IMPLEMENTING REASONABLE RULE FOR IMPOSING CRIMINAL PENALTY ON JOINT BIDDERS IN PUBLIC BID: CRITICAL COMMENT ON SOUTH KOREA'S CASE

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ABSTRACT

Recent decisions from Seoul District Court raise serious issues regarding joint bidding for public contracts. Joint bidding can work either pro- or anti-competitively in a public bid. When two or more enterprises come together to bid on a public contract, they can bring about new effects, such as efficiency-increase, synergy effect from combination of capabilities and ideas. Law-making and executing agencies in Korea even encouraged joint bidding. On the other hand, joint bidding can have a profoundly anti-competitive impact, especially if otherwise viable competitors collude to split the market or make fake competition. Korean courts are struggling to balance such pro-competitive effect with anti-competitive effect. The recent decisions penalizing joint bidders who did not offend official public tender rules threw out the threat of possibly serious criminal prosecutions against join bidding.

This article draws attention of international authorities by arguing that subtle and sophisticated economical and legal issues should be resolved carefully in order to penalize joint bidders. The authorities will do prosecute or ask prosecutors to file criminal law-suits against joint bidders only with unambiguous evidence or significant effect of anti-competitiveness in light of positive and negative effects of joint bidding.

I. INTRODUCTION: REGULATION ON THE BASIS OF DIFFERENT EVALUATIONS ON JOINT BIDDINGS

Joint bidding, as practices of submitting a single bid by one entity, e.g. a joint venture, established by two or more firms, grew popular in auctions/bids of public procurement or private competitive bid-submission system. Meanwhile, they have received mixed appreciations regarding its impact on the bids. Effect of a consortium on the bid, similar to horizontal mergers[1], is diversified in terms of the size of companies under the consortium, the number of firms participating in the bid, synergy effect of a consortium, and so on. The way that the price is offered for the auction/bid, moreover, can affect the impact of a joint-bid on the competition. A joint-bid in the price-sealed bid auction is less susceptible to collusion while one in price-ascending bid auction, enabling cartelistic detection, is more vulnerable to collusion.[2]

Each country has endeavored to design appropriate rules regulating a consortium for a joint bid. Some countries in the EU have almost no restriction against the formation of bid consortia while France allows solo bidders to create a consortium as long as their object or result is not to restrict competition.[3] Meanwhile, the U.S. Department of Justice has held on the regulatory approach by forbidding competition-restricting joint bids.[4] However, in a private action caused by the shareholders whose company was acquired by a joint bid between private-equity funds, the District Court of Washington held that plaintiff's claim failed to state price-fixing of violation of sec.1 of the Sherman Act under per se illegal or rule of reason standard. It reasoned that the joint bid as price-fixing among rival bidders in a corporate control context is not anticompetitive by spreading the risks of acquisitions among bidders, allowing poorer bidders to participate, and increasing rather than suppressing competition.[5] It added that, under the rule of reason, the appearance of being only two bidders prior to the joint bid in itself is insufficient to find the market power of the joint bidder because any other firm could have participated in the tender offer and the shareholders could have rejected the joint bid.[6]

This paper argues that criminal enforcement against a joint-bid should be supported by sound economic analysis proving that its anti-competitive effect significantly outweighs its benevolent effect. The analysis of this paper will be based on the price-sealed join-bid in the context of a public construction bid among other bids. Chapter 2 of this article examines a recent decision of the Seoul District Court which imposed criminal penalty on joint bidders, currently pending

at the Supreme Court for appellate review. Chapter 3 addresses diverse aspects of joint-biddings by explaining indefinite relationship between joint-bidding and anti-competitive effect. Chapter 4 points out the problems of indiscreet criminal enforcement against joint-biddings. Chapter 5 proposes rule of reason standard rather than per se illegal as an analytic guideline of anti-competitiveness of a joint-bidding. Finally, chapter 6 sums up arguments with conclusion.

