

Antitrust and Litigation

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Cartel in Bids: The Trend of an Investigation by the Bidding Bodies

INTRODUCTION

The General Superintendence of the Administrative Council for Economic Defense (“GS/CADE”) has recently opened an administrative proceeding to investigate an alleged cartel in bids for the use of areas for commercial exploration at various airports.¹

The investigation of a cartel in bids is not new in CADE’s jurisprudence. However, what draws attention is the position of Infraero (the bidding body) as the Claimant in this process and the growing trend of investigations initiated at CADE, based on complaints from the bidding bodies themselves.

According to Tereza Cristine Almeida Braga,² the Brazilian antitrust authority has few convictions of cartels in bids - either because of the difficulty of instruction in these cases or due to the lack of awareness of the unlawfulness of the practice by the bidding bodies. However, at the end of the article, we are able to conclude that bidding bodies can identify certain behavioral patterns of companies and that such behaviors are reported to CADE as a possible violation of the economic order.

This article proposes a critical analysis of the issue, including an analysis of CADE’s jurisprudence and a reflection on the greater scrutiny of competitive issues by the bidding bodies themselves.

¹ Administrative Proceeding n. 08700.003388/2018-52. Claimant: Empresa Brasileira de Infraestrutura Aeroportuária – Infraero. Defendants: Atos Livraria e Papelaria EIRELI EPP; Drogaria Furtado Ltda. ME; Ana Proneli Bremm de Castro ME; DPM de Castilho Cafeteria e Informática. EPP; Marilza Tomaz Pereira Cabeleireiros ME; Lopes & Pereira Ltda. ME and others. The case is in the procedural instruction phase.

² BRAGA, Tereza Cristine Almeida. Cade, cartéis em licitações: um novo nicho a política antitruste brasileira. In: Revista de Defesa da Concorrência, v.3, n.1 (2015). Available at: <http://revista.cade.gov.br/index.php/revistadedefesadaconcorrenca/article/view/143> (Accessed on 08/21/2019).

CARTELS IN BIDS

Notably, the cartels in public bids raise major concerns as they involve direct damage to public coffers. Thus, as this conduct is criminally and administratively illicit, in addition to possibly constituting an act of administrative improbity (bid rigging), it is possible to have a sphere of shared competence among the antitrust agency (CADE), the criminal justice, the Federal Court of Accounts (TCU), and the General Comptroller Office (CGU). The reason for this is that in cartel offenses, agents aim to fraud the market for products and services by simulating apparent competition; meanwhile in the offense of bid rigging, agents aim to thwart or defraud a particular public bid, constituting a crime against the Public Administration.³

According to CADE's booklet on the subject⁴ – created under the extinct Secretariat of Economic Law (SDE) - cartels in bids act mainly through: (i) fixing pricing; (ii) submitting coverage proposals; (iii) breaking the proposal confidentiality; (iv) private direction of the bidding; (v) market division; (vi) suppression of proposals, even if the agent is qualified and able to win the event; (vii) submission of pro forma proposals; (viii) rotation; and / or (ix) subcontracting, whereby the loser of the event is assured that he will be rewarded for being the supplier to the company that won the bid, who is also cartelized.

In addition to identifying the means of action of a particular cartel in bids, it is necessary to verify possible elements that facilitate collusion between companies, such as the existence of family or corporate ties between individuals of competing companies and the presence of class entities in congregating companies.

Although the booklet brings forth some possible behaviors that may indicate the existence of a cartel in public bids, we will also highlight below the conducts that were considered suspicious by the bidding bodies in their internal investigations, which were reported to CADE too.

COMPLAINTS FROM THE BIDDING BODIES: CADE'S JURISPRUDENCE

SABESP

The first case found, in which the bidding body itself reported to CADE alleged collusion, was Administrative Proceeding n. 08012.009885/2009-21.⁵ The case was opened following a

³In the opinion of Eduardo Molan Gaban and Juliana Oliveira Domingues (Direito Antitruste, ob. Cit., p. 162), "It is important to highlight that this type of cartel, besides being covered by the hypothesis of crime provided for in Law No. 8.137/90, may also constitute a crime based on the Bidding Law (Law No. 8.666/93), leaving the offender of such illicit subject to the sanctions of all applicable legal acts."

⁴Available at: http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/documentos-da-antiga-lei/cartilha_licitacao.pdf/view (Accessed on 07/11/2019)

⁵ Complainant: Companhia de Saneamento Básico do Estado de São Paulo (SABESP) | Defendants: SAENGE Engenharia de Saneamento e Edificações Ltda.; ÔNIX Construções S.A. (atual denominação de CONCIC Construções Especiais

complaint from Companhia de Saneamento Básico do Estado de São Paulo ("SABESP") on June 09, 2010 to investigate the alleged formation of a cartel in a bidding process aimed at the execution of the works of Lot 3 of the Mambu/Branco Water Producer System of Baixada Santista Metropolitan Region.

