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## IV. BID-RIGGING

### A. Overview

Section 47 of the Act is a specific offence prohibiting bid-rigging. Broadly speaking, bid-rigging ensues when two or more persons agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid, or submit a bid arrived at by agreement.

Section 47 of the Act is a *per se* offence (that is, bid-rigging behaviour captured by section 47(1) is deemed illegal without requiring proof of anticompetitive effects).<sup>76</sup> The bid-rigging provision of the Act was enacted in 1976.<sup>77</sup> The Act contains not only section 47 but a general conspiracy offence, section 45. The coexistence of a general conspiracy provision and a specific bid-rigging provision in the Act is unlike antitrust/competition legislation in other jurisdictions, where bid-rigging is addressed by a general conspiracy offence.<sup>78</sup> The historic rationale for this coexistence arises from the general conspiracy provision that was in place when the separate bid-rigging provision was enacted in 1976. The conspiracy provision in place in 1976 required the Crown to prove beyond a reasonable doubt that competition had been lessened unduly.<sup>79</sup> The Crown was unsuccessful prosecuting bid-rigging conduct under this provision, largely due to the difficulty in meeting this burden.<sup>80</sup> A separate bid-rigging offence sought to overcome this obstacle. Currently, the Act's conspiracy provision is now a *per se* offence, which has led some people to argue that sections 45 and 47 ought not to coexist and that section 47 ought to be repealed.<sup>81</sup>

76 See Section II for a discussion of *per se* offences, which applies equally to a *per se* offence under section 47 of the Act.

77 In 1976, the bid-rigging provision was section 32.2 of the *Combines Investigation Act* and was enacted by SC 1974-75-76, c 76, s 15.

78 For example, in the US, section 1 of the *Sherman Act* (15 USC §§ 1-7) prohibits any contract, combination, or conspiracy that unreasonably restrains interstate or foreign trade or commerce; this section captures price-fixing and bid-rigging violations. See also United States, Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Washington, DC: Federal Trade Commission, 2000) at 8.

79 The Act's conspiracy provision, section 45, was amended in March 12, 2010, rendering conduct captured by the offence *per se* unlawful. See Bill C-10, *supra* note 8, s 410.

80 *R v JJ Beamish Construction Company Limited et al*, [1967] 1 CCC 301 (Ont H Ct J), *aff'd* [1968] 1 OR 5 (CA); *Background Papers: Stage 1 Competition Policy*, *supra* note 69 at 29-31.

81 For example, see Omar Wakil & Marina Chernenko, "Bid-Rigging Enforcement Without a Bid-Rigging Provision: A Proposal for the Repeal of Section 47 of the Competition Act" (2015) 28:2 Can Comp L Rev 160, online: <<https://www.torlys.com/insights/publications/2015/07/bid-rigging-enforcement-without-a-bid-rigging-provision-a-proposal-for-the-repeal-of-section-47-of-the-competition-act>>.

The most common types of bid-rigging agreements or arrangements include *cover bidding* (giving the impression of competitive bidding when suppliers, in reality, agree to submit token bids that are usually too high), *bid suppression* or *withdrawal* (suppliers that agree to either abstain from bidding or withdraw bids), *bid rotation* (a preselected supplier that submits the lowest bid on a systematic or rotating basis), and *market division* (agreements among suppliers not to compete in designated geographic regions or for specific customers).<sup>82</sup>

When analyzing conduct that may be captured by section 47, one should have regard to section 47, applicable jurisprudence, and the Bureau's *Competitor Collaboration Guidelines*,<sup>83</sup> all of which are described more fully below. Section 45 should also be considered, since it may capture bid-rigging conduct that does not fit within the parameters of section 47.

## B. Elements of the Offence

The elements of bid-rigging are outlined in sections 47(1) and (2):

47(1) In this section, “bid-rigging” means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

(2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

Accordingly, prohibited conduct under section 47 is divided between agreements or arrangements between persons and those between bidders or tenderers.

Pursuant to section 47(1)(a), two or more *persons* commit an offence if (1) in response to a call or request for bids or tenders, these persons (2) intentionally and

82 Canada, Competition Bureau, “Bid-Rigging” (5 November 2015), online: <<http://www.competition-bureau.gc.ca/eic/site/cb-bc.nsf/eng/03152.html>>; OECD, *Guidelines for Fighting Bid Rigging in Public Procurement: Helping Governments to Obtain Best Value for Money* (2009) at 2, online: <<http://www.oecd.org/competition/cartels/42851044.pdf>>; United States Department of Justice, “Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For” (25 June 2015), online: <<https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>>.

83 *Supra* note 9.

advertently<sup>84</sup> agree or arrange between or among them (a) not to submit a bid or tender, or (b) to withdraw a bid or tender already submitted.<sup>85</sup>

Under section 47(1)(b), two or more *bidders or tenderers* commit an offence if, (1) in response to a call or request for bids or tenders, these bidders or tenderers (2) intentionally and advertently<sup>86</sup> submit a bid that they arrived at by an agreement or arrangement.

