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Mid-Term Evaluation of the Competition Bureau's Anti Bid-Rigging Activities

FINAL REPORT

April 25, 2008

Tabled and approved at DEC
on June 9, 2008

Canada¹

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Cat. No. Iu4-140/1-2008E-PDF

ISBN 978-1-100-10138-5

60488

Aussi offert en français sous le titre *Évaluation à mi-parcours des activités de lutte contre le truquage d'offres du Bureau de la concurrence.*

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Executive Summary

This report presents the findings, conclusions and recommendations of the mid-term evaluation of the Competition Bureau's anti bid-rigging activities. The evaluation focuses on the initiatives put in place and the activities carried out by the Bureau across the country to combat bid-rigging. Its purpose is to provide information to assess implementation and identify areas for improvement. It also provides a baseline / interim report card that could be used for comparative purposes in future potential evaluations.

This evaluation was initiated by the senior management of the Bureau and was managed by the Audit and Evaluation Branch of Industry Canada. The evaluation study was conducted by BMB Consulting Services Inc. An Evaluation Study Steering Committee with government and non-government members advised the evaluation team at key points throughout the project.

Background

As an independent law enforcement agency, the Competition Bureau contributes to the prosperity of Canadians through protecting and promoting competitive markets. The Competition Bureau is headed by the Commissioner of Competition, the law enforcement officer sanctioned by Parliament with the preservation of a competitive marketplace in Canada. The Commissioner's legislative authority is to maintain and encourage competition in Canada. The Commissioner's responsibilities are administered through the Competition Bureau.

The Bureau sets priorities in three areas: enforcement, advocacy and management. Domestic cartels and bid-rigging are one of the four enforcement priorities that have been identified for the 2007-2009 period¹.

Bid-rigging is defined under section 47 of the *Competition Act* and is a criminal offence. Bid-rigging occurs when there is a call or request for bids or tenders, and one or more bidders agree not to submit a bid, or two or more bidders agree to submit bids that have been prearranged among themselves, and, in either case, fail to make these arrangements known to the party issuing the call or request for bids or tenders. Bid-rigging schemes are often seen hand-in-hand with other types of collusion and conspiracy, most notably, section 45 offences (section 45 of the *Competition Act* makes it an offence to conspire, or agree with another person to unduly restrain competition).

Bid-rigging is a per se offence under the Act. A per se offence is one in which merely engaging in the conduct intentionally constitutes an offence. The effect of the conduct is irrelevant. Individuals and corporations found guilty of bid-rigging may be sentenced to

¹ In April 2008, the Bureau confirmed that these priorities would be extended to 2011.

a fine at the discretion of the court (i.e., there is no maximum fine level). In addition, individuals may be further liable to imprisonment for a term up to five years. Prohibition orders and private actions are also available.

The Competition Bureau's Anti Bid-Rigging Activities

The Criminal Matters Branch (CMB) administers and enforces criminal provisions of the *Competition Act* (Act), including those covering conspiracies such as bid-rigging. CMB carries out compliance, outreach and enforcement activities in the NCR and in five regional offices located across the country.

Outreach is a key activity to support prevention (through awareness building) and to increase detection (by educating buyers and sellers to identify and report potential bid-rigging schemes). Outreach activities include the development and distribution of communication materials and face-to-face presentations to stakeholder groups, delivered by managers and staff in the NCR and regions.

Enforcement activities are usually launched as a result of a complaint or someone coming forward to expose a bid-rigging scheme. The information provided is analyzed to determine if the situation raises a concern under the Act and, if so, a preliminary examination is undertaken. Where the Commissioner has reason to believe an offence has been committed, an inquiry is commenced. Based upon the evidence gathered a decision is made on how best to proceed.

Evaluation Scope

The evaluation questions/issues identified for inclusion in this evaluation focus on rationale, program design and delivery, implementation, early success and, to the extent possible, cost-effectiveness.

Evaluation Methodology

The overall evaluation strategy was based upon the collection and analysis of multiple lines of evidence. These lines of evidence were chosen to ensure that findings, conclusions and recommendations would be meaningful. The methodologies for data collection, analysis and presentation were designed to ensure reliable, valid and credible information was provided.

Evidence was drawn from six major avenues:

- Document review;
- Bureau Information Management System (BIMS);
- Literature review of published sources;
- Stakeholder consultations;
- Case studies; and

- Comparisons with three other countries (i.e., the UK, the US and Australia)

Evaluation Findings

Rationale

Issues related to program rationale focused on determining the size and scope of the issue and the roles and responsibilities of the key stakeholders involved.

Procurement Market Size, Key Sectors and Size of Problem

Bid-rigging occurs in that part of the marketplace in which competitive procurement takes place. Efforts undertaken throughout the course of the evaluation to identify a single consolidated information source that would ascertain the size and scope of the Canadian procurement market were not successful. Partial information on procurement transactions in key sectors was obtained from a variety of sources and, based on this information, it was possible to confirm the extent of procurement activity in certain sectors and organizations within them. It is generally accepted that the public sector undertakes a significant volume of procurement, and that most of this activity (measured in dollar volume) is achieved through competitive processes. While information on private sector organizations is more difficult to obtain, interviews conducted for this evaluation seem to indicate that a high volume of procurement in this sector is also done through competitive processes.

A more difficult question to answer is the extent of bid-rigging that is occurring in Canada. Due to the very nature of the activity (i.e., it is an illegal act), information is only available for those cases that have been detected. The detection of bid-rigging schemes has traditionally depended upon complaints coming forward from bidders or buyers who believe they have been the victims of bid-rigging or from “insiders” who have been involved in bid-rigging and have decided to expose the scheme to the authorities.

In interviews conducted for this evaluation, participants were asked their views on the extent of bid-rigging that is occurring in Canada. While there is agreement that bid-rigging undermines competition, there are two basic schools of thought on the volume of bid-rigging occurring in the Canadian domestic marketplace. The first school of thought is that it is a rather isolated problem. The small number of matters being dealt with by the Bureau (between 2001 and 2007, 58 complaints related to bid-rigging were filed with the Bureau), compared to the total number of procurement transactions (for example, in 2005, the federal government awarded over 410,000 contracts), is used to illustrate this position. The second school of thought is that bid-rigging is a much larger and systemic problem. Proponents of this school of thought point to the experiences of other countries with respect to international cartels and high-profile cases in particular sectors of their economies. The number of matters identified by the Bureau is viewed by this group as a detection issue, rather than a true reflection of the size of the problem.

Efforts to detect bid-rigging through the use of statistical approaches have been used. However, they have not been fully developed and tested in the Canadian context. One approach is “top-down”, starting from the universe of the procurement market, and working down to estimate the size and impacts of bid-rigging schemes. A second approach is “bottom-up”, starting with one or more cases, analyzing their impacts, estimating detection rates, and extrapolating to the broader universe. The success of either approach depends upon the use of detailed statistics on bid patterns over time, which is currently not widely available.

A more pragmatic approach for an antitrust agency may be a “risk-based” approach, identifying those sectors and situations where the risk of bid-rigging, in terms of likelihood and impacts, is greatest. This approach is being developed by both the Office of Fair Trading (OFT) in the United Kingdom and the Australian Competition and Consumer Commission.

Recommendation: *Over the short to medium term, the Bureau should increase its focus on advocacy through research in support of its anti bid-rigging activities. The goal of the research should be the development of an evidence base supporting risk-based targeting of sectors and situations where the risk of bid-rigging appears most acute. Opportunities to collaborate with research partners should be exploited.*

Roles of Various Players, and Overlaps or Duplication of Efforts

The evaluation found that the roles of buyers, sellers, the Competition Bureau and others in dealing with the anti bid-rigging issue appear relatively clear to each party. Their efforts are seen to be complementary rather than duplicative.

The Competition Bureau is expected to lead enforcement through section 47 of the Act. The Competition Bureau is also expected to continue to provide leadership on communications, outreach and monitoring.

Organizations interviewed who are involved in procurement, including those in the federal government, believe they are executing their roles adequately by deterring bid-rigging through their normal procurement policies, practices and systems. However, other interviewees suggest that the bid-rigging problem is just not being detected because of lack of the means to do so and appropriate incentives.

There appear to be opportunities for the Bureau to exercise its leadership at the federal government level. Interviewees from the Bureau felt the organization should take an advocacy role influencing the regulations and procedures being put in place by federal government departments to implement relevant parts of the *Federal Accountability Act*.

Understanding Key Stakeholders – Motivations and Behaviours

Certain conditions can either encourage or discourage organizations from engaging in bid-rigging. Understanding these conditions is key in developing an appropriate response. That said, the incentives and disincentives for engaging in bid-rigging by sellers/suppliers are fairly clear. The incentives generally include real or perceived financial gain and greater certainty about future revenue streams. The disincentives generally concern the criminal penalties and other ramifications, the impacts of which, even when there is a low likelihood of detection, are significant in terms of exposure to jail time, loss of reputation, and foregone business opportunities.

Most perpetrators would appear to engage in bid-rigging deliberately rather than accidentally. Therefore, the case to be made to an individual or company contemplating or already engaged in bid-rigging needs to go beyond the core message that it is unethical and criminal, to an additional understanding that it is a losing business proposition both in the short and longer terms.

The incentives and disincentives for procurement organizations to identify, prevent and address bid-rigging are fairly straightforward. The organization makes a decision that trades off, amongst other things, the cost of detection and addressing it versus the financial and reputational losses due to failing to take appropriate action concerning bid-rigging. For this group, the core message that bid-rigging is wrong and criminal needs to be amended to emphasize the organization's role in combating it.

Procurement procedures and policies put in place by an organization can have a significant impact on whether procurement officers are enabled to identify and prevent bid-rigging. For example, in the federal government, implementation of the *Federal Accountability Act* through revisions to other legislation, and the introduction of new regulations and procedures can have an impact on anti bid-rigging efforts. The sections in the *Federal Accountability Act* dealing with corruption and collusion should facilitate anti bid-rigging efforts. However, those sections increasing transparency could increase the availability of competitive information among bidders, suggesting that federal procurement officers may have to step up their vigilance to detect and report possible bid-rigging.

While an assessment of the impact of various policies and procedures on the likelihood of bid-rigging is outside the scope of this evaluation, it is sufficient to note that, as procurement policies evolve, the incentives to rig bids will change and the approaches to effectively detect bid-rigging will need to evolve as well. These approaches may need to involve more training of procurement officers, the creation and integration of data systems to identify bid patterns more consistently, and an enhancement of the incentives to identify and report suspected instances.

Recommendation: *Over the short to medium term, the Bureau should increase its focus on advocacy through partnerships in support of its anti bid-rigging activities. Opportunities to advocate with federal government departments should be pursued. As well, opportunities to build on existing and develop new relationships with national*

professional and business associations should be developed. More specific outreach messages should be tailored to target audiences.

The Competition Bureau's Response to Bid-Rigging (Program Design and Implementation)

While combating bid-rigging is not a new activity for the Bureau, there have recently been changes made in delivery methods. A five-year regionalization plan has been put in place to undertake activities to combat bid-rigging at the regional office level, in addition to activities currently underway in the NCR. In support of these new activities, capacity is now being built, with an expectation that regional resources committed to criminal matters will increase from 10 full-time equivalents (FTEs) in 2006-07 to 32 FTEs by 2010-11.

Appropriateness of Regional and Sectoral Design

The evaluation revealed that anti bid-rigging activities can be delivered in a number of ways. The Antitrust Division in the U.S. had seven field offices across the country that deal with criminal matters arising in their respective areas, while forty-eight states also have criminal antitrust laws. In Australia, anti bid-rigging activities are delivered at the state level, while in the U.K. the OFT operates from a central location in London, with staff traveling to different parts of the country to conduct investigations and outreach activities.

The regional design of the Bureau's anti bid-rigging activities is supported by interviewees in organizations in the regions and in the Bureau as a way of being closer to the procurement marketplace. There is broad consensus among interviewees that outreach activities need to be targeted to specific sectors of the economy. It was felt that the sectors should be chosen based upon evidence of where there is the greatest potential for problems and the highest impact. This approach is similar to that being contemplated for use in the U.S. and the U.K. where specific sectors of the economy are identified as priorities.

Status of Program Implementation

Generally, implementation has proceeded on time and within budget. Capacity is being built; however, staffing must continue to be managed carefully in order to address challenges related to the staffing process, training requirements, and retention. That said, some interviewees from within the Bureau feel the Five-year Regional Staffing Plan should be accelerated.

There was no consensus among interviewees on extending the program to related non-antitrust offences. While some interviewees felt that there was an opportunity to expand current outreach presentations to encompass a broader range of issues, others felt the key messages would be lost. There was general consensus that the audiences to be reached

with the non-antitrust messages would most probably differ from the ones currently targeted for outreach. However, there could be an opportunity to link with the Fraud Prevention Forum and its Fraud Prevention Month.

Marketing of the Anti Bid-Rigging Program

Although already present in much of its materials, the Bureau's marketing of the program could be improved by focusing on key messages including the role of the Bureau, the criminality of bid-rigging, and suggested approaches (guidelines, how to's) for dealing with the issue.

There appears to be an opportunity to co-market the anti bid-rigging message with at least some national business associations. This was seen as a good method to promote awareness and understanding of bid-rigging, teach the partners to work together, increase understanding of each others' roles and context, and help the associations provide value-added services to their membership.

Resourcing, Provision of Tools and Skill Sets

Skill and competency sets required for enforcement and for outreach overlap, but the most important skills and competencies differ. It is sometimes difficult to find individuals with both strong investigative skills and competencies, and strong communications and presentation skills and competencies. While the Bureau has been fortunate to have Competition Law Officers and Regional Assistant Deputy Commissioners who are good presenters, a more deliberate approach to resourcing for outreach activities would be beneficial.

With respect to the provision of tools, regional offices are outside the Bureau's firewall for some enterprise-wide information systems, making information dissemination and access cumbersome. Work is being done to correct this problem.

Recommendation: *The Bureau should ensure resources dedicated to outreach in each region have or develop the optimal skill sets necessary to engage effectively with stakeholders while balancing resources available to be dedicated to enforcement. This would position outreach alongside enforcement as an important pillar of anti bid-rigging activities. At the same time, it is faithful to the strengths of the regional delivery model.*

Early Success

Progress is being made towards the achievement of anti bid-rigging objectives. As not all regions are at the same stage of implementation, the coming year would appear to be critical in moving from the production of outputs to the achievement of results.

Both internal and external factors were identified as having a potentially significant impact on the achievement of results. Internal factors focused on the pace of implementation and capacity building, while external factors included the priority placed upon economic crime, and the extent of cooperation by parties in a case.

In order to facilitate further progress, it will be important to have greater clarity around the outcomes to be achieved and associated performance indicators and targets. This will help direct planning to fill performance gaps.

Performance Measurement Plan

While indicators in the CMB Strategic Work Plan can be used to measure the impact of anti bid-rigging efforts in the short term, a performance measurement plan does not currently exist to assess the achievement of longer term results. In addition, targets have not been developed to allow for a rigorous assessment of results over time.

There is an opportunity to coordinate work on performance measurement with Bureau-wide work being done by the Performance Measurement Working Group. Further, results could be documented in a Results-Based Management Framework (RMAF) and indicators integrated into the Bureau Information Management System (BIMS).

Target setting against the performance indicators for outcomes and outputs, and the ensuring that key enablers such as people and funding are in place to achieve the targets, are often done through a business planning process. This approach appears to be appropriate for the Bureau's anti bid-rigging activities.

Recommendation: *During FY 2008-2009, the Bureau should prepare a Results-Based Management and Accountability Framework (RMAF) for its anti bid-rigging activities. This would involve validating the logic model and developing a performance measurement strategy and evaluation strategy. Performance information should then be gathered for the performance indicators for each logic model output and outcome. Performance gaps should be analyzed and targets for the related performance indicators should be set through a business planning process that would also consider requirements for enablers such as human resources. This planning process should inform the Five-Year Regional Staffing Plan.*

Cost Efficiency and Cost Effectiveness

The question of program cost-efficiency and cost-effectiveness cannot be answered directly at this time, due to a lack of data. The development of a RMAF and Business Plan for the initiative should help to address this gap.

The assessment of cost-efficiency and cost-effectiveness will become more important over the coming years. During the last two to three years, the program has gone through an investment period to build capacity. It is realistic to now begin to see returns on this investment.

1. Introduction

1.1 Background

As an independent law enforcement agency, the Competition Bureau contributes to the prosperity of Canadians through protecting and promoting competitive markets. The Competition Bureau is headed by the Commissioner of Competition, the law enforcement officer sanctioned by Parliament with the preservation of a competitive marketplace in Canada. The Commissioner's legislative authority is to maintain and encourage competition in Canada in order to:

- Promote efficiency of the economy;
- Expand opportunities for Canadian enterprises in world markets;
- Ensure that small and medium-sized businesses have equitable opportunities; and
- Provide consumers with competitive prices and product choice.

The Commissioner's responsibilities are administered through the Competition Bureau.

The Bureau sets priorities in three areas: enforcement, advocacy and management. Four enforcement priorities have been identified for the 2007-2009 period (see Exhibit 1.1), one of which is domestic cartels and bid-rigging².

The Criminal Matters Branch (CMB) administers and enforces criminal provisions of the *Competition Act (Act)*, including those covering conspiracies such as bid-rigging. CMB carries out enforcement, outreach and compliance activities in the National Capital Region (NCR) and in five regional offices located across the country.

Combating bid-rigging is not a new activity for the Bureau; however, there have been changes in delivery methods. Activities to combat bid-rigging have been distributed in part to regional offices. In support of these new activities, capacity is now being built (see section 2.6). This mid-term evaluation has been conducted to provide feedback to the Bureau on their efforts to date to combat bid-rigging.

Exhibit 1.1

Legislative Authority: The Commissioner is responsible for the *Competition Act*, and the three labelling statutes – *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, and *Precious Metals Marking Act*.