According to SABESP, the following facts were indicative of a cartel: (i) the participation of thirteen companies in the bidding process, of which only six were qualified; (ii) the bidder that submitted the best bid was disqualified by the Special Bidding Committee because it missed the deadline granted by SABESP to provide clarifications, regarding the feasibility of the bid; and (iii) the declassified bidder was later associated with the winning company for the joint execution of the construction, which was the object of the bidding.

In SABESP's view, the alleged collusion should have taken place between the end of the deadline for providing the clarifications granted to the company that was subsequently disqualified and the date that the contract was signed with the winning company, possibly at the final stage of the bidding process.

The case was judged by CADE on April 08, 2015, and after the evidence raised by SABESP was confirmed through the procedural instruction, only one individual was not condemned by CADE for participating in the collusion. The evidence used to convict the defendants was that brought in during the Opening Technical Note, which proved the existence of collusion between the companies.

INSS

Another relevant case was Administrative Proceeding n. 08012.008507/2004-16⁶, opened on May 13, 2011, to analyze the existence of influence of uniformed commercial conduct and cartel on bids conducted by the Instituto Nacional do Seguro Social ("INSS") of the State of São Paulo, following a complaint by the Chairman of the Permanent Bidding Committee of Executive Management of INSS in Bauru.

According to the INSS, the main indication that there would have been collusion in the bids was the existence of **identical bids submitted by 7 of the 8 companies participating in the bidding for the 33 items**. According to the opinion of the Reporting Commissioner Gilvandro Vasconcelos, the bidding cartel had its practice influenced and facilitated by the existence of a reference price table published by ABOTEC - Associação Brasileira de Ortopedia Técnica, which

S.A.); Luiz Arnaldo Pereira Mayer; Marcos Assumpção Pacheco de Medeiros; Antonio Silva de Góes; João Antônio da Silva Saramago; Paulo Bie; Marcus Perdiz da Silva

⁶ Claimant: Instituto Nacional do Seguro Social em Bauru (SP) e Procuradoria Federal Especializada do Instituto Nacional do Seguro Social em Osasco (SP) | Defendants: Associação Brasileira de Ortopedia Técnica — ABOTEC, Estar Bem Aparelhos Ortopédicos e Podologia Ltda. EPP, Casa Ortopédica Filadélfia Ltda., Ortopedia Belo Horizonte Ltda., Ortolab Órtese e Prótese Ltda., Ortoservice Comércio e Serviços Ortopédicos Ltda., Ortopedia A Especialista Ltda., Ortopedia Americana Ltda., Ortopedia Fubelle Ltda., Ortopedia Germânia Ltda., Ortopedia Kamia Ltda. ME, Ortopedia Lapa Ltda., and Ortopedia Mathias Ltda. EPP.

specified the unit price to be charged for each product/material and suggested percentage margins that were an indicative of fixed expenses and profits. The table was supposedly followed by several companies in the market, including those included in the administrative proceeding. All defendants were convicted by CADE's Tribunal on December 10, 2014.

The procedural instruction concluded that the defendants adopted the strategy of "bid rotation" to circumvent the competition in the bidding events promoted by the INSS for contracting orthotics and prostheses. Confirming the evidence brought forth by the INSS, CADE proved that there was routine joint participation of the investigated companies in the bidding process, in which all submitted similar or even identical proposals.⁷

Similarly, the same wording - even with the same commas, bold types, and exclamations - was found in the appeals against the decision of declassification by the INSS, indicating collusion for the frustration of the events.

DETRAN/RJ

Also, it should be highlighted the alleged cartel in bids held by the Departamento de Trânsito do Estado do Rio de Janeiro ("Detran/RJ")⁸ for the hiring of various outsourced services between 2003 and 2010. The modus operandi of the conduct consisted of certain standards verified in the proposals presented by the companies and in the bidding procedures,⁹ such as the appointment of the same representative for the withdrawal of the notices of various companies and the presence of individuals and legal partners of the bidding companies in events held by Detran/RJ. However, on June 26, 2019, CADE's court voted to close the case against all the defendants, due to lack of evidence.

⁷ CADE understood that the identity of prices in four different bids by differing companies could not occur without the existence of pre-established agreements between the competitors; mainly because it was found that there were significant differences between the prices presented by the interested companies in the price surveys made in the quotation phase for the Administration.

⁸ Administrative Proceeding n. 08012.000742/2011-79. Claimant: Ministério Público do Estado do Rio de Janeiro (Divisão Anticartel e de Defesa da Ordem Econômica – DACAR/RJ) | Defendants: Angel's Segurança e Vigilância Ltda.; Angel's Serviços Técnicos Ltda.; Bandeirantes do Rio Conservação e Limpeza Ltda. (atual Facility Staff Ltda.); Best Brasília Empresa de Serviços Técnicos Ltda.; Confederal Rio Vigilância Ltda.; Construir Arquitetura e Serviços Ltda.; Dinâmica Segurança Patrimonial; Elfe Solução em Serviços Ltda. (atual Facility Saúde Ltda.); Facility Central de Serviços Ltda.; Facility Segurança Ltda.; Facility Tecnologia Ltda.; Hope Consultoria de Recursos Humanos Ltda.; Hope Vig Vigilância e Segurança Ltda.; Nova Rio Serviços Gerais Ltda.; Service Clean Ltda.; Shadow Participações e Empreendimentos Ltda.; Spana Serviços Ltda.; Transecur Vigilância e Segurança Ltda.