II. HOLDING OF SEOUL CENTRAL DISTRICT COURT REGARDING A JOINT BIDDING IN A PUBLIC CONSTRUCTION BID

The Seoul Central District Court issued a decision holding that, when enterprises, having competed with each other in a subway-construction bid, agreed not to compete but divided the areas of subway-construction, they violated Art.. 19 (1) of Korea's Monopoly Restraint and Fair Trade Act(MRFTA), a provision prohibiting companies from limiting contract partners or dividing markets.[7]

After deciding the illegitimacy of the collusion, the Court decided that the circumstances that each enterprise, taking part in a bid for respective zone distributed through the collusion, established a consortium with other competitors, not participating in the former collusion, indicated that the establishment of the consortium and its consequential reduction of competition in the bid were another anti-competitive practices.[8] The Court held that, although each consortium included small local company, the forming of the alliance itself violated Art..19(1) of the Korea's MRFTA. The Court imposed additional criminal penalty on each enterprise which operated the consortia.[9]

Meanwhile, sec.72(2) of Presidential Decree pursuant to Art. 25(1) of Acts on Contracts to which the State is a Party(ACSP)[10] states that when the head of each central government agency or the public official in charge of contracts intends to conclude a contract by competition, he shall conclude a joint contract as far as possible, unless the joint contract is deemed inappropriate in light of the purpose and characteristics of the contract. Art. 58 of MRFTA acknowledges that this Act shall not apply to lawful acts of an enterprise or an enterprisers' organization conducted in accordance with other Acts and subordinate statutes. The Court opined, nevertheless, the establishment of the consortium does not fall under the realm of a lawful act under Art. 58 of MRFTA as an exception to free competition in the business areas where strict public regulation is necessary from the perspective of public interests.

Proposing such narrow interpretation of Art. 58 of MRFTA, the Court analyzed each consortium in the respective zone of the subway construction bid, thereby holding that operating such consortium including a major competitor in the bid violates Art.19(1) of MRFTA which prohibits companies from setting or maintaining price or condition of a trade. Although the construction bid provider encourages the establishment of a consortium, particularly with bonus score to the consortium including a local company, and a joint contract is deemed as necessary under the Presidential Decree of ACSP, the Court held that the consortium including other competitors as well as a local company is not exempted by MRFTA Art. 58.

Without a concrete proof indicating anti-competitive effect, the Court finally held that there are no other circumstances constructed as the pursuit of efficiency for cost or construction techniques than avoidance of competition. Following this statement, the Court even stated that it surmised both the increase of the consortium's cost through its taking burden of a new member's draft cost and the rise of the bid-winning price so as to compensate for the draft cost. The reasonings reveal that the Court only through the pure conjecture deems the consortium as anti-competitive without any evidence of cost-increase or analysis of its impact on the competitive bid, and imply that burden of proof for the economic impact of the joint venture on competitiveness is in fact not on a prosecutor but on a defendant.[11]

The Court's decision, that is an appellate review[12], overrode the first-leveled decision of Seoul District Court with its main reasonings on the Presidential Decree under ACSP Art.72(2)&(3). The first-leveled decision had dismissed complaints by holding that there is no clear data sufficient to acknowledge that the consortium is intended merely for the restraint of competition, and that construction of the consortium falls under the realm of a lawful act to be exempted by ACSP, and Presidential Decree, & Art.20 of Criminal Code[13] in Korea.[14]

III. DIVERSE ASPECTS OF JOINT-BIDDINGS: INDISTINCT RELATIONSHIP WITH COMPETITIVENESS

1. Indefinite Effects Deriving from Joint-Biddings

The effect of joint-bidding on competitiveness does not lead to a consistent result, but depends on economic circumstances in an auction/bid, an industry, and a country. Moreover, even in the same economic circumstances, the degrees of efficiency of joint-bidding diverse according to the number, competitiveness, and locality of its

member companies.[15] Generally, a joint bidding is not firmly compatible with competition except for some areas where combination of labor and local techniques or foreign investment and familiarity to local areas is required.[16] However, such anti-competitive effect caused by the joint bidding is insignificant in quantitative analysis.[17] In the area where high degree of technologies are required, e.g. the electricity sector, where competition is already limited and strict technical requirement works as an entry barrier, overall joint-bidding effect should be very carefully examined in light of balance between positive joint-bidding effect and negative effect of restriction of competition.[18]