Competition Bureau's Enforcement Priorities for 2007-2009:

1. Domestic cartels and Bid-rigging
2. Mass Market Fraud
 - Target schemes that exploit Canadians
 - Maximize general deterrence
3. Electronic Marketplace
 - Target fraudulent and misleading health performance claims
4. Mergers and Abuse of Dominance
 - Clarify key enforcement principles

² In April 2008 the Bureau confirmed that these priorities would extend to 2011.

1.2 Study Objective

This report presents the findings, conclusions and recommendations of the mid-term evaluation. The evaluation focuses on the initiatives put in place and the activities carried out by the Bureau across the country to combat bid-rigging.

This evaluation was initiated by the senior management of the Bureau, for internal use, and was managed by the Audit and Evaluation Branch of Industry Canada. The evaluation itself was completed by BMB Consulting Services Inc. An Evaluation Study Steering Committee with government and non-government members advised the evaluation team at key points throughout the project. The membership of the Steering Committee is listed in Annex A.

The purpose of this mid-term evaluation is to provide information to assess implementation and identify areas for improvement. It also provides a baseline / interim report card that could be used for comparative purposes in future potential evaluations. The evaluation questions/issues identified for inclusion in this evaluation are as follows³:

Rationale

1. What is the size of the Canadian procurement market (based on publicly available information and interviews), which key sectors are involved, and what is the extent of the need for this initiative (i.e. how big is the problem of bid-rigging across the country)?
2. Based on existing literature and interviews how does this compare with the situation in other countries (i.e. United States, Australia, and United Kingdom)?
3. In the absence of existing estimates, what approaches could be used to measure the extent of the bid-rigging problem?
4. What are the net benefits of competitive bidding as opposed to, for example, a sole sourcing model?
5. What are the incentives/disincentives for individuals or companies to engage in bid-rigging?
6. What are the incentives/disincentives for organizations operating in different sectors (e.g., construction, health) in using tendering/procurement processes to:
 - identify;
 - take effective measures to prevent; and

³ Observations within the scope of this evaluation but of a more operational nature were communicated to the program under separate cover.

- address suspected or actual bid-rigging activities (including public/private processes, levels of decision-making, request for tender design and policy and program implementation, perceptions, etc.,)?

“Public” includes Federal, Provincial and Municipal levels, academics institutions, schools and hospitals. “Private” includes everything that is not “public”.

7. What is the role of the Federal Government (as policy maker), the Competition Bureau and other key stakeholders/partners (e.g. procurement offices in the private or public sector, including PWGSC) in dealing with this issue?
8. Is there overlap or duplication of efforts?
9. What public policies or practices at the federal level facilitate or impede anti bid-rigging efforts?

Program Design and Delivery

1. Is the current program regional and sectoral design appropriate, given the nature and context of the issue?
2. Is the anti bid-rigging program well marketed?

Program Implementation and Success

1. Is the Competition Bureau making progress towards the achievement of its anti bid-rigging objectives?
2. Is the program being implemented as planned, within the expected timelines and budget?
3. Does the staff responsible for implementing this initiative have the right resources, tools and skills required to carry out their responsibilities with respect to bid-rigging?
4. Has a performance measurement plan been put in place to assess the achievement of objectives over the short, medium and long term?
5. Has there been an increase in awareness among key stakeholders of the potential for/existence of bid-rigging across the country (e.g. the degree of adoption of certificates of independent bid)?
6. Are there any issues which significantly impact (both positive and negative) on the success of the program?

Cost-Effectiveness / Alternatives

1. Is the initiative cost-efficient and cost-effective?
2. Based on the experience of other countries (i.e. United States, United Kingdom and Australia) what alternative approaches exist to deal with bid-rigging?
3. To what extent should the program extend to related non-antitrust offences (e.g. kickbacks, organized crime, etc)?
4. What are the resource implications in the event that alternative approaches are implemented?

1.3 Approach and Methodology to the Evaluation

The mid-term evaluation was conducted in two phases. In phase 1 a logic model and detailed evaluation plan were developed, and are documented in the report, *Evaluation Planning Report, Final Draft*, dated July 27, 2007. In phase 2 the evaluation plan was implemented.

Phase 2, the evaluation, had three major outputs / deliverables:

- A preliminary deck outlining key findings and conclusions of the evaluation;
- An interim draft report; and
- The final report.

The overall evaluation strategy was based upon the collection and analysis of multiple lines of evidence. These lines of evidence were chosen to ensure that findings, conclusions and recommendations would be meaningful. The methodologies for data collection, analysis and presentation were designed to ensure reliable, valid and credible information were provided.

Evidence was drawn from six major sources:

- Document review;
- Bureau Information Management System (BIMS);
- Literature review of published sources;
- Stakeholder consultations:
- Case studies; and
- Comparisons with three other countries.

Each of these methodologies is described in detail in the following sub-sections.

1.3.1 Document Review

A wide range of documents were collected and reviewed to provide insight about the Bureau. These documents provided the broad context on the Bureau's anti bid-rigging activities, and related plans, processes and results. Documentation was also collected on international approaches and perspectives. Where appropriate, specific documents are referenced and footnoted in this report.

The documents were arranged in an Excel workbook, available under separate cover. An entry was made for each document, providing its name, source, a brief description and its relevance to the evaluation issues.

The documents were organized into the following sections:

- Canada – 71 documents
- U.S. – 23 documents
- Australia – 23 documents
- International Competition Network (ICN) – 8 documents
- OECD – 20 documents
- U.K. – 33 documents
- Other international – 29 documents

The document review was used to answer evaluation questions related to rationale and program design, delivery and implementation.

1.3.2 Bureau Information Management System (BIMS)

The Bureau Information Management System (BIMS) is an administrative database in which case information is stored, compiled and tracked over time. The system tracks case information, through entries made against a standardized listing of types of "events". For each case, basic profile information and event data are captured. When it was created in 2001, data dating back to 1997 related to section 47 of the Act were entered into the system.

The information in the system is used to measure results against performance standards for various phases of the case life cycle. A number of standardized reports are created for use by management.

The number of cases of bid-rigging is not large. For example, between early 2001 and mid-November 2007, there were 105 complaints or information requests related to bid-rigging and 34 matters (investigations) recorded in BIMS. Given this relatively small number of cases, and the system's filtering capability, information from BIMS was extracted, with the assistance of staff responsible for BIMS, from the standardized reports and then manually analyzed.

BIMS data was used to answer evaluation question related to program design, delivery, implementation and success.

1.3.3 Literature Review

The literature review encompassed previous reports, relevant studies, and published papers that relate to various aspects of anti bid-rigging activities in Canada and around the world. It was used for the most part to answer questions related to program rationale.

The Bureau's Resource Centre has access to a number of specialized databases and systems and was asked to undertake the literature search. A briefing session was held with the Resource Centre staff, at which time it was agreed that the search would focus on the following sources:

- Books and reference material in the Resource Centre concerning the history of competition and bid-rigging law in Canada;
- Relevant, peer-reviewed, economic and legal studies related to bid-rigging; and
- Market research studies that could be harvested on a page or chapter basis.

The researchers in the Resource Centre made use of the following search engines, databases and websites for the literature search:

- Business Source Complete
- Canadian Business and Current Affairs
- EconLit with Full Text
- Eureka.cc and CEDROM-SNi
- Factiva
- National Bureau of Economic Research (NBER)
- NetLibrary
- Amicus
- Dialog
- Infomart Online
- Nexis
- FirstSearch and WorldCat
- Profound
- TraceIT
- Statistics Canada publications
- Google Scholar

Broad search terms were used to identify potential sources of information. The search results were subsequently filtered by the consultants in order to identify the most relevant papers and research reports. As a result, 53 documents that appeared to address the research questions were selected for further review. This review, along with the document review, yielded 21 literature sources, listed in Annex B, and referenced with footnotes in this report.

1.3.4 Stakeholder Consultations

Key respondent interviews were conducted, either in-person or by telephone, with stakeholders inside and external to the Bureau. The interviews were a key source of information for all the issues included in the evaluation.

Standard interview guides, specific to each stakeholder group, were used. Interview notes were prepared for each completed interview. A total of 46 interviews were held, with the following distribution:

- Federal government departments and agencies – 5;
- Provincial governments, health care and schools – 8;
- Associations – 10;
- Private companies – 2;
- Law firms – 2;
- Foreign antitrust organizations – 3;
- Competition Bureau – Executives – 9;
- Competition Bureau – Program staff – 6;
- Competition Bureau – Electronic Evidence Unit – 1.

A listing of the organizations and individuals interviewed is presented in Annex C.

1.3.5 Case Studies

The main function of the case studies was to provide a better understanding of specific issues related to bid-rigging. Case study subjects were identified based on information provided during the interview process and suggestions were brought forward to the Project Committee for discussion and approval. Five topics were chosen for the conduct a more in-depth examination. They are:

- Electronic Evidence Unit – activities and challenges faced when dealing with electronic records as evidence;
- Regional capacity building and delivery – outreach in the Quebec Region as an example;
- E-marketplaces;
- Educational programs; and
- Illustration of a straightforward versus complex process.

The number of case studies was reduced from five to four as the Electronic Evidence Unit case and the illustration of a straightforward versus complex case contained several common elements. The resulting case study is focused on a complex case involving electronic evidence.

The four case studies are described in Annex D. Information for the case studies was collected through a document review (including websites) and internal and external interviews. The case studies, where relevant, are referred to in this report to provide support to the findings for various evaluation questions.

1.3.6 Comparisons with Three Other Countries

In order to better understand the international context, a comparative analysis of the approaches taken in other countries to combat bid-rigging was undertaken. Given their similar economic, legal and cultural environments, the United Kingdom, Australia and the United States were selected as the comparator countries. Basic information about each of the three countries' approaches to combat bid-rigging, obtained from the organizations' websites, is shown in Exhibit 1.2. In addition to the document review, interviews were conducted with representatives from each of these countries. An interview guide was developed in order to draw out the parallels or reveal the differences between the approaches taken in these three countries versus Canada. This additional information is presented in Annex E.

Like Canada, these countries consider bid-rigging to be contrary to their antitrust laws, although Canada is unique in having a specific section of its legislation dealing with bid-rigging. As well, all three comparator countries have leniency or immunity programs, and complement enforcement with outreach activities.

Exhibit 1.2: Basic Contextual Information about the U.K., Australia and USA

	United Kingdom	Australia	United States of America
Legislation	<i>Competition Act 1998</i> <i>Enterprise Act 2002</i>	<i>Trade Practices Act 1974</i>	<i>Sherman Act 1890</i>
Responsible Organization	Primarily Office of Fair Trading	Australian Competition and Consumer Commission ACCC	Criminal and civil enforcement actions brought on by the Antitrust Division of the Department of Justice. Civil enforcement action brought on by the Federal Trade Commission. Law suits brought on by private parties.
Type of Offence	Civil for enterprises and Criminal for individuals. The criminal courts under the <i>Enterprise Act</i> .	Civil. Increasing support for criminal sanctions	Criminal and civil
Penalties	5,000 pounds to unlimited fines. Imprisonment 6 months or less to 5 years.	For a breach by a corporation, a penalty of up to a maximum of: -\$10Million or, when the value of the illegal benefit can be ascertained, 3 times the value of the illegal benefit or, when the value of the illegal benefit cannot be ascertained, 10 percent of the turnover in the preceding 12 months.	Fine of up to \$10 million for corporations and a fine of up to \$350,000 or 3 years imprisonment (or both) for individuals (for crimes committed before June 22, 2004). For crimes committed after June 22, 2004, the maximum fine is \$100 million for corporations and \$1 million for individuals, the maximum jail sentence is 10 years. This maximum fine can be increased to twice the gain or loss involved.
Outreach	Limited outreach for anti bid-rigging	Brochure style information guides on their website	Antitrust Division attorneys are available to provide training
Leniency / Immunity Program	Leniency program	ACCC immunity Policy for Cartel Conduct	Corporate Amnesty or Corporate Immunity policy

Sources: Organizational websites, and telephone meetings with officers in each organization

1.4 Limitations of the Study

The study design and methodology had the following limitations:

First, from the design point of view, the evaluation issues/questions were focused upon providing context around the question of Rationale and Relevance, rather than answering rationale and relevance questions directly. Similarly, as this is a mid-term evaluation, questions related to program success were focused upon establishing whether or not the program appears to be moving in the right direction, establishing the conditions for success and identifying signs of success, rather than a more rigorous impact analysis of the program's desired outcomes. These limitations in the study design recognized the current level of maturity of the program, especially in the relatively early days of the regionalization plan, as well as data and performance information availability.

Second, from the methodological point of view, the stakeholder consultation line of inquiry was designed to gather information from a number of respondents in a range of stakeholder segments. The respondents were chosen, for the most part, because they had had a significant interaction with the Bureau's anti bid-rigging activities. They were not chosen on a statistical sampling basis. This limits extrapolation of findings across the full universe of stakeholders.

Third, the stakeholder consultations did not include organizations or individuals who specifically had been complainants, immunity applicants or targets of an investigation. During the evaluation planning phase, inclusion of these groups was considered. However, data collection from these groups would likely have required surveys. Such surveys were considered to be more appropriate for a summative (final) evaluation looking at program impacts. Therefore, consultations with these groups were determined to be outside the scope of this evaluation at the planning stage.

These limitations were considered to be relatively minor in nature and do not compromise the findings, conclusions and recommendations presented in this report.

2. Profile and Context of the Anti Bid-Rigging Activities

2.1 Bid-Rigging Defined

Bid-rigging is defined under section 47 of the *Competition Act* and is a criminal offence. Before becoming a separate offence in 1976, bid-rigging was prosecuted under either the conspiracy provisions of the Act (section 45) or under the fraud provisions of the Criminal Code. These other provisions can still be applied; however, section 47 is considered to be the best way to proceed.

Bid-rigging occurs when there is a call or request for bids or tenders, and one or more bidders agree not to submit a bid, or two or more bidders agree to submit bids that have been prearranged among themselves, and, in either case, fail to make these arrangements known to the party issuing the call or request for bids or tenders.

A bid-rigging scheme can involve one or more of the techniques described in Exhibit 2.1. It is often seen hand-in-hand with other types of collusion and conspiracy, most notably, section 45.

Bid-rigging is a per se offence under the Act. A per se offence is one in which merely engaging in the conduct intentionally constitutes an offence. The effect of the conduct is irrelevant.

Individuals and corporations found guilty of bid-rigging may be sentenced to a fine at the discretion of the court (i.e., there is no maximum fine level). In addition, individuals may be further liable to imprisonment for a term up to five years. Prohibition orders and private actions are also available.

Bid-rigging is considered to be an example of hard core cartel behaviour, the most serious of all competition infringements. Bid-rigging is collusive and fraudulent and

Exhibit 2.1: Bid-Rigging Techniques

Cover Bidding: Also known as “complementary” or “courtesy” bidding, it occurs when one or more bidders agree to submit bids that are intentionally uncompetitive (for example, prices that are too high to be accepted or that contain terms that do not meet the specified requirements of the tendering authority). Such bids are not intended to be successful but, rather, they are designed to give the appearance of genuine competition.

Bid Suppression: An agreement among bidders to refrain from bidding, or to withdraw a previously submitted bid, thereby enabling the chosen company to win the contract.

Bid Rotation: An agreement to take turns being the successful bidder. The conspirators hope to spread the work so that every conspirator gets a “fair share” of the contracts at uncompetitive prices. The rotation scheme can be systematic or random. Sophisticated rotation schemes are less likely to produce easily detected bidding patterns.

Market Division: An agreement to allocate specific customers, products or geographic territories. For example, one conspirator might be designated to be the winning bidder on contracts that are let by particular government departments. In return, that conspirator would avoid winning contracts for government departments that have been allocated to other conspirators. A market-division scheme might also involve pre-determined amounts or percentages of the total business.

Subcontracting: Frequently part of a bid-rigging scheme. In exchange for agreeing to allow a co-conspirator to win a contract, a conspirator may receive sub-contracts, other business or cash payments, perhaps disguised as false invoices. SOURCE: Competition Bureau – internal note

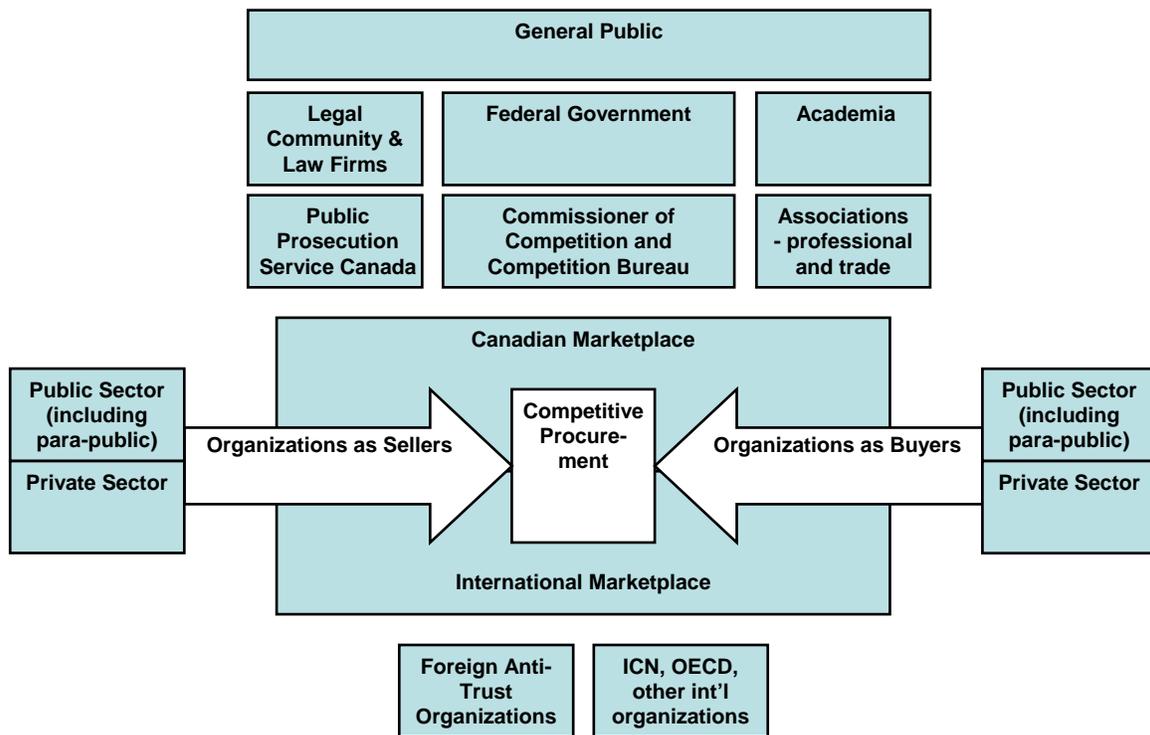
impacts both buyers and sellers. It undermines a competitive marketplace and the benefits that it provides. The victims include buyer organizations, competing suppliers and ultimately consumers.