As noted, bid-rigging is a *per se* offence.<sup>87</sup> Section 47 does not capture all forms of bid-rigging but only what is statutorily defined in section 47(1). Accordingly, conduct not captured by section 47(1) does not trigger an offence under section 47 even if the conduct may amount to bid-rigging in the ordinary sense.<sup>88</sup> However, bid-rigging conduct not captured by section 47 may nevertheless be captured by section 45 of the Act. As a practical matter, an analysis of conduct that may be considered bid-rigging should have regard to the general conspiracy provision (s 45) and specific bid-rigging provision (s 47) of the Act.

### 1. What Constitutes an Agreement or Arrangement?

An agreement or arrangement—the *actus reus* for a section 47 offence—involves a mutual arrival at an understanding. An agreement or arrangement under section 47 has been characterized as a “meeting of the minds” between the parties, either explicitly or tacitly, to engage in the prohibited conduct described in section 47.<sup>89</sup> It has also been characterized through a “consensus” approach—namely, as “a consensus of minds relative to conduct performed, or to be performed.”<sup>90</sup> The agreement or arrangement does not have to be in relation to all aspects of the bids to be submitted in order to constitute an agreement or arrangement under section 47 of the Act.<sup>91</sup>

The “meeting of the minds” to engage in bid-rigging may be inferred from all of the circumstances under section 47 (as it may under section 45).<sup>92</sup> However, a

84 *Regina v Charterways Transportation Limited et al*, *supra* note 29; *R v McLellan Supply Ltd*, *supra* note 29.

85 Before 2009, the withdrawal of a tender pursuant to an agreement or arrangement was not an offence under section 47 of the Act. See *R v Rowe* (2003), 29 CPR (4th) 525 at para 17 (Ont Sup Ct J).

86 *Regina v Charterways Transportation Limited et al*, *supra* note 29; *R v McLellan Supply Ltd*, *supra* note 29.

87 Behaviour that is considered bid-rigging under section 47 is deemed illegal without requiring proof of anticompetitive effects (see s 47(1)); *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 73.

88 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 59; RJ Roberts, *Roberts on Competition/Antitrust: Canada and the United States*, 2nd ed (Toronto: Butterworths, 1992) at 121-22.

89 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at paras 16-18; *R v Bugden's Taxi*, 2006 CanLII 31901, [2006] NJ No 250 (QL) at para 15 (Prov Ct); *United States of America v Dynar*, *supra* note 27 at para 87; *Regina v Armco Canada Ltd and 9 other corporations*, *supra* note 26 at 191; *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, *supra* note 27; *R v Durward et al* (26 April 2015), Ottawa 09-300-68 at p 90 (Ont Sup Ct J) (jury instructions).

90 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 34; *R v McLellan Supply Ltd*, *supra* note 29. See also Roberts, *supra* note 88 at 128-29.

91 *R v Durward et al*, *supra* note 89 at pp 136, 172, and 211.

92 *R v Bugden's Taxi*, *supra* note 89 at para 15.

mere accommodation by another bidder does not constitute an “agreement or arrangement” under section 47 of the Act.<sup>93</sup>

The *mens rea* for section 47 arises from the agreement or arrangement, and is met when the Crown proves beyond a reasonable doubt that the accused intentionally and advertently entered into the agreement or arrangement.<sup>94</sup> The motive of the accused in entering into the agreement or arrangement is irrelevant to the existence of *mens rea*.<sup>95</sup>

As noted, to constitute an offence under section 47(1)(b), a bid must be arrived at by an agreement or arrangement, and, as a result, the outcome of the agreement or arrangement must lead to the bid and not simply relate to steps in the preparation of the bid.<sup>96</sup>

## 2. Call or Request for Bids or Tenders

The phrase “call or request for bids or tenders” or the terms “bids” or “tenders” are not defined in the Act. The phrase “call or request for bids or tenders” is broad in nature, the interpretation of which is evolving in jurisprudence. Some have characterized the phrase as carrying “the highest degree of uncertainty.”<sup>97</sup>

At a minimum, an agreement or arrangement to bid-rig requires a direct relationship, or nexus, between the person calling for the bids and tenders and the person submitting the tenders.<sup>98</sup> Determining what is captured by a “call or request for bids or tenders” focuses on the intention of the parties to create contractual relations.<sup>99</sup> For example, requests for a quotation to supply motor vehicle manufacturers with motor vehicle components have been found to be captured by a “call or request for bids or tenders.”<sup>100</sup>

93 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at paras 14-15.

94 *Regina v Charterways Transportation Limited et al*, *supra* note 29 at para 74; *R v McLellan Supply Ltd*, *supra* note 29 at paras 22, 24-25.

95 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30 at para 7.

96 *R v Durward et al*, *supra* note 89 at pp 87-88.

97 Pierre-Christian Collins Hoffman & Guy Pinsonnault, “The Characterization of a Procurement Process as a ‘Call or Request for Bids or Tenders’ Under Section 47 of the Competition Act” (2014) 27:2 Can Comp L Rev 323 at 329 [Hoffman & Pinsonnault, “The Characterization of a Procurement Process”].