2. Negative Propensities of Joint-Bidding

As regards the competitive effect on a bid by joint bidding, theories reveal different predictions.[19] Joint-bidding weakens the possibility of aggressiveness of biddings since it reduces the number of participants in a bid through a single joint-bid. Such reduction of the number of participants tends to less competition and the increase of a bid-winning price.[20] In other words, a bid-provider tends to pay more to a bid-winner in cases of joint-bidding than in cases of single-bids. According to an econometric research, a winning bid through joint bidding went higher by 15% than one through several sole bids.[21]

3. Benevolent Propensities of Joint-Bidding

The possibility of joint bidding, however, goes high as total project cost is high and estimated project duration is long.[22] The result of another research reveals, on the other hand, that a joint-bid is required in spite of its (indigenous) anti-competitive effect, or that it makes competition more intense when there is not sufficient financial resource, technological capacity, or information.[23] The OECD report on competition in bidding markets confirms the former research by citing empirical studies claiming that joint bidding did not, in fact, reduce the number of bids but was a tool to diversify risk, weaken liquidity- or capital constraints, and allow the sharing of private information.[24]

Other factors in a market, e.g. stability of market shares, entry barriers, the countervailing power of buyers/suppliers, & the nature of the product, should be considered so as to deem a joint-bid legitimate.[25] As a bid market is unstable, and potential competitors are expected to participate in the near future, a joint bid with highly-combined market share can be classified as an allowed alliance. When the power of a bid provider sufficiently outweighs that of

supplying companies in the market, the joint-bid can be treated as legitimate. When the product or service as the object of a bid needs sophisticated technology or mid- or long-term investment in a huge scope, the joint-bid in the public auction/bid for the product is to be encouraged or at least legitimized in light of the characteristics of the product or service.

When there are economic benefits from a joint-bid, sufficiently outweighing anti-competitive effect, the joint-bid with substantial proof for efficiency improvement, for example, should be allowed. In order to legitimize their joint-bid, joining parties are to demonstrate that such efficiencies are likely to be caused by the cooperation. Collaboration between a foreign company with much money but less familiarity in locality and a local company with need of monetary investment is one example of the efficient cooperation. Careful determination of legitimacy based on economic analyses is necessary to distinguish a phony joint-venture from benevolent collaboration. From the economical standpoint, a standard that anti-competitive effect significantly outweighs the benefit of joint-bidding shall be the guideline which disallows a joint-bid working as a cartel.

4. Other Considerations for Distinguish of Benevolent Joint-bidding

Availability of less restrictive means for collaboration under law other than a joint bid is another consideration for deciding violation of the law. When a measure, e.g. a consortium only composed of companies individually incompetent to proffer an effective bid, is available as the least restrictive means, a joint bid including a company capable for the bid can violate antitrust law as an activity restricting competition. Meanwhile, when a consortium including a competent company is encouraged or allowed by law, the joint bid including a company with sufficient sources shall rarely be punished with criminal enforcement.

IV. Indiscrete Criminal Enforcement against Joint-Bidding

1. Public Enforcement of Administrative Agency

With respect to enforcement of antitrust law in civil law countries, public enforcement by an administrative agency, e.g. administrative sanction or surcharge, has been a tool against an illegal cartel, used frequently and conveniently by the agency in charge of competition law enforcement. Korea’s Fair Trade Commission(FTC) in charge of operating Monopoly Restraint and Fair Trade Act(MRFTA) has issued surcharges as well as administrative sanctions against cartels.