2.2 Stakeholders

The issue of bid-rigging is of relevance to a range of stakeholders, as illustrated in Exhibit 2.2. Central to the issue is that part of the marketplace in which competitive procurement takes place. Organizations participate in this marketplace as buyers and/or sellers. Depending on where the organization is situated in the supply chain, it can be a buyer or seller, and therefore, either a potential victim or perpetrator of bid-rigging.

On the periphery of the marketplace sit a number of organizations that help to develop, guide, monitor and enforce marketplace rules, behaviours and transactions. The Competition Bureau is one of these organizations.

Exhibit 2.2 Stakeholder Landscape



2.3 Competition Bureau’s Approach to Combat Bid-Rigging

The Bureau’s approach to enforcement includes detection, enforcement and outreach activities. These are described in the following sub-sections.

2.3.1 Detection

Detection of a bid-rigging scheme is the critical first step. Since such schemes are covert, detection is usually difficult. In fact, most often, the Bureau becomes aware of potential cases through information provided by individuals who come forward to the Bureau. These individuals can be, among others, buyers/procurement officers or sellers/bidders who believe a competitive process has been circumvented, or former or current employees of organizations that have engaged in bid-rigging.

Two main mechanisms are used to encourage individuals to come forward: outreach activities and an immunity program. Among a number of goals, outreach activities carried out by the Bureau are intended to ensure that individuals have the awareness and knowledge necessary to suspect or identify a potential bid-rigging situation and make a complaint. Outreach activities are described in more detail in section 2.3.3.

The immunity program has been put in place to encourage corporations or individuals who have been or are currently involved in a bid-rigging scheme to come forward. Under the program, business organisations and individuals may admit their involvement in criminal activity and offer to co-operate with the Bureau's investigation and any subsequent prosecutions. The program offers immunity from criminal prosecution to individuals involved in a bid-rigging scheme who are the first to disclose an offence that has not yet been detected or, in cases where there is an ongoing investigation, who can provide additional evidence to support referral to the prosecutor. The process for obtaining immunity is described in Exhibit 2.3. The immunity program is considered by the Bureau to be the "single most effective weapon in detecting and fighting cartels",⁴ including those engaged in bid-rigging.

⁴ Speaking Notes for Sheridan Scott Commissioner of Competition "The Role of the Competition Bureau in a Competitive Canadian Economy", Institut des administrateurs de sociétés Montréal (QC), December 13, 2007, accessed on the internet (<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02542e.html>), February 17, 2008.

Exhibit 2.3
Immunity program under the *Competition Act*,
Competition Bureau Information Bulletin, October, 2007

C. Obtaining Immunity

10. A party implicated in criminal anti-competitive activity that may violate the Act may offer to co-operate with the Bureau and request immunity. A company may, but does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf. The Bureau will evaluate each offer of co-operation separately.
11. In this Bulletin, the term “immunity” refers to a grant of full immunity from prosecution under the Act. Where a party does not qualify for immunity, but the party co-operates with the Bureau, the Bureau may recommend that the DPP grant some form of leniency.
12. The Bureau encourages parties seeking immunity to come forward as soon as they believe they are implicated in an offence. It is not necessary for a party to have assembled a complete record of the information required when first contact is made with the Bureau. As the application process progresses, and before immunity is granted, the Commissioner and the DPP will examine an applicant’s immunity request to ensure that it complies with Program requirements.

Requirements

13. Subject to the requirements set out in paragraphs 14 through 18, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the DPP that immunity be granted to a party in the following situations:
 - a. the Bureau is unaware of an offence, and the party is the first to disclose it; or
 - b. the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the DPP.
14. The party must terminate its participation in the illegal activity.
15. The party must not have coerced others to be party to the illegal activity.
16. Where the party requesting immunity is the only party involved in the offence it will not be eligible for immunity.
17. Throughout the course of the Bureau’s investigation and subsequent prosecutions, the party must provide complete, timely and ongoing co-operation:
 - a. unless made public by the Commissioner or the DPP, or as required by law, the party shall not disclose its application for a marker and subsequent immunity, or any related information, to a third party without the consent of the Bureau or the DPP. Where disclosure is required by law, the party must give notice to and consult with the Bureau and the DPP on how to protect the interests of the investigation in light of the disclosure requirement. The party shall give this notice as soon as it becomes aware of the disclosure requirement;
 - b. the party must reveal to the Commissioner and the DPP any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the Act and in which it may have been involved;
 - c. the party must provide full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which immunity is sought. There must be no misrepresentation of any material facts;

- d. companies must take all lawful measures to secure the co-operation of current directors, officers and employees for the duration of the investigation and any ensuing prosecutions. Companies must also take all lawful measures to secure the co-operation of former directors, officers and employees as well as current and former agents, where doing so will not jeopardize the investigation and where the company has the consent of the Bureau or the DPP, as set out in (a). Companies shall encourage such persons to voluntarily provide to the Commissioner and the DPP all of their non-privileged information, evidence and records, in their possession or under their control, wherever located, that in any manner relate to the anti-competitive conduct; and
 - e. companies must facilitate the ability of current and former directors, officers, employees and agents to appear for interviews and to provide testimony in judicial proceedings in connection with the anti-competitive conduct.
18. Parties must co-operate with the Bureau's investigation and any subsequent prosecution at their own expense.
19. If the first party to apply for immunity fails to meet the requirements above, a subsequent party that does meet the requirements may be recommended for immunity.

The Bureau is also developing a written leniency policy to guide second and third parties on the benefits of cooperating with investigations in return for a recommendation for lenient treatment.

2.3.2 Enforcement

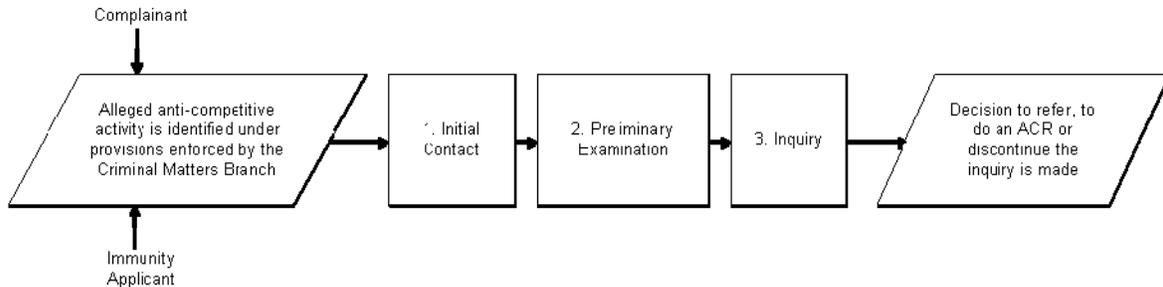
Major Steps

The major steps in the enforcement process are illustrated in Exhibit 2.4. The process is usually launched by a complainant or an immunity applicant. If the information provided raises concerns under the Act a “matter” is “opened”. A preliminary examination is then undertaken, and more evidence is gathered. This step may include additional interviews and a review of the complainant’s tender records. Evidence gathered can be in either hardcopy or electronic format, or from witnesses. (The challenges of electronic evidence will be discussed later in this section of the report.) All such evidence is captured in a system using specialized litigation support software.

If it is determined that the Commissioner of Competition has reason to believe that an offence had been or is about to be committed, an inquiry is initiated under section 10 of the Act. A decision is then made to refer to the Attorney General, to do an Alternative Case Resolution (ACR), or to discontinue. When a “no go” decision is made at any step in the process, or the matter is completed, then the Matter is “closed”.

Throughout the process, information about each matter is recorded in the Bureau Information Management System (BIMS).

Exhibit 2.4: Major Steps in the Enforcement Process



Extracted from *Macro Level Process Map of Administrative and Enforcement Activities Process in CMB* Prepared by: CMB, June 2006

Level of Enforcement Activity

The levels of enforcement activity are illustrated by the number of requests (i.e., information requests and complaints) and investigations (i.e., matters as described above) recorded in BIMS.

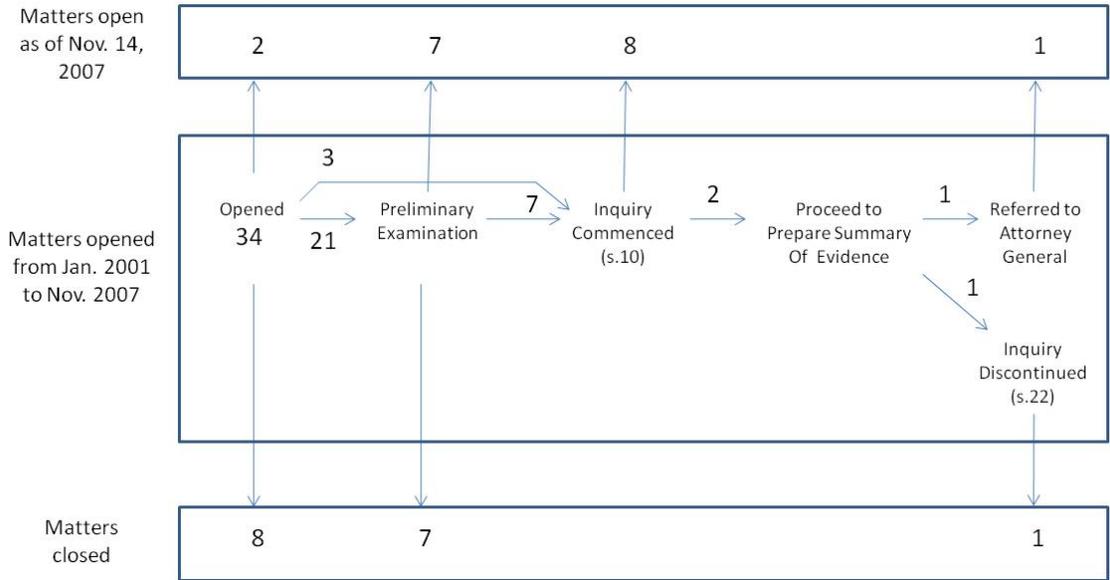
Requests: Between April 2001 and November 2007, there were 47 information requests and 58 complaints that involve section 47 bid-rigging.

Investigations: Between January 2001 and November 2007, 34 matters that involve section 47 were opened. Of these 34 matters, 14 also involved other sections of the Act. Overall, bid-rigging is involved in approximately 1/3 of the CMB cases since 2001.

The progress and status of the section 47 matters are shown in Exhibit 2.5. For example, of the 34 matters, 8 were closed as of November 14, 2007, 21 moved to preliminary examination, 3 moved directly to the commencement of an inquiry, and 2 are still at this stage. Of the 21 matters that moved to preliminary examination, 7 were closed at this stage, 7 moved on to inquiry, and 7 are still at this stage. In total 16 matters were closed, and 18 remain active at various stages.

The 18 active matters are distributed across the country, in each region, including the NCR. The vast majority of the matters were triggered by complaints. However, three matters (since the start of 2006) were triggered by immunity requests.

Exhibit 2.5: A Snapshot of Investigations Activity, as of November 14, 2007



Data Source: As reported in BIMS. Filtered for Criminal Matters Branch and Section 47. *Matter List* and *View Matter* reports run on Nov. 14, 2007.

The investigation process shown in Exhibit 2.5 represents a high level process map. The complexity of the detailed process is illustrated in the process map in Annex F.

2.3.3 Outreach

Outreach is a key activity to support prevention (through awareness building) and to increase detection (through knowledgeable buyers and sellers). Outreach activities include communications materials (such as the Information Bulletin on the Immunity Program), web-based materials (including the interactive Bid-Rigging Presentation), and face-to-face presentations, delivered by managers and staff in the NCR and regions. A typical presentation includes information about the Competition Bureau and its role, bid-rigging and how it is dealt with in the Act, the importance of and benefits from taking action to deter bid-rigging and practical suggestions of what to look out for.

Of particular note is that, over the past 2.5 years, 99 outreach presentations reached almost 3,300 attendees across the country, across a broad range of organizations – e.g., federal, provincial and municipal governments; health care; schools; associations – professional, trade; and companies. The distributions of outreach presentations by region and by type of organization are shown in Exhibits 2.6 and 2.7 respectively.

Exhibit 2.6: Presentations during the Last 2.5 Years by Region

	NCR	Atlantic	Quebec	Ontario	Prairies	Pacific	Totals
2005-2006							
No. of Presentations	4	4	7	7	9	13	44
Estimated No. of Attendees	60	113	342	292	230	216	1273
2006-2007							
No. of Presentations	3	5	14	10	9	4	45
Estimated No. of Attendees	90	61	455	414	205	235	1460
2007-2008 (1st 6 mo.)							
No. of Presentations	1	1	2	2	1	3	10
Estimated No. of Attendees	200	2	45	103	18	165	533
Total over 2.5 years							
No. of Presentations	8	10	23	19	19	20	99
Estimated No. of Attendees	370	196	842	809	453	616	3266

Exhibit 2.7: Presentations during the Last 2.5 Years by Type of Organization

Type of Organization	2005-2006	2006-2007	2007-2008
Federal Government		2	
Provincial Governments	7	10	1
Regional or Municipal Governments	8	7	1
Health Care	10	5	1
Schools	2	5	
Associations – Trade	4	3	
Associations – Professional	8	5	3
Companies	2	3	1
Other	3	5	3
Totals	44	45	10

2.3.4 Outcomes

The activities and outputs outlined in the previous subsections contribute to the achievement of a range of outcomes. These outcomes specify the benefits, impacts or consequences that the anti bid-rigging initiatives seek to influence.

The immediate outcomes, those over which the Bureau has the greatest influence, are that:

- Cases are brought to resolution in a timely and effective manner;
- Tenderers are well informed of the risks of bid-rigging and strategies to avoid it; and
- Governments, businesses and consumers are aware of the benefits of competitive bidding and the role of the Competition Bureau.

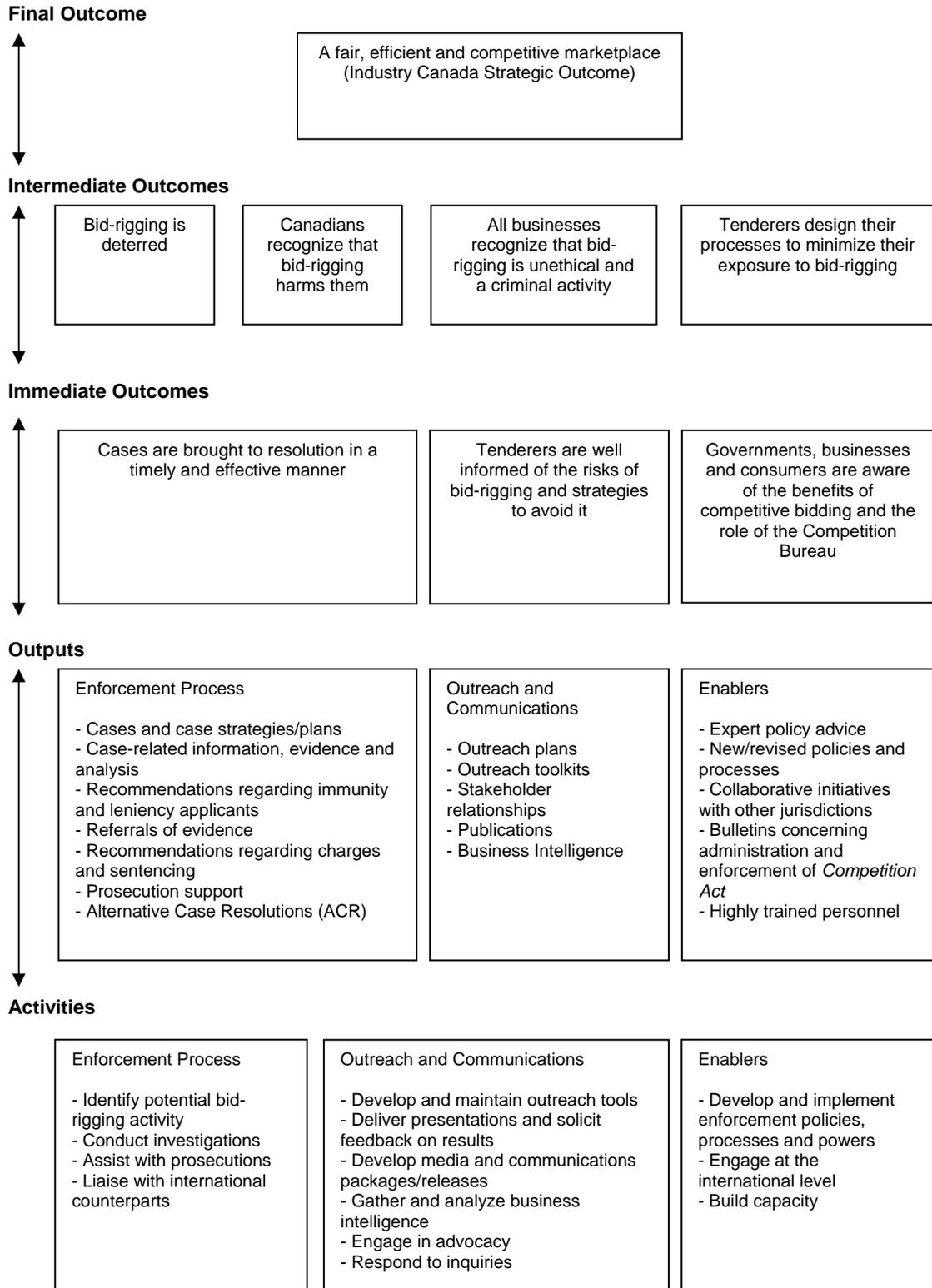
The intermediate outcomes, those that the Bureau influences and contributes to, but also are influenced by other parties, are that:

- Bid-rigging is deterred;
- Canadians recognize that bid-rigging harms them;
- All businesses recognize that bid-rigging is unethical and a criminal activity; and
- Tenderers design their processes to minimize their exposure to bid-rigging.

