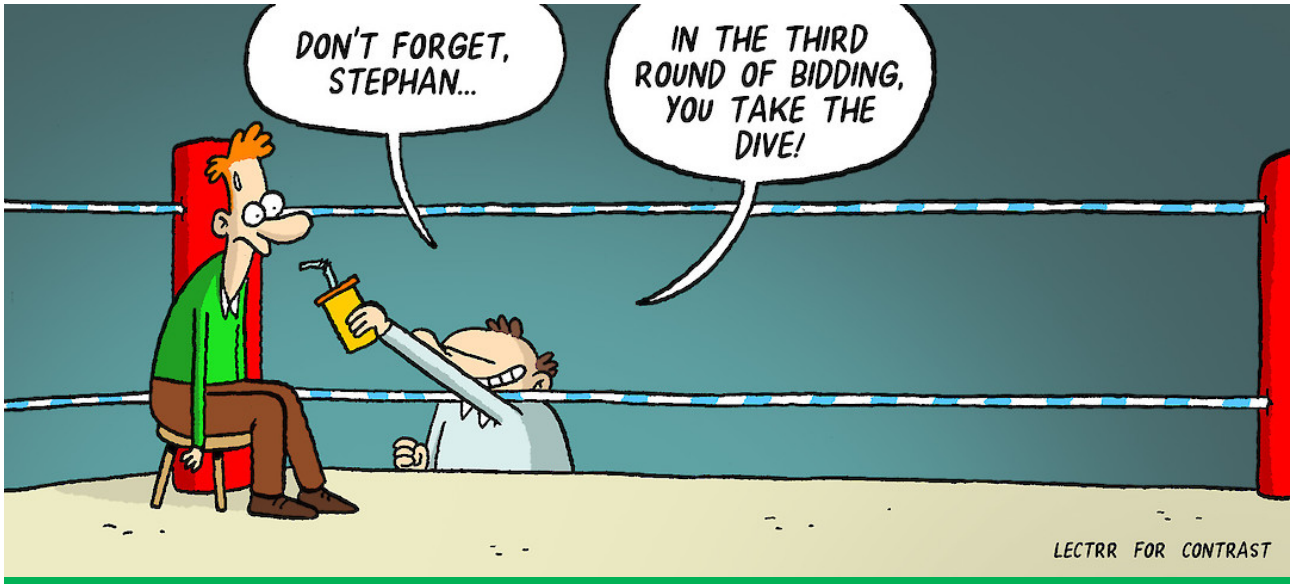
contrast



To bid or not to bid, that cannot be the question!

December 2017

Imagine…

You head the sales department of a young and dynamic company that is active in a flourishing sector. Competition in this sector is tough, and you have to cut your profit margins in order to attract new customers.

You find out that one of your most important customers will soon be issuing a call for tenders for a very sizeable contract. You also hear that three of your competitors will be gunning for it as well.

If you succeed in winning this call for tenders and are able to achieve a solid profit margin, you will amaze your colleagues - and your boss. You might even wangle a hefty bonus out of it. So you come up with a plan whereby the customer involved will have no other choice than to award the contract to your company . . .

You get right down to work. You call up former colleagues and contacts at your three competitors. You propose to divide up this call for tenders plus the next three in your sector amongst the four of you. For the first call for tenders it is agreed that the contract will be awarded to your company: one of the competitors will not submit any tender at all, and the other two will file ones that are more expensive

than yours. The next three calls for tenders will be awarded in a similar way to a different one of the competitors in turn, so that over the next four calls for tenders, each company will win one contract.

You excitedly inform the legal department about this plan of action and, to your dismay, they prove to be less than enchanted. Your plan would result in an illegal cartel in the form of *bid rigging*. You can hardly believe your ears. What do they mean, *bid rigging*? What do they mean, illegal cartel?

A brief clarification.

Competition law prohibits companies from engaging in actions that distort competition. An agreement between competitors to share markets is a perfect example of such distortion. Agreements like this constitute cartels, and they are very serious violations of competition law.

Within the framework of calls for tenders, such market-sharing practices are referred to as "*bid rigging*".

Bid rigging can assume various forms:

- The competitors agree in advance about who will submit a real offer and who will submit a false one (i.e. a non-competitive tender that everyone knows in advance will not be accepted by the principal);
- The competitors set up a rotation system where they agree about who will participate under what conditions in future calls for tenders, so that each of the parties “wins” a contract in turn;
- The competitors agree on who will refrain from submitting an offer (or will withdraw it) so that the other has a better chance of being awarded the contract;
- The competitors are assigned their own specific regions, and they agree not to participate in calls for tenders that take place outside their "own" region.

Bid rigging agreements often include mechanisms for calculating and dividing the extra profits that the "winner" obtained through the higher prices he was able to get from the principal. The competitors who have refrained from submitting a tender or who have submitted a false one can, for example, be rewarded via a subcontracting agreement or by supplying goods or services to the winning company.

Participation in *bid rigging* can have serious consequences. Competition authorities can impose fines that amount to 10% of the worldwide turnover of the group to which the cartel participant belongs. In Belgium, an administrative fine amounting to a maximum of 10,000 euros can also be imposed on the individuals who were involved in these practices. Finally, participation in bid rigging within the framework of public procurement contracts can lead to criminal-law sanctions (imprisonment and penal fines).

Already in 2007 and 2008 the European Commission imposed heavy fines for *bid rigging* in the “lifts and escalators cartel” case (almost 1 billion euros) and the “removals cartel” case (almost 33 million

euros). In France the “yoghurt cartel” led to fines of almost 200 million euros, including for bid rigging. In May 2017, the Belgian Competition Authority for the first time imposed a penalty of 1.8 million euros for *bid rigging* on five companies that were involved in such agreements within the framework of a public procurement contract issued by Infrabel, the manager of the Belgian railway infrastructure. Infrabel subsequently announced that it is planning to seek damages from the companies involved.

Concretely:

- Competition law requires that each company participate autonomously in tender procedures, fully independent of its competitors. It is irrelevant in this respect whether the call for tenders is organized by a government authority, a public company or a private company.
- If you are approached by a competitor with a request to participate in *bid rigging*, immediately contact the legal department. Legal will prepare a written response in which your company distances itself from this request and clearly states that it does not wish to receive any similar requests in the future.

Want to know more?

- Click here for the European Commission's press release (2007) on the lifts and escalators cartel.
- Click here for the European Commission's press release (2008) on the removals cartel.
- Click here for the French competition authority's press release (2015) on the yoghurt cartel.
- In December 2016, the Belgian Competition Authority published a guide on bid rigging within the context of public procurement contracts. Click here to consult this guide.

- In May 2017, the Belgian Competition Authority sanctioned five companies for their participation in bid rigging practices within the framework of a call for tenders issued by Infrabel. Click here to consult this decision.