Although the administrative sanctions have been rigorous, the sanctions are considered to have limited retributive power particularly against corporate individual colluders. Illegal profits and monetary damages caused by a cartel are very difficult to calculate precisely, thereby resulting in the imposition of lenient surcharges in many cases.[26] Criminal enforcement, especially with the threat of imprisonment, as a complement to administrative sanctions on a corporate entity, has been invoked by Korea's antitrust law expert encouraged by a rigorous criminal enforcement against cartels of the U.S. Department of Justice.[27]

2. Problems of Rough Criminal Enforcement against Business Collaboration

When it matters the object of criminal enforcement, it is not good that criminal penalty be imposed on overall scopes of cartels. As an unambiguous division between a benevolent cartel and an anticompetitive cartel seems difficult to be made in light of benevolent effects of a cartel, introducing criminal enforcement as the strictest sanction may press any kind of legitimate inter-company cooperation, or generate a waste of huge amount of legal fee for counseling about whether a business alliance is allowed or whether inter-corporate activities are under criminal punishment[28].

Particularly, when criminal penalty can pierce into such gray economic areas as prior regulations or guidelines for penal code are not explicitly promulgated, fundamental principles for application of criminal law shall be abided by. Unless such rules are followed, enterprises will consider all most all collaborative practices among enterprises being under criminal enforcement. Such strong threat and less predictability about criminal penalty will lead to shrinkage of even legitimate business activities and wastes of much legal counseling cost.

Imprudent and harsh condemnation against information-sharing among bidders can result in such negative effect as frustration of businessman' originality under the threat of criminal penalty. Such originality, indispensible for businessmen to innovate their business in spite of future risks, can function well only without the threat of criminal punishment.[29] Korea's Supreme Court, recently, adopted business-judgment rule which does not punish entrepreneurs taking risks in their businesses with good faith but facing unintended losses.[30]

One of the principles under criminal law is that criminal punishment should be reserved for a joint bidding of which anticompetitive effects sufficiently outweigh its causing benefits. The example is a phony joint bidding, such as a tacit scheme of bid rotation or a phantom bid.[31] When the degree of anticompetitive effects is more or less around that of benefits of the joint bid, the careless application of penal punishment shall disrupt sophisticated consideration of the balanced effects by potential bidders as well as current bid participants. Particularly, in light of situations of developing countries where there are less financial resources and less technical skills, criminal punishment strict enough to sacrifice benevolent joint-biddings shall be drawn back.

3. EC Commission Notice Using Economic Criteria

As cooperation among competitors may have diverse effects on efficiency and competition, criminal enforcement against an alliance, unsupported by economical analysis of both negative and positive effects, shall be withdrawn. European Communities(EC) Commission Notice regarding guidelines on the applicability of Art.101[32] of the EC Treaty to horizontal cooperation confirms the point that economic criteria form a key element of the assessment of the market impact caused by cooperation and the violation of Art.101.[33]

Application of criminal provisions is effective in punishing collusive behaviors among companies with their own capacity to carry out a project or involving significant market power. EC Commission Notice, on the other hand, approves collaboration among competitors (i) which do not have independent capacities sufficient to operate business or (ii) whose combined market share is low, or (iii) which one of two collaborators has insignificant market share and does not possess important resources.[34]

First, when competitors do not have sufficient capacities for a project, a kind of collaboration, e.g. a consortium or a joint venture, can be allowed. A research also approves a consortium consisting of the companies which would not be able to offer or meet a winning bid because the joint or consortium agreement does not restrict competition.[35] It argued that a tender from a joint venture of companies which would not have been able to win the bid will never restrict competition which otherwise would have taken place.[36] Rather, a consortium made up of competing companies with limited capacities can bring about positive economic benefits through reciprocal collaboration, information-pooling, and its synergy effect. If such collaboration is not allowed among competitors with limited

capacity, winning of a project will go only to a large corporation with sufficient capacity, thereby heightening current market barriers against potential participants. Such a result will exclude participation in a market through collaborative alliance between/among small and mid-sized companies.