The final outcome is the Industry Canada Strategic Outcome – A fair, efficient and competitive marketplace.

The outcomes, outputs and activities are displayed as a logic model in Exhibit 2.8.

Exhibit 2.8: Logic Model for Anti Bid-Rigging Activities



2.4 Alignment with the Conformity Continuum

The anti bid-rigging initiatives are aligned with the Conformity Continuum, which guides the Bureau’s approach to administration and enforcement of the *Competition Act*, and the three labeling statutes. As noted in the *Conformity Continuum, Information Bulletin*:

The Bureau’s commitment to educate the marketplace is complemented by the availability and promotion of several forms of voluntary compliance. For businesses and individuals who disregard the law or fail to take advantage of the opportunities for voluntary compliance, the Bureau will take the necessary action to respond to non-conformity.

The shaded boxes in Exhibit 2.9 show how current anti bid-rigging activities map onto the full spectrum of tools/instruments available across the Conformity Continuum.

Exhibit 2.9: Alignment of Anti Bid-Rigging Activities with the Conformity Continuum

Conformity through Education			Facilitating Conformity		Responses to Non-Conformity		
Publications	Communication	Advocacy	Monitoring	Voluntary Compliance	Suasion	Consent	Adversarial
Information Bulletins	Speeches	Interventions	Information Centre	Advisory Opinions	Information Contacts	Negotiated Settlements	Prosecutions
Enforcement Guidelines	Seminars	Representations	Pre-notification	Pre-market Assessment	Information Letters	Consent Orders	Tribunal Applications
Annual Report	Trade Shows	Policy Development	Targeted Inspections	Advance Ruling Certificates	Warning Letters	Consent Prohibition Orders	Product Seizures
News Releases	Web Site	Liaison	Marketplace Contacts	Corporate Compliance Programs	Compliance Meetings	Undertakings	Contested Prohibition Orders
Discussion Papers	Media Contacts	Partnerships	Practitioner Contacts	Voluntary Codes		Corrective Notices	Injunctions
Reports	Videos	Research	Consultations			Voluntary Product Recalls	
Pamphlet Series							
General Application				Specific Application			

Reference: *Conformity Continuum, Information Bulletin, page 3*

2.5 Resource Levels

The *CMB 5 Year Regional Staffing Plan*, dated April 2007, projects an increase in regional resources devoted to criminal matters from 10 Full Time Equivalents (FTEs) on April 1, 2006 to 24 this fiscal year (Year 2) and 32 by 2010-11 (Year 5). Note that not all of these positions are filled at the beginning of the year. Staffing actions, in several cases, are expected during the year.

At least at the outset, the expectation is that a high percentage of the regional resources will be devoted to section 47 anti bid-rigging compared to other sections of the Act. As a per se offence, bid-rigging cases are less complex compared to cases for which an undue impact on competition is required to be proven. However, in later years other types of criminal cases could be handled in the regions as their capacity and experience increase.

The resources are “fenced” in the larger regional offices (Pacific, Ontario and Quebec), meaning that they can only be allocated to CMB work. They are “unfenced” in the smaller regional offices (Prairies and Northern, Atlantic), meaning they can be used for both CMB and Fair Business Practices Branch work. In the smaller offices, this is done to ensure a critical mass of people to support both branches.

The estimate of resources dedicated to anti bid-rigging for the National Capital Region is 6 FTEs, or approximately 15% of the 39 FTEs currently allocated to CMB.

Exhibit 2.10: Resource Levels and Distribution by Region

Year	NCR	Atlantic (unfenced)	Quebec (fenced)	Ontario (fenced)	Prairies & Northern (unfenced)	Pacific (fenced)	Total
April 1, 2006	6	2	2	3	1	2	16
Year 1: 2006-07	6	3	5	5	2	4	25
Year 2: 2007-08	6	4	6	5	4	5	30
Year 3: 2008-09	6	4	7	8	3	5	33
Year 4: 2009-10	6	4	9	10	3	5	37
Year 5: 2010-11	6	4	9	10	4	5	38

Source: *CMB 5 Year Regional Staffing Plan*, April 2007 for all data except National Capital Region (NCR) figures. NCR figures estimated by CMB executive. Regional figures are for criminal matters work. In early years, the vast majority of this criminal matters work in the regions is focused upon bid-rigging enforcement and outreach.

3. Findings and Conclusions related to Rationale

The following section of the report focuses on the current state of affairs related to the Competition Bureau's anti bid-rigging activities.

3.1 Procurement Market Size, Key Sectors and Size of Problem

Evaluation Question

What is the size of the Canadian procurement market (based on publicly available information and interviews) and which key sectors are involved?

What is the extent of the need for this initiative (i.e. how big is the problem of bid-rigging across the country)?

Findings

Size of Procurement Market and Key Sectors Involved

The key sectors involved in the procurement market were reported by interviewees to be the federal and other levels of government, health care organizations, schools, and private sector companies. Within particular areas of the country, one or more of these sectors may predominate, such as, for example, federal government procurement in the NCR.

A single consolidated information source on the dollar amounts by sector or their percentage share of overall procurement was not found in the literature search nor identified by interviewees. At the sector level, data on procurement volumes is more often available for the public sector than for the para-public and private sectors. This information, garnered from websites or published sources, was supplemented, where possible, with information from interviewees.

The information gathered is summarized below. Care must be taken in using this information for anything more than illustrative purposes – there can be considerable variation in the numbers obtained from various sources that we have not attempted to rationalize.

At the most aggregate level, the national system of public accounts provides information on total government expenditures on procurement. Using this information, which is considered comparable across countries, the OECD estimated that total government expenditures on procurement (excluding wages and defence procurement) in Canada amounted to 10.4% of GDP (1998 level). This compared with 6.18% in the US, 7.64% in

Australia and 9.97% in the U.K. The estimate for OECD member countries was 7.57% and for the EU countries was 8.03%⁵, which would seem to indicate that government expenditures on procurement in Canada are significant.

In terms of dollar volumes, the federal government tracks purchasing activity of departments and agencies subject to the *Government Contracts Regulations*. The total value of contracts awarded in 2005 for goods, services and construction (including both competitive and non-competitive contracts) totaled almost \$16 billion (over 410,500 contracts, including amendments)⁶. Since these figures do not include call-ups against Standing Offers, total federal government spending on goods, services and construction is actually higher.

For their part, Public Works and Government Services Canada (PWGSC), the common service supplier to federal government departments and most agencies, reported having purchased roughly \$12 billion worth of goods and services in 2006-2007⁷.

Provincial and territorial governments are required to report annually on all purchases at or above the threshold levels specified by the Agreement on Internal Trade. In 2005-2006, the latest date for which information is available, over \$11 billion was recorded⁸. This number understates total provincial and territorial government procurement, because of the threshold levels. Of note, it is probably safe to say that the over \$11 billion represents competitive procurement. However, below the Agreement on Internal Trade threshold, the practices of various provincial and territorial governments vary considerably as to their own thresholds for competitive procurement.

Aggregate information on spending by municipalities could not be found. However, an interviewee from a large municipality estimated total spending on procurement in their municipality at approximately \$1 billion per year.

As mentioned previously, information on procurement levels in the private sector is not widely available. The Canadian Construction Association estimates that the non-residential segment of the construction industry annually produces \$160 billion in goods

⁵ Government Procurement: a Synthesis Report (Working Party of the Trade Committee, OECD, October 31, 2001)

⁶ 2005 Purchasing Activity Report – Summary. For Departments and Agencies subject to Government Contracts Regulations. Obtained from Procurement and Project Management Policy Directorate, Treasury Board Secretariat. Earlier years are available on the TBS website.

⁷ 2006-2007 Departmental Performance Report: Public Works and Government Services Canada, accessed via the internet <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/svc/svc00-eng.asp>, on February 18, 2008.

⁸ From Reports on Agreement on Internal Trade, www.marcan.net:80/index_en/procure.htm. Figures exclude the MASH Sector (Municipalities, Academic, Schools, Hospitals). Figures could be understated since the report lists federal government procurement at \$9.3 billion compared to almost \$16 billion in the 2005 Purchasing Activity Report.

and services⁹. This production is, for the most part, procured by organizations in other sectors.

Large private sector organizations interviewed through the course of this evaluation provided estimates ranging from \$400 million to \$5 billion annually.

Clearly, it is difficult to identify the size of the procurement market in Canada, although from the limited information available, it would appear to be significant.

Competitive Processes

Interviewees with both public and private organizations confirmed that a high percentage of their procurement follows competitive processes. In their views, such processes can range from requests for proposals in a very open marketplace all the way to a very local circle of suppliers, or suppliers that have been pre-qualified or are on a standing offer arrangement set up through a competitive process. Their use of these processes brings that portion of their procurement within the scope of section 47 bid-rigging.

It is important to note, however, that the portion of contracts awarded through competitive processes, can be looked at from two perspectives: volume of transactions and dollar value of contracts. For example, in its *2005 Purchasing Activity Report – Summary*¹⁰, the federal government reports that approximately 22,500 contracts of \$25,000 and above were awarded for goods, services and construction. The total dollar value of these contracts was \$14.8 billion. Of these 22,500 contracts, 81% by volume and 90% by dollar value were procured through competitive processes. In contrast, 388,000 contracts below \$25,000, with a total value of \$1.2 billion, were awarded. A breakdown between competitive procurement and sole source contracts for the below \$25,000 contracts was not available. However, it is safe to say that a large percentage of federal government procurement, by dollar value of contracts, is done by competitive processes.

Size of the Bid-Rigging Problem

How big is the problem of bid-rigging across the country? This is a key question related to the extent of the need for the initiative. Data was sought concerning the numbers of cases, reach, volume of commerce involved and impact. The literature review did not reveal any studies that would help to fill these data gaps on the extent of the bid-rigging problem in Canada.

⁹ Estimate from the Canadian Construction Association. www.cca-acc.com

¹⁰ *2005 Purchasing Activity Report – Summary*. For Departments and Agencies subject of Government Contract Regulations. Obtained from Procurement and Project Management Policy Directorate, Treasury Board Secretariat. Reports for earlier years are available on the TBS website, www.tbs-sct.gc.ca

There are metrics available for detection based upon cases being investigated by the Bureau. The analysis of BIMS data reveals that 34 bid-rigging cases entered various stages of investigation between January 2001 and November 2007. These represent one-third of the 97 cases pursued by the CMB during the same period of time.

Data provided by the Bureau also shows that, as of January 2008, there were 10 active bid-rigging investigations, including cases in every region and in the NCR. Some of these cases were mixed section 45 / section 47 cases. The number of affected Requests for Proposal was approximately 230, and the number of potential targets (i.e., parties involved in potential bid-rigging schemes) was approximately 68. The volume of commerce affected by nine of these cases was estimated to be approximately \$400 million in total, while the tenth case involved over \$1 billion in commerce. These figures are estimates of the combined volumes of commerce related to bid-rigging and other related offences.

Given this data, the issue then presented is how the number of detected bid-rigging cases compares to how much bid-rigging is actually happening. Most Bureau interviewees thought that current detection rates are very low, and that bid-rigging is truly a big problem, that it is systemic in some sectors such as construction, and that it is prevalent at local, regional and national levels. In the Bureau's experience in conducting cartel and bid-rigging investigations, the persons involved generally take positive steps to conceal their conduct and avoid detection. Further, once a section 47 offence is uncovered, it is often discovered that it is a symptom of a broader problem.

In contrast, most interviewees who are procurement practitioners indicated that bid-rigging is a problem that they have seldom, if ever, seen or suspected. Many also said that their organizations have controls in place to mitigate against the risks of collusive behaviours – among bidders and between suppliers and their own staff. They did not see bid-rigging as being a frequent problem.

This dichotomy may be explained in part by differences in perception. While the Bureau tends to focus on the impact of bid-rigging, as measured by the volume of commerce/dollar value of the transactions, procurement officers may be more focused on the actual number of transactions. As a result, the perceived size of the problem may be assessed quite differently.

Conclusions

Based upon publicly available information collected and interviews conducted in this evaluation study, there are data gaps related to the size of the Canadian procurement market, and the size of procurement in key sectors within it. A single consolidated information source on overall procurement was not found. That said, information collected from a number of sources (primarily websites and some interviewees) can serve to illustrate the size of the procurement activity in certain sectors and organizations

within them. However, aggregation of this data needs to be done with great care, because of differing definitions.

Interviewees from both the public and private sector reported using competitive processes in a high percentage of cases. This brings these transactions into the scope covered by section 47 of the Act. A review of available data on federal government procurement found that while the number of procurement transactions using a competitive process does not appear to be high, it represents a significant percentage of total dollar value of procurement.

There is agreement that bid-rigging undermines competition. However, there are two basic schools of thought on the volume of bid-rigging occurring in the Canadian domestic marketplace. The first school of thought is that it is a rather isolated problem. The small number of matters being dealt with by the Bureau, compared to the total number of procurement transactions, is used to illustrate this position. The second school of thought is that bid-rigging is a much larger and systemic problem. Proponents of this school of thought point to the experiences of other countries with respect to international cartels and high-profile cases in particular sectors of their economies. The number of matters identified by the Bureau is viewed by this group as a detection issue, rather than a true reflection of the size of the problem.

In the absence of sufficient data in support of either position, it is not possible to determine the size of the bid-rigging problem in Canada. There are information gaps in understanding the size of the problem in Canada – between how much bid-rigging is being detected and how much is actually occurring.

3.2 Comparison with Situation in Other Countries

Evaluation Question

Based on existing literature and interviews how does this compare with the situation in other countries (i.e. United States, Australia, and United Kingdom)?

Note that our focus in this question is upon the size of their bid-rigging problems.

Findings

Information concerning the overall size of the bid-rigging problem in the United States, United Kingdom and Australia was not found either in the literature review or from interviews with respondents in antitrust organizations. The findings in this section, therefore, focus upon metrics related to their current cases and other data they collect and analyze.

United States

At the federal level, the Antitrust Division, Department of Justice, is the sole criminal prosecuting authority for cartels, including bid-rigging. The cases that the Antitrust Division pursues are a portion of the total number of cases country-wide. For example, some of the individual states have antitrust legislation that can cover bid-rigging, and as a result there are cases investigated at the state level. Companies and individuals can also take cases to court through “private actions”.

The respondent from the Antitrust Division indicated that they do not try to track the amount of bid-rigging, nor do they undertake a detailed quantitative analysis of its impact on the economy. They do believe, based on anecdotal information, that there are fewer bid-rigging cases than in the past.

While the Antitrust Division does not conduct any in-depth analysis, they do track certain metrics. As of December 2007, the Antitrust Division was dealing with 139 grand jury investigations, of which 40% were potential cases of bid-rigging and 60% were investigations of price fixing or frauds. Over the last 4 to 5 years, typically there have been 100-135 grand jury investigations at any one time. Last year 6 cartel investigations were opened and 2 were closed. They also had 82 preliminary inquiries (complaints) last year, many of which opened and closed very quickly.

These metrics reflect the focus of the Antitrust Division, which is on the most pernicious cases. Cartels are its number one priority, particularly when the U.S. government is the victim. As such 75% to 80% of their cases involve the public sector.

One target area where bid-rigging has been found is disaster recovery. The Antitrust Division has been active with the Hurricane Katrina Fraud Task Force, as well as with the National Procurement Fraud Task Force set up to deal with similar reconstruction issues in Iraq. These are examples of instances where large amounts of money have been focused on the rebuilding of critical infrastructure and where, due to the emergency situation, due diligence is likely to be lessened.

United Kingdom

The Office of Fair Trading (OFT) deals with the investigation of cartel offences, including bid-rigging. As of December 2007, the domestic cartel work relating to the construction industry was almost exclusively focused on bid-rigging and, more specifically, on one particular large case.¹¹ The case originally arose out of allegations of bid-rigging brought forward by a hospital in the East Midlands. In total, 57 companies were raided during the period 2004-2006. When all of the evidence was gathered together, the case involved several thousands of tenders, many hundreds of companies

¹¹ The antitrust organization in the Netherlands is also in a midst of a construction case with similar size, scope and situation.

and 3 billion pounds sterling in contract value. A Statement of Objectives was issued in this case in April 2008 indicating that 112 construction companies face heavy penalties due to the alleged bid-rigging activity¹².

The OFT suggested that it is not possible to extrapolate directly from the construction case to other industries. The construction industry seems particularly prone to bid-rigging due to the fact that much of the work is still obtained through tenders and competitors seem to have close links which facilitate collusive behaviour. The OFT prefers to build cases on evidence it obtains from leniency applicants or through its investigative powers. More recently, the OFT has started to undertake research on certain sectors which would support strategic and tactical decisions on which sectors to investigate.

At the time of this study, the OFT was also commissioning an evaluation study to get a better idea of the impact of cartel enforcement activity on the construction industry. The purpose of the evaluation was to establish the effectiveness of the OFT's activities in relation to cartel activity in the construction sector, particularly in relation to the impact of previous investigations. The independent study, undertaken by external consultants, was to include a survey of construction companies and their clients.

