efficiency, maybe the very survival of some SMEs.

We look forward to hearing your reply addressing our concern.

Yours truly,

Emil Yu
Chairman

Encl.: HKECA Overview

CC. . HKFEMC