Second, so as to decide a market as concentrated, a market should be defined,[37] and its scope should not be de minis.[38] When the scope of market reaches a level beyond a tiny-scoped market, the higher a combined market share of a joint venture, the more likely the market goes concentrated. Market concentration, often assessed with an indicator called the Herfindahl-Hirshmann Index(HHI), is high when competitors have the significant market position.[39] As market goes concentrated, the information regarding prices or market strategy grows important. In addition, the incentive for information-sharing among competitors becomes significant, thereby increasing the possibility of collusion.[40] Without the high combined market-share, a joint bid through information-sharing may be approved for potential economic benefits caused by collaboration.

Third, although the combined market share is relatively high, a joint bid can be permitted when one of just two parties has an insignificant market share and when it does not possess important resources.[41] Such an alliance between the small company and mid- or big company can bring about high synergy effect and benevolent competitive impacts on the market through its strategic cooperation. Combining important resources, however, can be led to the high probability of collective production and marketing, thereby increasing the possibility of market concentration.

4. Conflict with Evidentiary Rule of Criminal Procedure

Evidence rule under criminal procedure, beyond reasonable doubt, should be abided by in enforcing criminal penalty in antitrust law while evidence rule under civil procedure, preponderance of evidence can still be applied to private actions of antitrust law, e.g. an action in damages. A provision which presume the illegality of a collusive behavior, e.g. MRFTA Art.19.5, is an inappropriate rule to be applied as an evidentiary provision in criminal procedure of antitrust law as the provision does not require the economic analysis for determining the illegality of collusion, and shift burden of proof from a prosecutor to defendants. The prosecutor can meet the illegality of a cartel with the surmise of competition-restriction whenever he/she sees concerted business practices. Such practices under the provision conflict with the vital evidence rule that prosecutors should take responsibility to prove overall elements of a crime.

V. Rule of Reason with Economic Analysis rather than per se Illegal

1. Practices and Decisions in Countries with Accumulated Experiences of Antitrust Law

(1) The U.S.

Countries with sound experiences of antitrust enforcement do not demonstrate the same attitudes regarding a joint bid. The U.S. strictly prohibits auction/bid from being influenced by an explicit price-fixing.[42] The U.S. antitrust practices demonstrate that the necessity of a joint bid should be under careful examination if any firm can obtain the object contract without collaborating with other companies.[43]

Courts in the U.S., both federal and state-leveled, have issued decisions which require economic analysis for determining pro- or anti-competitiveness of a joint-venture[44]. Seemingly anti-competitive practices were not condemned under the per se illegal rule as violation of sec.1 of the Sherman Act[45], but were held as allowed under the rule of reason when there is no sufficiency of economic analysis indicating its anti-competitiveness.[46] The Court of Appeals of the Second Circuit, through Columbia Broadcasting System Inc. (CBS) v. American Society of Composers, Authors, & Pub.(ASCAP) et. al, has held that the practices of blanket license[47] should be assessed not under per se illegal but under the rule of reason when the opportunities for having deals with individual composers and publishers are available.[48]

State courts held, particularly, a joint-bid for public construction or one through a joint-venture is held as not per se price-fixing, thereby requiring actual inquiry into competitive conditions of a market under rule of reason.[49] The Court of Appeals of Minnesota, for example, opined that the submission of a joint bid, a practice provided for in the Minnesota Department of Transportation(DOT)'s specifications for construction, does not necessarily discourage competition and raise prices. Rather, the Court held that, unless the joint bid is so facially anticompetitive that inquiry into market conditions is unjustified, contractors' joint endeavors could have increased economic efficiency and enhanced market competition,[50] thereby requesting economical examination. In addition to the economical study, the analyses of business-peculiar facts, the history of the restraint, and the reasons for imposing the restraint are

necessary to decide whether the restraint impedes competition unreasonably.[51]

(2) The United Kingdom

Joint-biddings, including companies with strong market position, were decided as legitimate by the U.K. competition authority. The Office of Fair Trading of the U.K. approved joint bidding through the acquisition by assessing, among other things, the probability of intervention from the national or EU competition authorities with penalty as well as the existent strong position of an acquired company.[52]

(3) Japan

Although prior bid-price setting is a price cartel, Japan does not consider a price cartel as violation of antitrust law without careful examination of circumstances, e.g. business customs and policy coherence. A joint-bidding, consequently, is an area where antitrust law has been rarely applied in Japan.