Australia

Information from our interview with individuals in the Australian Competition and Consumer Commission (ACCC) suggests that bid-rigging is not currently in the public consciousness. Currently, there are only two to three bid-rigging cases being handled by the ACCC at any one time. The small number of cases is considered a reflection of the current economic climate. Over the past 17 years, the level of public expenditures has increased dramatically as a result of unprecedented economic growth. Labour shortages have resulted in a sellers' market, and as a result, suppliers have been able to raise prices without thoughts of collusion.

This differs from the situation 10 to 12 years ago when a major case involving the construction industry was very much in the public eye. The bid-rigging actually occurred earlier, in the 1991-93 time period, when Australia was in a slight recession.

Until recently suppliers to the Crown were considered to have derivative Crown immunity – so cases of bid rigging in public sector contracts could not be prosecuted. Accordingly, this was an area of low priority. However, following a recent High Court decision reversing the position on derivative Crown immunity, the ACCC considers that this issue may take a higher profile.

¹² Press release 2008, "OFT issues statement of objections against 112 construction companies", accessed on April 21, 2008 at <http://www.of.gov.uk/news/press/today?prid=532634>

Conclusions

In the cases of the United States, United Kingdom and Australia, the three countries in the comparator analysis, there are data gaps concerning the size of their bid-rigging problems similar to those found for Canada.

All three comparator countries have experienced or are now publicly involved in large bid-rigging cases. However, because of different drivers and context, extrapolation of data and analysis from their cases to the Canadian situation needs to be done with care. In fact, respondents noted that they were careful in extrapolating across sectors within their own countries.

3.3 Approaches to Measure Extent of Problem of Bid-Rigging

Evaluation Question

In the absence of existing estimates, what approaches could be used to measure the extent of the bid-rigging problem?

Findings

Based upon the literature reviewed, limited research was found to answer the question of the overall extent and impact of the bid-rigging problem. Even though many would consider it the most important question to ask, it is a difficult question to answer, because bid-rigging is, by its very nature, secretive, and data is hard to obtain.

Two basic approaches, both of which rely on the use of econometric models, have been taken to measure the full extent of the bid-rigging problem.

Top-Down Approach

The first approach is a “top-down” approach and would take the following steps:

1. Calculate the total size of the procurement market and key sectors within it.
2. Estimate the proportion of the market size for which competitive bidding is used (and is therefore within the parameters of section 47).
3. For each of the key sectors determine the propensity for bid-rigging based upon incentives and disincentives for sellers and buyers.
4. Calculate the amount of procurement for which bids have been rigged by applying the propensity to the market size.
5. Estimate the percentage increase in prices due to bid-rigging schemes in the sector, and apply this to the amount of procurement calculated in 4.
6. Aggregate the results in 5 across all sectors to calculate a total.

The difficulties in this approach are the data gaps related to steps 1 to 3.

Bottom-Up Approach

The second approach is “bottom-up” and is dependent upon the cases that have been found and analyzed. It would involve the following steps:

1. Analyze a case or set of cases in a sector to determine the increase in prices that occurred.
2. Estimate the typical detection rate of bid-rigging cases in the sector.
3. Divide the increase in prices from 1 by the detection rate in 2 to calculate the total increase in prices cause by bid-rigging in that sector.
4. Assuming that detection rates and price increases are the same across sectors, extrapolate to the larger procurement market. Alternatively, other “bottom-up” analyses could be used to aggregate to the larger procurement market.

Based upon the literature review, the second case-driven approach appears to have been developed more fully.

For example, related to step 1 in the second approach, the literature review revealed a number of studies that have tried to quantify the costs of cartel activity and, to a much more limited extent, the costs of bid-rigging. Froeb et al¹³ estimated that a fairly typical bid-rigging scheme raised prices by over 20% for over 4 years. This result is similar with the price impacts more generally found in broad-based surveys of cartel research.

In most cases it may be difficult to quantify and establish (to the criminal standard) the actual economic harm resulting from cartel behaviour. In such cases, proxies must be used to estimate economic harm for sentencing purposes. The proxy most commonly used by the Bureau in joint sentencing submissions where parties have pled guilty to a

¹³ What is the effect of bid-rigging on prices? (Luke M. Froeb, Robert A. Koyak, Gregory J. Werden, Economics Letters, Volume 42, 1993)

Hard Core Cartels - Harm and Effective Sanctions (OECD Policy Brief, May 2002)

Recent research on overcharges in cartel cases, based on a review of a large number of cartels, estimated that the average overcharge is somewhere in the 20 percent - 30 percent range, with higher overcharges for international cartels than domestic cartels.

Cartel overcharges: Survey and Meta-Analysis (John M. Connor, Yuliya Bolotova, International Journal of Industrial Organization, Vol 24, Issue 6, November 2006) - Estimates cartel overcharges based on a large-scale survey. Overcharges have a mean value of 29% above the competitive benchmark price and a median of 19%. International cartels were found to obtain overcharges that are 14 percentage points higher than cartels composed of participants from one nation. For each five additional years of cartel operation, the overcharge level rises by 4 percentage points. Cartels achieve lower overcharge rates in jurisdictions with strongly enforced antitrust laws.

cartel offence is the volume of commerce in Canada affected by the cartel multiplied by an ‘overcharge’ factor.

Volume of Commerce: The affected volume of commerce in Canada is calculated for each participant by aggregating the value of sales of the product in Canada that was the object of the anti-competitive agreement over the time period that the party participated in the offence. Where one or more parties did not directly participate in the market as part of the cartel arrangement, for example, where the party agreed not to enter the market or not to submit a bid in response to a call for tenders, the volume of commerce of the other cartel participants may be considered as the basis for calculating the economic harm resulting from the illegal conduct. In most cases, it is only necessary to include direct sales in Canada to determine volume of commerce. However, it may also be appropriate to include indirect sales to properly reflect the magnitude of the effects of the offence in Canada.

Overcharge factor: Numerous studies have estimated that quantitatively the degree of the ‘overcharge’ resulting from cartel activity is in the order of at least 10 percent. However, as noted above, this figure would not capture the totality of the potential or actual harm caused by a cartel. In assessing harm, the Bureau also considers the qualitative effects of the cartel such as the exclusion of consumers from the market as a result of higher prices (i.e. the deadweight loss) and general harmful effect of cartels on the Canadian economy. For this reason, the Bureau uses 20% of the volume of commerce affected as a proxy of the economic harm.

Related to step 2 in the second approach, Connor et al¹⁴ note that in 1986 the Assistant Attorney General for Antitrust, Douglas Ginsberg, opined that the enforcers detected no more than 10% of all cartels. Other experts from the U.S. and Europe have suggested detection probabilities of 10% to 33%. Ginsberg's estimate is probably out of date, since the U.S. amnesty program has probably resulted in more detection than in 1986. However, the authors of the study see no evidence to negate the 33% estimate. Whether these same percentages would apply to bid-rigging would need to be tested.

With steps 1 and 2 resolved, step 3 is a simple calculation. However, there is a significant challenge remaining in step 4. There are data and research gaps that would hinder both extrapolation across the full procurement market, and using sectoral estimates to simply aggregate for the market.

¹⁴ The size of cartel overcharges: Implications for U.S. and EU fining policies (John M. Connor and Robert H. Lande, *The Antitrust Bulletin*, Vol 51 No 4, Winter 2006)

Risk-Based Approach

The difficulties in applying the two basic approaches appear to have led to research on a third approach focusing more on anticipating and predicting where the risk of bid-rigging is greatest, rather than trying to measure its full extent.

From the point of view of an antitrust agency, this third approach may be most pragmatic, as it supports targeting efforts where the greatest results can be achieved, in terms of reducing the likelihood or probability of bid-rigging happening in the first place, and/or identifying and appropriately addressing it when it does happen.

In interviews, buyers and sellers could quickly point to high risk situations such as:

- Small number of suppliers, with limited differentiation;
- Where a long term relationship with a buyer is not important, or less important than that with other suppliers, e.g., some types of project-based work; and
- Where urgency of action may reduce due diligence and audit.

Risk has two important dimensions – likelihood or probability of the risk event happening, and its impact when it happens. Risk management is based upon choices as to how to mitigate the likelihood and/or impact of the risk event. Choices for risk management could be to do nothing¹⁵, or to implement various actions across the Bureau's Conformity Continuum (see section 2.5).

Both the OFT and ACCC indicated that they were also developing a risk-based approach, identifying target sectors. For example, a study by the OFT describes a method to identify sectors that may be subject to competition concerns¹⁶: Indicators suggested to identify these sectors are:

- the share of the domestic supply purchased by the public sector
- whether this is centralised
- the level and trend in supplier concentration
- the extent of supplier churn
- openness to imports
- market growth, especially growth in residual demand (which comprises private sector demand and exports), and
- various indicators of entry barriers unrelated to procurement.

The OFT study led to the identification of nine sectors that may be subject to competition concerns and are recommended for further examination:

¹⁵ For example, where there has been a purely technical breach of section 47 on a low dollar value contract and with no impact on the final award.

¹⁶ Assessing the impact of public sector procurement on competition - Summary (Office of Fair Trading, September 2004).

- Sewage and refuse disposal/sanitation;
- Manufacture of weapons and ammunition;
- Human health activities;
- Shipbuilding and repair;
- Manufacture of pharmaceuticals/medicinal chemicals and botanical products;
- Manufacture of cement, lime and plaster;
- Site preparation;
- Building of complete constructions or parts thereof/civil engineering;
- Manufacture of office machinery and computers.

This type of approach is also explored in the literature, although again at the level of cartels in general. For example, Harrington¹⁷ describes screening industries and sectors to identify traits conducive to cartels and behaviours that could be used to detect cartels. Again, the application of the approaches and findings of these researchers from cartels in general to bid-rigging would need to be validated.

Conclusions

Approaches to measure the extent of the bid-rigging problem exist, but have not been fully developed and tested in the Canadian context. One approach is “top-down”, starting from the universe of the procurement market, and working down to the size and impacts of bid-rigging. A second approach is “bottom-up”, starting with one or more cases, analyzing their impacts, estimating detection rates, and extrapolating the universe. The success of either approach would depend upon key data gaps being filled, which may not be possible.

A more pragmatic approach for an antitrust agency may be a “risk-based” approach, identifying those sectors and situations where the risk of bid-rigging, in terms of likelihood and impacts, is greatest. This approach is being developed by both the OFT and ACCC.

Recommendation

Over the short to medium term, the Bureau should increase its focus on advocacy through research in support of its anti bid-rigging activities. The goal of the research should be the development of an evidence base supporting risk-based targeting of sectors and situations where the risk of bid-rigging appears most acute. Opportunities to collaborate with research partners should be exploited.

¹⁷ Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion (Joseph E. Harrington Jr., John Hopkins University, January 31, 2006), and Antitrust Enforcement (Joseph E. Harrington Jr., John Hopkins University, September 29, 2005)

3.4 Net Benefits of Competitive Bidding

Evaluation Question

What are the net benefits of competitive bidding¹⁸ as opposed to, for example, a sole sourcing model?

Findings

Interviewees in both the public and private sectors noted that, in many cases, the benefits of competitive bidding can include:

- Better price, quality and service;
- Increased innovation; and
- Reduced dependency on one or a few suppliers.

In addition, public sector buyers indicated that they view competitive bidding as a more public process providing greater transparency.

However, in practice, it was suggested that there are many factors that determine the best sourcing model. Further, it was noted that this question, if interpreted as being biased towards the competitive bidding model as the ideal starting point, is the wrong question to be asking. Rather, all the potential sourcing options should be put on the table at the outset and considered in the decision-making process about the best procurement approach.

Factors that affect the assessment and choice of the best option include:

- Any political or public policy direction concerning the use of various options – e.g., a policy setting thresholds for competitive bidding versus sole sourcing;
- The nature of the procurement – e.g., a commodity versus a well-specified service versus a less well-specified product;
- The types of benefits – price, innovation – to be derived from each option in the particular instance;
- The process costs of each option, in terms of both dollars and time. The process costs of competitive processes can become especially significant for low dollar value contracts;
- The procurement practices used by the organization – e.g., lowest price wins, limited geographic scope of competition; and
- The interests of the buyer in establishing a long-term relationship with the seller.

¹⁸ The Bureau's anti bid-rigging efforts focus, by definition, on processes where a tender or competitive bidding process has already been chosen.

The result is that competitive bidding is not viewed as being the best sourcing model in every instance.

This assessment is corroborated in the literature. Washington¹⁹, in a review of the literature on procurement in the defense industry, notes that not all competitive procurements produce savings, and decision-makers should conduct a cost-benefit analysis before choosing competitive procurement to determine if that avenue will result in any savings. Tadelis and Bajari²⁰ suggest that competitive bidding is the preferred model for simple or moderately complex requirements that can be specified within moderate costs, and for which there are many potential competitors.

Conclusions

The best choice of procurement model depends upon many factors, including political and public policy direction, and a variety of costs and benefits. A bias towards competitive procurement models as the best starting point for selection is not justified in every situation. For example, competitive bidding models are best in particular circumstances, such as for procurements with relatively straightforward requirements that can be specified in a tendering document at a reasonable cost, and for which there are many potential competitors. In other cases, other procurement models may be preferred.

3.5 Incentives and Disincentives to Engage in Bid-Rigging

Evaluation Question

What are the incentives / disincentives for individuals or companies to engage in bid-rigging?

Findings

Incentives

Respondents in all stakeholder groups, both internal and external to the Competition Bureau, gave similar answers to this question. They suggested that the number one incentive to engage in bid-rigging is the money to be gained, by companies and individuals, that outweighs the risk of financial and other penalties that might be imposed on the company or individual if detected.

Beyond money, other incentives included:

¹⁹ A review of the literature: Competition versus Sole-Source Procurement (William N. Washington, Acquisition Review Quarterly, Spring 1997)

²⁰ Incentives and Award Procedures: Competitive Tendering versus Negotiations in Procurement (Steve Tadelis, Patrick Bajari, January 2006)

- Greater business certainty through more control of the marketplace;
- “Being part of the club” and “the way we’ve always done business”; and
- Sellers are sometimes required to bid to stay on eligible seller lists, even if they do not have the capacity or resources to perform if they win a particular tender.

Although care must be taken in applying the findings directly to the Canadian situation, from the literature, Dorée’s²¹ examination of collusion in the Dutch construction industry also noted situations that may encourage companies and individuals to engage in bid-rigging. In particular, risk perception was identified as an impetus for collusion. If firms feel they have similar high risks that can be reduced by collective action, the urge arises to talk about the risk, team up and take coordinated action. In addition, buyers’ discontent with performance can be a stimulus that drives firms to see themselves as companions linked by fate, creating a spirit of familiarity that can lead to collusion.

For those involved in the bid-rigging scheme, the collusion system helped to stabilize the workload and reduce their uncertainty about future workload fluctuations. Businesses were also less vulnerable to predatory pricing. In essence, from the supplier perspective, collusion created a more predictable and stable market environment.

Disincentives

In interviews, the major disincentives to bid-rigging mentioned by all respondents included:

- It is illegal and contrary to corporate values;
- The impacts of getting caught including fines and perhaps a jail term, the damage to the relationship with the buyers (including perhaps disqualification/debarment from future bidding opportunities), and the loss of reputation in the marketplace;
- The costs for participants creating and then managing a bid-rigging scheme; and
- The inherent risk in collaborating with individuals who are willing to break the law.

The experience of comparator countries supported these findings. A survey of U.K. companies conducted by the OFT²² found that compliance was motivated by the following factors (in order of ranking):

- Criminal penalties
- Disqualification of directors
- Adverse publicity
- Fines
- Private damages actions

²¹ Collusion in the Dutch construction industry: an industrial organization perspective (A.G. Dorée, *Building Research & Information*, 32(2), March-April 2004)

²² The deterrent effect of competition enforcement by the OFT (Office of Fair Trading, November 2007)

The U.S. DOJ notes similar disincentives for bid-rigging, citing fear of detection, fear of going to jail and disqualification from future bid opportunities as the major disincentives to bid-rigging.

Decision-Making

Generally, respondents, again from all groups interviewed, felt that perpetrators know that to engage in bid-rigging is wrong, and the decision to do so is a carefully weighed business decision. In other words, the incentives are judged to outweigh the disincentives.

Respondents also noted that the weights attached to the incentives and disincentives and, hence, the expected net benefits of engaging in bid-rigging can vary depending upon the situation.

- In a booming economy, when it is a suppliers' market, the money to be gained by bid-rigging may be less of an incentive, since suppliers can already set high prices.²³ In contrast, in a recession, the incentives to make more money and achieve enhanced control of the marketplace may be greater.
- In the case of a major one-off project, the long term relationship with the buyer may not be as important, and so the impact of getting caught (e.g. disqualification from future bidding opportunities) would be weighted less.
- If penalties are not significant, then the impact of getting caught again would be weighted less.

Conclusions

The incentives and disincentives for engaging in bid-rigging by sellers/suppliers are fairly clear. The incentives generally include real or perceived money to be made and greater certainty about future revenue streams. The disincentives generally concern the criminal penalties and other ramifications, the impacts of which, even when there is a low likelihood of detection, are significant in terms of perceived jail time, loss of reputation, and foregone business opportunities.

The seller implicitly weighs these factors and calculates the short and long term trade-offs. The weights can change given the circumstances, e.g., changes in the economic climate, or changes in the treatment of cases by the courts. Hence, the decisions made can also change over time.

Most perpetrators would appear to engage in bid-rigging deliberately rather than accidentally. Therefore, the case to be made to an individual or company contemplating or

²³ In contrast, in a booming economy, at least in the private sector, the incentives for identifying bid-rigging may be less, because the ultimate goal is to keep business going.

already engaged in bid-rigging needs to go beyond the core message that it is unethical and criminal, to an additional understanding that it is a losing business proposition both in the short and longer terms.