98 *R v Coastal Glass & Aluminum Ltd*, *supra* note 26 at para 12.

99 *R v Dowdall*, 2013 ONCA 196; *R v Al Neshar et al* (1 February 2013), Montreal 500-73-0035350-104, 500-73-0035350-102 (QCCQ).

100 *R v Yazaki Corp* (18 April 2013), Ottawa (Ont Sup Ct J). See Canada, Competition Bureau, News Release, “Record \$30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier” (18 April 2013), online: <<http://www.competitionbureau.gc.ca/cic/site/cb-bc.nsf/eng/03560.html>>.

The courts have relied heavily upon the law of tendering and contract law in respect of requests for proposals (RFPs) in interpreting the phrase “call or request for bids or tenders.”<sup>101</sup>

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The jury in *Durward* returned a finding of not guilty.<sup>103</sup> As with all findings in jury proceedings, no written reasons are provided. Accordingly, the basis for the jury’s finding is unknown. Interestingly, the preliminary inquiry judge in *Dowdall* determined that there was sufficient evidence for a jury to consider at trial. In so doing, the preliminary inquiry judge found that an RFP may be captured by a “call or request for bids or tenders” even when it contains a term permitting the party issuing the RFP to retain the discretion not to proceed to call up work or services.<sup>104</sup>

In contrast, in *Al Nasher*,<sup>105</sup> a contested proceeding involving several charges under section 47 of the Act, the preliminary hearing judge concluded that there was insufficient evidence to commit the accused to trial. The judge relied largely on the fact that the condominium owner had no obligation to award a contract to any complaint bidder and no obligation to accept the lowest complaint bid.

Because the courts rely heavily upon the law of tendering rather than upon a statutory definition in interpreting the phrase “call or request for bids or tenders,” a determination of whether bid-rigging conduct is captured by the phrase is very contextual.

## C. Defences

### 1. The “Make Known” Defence or Notification Defence

There is no offence under section 47(1) where the agreement or arrangement is made known to the person requesting the bid or tender at or before the bid or tender is submitted or withdrawn (as the case may be) by any person who is a

101 The law of tendering and contract law in respect of RFPs has evolved in jurisprudence, including in a number of decisions by the Supreme Court of Canada: *The Queen (Ont) v Ron Engineering*, [1981] 1 SCR 111; *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619; *Martel Building Ltd v Canada*, 2000 SCC 60, [2000] 2 SCR 860; *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58, [2001] 2 SCR 943; *Double N Earthmovers Ltd v Edmonton (City)*, 2007 SCC 3, [2007] 1 SCR 116; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69. Conceptually, the contract in an RFP is comprised of a two-phase contract: a preliminary “contract A” and a final “contract B.” For a helpful discussion of the aforesaid jurisprudence arising from the Supreme Court of Canada and the law of tendering and contract law in respect of RFPs, see Collins Hoffman & Pinsonnault, “The Characterization of a Procurement Process,” *supra* note 97.

103 *Ibid.*

104 *R v Dowdall*, 2012 ONSC 3945 at para 39; *R v Dowdall*, *supra* note 99 at para 6. The RFP contained a “task authorization” mechanism, whereby the winners who received a contract for services were required to meet a further step (i.e., task authorization) in order to be retained to conduct the work or services.

105 *Supra* note 99.

party to the agreement or arrangement (s 47(1)). As a practical matter, this defence legitimizes joint bidding arrangements. The accused must expressly notify the person requesting the bid or tender of the agreement or arrangement,<sup>106</sup> or take all reasonable care to make an agreement or arrangement known.<sup>107</sup> Notification cannot be inferred by the person requesting the bid or tender.<sup>108</sup>

The “make known” defence or notification defence is not a defence for the general conspiracy offence under section 45(1). Accordingly, an act of bid-rigging that does not trigger sections 47(1) and (2) due to the “make known” defence or notification defence may nevertheless trigger section 45(1).

## 2. Affiliate Companies

There is also no offence under section 47(1) where the agreement or arrangement is arrived at only by companies each of which is an affiliate company (s 47(3)). As noted, “affiliate” is defined in the Act, but the definition refers to affiliated corporations, not to affiliated companies.<sup>109</sup>

## D. Penalty

According to section 47(2) of the Act, “Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.”

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106 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30.

107 *Regina v Charterways Transportation Limited et al*, *supra* note 29.

108 *Regina v Lorne Wilson Transportation Ltd; Regina v Travelways School Transit Ltd*, *supra* note 30. However, in her jury instructions in *R v Durward et al*, *supra* note 89 at pp 142 and 147, the trial judge noted that the “make known” defence could be made through express notification or implied notification.

109 Section 2(2) of the Act reads as follows: “For the purposes of this Act, (a) one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual; (b) if two entities are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and (c) an individual is affiliated with an entity if the individual controls the entity.”