2. Joint-Bidding: More Than the Mere Sum of Those of Members

The U.S. District Court in Tennessee defined a joint venture as a separate enterprise distinguished from its parent firms, which, through integration of operations of the parent firms, has the characteristic of new productive capacity, new technology, a new product, or access to a new market.[53] The definition demonstrates, in itself, that the integration through a joint venture is the creation of new productive capacity sufficiently outweighing the summing of member firms' capacities.[54] In other words, the whole capacity of a joint venture should be more than the mere sum of those of its member firms.[55]

▷Integration Effect A joint-bidding, according to the same logic, can be approved when it proves effect more than the sum of respective bidders. Such effect of integration, analogous to so-called synergy effect of a joint venture or merger, is caused by information-pooling effect, cost-saving, and the promotion for aggressive biddings. As a post-merger firm can hold wider networks reflecting the merger and more powerful production bases from the combination of resources than respective member firms would have, a joint venture is able to possess extra-benevolent effect beyond the mathematical sum of resources of its member companies. The effect can come out through combination of information with technology,

by business strategy supported by financial resources, or by risk distribution along with financial advantages.

▷Promotion of SMEs A joint-bidding can contribute to promotion of small or middle-sized enterprises(SMEs). Particularly, in a public construction bid, SMEs are difficult to win the bid. Design costs for drafts and specifications which are going to be submitted to and evaluated by bid providers are heavy burden[56] for the companies because the companies are not sure whether they can obtain the project under the action. For fear that they may lose the bid, they hesitate to invest many financial resources to drawing good blueprints. Less aggressive bidding under less investment leads to less competitiveness in the construction bid. The joint-bidding, which includes small/ mid-sized firms, can lead to large-scaled investment into the bid preparation process, thereby contributing to a more competitive bidding result, or high-leveled draft.

◁ Reduction of Competition On the other hand, a joint-bid can reduce competition between competitors through offering the method of co-operations. Sometimes, a joint-bid generates collusion.[57] In the U.S. where social policy for racial equality is emphasized, a U.S. District Court held that a joint bid with the idealistic object of prohibiting racial discrimination worked as a private conspiracy and violated the Sherman Act since it excluded others' participations in a relevant market, which has been traditionally recognized clearly as anticompetitive, e.g. horizontal allocation of a market.[58]

3. Capacity Issue of Member Company

Judicial examination of settlement decree's provisions in the U.S. bid-rigging cases indicated that joint bidding between competitors in a construction project is not allowed unless the project is unable to be accomplished without a combination or competitively by just one of the participants, or unless the joint venture is to produce a product never made by any of its members.[59] Pursuant to the judicial principle, only a joint venture whose member companies have insufficient capacities to accomplish construction project may be a legitimate tool.

Under the careful consideration of cost and benefit caused by a joint bidding, however, even combination of companies with sufficient capacity for the project may be allowed to win the bid if benefit through the joint bidding is proved to outweigh cost. Such benefit will be illustrated as improvement of quality of a draft, or decrease of the bid price as well as saving of draft cost. Meanwhile, cost will be

calculated with increase of the auction/bid price under less competition or reduction of bid-participating companies as a result of restricted competition. Under the rule of reason, when overall benefit outweighs cost out of a joint venture, the venture can be approved in spite of its members' sufficient capacities.