⁹ According to the Public Prosecution at CADE, "The same company wins most of the competitions; a certain number of companies succeed in successive competitions; the existence of few bidders or no new bidders; bidders are aware of their competitors and their bids; the bidding does not reduce the estimated value; bidders withdraw their bids during the event; limited access to bidding information; the value of the administrative contract deviates substantially from fair market value; and the existence of successive contractual extensions with the same company."

MEC

Finally, there is the alleged cartel in bids held by the Ministry of Education (MEC) for the acquisition of computer technical services,¹⁰ currently in the instruction phase.¹¹ MEC's complaint was based on the fact that, even after wide disclosure of its bidding process, only two companies were accredited and attended to participate in the event. This fact aroused suspicion because: (i) the contract was worth more than BRL 10 million per year; (ii) the bidding was divided into four items; (iii) more than 30 companies had submitted proof of notice withdrawal during the disclosure phase; and (iv) it was found that there were several questions and challenges regarding the scoring criteria of the notice, indicating a great interest of the companies for the object of the bidding. Moreover, after the revocation of the competition in which this occurred, MEC carried out two other bidding processes, whose objects were very similar to that of the revoked competition that had a much larger number of participants.

CONCLUSIONS

As it turns out, the bidding bodies seem to pay more attention to certain behaviors that may indicate collusion among the bidding participants, which may eventually result in a complaint to CADE.

The existence of a compliance program has already been a prerequisite for a company to participate in any public bidding process for a long time. However, the same is not true for those who hire. Bidders rarely had compliance processes or departments that internally enforce bidding procedures.

¹⁰ Administrative Proceeding n. 08012.003021/2005-72 (Claimant: Ministério da Educação (MEC) prosecuted in 2015. Defendants: Sindicato das Empresas de Serviços de Informática do Distrito Federal - SINDESEI; CTIS Informática Ltda.; Poliedro Informática Consultoria e Serviços Ltda.; Cast Informática Ltda.; MI Montreal Informática Ltda.; Brasília Soluções Inteligentes Ltda.; Brasília Emp. Serviços; Aval Informática; Leilis Informática Ltda.; Apoio Editora Multimídia Ltda.; Conecta Tecnologia em Sistemas de Comunicação Ltda.; Dominio Consultoria e Tecnologia Relacional Ltda.; TBA Holding Ltda.; Tata Consultancy Services do Brasil Ltda.; Policentro Tecnologia da Informação S.A.; B2BR - Business To Business Informática do Brasil S.A.; True Access Consulting Ltda.; Lafayete O. Galvão; José Calazans da Rocha; Avaldir da Silva Oliveira; Luis Carlos Garcia; Suely Santos Nakao; Joffre Leilis Filho; Francisco Maia Farias; Francisco Tony Brix de Souza; Marcio Pontes Veloso; Silvia Küster; Maria Cristina Boner Leo; Carlos Roberto Chamelete; and Luiz Antonio Garcia.)

¹¹ Currently, CADE's General Superintendence is conducting procedural instruction of the case, which has no decision made on it yet. The next step will be the clearance of the case, with the analysis of the preliminary arguments, and requests for evidence.

However, this scenario has changed¹²⁻¹³. It appears that many public administration bodies already have compliance programs, codes of conduct, supervisory departments, or internal investigations regarding public procurement.

These new internal procedures by the Public Administration demonstrate credibility and transparency in order to protect the public interest by hiring reputable companies to serve the community. Although, in a repressive way, we take the numerous Petrobras Internal Investigation Committees (CIA) as an example, which were set up to find evidence of acts incompatible with internal regulations or possible cases of corruption¹⁴.

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¹² The United Nations Convention against Corruption, adopted by the United Nations General Assembly on October 31, 2003, and it was ratified by Brazil through Decree 5.687/06, in article 5. It provides for the establishment of a public management program for public affairs, concerning topics, such as public goods, integrity, transparency, and control of public accounts.

¹³The State Law (Law n. 13.303/2016), for example, requires corporate governance rules and compliance practices in the activities of public companies and mixed capital companies, applied in their internal processes and in hiring and relationships with the external public (suppliers, third parties, public agents, etc.).

¹⁴ *Após Lava Jato, Petrobras triplica volume de investigações internas*. Available at: <https://congressoemfoco.uol.com.br/especial/noticias/apos-lava-jato-petrobras-triplica-volume-de-investigacoes-internas/> (Access on 28.08.2019).