3.6 Incentives and Disincentives to Detect and Deal with Bid-Rigging

Evaluation Question

What are the incentives / disincentives for organizations operating in different sectors (e.g., construction, health) in using tendering / procurement processes to:

- Identify;
- Take effective measures to prevent; and
- Address suspected or actual bid-rigging activities (including public/private processes, levels of decision-making, request for tender design and policy and program implementation, perceptions, etc.)?
 - “Public” includes Federal, Provincial and Municipal levels, academics institutions, schools and hospitals. “Private” includes everything that is not “public”.

Findings

Incentives

Interviewees from all groups, both internal and external to the Competition Bureau, gave mostly consistent responses to this question. They suggested that the key incentives for buyers to detect, take measures to prevent, and address bid-rigging through their tendering / procurement processes are:

- Bid-rigging is illegal and there is an organizational obligation, including fiduciary responsibilities to shareholders and stakeholders, to stop it;
- Cost savings (e.g., research suggests that bid-rigging raises prices);
- Maintenance of the buyer’s reputation as a buyer;
- Maintenance of the company’s reputation as an organization supplying the marketplace; and
- Fear of potential audit.

It was also generally felt that public sector organizations may be viewed as particularly vulnerable targets because of their bureaucratic nature and lesser emphasis on the “bottom line”, and thus would have an extra incentive to be diligent.

Disincentives

The disincentives outlined by interviewees include:

- Time and cost of detection and follow-up;
- Impacts on the issuance of contracts and delivery of critical supplies;
- Embarrassment of having been victimized; and
- Damage to the organization's relationships with suppliers.

It was further noted that the time and costs of detection and follow-up are potentially getting higher. The buyers' side of procurement is not monolithic, but rather comprises many procurement officers, increasingly with a view of and accountability only for their specific part of a many layered procurement process. Officers are expected to be experts in the process, perhaps more so than experts in an area of procurement. As such, procurement officers are focused on individual transactions and are therefore limited in their ability to detect patterns of bid-rigging over time.

The literature review also points to similar disincentives and barriers. For example, Haberbusch²⁴ notes that:

- Bid prices depend on a number of factors such as labour costs, cost of materials, use of subcontractors, and firm characteristics, making it very difficult to identify bid-rigging;
- In some organizations there is a high level of turnover among procurement officers. Many are therefore not very familiar with the goods or services they are procuring and are less able to assess what would be a fair price;
- Procurement officers lack market incentives to minimize costs;
- Officers are often faced with subtle pressure to award the contract even though there may be indications that the process was compromised;
- Corroborating suspicions of collusion is time consuming and there is typically a need to proceed with the procurement as quickly as possible; and
- A suspicious buyer has no flexibility to negotiate, seek another bidder or test his or her suspicions.

Decision Making

Interviewees in procurement organizations noted that procurement staff are more proactive in their response to suspected or actual bid-rigging activities when they have the support of the senior management and there is a process in place that is used to escalate any issues. In this situation, the corporate and individual decisions are in alignment and uncertainty is diminished.

In the comparator country analysis, the U.S. has acknowledged similar concerns brought forward by procurement officers, and tried to provide them with responses to their concerns.²⁵

²⁴ Limiting the government's exposure to bid rigging schemes: a critical look at the sealed bidding regime (Kara L. Haberbusch, Public Contract Law Journal, Fall 2000)

²⁵ Price Fixing and Bid Rigging - They Happen: What they are and what to look for (Department of Justice, September 2000). This antitrust primer for procurement professionals seeks to assure purchasers that their

Conclusions

Incentives and disincentives for buyers represent the other side of the issue when compared to sellers (see section 3.5).

The incentives and disincentives for procurement organizations to identify, prevent and address bid-rigging are fairly straightforward. The organization makes a decision that trades off, amongst other things, the cost of detection and addressing it versus the financial and reputational losses due to failing to take appropriate action concerning bid-rigging.

Buyers are similarly affected by factors as are sellers, for example changes in the economic climate, corporate culture, or the attention generated by cases in the courts.

Therefore, the case to be made to an organization contemplating using tendering / procurement processes to identify, prevent and address bid-rigging also needs to go beyond the core message that bid-rigging is wrong and criminal, to one that emphasizes their role in combating it. They must also be led to understand that bid-rigging is a losing business proposition to them, both in the short and longer term.

3.7 Roles of Various Players, and Overlaps or Duplication of Efforts

Evaluation Questions

What is the role of the Federal Government (as policy maker), the Competition Bureau and other key stakeholders/partners (e.g. procurement offices in the private or public sector, including Public Works Government Services Canada (PWGSC)) in dealing with this issue?

Is there overlap or duplication of efforts?

concerns about reporting a suspected antitrust violation should be eased by how the Antitrust Division values and treats citizen complaints. It addresses concerns such as “But I Just Have a Suspicion”, “I Don’t Want to Get Anyone in Trouble”, and “I Don’t Want to be Identified”.

Findings

The federal government's policy role to combat bid-rigging is expressed through the Act. In interviews, there was consensus that the federal government needs to continue to play this role. Furthermore, not a single interviewee suggested that bid-rigging should be ignored, even when they have not experienced such situations or they think it is an infrequent problem.

Interviewees in all groups expressed support for the Bureau's key ongoing role to combat bid-rigging through awareness/education, compliance and enforcement activities and that this role be visible at a regional level. Further, efforts in these areas by the Bureau and other parties were seen to be complementary rather than overlapping or a duplication of effort.

Roles in Compliance – Federal Government Procurement

Within the federal government, the policy centre for contracting is the Procurement and Project Management Policy Directorate (PPMPD) in the Treasury Board Secretariat (TBS). Policies and regulations are executed by PWGSC (the common service supplier to government departments and many agencies), as well as by material management organizations in individual departments. The applicable legislation, policies and procedures include the *Federal Accountability Act*, the *Financial Administration Act*, the *Contracting Policy*, the *Code of Conduct for Procurement* and the *Supply Manual*.

TBS is the lead in supporting the Treasury Board's responsibility for the government's *Contracting Policy*. Its role includes contracting policy development and guidance, and capacity development. On the policy front, a major thrust is putting the *Federal Accountability Act* into practice through regulation and policies. This includes revisions to the *Financial Administration Act*. Discussions with federal government interviewees suggested that the regulations and policies will require bidders to make specific declarations regarding collusion in some situations, whereas in others it is covered implicitly when submitting a bid.

In September 2007, PWGSC posted on its website the *Code of Conduct for Procurement*. The Code outlines responsibilities of the vendor and speaks to collusion in the bidding process. The *Competition Act* is listed in the Code under Key Legislation and Policies. The Code is to be modified as new regulations are implemented under the *Federal Accountability Act*.

PWGSC's *Supply Manual* (the "bible" for acquisitions) gives direction to contracting officers in dealing with

Supply Manual Chapter 7 – Competitive Procurement

Bid Rigging/Collusion/Fraud

7D.430 (1994-06-23) The contracting officer must notify Legal Services and the director whenever there is an indication of possible bid-rigging activities, collusion or fraud. Legal Services will assist in subsequent discussions with the Bureau of Competition Policy pursuant to the 'Competition Act'.

potential instances of bid-rigging. It also lists a number of examples of possible bid-rigging activities. The manual, from 1994, makes reference to the Bureau of Competition Policy, suggesting that an update is required.

The majority of interviewees in the federal government did not consider bid-rigging a high priority because of the few instances that they have experienced. It was suggested that the current mechanisms in place are sufficient to execute their roles. However, it was noted, if bid-rigging could be demonstrated to be a significant problem, a government-wide policy directive could be issued to all procurement officials. Further, it was suggested that the place to highlight the issue would be the Treasury Board Advisory Committee on Contracts.

At the same time, other interviewees in the federal government or with previous experience in the federal government suggested that the current mechanisms, such as the Code of Conduct and direction in the Supply Manual or a government-wide policy direction may have limited impact. They perceive the real issue to be that federal government procurement officers do not have the tools to look for bid-rigging and there are limited corporate or individual financial or other incentives for buyers to look into the issue further.

Roles in Compliance – Other Players

Interviewees suggested that there are other organizations that play key roles in encouraging compliance.

The procurement organizations within private sector companies or public organizations (e.g., health care providers) put in place procurement policies and procedures that they believe act as barriers to collusive activities. They also provide training to their procurement staff on these policies and procedures, as well as conduct audits.

Private sector organizations²⁶ have codes of corporate compliance or responsibilities that speak to relationships with suppliers and illegal and unethical conduct. These codes are frequently developed with assistance from private sector law firms specializing in corporate law. In some cases, employees are required to be briefed on and to sign the codes on a regular basis. In support, law firms often present corporate compliance sessions to clients. The sessions may mention the issue of bid-rigging.

Trade associations may also play an active role. For example, the Canadian Construction Association²⁷ seeks to support and promote ethical business standards in the construction industry (non-residential) through the development of standard industry guides and

²⁶ A Google search and subsequent scanning of websites showed that companies such as Enbridge, IBM, Nortel, Suncor and CN have corporate level statements that include collusion. This search was intended to provide illustrative data rather than an inventory.

²⁷ Information about the Gold Seal Certification Program and contract documents is found at www.cca-acc.com.

contract documents. It endorses the Gold Seal Certification Program for a number of occupational groups. Going further, its current strategic plan calls for the development of a code of conduct for itself and its member firms. Such codes of conduct typically include a range of issues that would include illegal acts. However, they are also often voluntary without strong enforcement mechanisms or sanctions applied in case of wrongdoing.

Roles in Awareness / Education

The Competition Bureau, through outreach presentations by CMB in the NCR and other regions, plays an important role in awareness building. As demonstrated by its audiences for outreach presentations over the last 2.5 years, it has touched many of the organizations that deal with compliance.

Other organizations also play active roles in awareness building and education. Organizations that invite the Bureau to make an outreach presentation, or support having one when approached by the Bureau, obviously recognize the issue and welcome assistance in addressing it.

Professional associations provide training and certification of procurement professionals. Often, their programs have a contract law component²⁸. As identified in the case study on education and awareness, the Purchasing Management Association of Canada (PMAC), the Material Management Institute (MMI) and the Construction Institute all offer professional development programs that have components that include or could include the issue of bid-rigging. One regional office has already done outreach to PMAC, and a presentation was made to the last annual national meeting of MMI.

Professional associations such as PMAC, MMI and the Canadian Public Procurement Council, as well as national business associations such the Canadian Chamber of Commerce, do outreach through their national and regional conferences, and their hardcopy and e-copy communications (i.e., websites, magazines, newsletters) to their membership. Again there appear to be opportunities to leverage these communication channels to distribute anti bid-rigging outreach messages.

Universities, colleges and institutes provide courses in their business, law and occupational/trades areas that again deal with contracts and ethics. For example, a regional office has worked with the British Columbia Institute of Technology (BCIT) on the bid-rigging portion of their Forensic Investigation (Economic Crime Studies Option) certificate program²⁹. Another regional office, as part of outreach, gives an anti bid-

²⁸ An inventory of training and certification programs is available on the Canadian Supply Chain Sector Council website. This *Education and Training Programs Compendium* includes college and university offering and association offerings, for supply chain training (which includes procurement). The compendium is available at: www.supplychaincanada.org/assets/Compendium_website.pdf.

²⁹ See BCIT website: www.bcit.ca/study/programs/526eascert

rigging module as part of the ethics course offered by the Construction Institute³⁰. There appear to be opportunities to further develop these and other relationships with teaching institutions.

Conclusions

The roles of buyers, sellers, the Competition Bureau and others in dealing with the anti bid-rigging issue appear relatively clear to each party. Their efforts are seen to be complementary rather than duplicative.

Organizations interviewed who are involved in procurement, including those in the federal government, believe they are executing their roles adequately by deterring bid-rigging through their normal procurement policies, practices and systems. However, other interviewees suggest that the bid-rigging problem is just not being detected because of lack of the means to do so and appropriate incentives.

The Competition Bureau is expected to lead enforcement through section 47 of the *Competition Act*. It appears that the Competition Bureau will also be expected to continue to provide leadership on communications, outreach and monitoring.

There appear to be opportunities for the Bureau to exercise its leadership at the federal government level. Interviewees from the Bureau felt the organization should take an advocacy role influencing the regulations and procedures being put in place by federal government departments to implement relevant parts of the *Federal Accountability Act*.

Recommendation

Over the short to medium term, the Bureau should increase its focus on advocacy through partnerships in support of its anti bid-rigging activities. Opportunities to advocate with federal government departments should be pursued. As well, opportunities to build on existing and develop new relationships with national professional and business associations should be developed. More specific outreach messages should be tailored to target audiences.

³⁰ See The Construction Institute website: www.theconstructioninstitute.com/educationinstitute.cfm

3.8 Impact of Federal Level Public Policies or Practices

Evaluation Question

What public policies or practices at the federal level facilitate or impede anti bid-rigging efforts?

Findings

A number of public policies and practices at the federal level that facilitate or impede anti bid-rigging efforts were identified by interviewees, primarily by those who have had experience in the federal marketplace. They apply to anti bid-rigging efforts in the federal government procurement market.

Policies and Practices that Facilitate

Clauses in the *Federal Accountability Act* respecting corruption and collusion will be implemented through regulation. These will be amendments to clause 312 of the *Financial Administration Act*. They should facilitate anti bid-rigging efforts.

Policies and Practices that Impede

A number of policies and practices that could impede anti bid-rigging efforts were noted.

Policies and practices that reduce the number of bidders could increase the likelihood that the eligible bidders might engage in bid-rigging, thereby, impeding anti bid-rigging efforts. Such policies and practices include:

- Additional rules and regulations associated with increased accountability and risk management that may discourage potential suppliers from participating in the federal government marketplace;
- A greater commitment to transparency – posting firms requesting RFP documents on MERX, bidders conferences, announcing contract awards – all provide firms with more information about their competitors that can then be used to develop agreements to collude;
- Limitations on the geographic area of competition and restrictive evaluation criteria; and
- Regulations such as Canadian content regulations that either act as a barrier and thereby reduce the number of firms bidding, or potentially might encourage manipulation of the bidding process³¹.

³¹ Canadian content policy applies if there are at least 3 Canadian suppliers. There is the potential for manufacturers and distributors to team up to ensure that there are enough Canadian suppliers bidding in order for the policy to apply.

Practices that affect the knowledge and tools available to procurement officers to understand and detect bid-rigging also deter anti bid-rigging efforts. Such practices include:

- The lack of data systems that allow for tracking of bidding patterns by suppliers for their business across government means that post-award monitoring and detection of bid-rigging is nearly impossible; and
- The lack of consistent regular training of procurement officers about bid-rigging, and how to detect and deal with it.

Haberbush³², in his review of sealed bidding regimes in the United States, found similar results. Policies identified that may facilitate bid-rigging include:

- Limiting the number of companies that can bid on a project (e.g. restrictions on non-local or foreign competitors, requirements to use domestic products/materials only, stipulations that a certain proportion of contracts must go to SMEs);
- Policies that stipulate that the lowest bid must be accepted;
- Transparency provisions (e.g. the requirement to publicly open sealed bids provides cartel members with an opportunity to detect cheating among members);
- Pre-bid meetings that can facilitate collusion - bidders get to know their competitors and are provided with an opportunity to discuss potential collusion.

Conclusions

Implementation of the *Federal Accountability Act* through revisions to other legislation, and the introduction of new regulations and procedures are the major federal level public policies and practices impacting on anti bid-rigging efforts. The sections in the *Federal Accountability Act* dealing with corruption and collusion should facilitate anti bid-rigging efforts. However, those sections increasing transparency could increase the availability of competitive information among bidders, suggesting that federal procurement officers may have to step up their vigilance to detect and report possible bid-rigging.

The public policy reasons for such imperatives are beyond the scope of this evaluation. It is sufficient to note that, as procurement policies evolve, the incentives to rig bids will change and the approaches to effectively detect bid-rigging will need to evolve as well. These approaches may need to involve more training of procurement officers as well as building and integration of data systems and enhancement of the incentives to identify and report suspected instances.

³² Limiting the government's exposure to bid rigging schemes: a critical look at the sealed bidding regime (Kara L. Haberbush, Public Contract Law Journal, Fall 2000)

4. Findings and Conclusions related to Program Design and Delivery

The following section addresses evaluation issues related to the appropriateness of the program's design and delivery.

4.1 Appropriateness of Regional and Sectoral Design

Evaluation Question

Is the current program regional and sectoral design appropriate, given the nature and context of the issue?

Findings

Regional Design

The vast majority of interviewees, both inside and outside the Bureau, supported the current regional design of the program. The sense was that the regional design allows for a better understanding of regional issues and markets, and facilitates the development of relationships at the local level.

Regional offices are located in major Canadian commercial hubs – Halifax, Montreal, Ottawa, Toronto, Calgary and Vancouver. As such, they are positioned close to what is undoubtedly a large percentage of procurement transactions.

The case study of the Quebec region illustrates how regional capacity has been built. The Anti-Bid Rigging Program was initiated in the Quebec region at the start of the 2005-2006 fiscal year. There are currently five full-time officers dedicated to the Program, composed of one CO-3, three CO-2s and one CO-1. The intention is to have nine dedicated staff members in place in the program by 2009-2010.

The prevailing sentiment in the Quebec region is that the program is only scratching the surface of the issue, particularly with respect to infrastructure development and maintenance at the provincial and municipal levels. These two areas, along with some parts of the transportation industry, have been the focus of the program's activities to date. The program has already demonstrated some success, with four active cases currently in the investigation phase.

Outreach activities have targeted representative associations and organizations in the sectors outlined above, thereby leveraging the number of individuals exposed to the program. However, no direct link has been determined between these outreach activities and the cases brought forward. The follow-up survey of participants who attended

outreach initiatives, being implemented nationwide, should help to better track the outcomes of these efforts.