4. Necessity of Rule of Reason Standard

It is noteworthy that the restriction of a bid consortium among firms does not always lead to aggressive biddings under competition. The results are different, depending on the degree of synergy of consortia among bid firms and among small firms.[60] Particularly, when synergy from the consortium including big firms is substantial and the number of big firms is high, the restriction of the consortium can produce negative impact on the auction/bid and efficiency in a market.[61] The argument is more applicable when synergy from the consortium of small firms is small or trivial compared to that from the consortium of big firms.

Auctioneers' abilities to design auction rules for promoting competition as much as possible can function in favor of joint biddings. As auctioneers may impose various restrictions, e.g. preventing bidders from sharing confidential information or from teaming up with other competitors, a joint-bidding, not violating issued auction rules although seemingly anti-competitive, shall be less likely assessed as creating seriously anti-competitive impact on the auctions.[62] As bid providers, similarly, have powers to design bidding rules to prevent collusion through a joint-bid and to reject to make a joint contract, anti-competitive effect through a joint bid is not so high as the joint bid appears. Especially, in criminal procedure for imposing criminal penalty against joint bidders, imposing criminal penalty on joint-bidding, which does not explicitly conflicts with prior-issued auction/bid rules, lacks a reasonable ground without proving unbearably serious anti-competitive impact on the auction/bid.

5. Statutory Exemption Issue

Although a joint bid unreasonably restricted competition, a state court in the U.S. held that such joint bid may have been statutorily exempted as a joint venture permitted by the DOT of the state.[63] Similarly, Korea's Act on Contracts to which State is a Party(ACSP) encourages respective participant in a government construction project to submit a joint contract, and the Presidential Decree for ACSP makes mandatory a joint contract with a small local

company.[64] In addition, Art.56 of MRFTA also acknowledges the exemption from its application for activities pursuant to other laws and decrees.[65] Sharing information about each bidder's valuation for the object up for an auction/bid can make the bid/auction process competitive through more aggressive bidding.[66]

VI. Conclusion: Reserving Abrupt Criminal Penalty against Joint-Biddings

Creating and operating a consortium in a construction project have been not a rare phenomenon in these days. Public procurement or bid is not an exceptional area to the trend as the scope of construction grows bigger and society goes more specialized. Korea's law encourages and even requires such an association between a company with financial resources and a company with technical expertise along with the local awareness.[67] In such circumstances, controversial issues regarding distribution and appropriation of construction fee claims in the context of a joint venture/consortium or joint contract have been decided and judgments have been accumulated at South Korea's courts with respect to the joint contract issue.[68]

Until recent judgments from Seoul District Court, the issue of criminal law application, particularly with respect to 'anti-competitive effect of a joint venture', has never been seriously treated in South Korea. Although the possibility of fraudulent avoidance of regulation of competition law is to be closely scrutinized, lawful activities pursuant to related laws should never be under criminal punishment unless their benefit-outweighing anti-competitive effects are clearly proved by prosecutors. According to a long-standing general principle of criminal procedure, prosecutors shall prove beyond a reasonable doubt [69] fraudulent acts, distinguished from lawful acts. Other countries' practices, including even the U.S. enjoying the strictest antitrust law enforcement, indicate that penalization of a joint venture and its members with criminal penalty is to be decided not under per se illegal but under rule of reason standard. Moreover, the practices explicitly reveal that anti-competitiveness under rule of reason shall be verified with clear evidences rather than mere conjecture. Electronic procurement system for identifying bid-rigging symptoms called as 'Bid Rigging Indicator Analysis System(BRIAS)', currently operating and being contributed to discovering tacit bid-riggings with quantitative data in South Korea, can provide actual helps to collect evidences on the basis of economic analysis.[70] Because, unlike a hard-core cartel cartel, a consortium/joint venture operating as one entity has plenty of room to consider its synergy effect, pro-competitive effect, or

other benevolent economic effects, the association shall not be decided as per se illegal without evidence reflecting its economic conditions.