The region anticipates that with the addition of resources to the program, there will be further progress made with respect to bid rigging enforcement, resulting in an increased number of investigations and referrals for prosecution where appropriate.

The comparator country analysis revealed different approaches in each of the three countries. In Australia, there is regional delivery of its anti bid-rigging activities in each of the country's states. In the U.K., the OFT operates from its central location in London. From there, staff travel to different parts of the U.K. to conduct investigations and outreach activities.

In the US, the Antitrust Division of the DOJ has seven field offices — in Atlanta, Chicago, Cleveland, Dallas, New York, Philadelphia, and San Francisco. They handle criminal matters arising in their respective areas and serve as the Division's liaison with U.S. attorneys, state attorneys general, and other regional law enforcement agencies. The field offices also handle national and international matters that arise within their territories. They play a primary role in the Division's criminal investigations and prosecutions.

Antitrust activities are also dealt with at the state level in the U.S. Forty-eight states³³ have criminal antitrust laws, some of which allow for fines up to \$1,000,000 for corporations and \$100,000 for individuals, and prison terms up to 3 years. On the civil side, 44 states allow both the State and an individual³⁴ to sue. Forty-six states provide for injunctions. Further, the Attorney General of any state may bring a civil suit on behalf of the citizens of the state seeking damages identical to those available to any private person. There is the opportunity to seek treble damages which is said to provide a strong disincentive.

Sectoral Design

The Bureau has focused on the health care sector as a national priority for their advocacy efforts. This priority also informs the Bureau's enforcement priorities, particularly in the area of outreach. Over the last two to three years, regional offices have targeted every health authority in their regions for an outreach presentation. Our interviews with health care authorities suggested that these presentations were well received. However, most Bureau program staff indicated that the decision to focus on the health care sector did not

³³ State of Massachusetts website:

http://www.mass.gov/?pageID=ocaterminal&L=6&L0=Home&L1=Licenses&L2=Division+of+Professional+Licensing+Boards&L3=Board+of+Registration+of+Real+Estate+Brokers+%26+Salespersons&L4=Continuing+%26+Pre-Licensing+Education&L5=Continuing+Education+Subject+Matter+Curricula&sid=Eoca&b=terminalcontent&f=dpl_boards_re_conted_re11rc01_antitrust&csid=Eoca

³⁴ In Canada, private actions can be brought forward under section 36 of the *Competition Act*.

necessarily translate directly into its anti bid-rigging strategy. Rather, regional program staff favoured regional-specific strategies such as those now being developed. For example, regional offices are exploring opportunities to target specific sectors, such as oil and gas and construction.

The construction sector was mentioned frequently by interviewees in procurement organizations and in the Bureau as being potentially the most problematic. To date, it, like other sectors such as building materials, which are typically viewed to be on the seller side, have not been a strong target for outreach. This is despite the fact that, because of their position in the supply chain, many companies in these sectors can act as both buyers and sellers. Hence, they may likely be a victim of bid-rigging (from their own suppliers and subcontractors). As a result, outreach presentations may be appropriate for both their procurement and sales groups.

From the comparator country analysis, it is noted that the U.S. DOJ puts its highest priority on bid-rigging affecting the federal government. The U.K. OFT is heavily engaged in a large construction case, but is also conducting market studies in order to identify potential priority sectors. In Australia, the ACCC is starting to look at ways to proactively identify target sectors and will be more strongly focusing on the public sector which, until recently, has not been a target sector because of derivative Crown immunity accorded to suppliers.

Conclusions

The regional design of the Bureau's anti bid-rigging activities is supported by interviewees in organizations in the regions and in the Bureau as a way of being closer to the procurement marketplace. It is considered to be working well across the country, as capacity is increasing and focus is being placed on the achievement of results. While it is too early to measure outcomes, early signs appear to be positive.

There is broad consensus among interviewees that outreach activities need to be targeted to specific sectors of the economy. It was felt that the sectors should be chosen based upon evidence of where there is the greatest potential for problems and the highest impact. This approach is similar to that used in the U.S. and the U.K. where specific sectors of the economy have been identified as priorities.

The need for targeted outreach activities, based on evidence, is captured in recommendations 1 and 2 previously described in this report.

4.2 Marketing of the Anti Bid-Rigging Program

Evaluation Question

Is the anti bid-rigging program well marketed?

Findings

Most interviewees from the Bureau suggested that marketing of the anti bid-rigging program could be improved. In fact, some felt that as a start, improvements should be made in marketing the Bureau itself and its role. These observations were corroborated by many external interviewees who knew the Bureau based solely upon their own interactions with the organization.

Competition Bureau interviewees felt that a marketing approach in support of anti bid-rigging activities should help convey a number of key messages: the role of the Bureau, the criminality of bid-rigging, benefits from addressing bid-rigging, approaches (guidelines, how to's) for dealing with the issue, and the range of tools that the Bureau has to help. Much of this messaging is in current marketing materials such as the online anti bid-rigging presentation, the outreach presentation, and the anti bid-rigging brochure. However, it was felt that more "curb appeal" would be helpful. Examples and interesting stories used by some presenters in current outreach presentations are found to be effective to illustrate the issue.

In interviews with national business associations, the key messages were confirmed. In order to be useful to their membership, it was suggested that marketing efforts should strive to answer the following basic questions:

- What is the Competition Bureau (mission, role) and why is the Bureau conducting outreach?
- What is bid rigging?
- Why is it important? and
- How do you deal with the issue?

Two national business associations indicated that they would be interested in the opportunity to discuss co-marketing to their memberships using their existing communications and networks. However, the activity would need to be positioned as informing and supporting their members, rather than suggesting that they were being targeted as potential perpetrators. One of these respondents noted that they already have a joint initiative with another federal government agency to increase awareness and improve compliance.

Conclusions

Marketing of the program could be improved by focusing on key messages including the role of the Bureau, the criminality of bid-rigging, and suggested approaches (guidelines, how to's) for dealing with the issue.

There appears to be an opportunity to co-market the anti bid-rigging message with at least some national business associations. This was seen as a good method to promote awareness and understanding of bid-rigging, teach the partners to work together, increase understanding of each others' roles and context, and help the associations provide value-added services to their membership. This suggestion is captured in recommendation 2.

5. Findings and Conclusions related to Program Success and Implementation

The following section deals with evaluation issues related to program implementation and early success.

5.1 Progress Towards the Achievement of Objectives and Issues which Impact Program Success

Evaluation Question

Is the Competition Bureau making progress towards the achievement of its anti bid-rigging objectives?

Are there any issues which significantly impact (both positive and negative) on the success of the program?

Findings

The logic model (see section 2.3.4) describes the results chain for anti bid-rigging activities, in other words how objectives are realized. Exhibit 5.1 reviews progress that appears to have been made to date on each element of the logic model.

Exhibit 5.1: Progress Made against Components of the Logic Model

Logic Model Component	Status – Progress Made
Outputs	
1. Enforcement Process	
• Cases and case strategies/plans	Yes. Increasing capability in regional offices.
• Case-related information, evidence and analysis	Yes. Ongoing. Inter-regional teams were deployed where needed. Use of BIMS and Ringtail.
• Recommendations regarding immunity and leniency applicants	Yes. Based on cases.
• Referrals of evidence	Yes. Based on cases.
• Recommendations regarding charges and sentencing	Yes. Based on cases.
• Prosecution support	Yes. Based on cases.
• Alternative Case Resolutions (ACR)	Yes. Based on cases.
2. Outreach and Communications	
• Outreach plans	Limited. Evidence of regional specific plans being developed. No overall strategy. See section 4.1 for more details.
• Outreach toolkits	Yes. Includes new outreach presentation.
• Stakeholder relationships	Partial. Regional specific. In many cases, at early stages – appear to be focused more on communications than the development of relationships. There are noteworthy cases of significant relationships being developed with professional and trade associations. See section 3.7 for more details.
• Publications	Yes. Brochure. Website.
• Business Intelligence	Limited. Acknowledgement of need.
3. Enablers	
1. Expert policy advice	Yes.
2. New/revised policies and processes	Yes. Usually within larger context of CMB.
3. Collaborative initiatives with other jurisdictions	Results from interviews suggest that this enabler output could be broadened to include “collaborative initiatives with associations” or it could be a separate output. See sections 3.7 and 4.1 for more details.
4. Bulletins concerning administration and enforcement of <i>Competition Act</i>	Yes.

Logic Model Component	Status – Progress Made
5. Highly trained personnel	Partial. Underway in regions. Suggestion to accelerate staffing. See section 5.3 for more details.

Immediate Outcomes	
<ul style="list-style-type: none"> Cases are brought to resolution in a timely and effective manner; 	Limited capability to measure in a broad sense (e.g., related to effectiveness). Service and performance standards have been introduced for the Bureau's part in investigating cases.
<ul style="list-style-type: none"> Tenderers are well informed of the risks of bid-rigging and strategies to avoid it; and.... 	Limited capability to measure. Survey distributed 6 months following outreach presentations has been implemented. Anecdotally, tenderers who were interviewed in this evaluation reported the outreach presentation to be useful.
<ul style="list-style-type: none"> Governments, businesses and consumers are aware of the benefits of competitive bidding and the role of the Competition Bureau. 	<p>Has not been measured. Anecdotally, federal departments have mixed awareness of the Competition Bureau, when competitive bidding provides benefits, and the issue of bid-rigging. See section 3.7 for more details.</p> <p>Businesses would also appear to have different levels of awareness, although our sample of interviewees was small.</p>
Intermediate Outcomes	
<ul style="list-style-type: none"> Bid-rigging is deterred. 	Was not measured in this evaluation.
<ul style="list-style-type: none"> Canadians recognize that bid-rigging harms them. 	Was not measured in this evaluation.
<ul style="list-style-type: none"> All businesses recognize that bid-rigging is unethical and a criminal activity. 	Business associations we interviewed recognize that bid-rigging is unethical and a criminal activity, and appear ready to "co-market" this message to their members. See section 5.5 for more details.
<ul style="list-style-type: none"> Tenderers design their processes to minimize their exposure to bid-rigging. 	Some evidence from interviewees that those who received outreach presentations reviewed their processes to minimize exposure to bid-rigging. See section 5.5 for more details.

Based upon the above review of progress against the logic model, the areas in which there are gaps in progress would appear to be:

- At the output level:
 - Strategies and plans for outreach that are geared to the achievement of all of the outcomes in the logic model;
 - Business intelligence, that can feed evidence-based decision making
 - Partnering with other jurisdictions beyond enforcement coordination initiatives (e.g., research into the extent of the problem)
 - Collaborative initiatives with other partners such as associations.

- At the outcome level:
 - The capability to demonstrate progress at this time (see section 5.4 for a more detailed discussion on performance measurement)

A final observation relates to the statement made in one regional meeting that, as a result of outreach presentations, more individuals should be coming forward with information on possible bid-rigging situations that could be converted into cases. In fact, in the current logic model, there is no immediate outcome that suggests the above result is intended for outreach. If it is an intended outcome, then the logic model should have an immediate outcome statement such as “Potential and actual bid-rigging situations are identified to and by the Competition Bureau”.

Two other issues were raised in our interviews that affect the success of the program.

Several interviewees, both inside the Bureau and in outside organizations with an interest in economic crime, noted that the extent to which economic crime is a priority of the police agencies and courts affects the deterrence value of enforcement and the strength of the outreach message, and therefore the success of the Bureau’s efforts. The opinion was that a high priority was not being placed on economic crime and, as a result, detection and subsequent penalties were less likely to be a disincentive to bid-rigging.

Interviewees in the Bureau noted that the cooperation of other parties – e.g., complainants – is critical during investigations. To the extent that they are not willing to participate and devote the necessary time and effort throughout the investigation, the quality and end result of the investigation suffers.

Conclusions

Progress is being made towards the achievement of anti bid-rigging objectives. A critical mass of resources with the appropriate skills and competencies is being built in the regions, and, as a result, program staff members are increasingly confident that they can carry the program forward. Without all regions at the same stage of implementation, the coming year would appear to be critical in moving from the production of outputs to the achievement of results.

In order to facilitate further progress, it will be important to have greater clarity around the outcomes to be achieved and associated performance indicators and targets. This will help direct planning to fill performance gaps. This point is analyzed in more detail in section 5.4 on performance measurement.

Both internal and external factors were identified as having a potentially significant impact on the achievement of results. Internal factors focused on the pace of implementation and capacity building, while external factors included the priority placed upon economic crime, and the extent of cooperation by parties in a case.

5.2 Status of Program Implementation

Evaluation Question

Is the program being implemented as planned, within the expected timelines and budget?

Findings

Generally Competition Bureau executives are satisfied that the program is being implemented as planned, and within the expected timelines and budget, as per the Five-Year Regional Staffing Plan outlined in section 2.6.

It was noted by Bureau executives and program staff that the staffing of positions can be slow (however, not slower than staffing generally in the public service). As a result, while the targets have been met with respect to the numbers of staff listed in the Five-Year Regional Staffing Plan, these individuals may not be in place at the start of the fiscal year in which they are to be hired, as assumed in the plan.

While staff levels are increasing, albeit at a slower pace than desired, some Bureau interviewees, especially those in regional offices, cautioned that there is a learning curve for new staff that must also be taken into consideration. There appears to be no consensus on the length of time required to train an officer to be fully functional in their job. Estimates provided by interviewees ranged anywhere from a few months to three to five years, with 1.5 to 2 years being considered a reasonable average according to senior Bureau managers. The lack of consensus may be based on differing opinions regarding the level of competency required by staff to undertake anti bid-rigging activities. It could also be based on differences in the skills and knowledge level of the staff being trained. In some instances, competition officers who have experience in Fair Business Practices are being trained to take on Criminal Matters work, while in other cases, new employees with little previous Bureau experience are being hired.

Some interviewees expressed concerns that staffing levels will not remain stable over time. Trained staff can be very attractive to private sector law firms and companies, resulting in a retention issue for the Bureau. This issue was seen to be a potential risk to program success.

It was suggested by several Bureau interviewees that the Regional Staffing Plan be accelerated in order to get critical mass in place sooner, so that results would also be seen sooner. Several Bureau interviewees also suggested that revisiting the Regional Staffing Plan would provide a good opportunity to reassess and revise if needed the original staffing allocations of each region.

Conclusions

Generally, implementation has proceeded on time and within budget. Capacity is being built; however, staffing must continue to be managed carefully in order to address challenges related to the staffing process, training requirements, and retention. That said, some interviewees from within the Bureau feel the Five-year Regional Staffing Plan should be accelerated.

The issue of planning is discussed in more detail in section 5.4 on performance measurement.

5.3 Right Resources, Tools and Skills

Evaluation Question

Does the staff responsible for implementing this initiative have the right resources, tools and skills required to carry out their responsibilities with respect to bid-rigging?

Findings

Generally, program staff and executives within the Bureau felt that staff has and/or is developing the right resources, tools and skills required to carry out their responsibilities. External respondents who have had contact with Bureau staff at outreach presentations confirmed that both the quality of the outreach presentation tools and the skill levels of the presenters were high. The Bureau has been fortunate to have Competition Law Officers and Regional Assistant Deputy Commissioners (ADC) who are good presenters and enjoy this aspect of their work.

On the enforcement side, increased skills are being developed in the regions as part of the regionalization plan. Responses from Competition Bureau interviewees suggested that this development is proceeding well. In this evaluation, we did not speak to external people who had been involved in a matter, either as a victim or as a perpetrator, and so cannot speak to their opinions.

In our discussions with program staff and executives, it was noted that key skills for staff include:

- Investigative ability – inquiring, thorough
- Analytical and synthesis skills
- Interpersonal skills
- Negotiating skills
- Communication and presentation skills.

Some of these are considered to be innate abilities, so must be considered at the recruitment stage, while others can be learned.

Differences in the most important skills needed for outreach (i.e., communication and presentation skills) and for investigation (i.e., investigative ability, analytical and synthesis skills) were highlighted in interviews with program staff and executives. Some interviewees felt that recruitment criteria, which frequently put more weight on investigative skills, could lead to weaknesses in the quality of outreach skills.

Three suggestions were made by Bureau interviewees to ensure that outreach skills are available to optimize the effectiveness of related activities:

1. Continue with the status quo, with staff doing both outreach and investigation, and identifying those staff with the best presentation skills to do the most outreach (note that this is similar to what the U.S. DOJ does now); or
2. Dedicate a resource(s) in each region for outreach, and recruit accordingly (i.e., people whose skills sets are in alignment with those required for outreach activities, but who also have a certain level of understanding of the enforcement side). These resources would be teamed with a person with enforcement experience for presentations (note that this is similar to what the ACCC does now); or
3. Create a national-level outreach team, with dedicated resources, to cover the country, and team them with people from the regional offices at outreach presentations.

All three approaches had their advocates among Bureau interviewees. However, the most support was for the second suggestion, so long as enforcement priorities can be met. It provides the profile and specialized skills needed for outreach. At the same time, it means outreach will be tailored to the regional context.

Finally, in terms of tools, it was noted that regional offices have been outside of the Bureau's firewall for some enterprise-wide information systems. This has made information dissemination and access cumbersome in the regional offices. However, it was also understood that work is being done to correct this problem.

Conclusions

Skill and competency sets required for enforcement and for outreach overlap, but the most important skills and competencies differ. It is sometimes difficult to find individuals with both strong investigative skills and competencies, and strong communications and presentation skills and competencies. While the Bureau has been fortunate to have Competition Law Officers and Regional ADCs who are good

presenters, a more deliberate approach to resourcing for outreach activities could be beneficial.

With respect to the provision of tools, regional offices are outside the Bureau's firewall for some enterprise-wide information systems, making information dissemination and access cumbersome. Work is being done to correct this problem.

Recommendation

The Bureau should ensure resources dedicated to outreach in each region have or develop the optimal skill sets necessary to engage effectively with stakeholders while balancing resources available to be dedicated to enforcement. This would position outreach alongside enforcement as an important pillar of anti bid-rigging activities. At the same time, it is faithful to the strengths of the regional delivery model.

5.4 Performance Measurement Plan

Evaluation Question

Has a performance measurement plan been put in place to assess the achievement of objectives over the short, medium and long term?

Findings

In our interviews, several senior executives at the Bureau emphasized the need to manage by results and develop a good performance measurement framework and plan.

In the CMB Strategic Work Plan for 2006 to 2009, outcomes and indicators were identified against two priorities – anti-cartel enforcement and awareness with a focus on domestic cartels and bid-rigging; and improved enforcement capacity. There is very good alignment between these outcomes and indicators and the outcomes in the logic model. Therefore, tracking the work plan will help, in the short term, to measure achievement of outcomes in the logic model. The alignment is shown in Exhibit 5.2 on the next page. In the medium to longer term, performance indicators and associated data collection methodologies would normally be developed for each outcome and output in the logic model.

There appears to be an opportunity to coordinate this need with the work of the Bureau-wide Performance Management Working Group (PMWG). In April 2006, the Bureau's Senior Management Committee made Performance Management a Bureau priority and in August, approved a work plan for the PMWG. The PMWG's work will include revised and new performance measures, revised processes and procedures, as well as a renewed Bureau Information Management System.

Exhibit 5.2: Using the Strategic Work Plan to Measure Performance against the Logic Model

CMB Strategic Work Plan for 2006 to 2009		Logic Model (see section 2.3.4)
Expected Results / Outcomes	Indicators	
Priority 1: Anti-cartel enforcement and awareness with focus on domestic cartels and bid-rigging		Logic model component
A. Increased deterrence of cartel activities and bid-rigging to enhance market competitiveness	<ul style="list-style-type: none"> - VOC affected by anti-competitive activities addressed through application of the Conformity Continuum - Recidivism: level of subsequent complaints subject of a resolution through the Conformity Continuum in the past 5 years. <i>Time line: 2008-09</i> Trend analysis: <ul style="list-style-type: none"> - Number of convictions (either through pleas or contested prosecutions) -Level of fines -Number of individuals sanctioned -Number of immunity applicants -Number of leniency applications -Number of inquiries commenced -Number of ACR -Number of discontinuances -Number of complaints/info requests -Number of media hits on case resolution 	Intermediate Outcome – Bid-rigging is deterred.
B. Better informed marketplace (government, business and consumers) to prevent and detect anti-competitive behaviour	<ul style="list-style-type: none"> - Outreach activities: <ul style="list-style-type: none"> -Number of outreach activities -Size of audiences -Level of awareness -Changes in tendering authorities' policies after the outreach activity and their related follow up activities. - Media hits on relevant keywords - Level of marketplace awareness - Number of complaints/info requests (assumption that more indicates greater awareness) and identify source of Bureau awareness (How did you find out about the Bureau?). 	<p>Immediate Outcome - Tenderers are well informed of the risks of bid-rigging and strategies to avoid it; and</p> <p>Intermediate Outcome - Tenderers design their processes to minimize their exposure to bid-rigging.</p> <p>Immediate Outcome - Governments, businesses and consumers are aware of the benefits of competitive bidding and the role of the Competition Bureau.</p> <p>Intermediate Outcome - Canadians recognize that bid-rigging harms them.</p> <p>Intermediate Outcome - All businesses recognize that bid-</p>

CMB Strategic Work Plan for 2006 to 2009		Logic Model (see section 2.3.4)
Expected Results / Outcomes	Indicators	
		rigging is unethical and a criminal activity.
C. Improved case selection and timeliness of investigations	- % of time meet or exceed service standards - Case selection / desirable outcome (general deterrence) <i>Time line: 2007-2009</i>	Immediate Outcome - Cases are brought to resolution in a timely and effective manner
Priority 2: Improved Enforcement Capacity		
A. Appropriately staffed and trained workforce	-Service standard indicators -Coherence with annual Departmental Staffing Plans (including Regional plan) -Number of staff : -meeting performance objectives -meeting personal learning plan - Employee satisfaction - Proportion of CO-1s who advance to CO2 level via CO Development program	"Highly trained personnel" is an output in the logic model.
B. Consistent, effective and transparent enforcement policies and processes including: (i) immunity program - ongoing value of Bureau's immunity program in the detection and deterrence of cartel and other anti competitive criminal activity (ii) leniency/sentencing policies -acceptance by AG and Courts of Bureau's recommendation based on new leniency/sentencing policies and ongoing value of these policies to encourage early case settlement.	-Stakeholders recognise that policies and processes are applied according to the principles of transparency and predictability through: -Stakeholders= feedback -Number of submissions received -Number of stakeholders consulted -AG and Courts acceptance of immunity, leniency/sentencing recommendations -Incidence of immunity applicants -Incidence of negotiated pleas	
C. Managed cooperation with other enforcement agencies against cartels, including international cartels.	-Enforcement policy / process convergence with key enforcement partners -Level of cooperation with key enforcement partners on casework and other initiatives.	

Conclusions

While indicators in the CMB Strategic Work Plan can be used to measure the impact of anti bid-rigging efforts in the short term, a performance measurement plan does not currently exist to assess the achievement of longer term results. In addition, targets have not been developed to allow for a rigorous assessment of results over time.

There is an opportunity to coordinate and align this performance measurement work with bureau-wide work being done by the Performance Measurement Working Group. Further, results could be documented in a Results-Based Management Framework (RMAF) and indicators integrated into BIMS.

Target setting against the performance indicators for outcomes and outputs, and the ensuring that key enablers such as people and funding are in place to achieve the targets, are often done through a business planning process. This approach appears to be appropriate for the Bureau's anti bid-rigging activities.

Recommendation

During FY 2008-2009, the Bureau should prepare a Results-Based Management and Accountability Framework (RMAF) for its anti bid-rigging activities. This would involve validating the logic model and developing a performance measurement strategy and evaluation strategy. Performance information should then be gathered for the performance indicators for each logic model output and outcome. Performance gaps should be analyzed and targets for the related performance indicators should be set through a business planning process that would also consider requirements for enablers such as human resources. This planning process should inform the Five-Year Regional Staffing Plan.

5.5 Level of Awareness among Key Stakeholders

Evaluation Question

Has there been an increase in awareness among key stakeholders of the potential for/existence of bid-rigging across the country?

Findings

As described in section 2.3.3, over the past 2.5 years, 99 outreach presentations reached almost 3,300 attendees across the country, across a broad range of organizations – e.g., federal, provincial and municipal governments; health care; schools; associations – professional, trade; and companies. However, the review of data on outreach presentations revealed that the vast majority were done within a day-trip range of the regional office, and no presentations have been given in the Territories. This finding was corroborated in interviews with regional staff. As well, the review highlighted that only two presentations, with a combined total of 45 attendees, were conducted for stakeholders in the federal government.

Most interviewees in buyer organizations felt there had been some increase in awareness of the issue. They attribute this, first, to their own efforts to improve their processes and

provide training. Respondents who had attended or hosted a Bureau outreach presentation, reported them to be useful in examining the rigour of their internal processes.

Organizations involved in presentations noted that there had been little follow-up from the Bureau to date. This is changing with the introduction of a survey, to be conducted six months after each outreach event. Also, organizations suggested the importance of ongoing awareness building. Ideally, the Bureau would repeat its presentation every two to three years to maintain awareness levels, and orient new staff.

Some organizations reported using a certificate of independent bid or an equivalent mechanism embedded within their bid and contracting documents. However, the evaluation was not able to determine if there is any widespread adoption of such certificates or their equivalents as a standard practice.

Conclusions

The current level of awareness among key stakeholders of the potential for/existence of bid-rigging across the country is not known. It is expected that the newly created participant survey, to be distributed six months after each outreach event, will be useful in reinforcing key messages covered in the presentations. In order to measure changes in awareness and understanding over time, pre- and post-measures would be required. As well, a need was identified to repeat outreach presentations over time to maintain awareness levels.

6. Findings and Conclusions related to Cost Effectiveness

The following sections of the report deals with issues related to program cost-efficiency and cost-effectiveness.

6.1 Cost Efficiency and Cost Effectiveness

Evaluation Question

Is the initiative cost-efficient and cost-effective?

Findings

Cost-efficiency assesses costs per output while cost-effectiveness assesses cost per outcome achieved. Ideally, performance indicators related to outputs and outcomes should be tracked and reported on over time in order to judge the Bureau's progress along these two dimensions.

In terms of cost-efficiency, output data is currently available for metrics such as the number of enforcement processes and the number of outreach activities. However, cost information is not currently available at the activity level. While BIMS does allow for time reporting, this does not appear to be done consistently, and when done, is not viewed to be reliable. Therefore, cost-efficiency calculations are not possible.

The lack of costing data also applies to the calculation of cost-effectiveness. In addition, it is premature to use outcome data to assess cost-effectiveness as the implementation of anti bid-rigging activities is still underway. Therefore, cost-effectiveness calculations are also not possible at this time.

While data is not available, interviews with Bureau staff and executives suggest that to date outputs have been produced cost-efficiently. Although the number of enforcement matters and outreach presentations has remained relatively constant over the last two to three years, a significant investment has been made in capacity building – i.e., staffing and training additional staff in the regions, and the development of tools such as the new outreach presentations. This capacity building will continue. However, it is reasonable to expect that there will soon be sufficient capacity in each region to see increased levels of outputs tied directly to outcomes. If not, then cost-efficiency will reduce in the coming years, due to underutilized capacity.

For measures of efficiency and effectiveness to be useful, they need to be tied to integrated strategies for anti bid-rigging activities. This issue was raised in interviews with regional staff who felt that certain decisions, such as the selection of target sectors

for outreach, if not done at the regional level, may not directly contribute to the achievement of outcomes. As a result, outreach activities, while being cost-efficient, may not be cost-effective.

The calculation of cost-effectiveness may be usefully informed by examples from other jurisdictions. In the U.K., the OFT³⁵ has committed to delivering measurable benefits to U.K. consumers of five times their annual budget over the financial years 2008-11. Changes in this ratio over time are tracked, with the expectation that the ratio will increase. Use of this measure is felt to have influenced their priorities, resulting in a portfolio containing a greater percentage of high impact cases, resulting in larger deterrence effect and increased consumer benefits.

Another approach that is used to show the value of programs or initiatives employs a cost-benefit analysis at the case/project level. This approach was used to provide an approximate measure of the success of antitrust enforcement activities in the US³⁶. As a first step, an estimate was made of the direct government cost of antitrust enforcement in the U.S., which totaled roughly \$150 Million per year³⁷. The benefits of antitrust enforcement were roughly estimated by looking at the price overcharges incurred as a result of the vitamin cartel in the US, one of the larger cases undertaken by antitrust authorities in recent years. The case involved price fixing, product allocation and bid-rigging charges. Using a number of previously published sources that focused on the impacts of anti-competitive behaviours in the marketplace, the deadweight efficiency loss from this one cartel was estimated to be between \$50 Million to \$100 Million per year. Using these estimates the author concluded that, every year by which the life of the cartel was shortened due to antitrust enforcement justified between one-third and two-thirds of the total direct costs of antitrust enforcement against all anticompetitive cartels and mergers.

Conclusions

The question of program cost-efficiency and cost-effectiveness cannot be answered directly at this time, due to a lack of data. The development of a RMAF and Business Plan for the initiative should help to address this gap.

The assessment of cost-efficiency and cost-effectiveness will become more important over the coming years. During the last two to three years, the program has gone through an investment period to build capacity. It is realistic to now begin to see returns on this investment.

³⁵ Information obtained during interview with OFT.

³⁶ The Case for Antitrust Enforcement (Jonathan B. Baker, Journal of Economic Perspectives, vol. 17 No. 4, Fall 2003)

³⁷ Baker's article indicates that this total does not include estimates of private litigation costs, or indirect costs, which, when added, would raise the total to approximately \$2 Billion.

6.2 Extension to Related Non-Antitrust Offences

Evaluation Question

To what extent should the program extend to related non-antitrust offences (e.g. kickbacks, organized crime, etc)?

Findings

Mixed opinions were received from interviewees with regard to the program extending to related non-antitrust offences such as kickbacks, and organized crime. The opinions mainly differed in areas related to outreach activities.

Proponents thought that a more broad-based message might answer more questions for an outreach audience, but admitted that it really depended upon the audience itself. They also thought that there could be an opportunity to leverage the model and lessons learned from the Fraud Prevention Forum and associated activities such as Fraud Prevention Month.³⁸

Opponents thought that antitrust and non-antitrust offences are sufficiently different that the audiences for outreach would be naturally different, and any message to a joint audience would lose its focus.

As an interesting middle ground, it was suggested that anti bid-rigging could be considered as a theme for an upcoming Fraud Prevention Month. This would provide an opportunity to bring together the stakeholder community, test the Fraud Prevention Forum approach and reach a broad cross-section of Canadians, while using an existing platform to do so.

Conclusions

There was no consensus among interviewees on extending the program to related non-antitrust offences. While some interviewees felt that there was an opportunity to expand

³⁸ The Fraud Prevention Forum, chaired by the Bureau, is a group of private sector firms, consumer and volunteer groups, government agencies and law enforcement organizations, who works to prevent Canadians from becoming victims of fraud through education.

Membership in the Forum has grown from a total of 24 members at the initial launch in 2004 to over 80. At the international level, the Fraud Prevention Forum model has been adopted around the world. Twenty-nine countries, including the U.S., Australia, England, Chile and Japan, will host Fraud Prevention Month activities this year. For more information, see <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02281e.html>

current outreach presentations to encompass a broader range of issues, others felt the key messages would be lost. There was general consensus that the audiences to be reached with the non-antitrust messages would most probably differ from the ones currently targeted for outreach. However, there could be an opportunity to link with the Fraud Prevention Forum and its Fraud Prevention Month.

6.3 Approaches Used in Other Countries

Evaluation Question

Based on the experience of other countries (i.e. United States, United Kingdom and Australia) what alternative approaches exist to deal with bid-rigging?

Findings

The approaches used in the United States, United Kingdom and Australia have been used as a line of evidence throughout this report. A summary of their key practices is described below.

United States

The U.S. DOJ emphasized the importance of their penalties as a deterrent factor. Their courts will sentence individuals to jail and impose “three times” damages in civil actions. A number of interviewees both internal and external to the Competition Bureau referred to this enforcement regime with admiration and suggested that Canada should adopt similarly deterrent sanctions. This sort of enforcement regime was also mentioned as one reason why corporations operating in both Canada and the United States have put in place corporate compliance programs.

- In Canada, the Act permits unlimited fines and imprisonment up to five years. In practice, offenders are seldom imprisoned. Although the Bureau makes recommendations in sentencing to the DPP, which in turn makes submissions before the courts, sentencing is ultimately beyond the control of the Competition Bureau, therefore a recommendation in this area has not been made.

The U.S. DOJ has a clear number one priority, which is combating cases where the U.S. government is the victim.

The U.S. DOJ has focused its outreach on agents in enforcement agencies such as the FBI, and public procurement officials. They find that these agents and procurement officials then pass along leads of bid-rigging activities. However, this analogy is of limited value, at least as it relates to enforcement agencies such as the FBI, given the different roles and responsibilities of each (FBI investigative support; DOJ prosecutes).

Australia

In Australia, the ACCC has dedicated outreach teams (two to three people) in each regional office. They do outreach across the spectrum of ACCC activities, with a small bid-rigging component. Their target audiences appear to be mainly seller organizations and associations. The outreach message to these audiences is being redesigned to go beyond the general message that “cartels are illegal” to one that also emphasizes the economic costs to organizations and individuals.

United Kingdom

The U.K.’s OFT’s analytical work to increase their evidence base is the most noteworthy aspect of their approach that could be applied in Canada. This work includes both research to better identify sectors to target their efforts as well as studies to better define the overall impacts.

Conclusions

Discussions with the U.S. DOJ, U.K. OFT, and Australia’s ACCC revealed that they are also continually looking at research approaches and service delivery improvements.

6.4 Resource Implications of Alternative Approaches

Evaluation Question

What are the resource implications in the event that alternative approaches are implemented?

Findings and Conclusions

A very preliminary estimate of resource implications to address key points was undertaken; however, the level of analysis is insufficient to provide reliable estimates. A more detailed costing of work breakdown tasks is suggested as a next step.

7. Overall Conclusion and Final Recommendations

While the Bureau has made progress in implementing its anti bid-rigging initiative across the country, improvements could be made. These improvements are summarized in the following set of recommendations.

- Recommendation 1: Over the short to medium term, the Bureau should increase its focus on advocacy through research in support of its anti bid-rigging activities. The goal of the research should be the development of an evidence base supporting risk-based targeting of sectors and situations where the risk of bid-rigging appears most acute. Opportunities to collaborate with research partners should be exploited.
- Recommendation 2: Over the short to medium term, the Bureau should increase its focus on advocacy through partnerships in support of its anti bid-rigging activities. Opportunities to advocate with federal government departments on the implementation of new policies should be pursued. As well, opportunities to build on existing and develop new relationships with national professional and business associations should be developed. More specific outreach messages should be tailored to target audiences.
- Recommendation 3: The Bureau should ensure resources dedicated to outreach in each region have or develop the optimal skill sets necessary to engage effectively with stakeholders while balancing resources available to be dedicated to enforcement. This would position outreach alongside enforcement as an important pillar of anti bid-rigging activities. At the same time, it is faithful to the strengths of the regional delivery model.
- Recommendation 4: During FY 2008-2009, the Bureau should prepare a Results-Based Management and Accountability Framework (RMAF) for its anti bid-rigging activities. This would involve validating the logic model and developing a performance measurement strategy and evaluation strategy. Performance information should then be gathered for the performance indicators for each logic model output and outcome. Performance gaps should be analyzed and targets for the related performance indicators should be set through a business planning process that would also consider requirements for enablers such as human resources. This planning process should inform the Five-Year Regional Staffing Plan.