A target of criminal enforcement shall be, except a joint-venture/consortium under concrete evidences proving anti-competitive effect and its unlawful intents, confined to the association consisting of major competitors with sufficient capacity for the object construction and with significant market shares along with important resources of production, in a not de minis contract/bid. Even in cases of the former association, the imposition of criminal penalty on the one created pursuant to other law and decrees, in the light of diverse economic circumstances, shall be supported by evidences on the basis of sound economic analyses demonstrating anti-competitive impact of the association on public bid/procurement .

The rough deployment of criminal penalty against a joint consortium/association without its economic analysis in the context of a public bid conflicts with public procurement/bid law reflecting diverse interests within the public system. It should be noted that even the threat of criminal enforcement without proposing a clear rule distinguishing a legal joint venture from criminal one can bring about strategic avoidance of an innovative-integrating process, and waste of time and money, e.g. legal-counseling fee, for forming a cooperative entity in a public bid/procurement.

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3. Cases (the U.S. and Korea)

Columbia Broadcasting System(CBS), Inc. v. American Society of Composers, Authors, and Publishers(ASCAP) et. al, 620 F.2d 930 (C.A.2nd Cir. 1980)

Compact et al. v. The Metropolitan Government of Nashville & Davidson County, TN., et al. 594 F.Supp. 1567, 1574 (1984)

Gary R. Ballo & Kristin Ballo v. James S. Black Co. et. al, Inc. 692 P.2d 182, 39 Wash.App. 21 (C.A.Wa. 1984)

Pennsylvania Avenue Funds v. Borey, Case No. C06-1737RAJ , 569 F.Supp.2d 1126, 1133-1134 (W.D. Was. Feb. 21, 2008)

State of Minnesota v. Road Constructors, Inc. 474 N.W.2d 224 (C.A.MN, 1991)

Seoul Central District Court (SCDC)(Division of Appeals of Criminal Affairs), Case 2008No[노]862 (2008.6.27)

SCDC, 2007godahn[고단]6399 decision, at 18-19 (2008.2.14)

Supreme Court of Korea(SCK), Judgment 2002Do[도]4229 (2004.7.22)

SCK, Judgment 2002Do[도]3131 (2004.10.28)

Korea Fair Trade Commission(KFTC), Case (No.2007 – 533), 2007Kah-Jung[카정]2674 (Nov. 1, 2007)

4. Newspaper Article

Berman & Senders, Private-equity Firms Face Anticompetitive Probe, The Wall Street Journal, A3 (Oct. 10, 2006)

END NOTES

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[1] For an article pointing to such similarity, Gian L. Albano, Giancarlo Spagnolo, and Matteo Zanza, Joint Bidding in Procurement, Journal of Competition Law and Economics 2 (2008); Fabio Falconi, Antitrust Aspects of Joint Bidding Among Competitors, 6(2) Competition Law Journal 113 (2007).

[2] Falconi, *supra* note 1, at 114.

[3] Belgium and Denmark has almost no constraint to the formation of a bidding consortium. Meanwhile, Italy, Austria, and Romania have taken regulatory approaches. Albano et al. *supra* note 1. at 2.

[4] In 1975, the U.S. Department of the Interior prohibited the eight major producers from offering a joint bid for outer continental shelves leases. See id. In 2006, the Department of Justice investigated into a consortium among private equity firms for a joint bid for target companies. Berman & Senders, Private-equity Firms Face Anticompetitive Probe, The Wall Street Journal, A3 (Oct. 10, 2006)

[5] Pennsylvania Avenue Funds v. Borey, Case No. C06-1737RAJ , 569 F.Supp.2d 1126, 1133-1134 (W.D. Was. Feb. 21, 2008)

[6] Pennsylvania Avenue Funds case, 569 F.Supp.2d, 1126, 1134.

[7] Seoul Central District Court (SCDC)(Division of Appeals of Criminal Affairs), Case 2008No[노]862, at 5-7 (2008.6.27)

[8] With the same cause, Korea' Fair Trade Commission filed a criminal complaint against construction companies to public prosecutors' office. KFTC, Case (No.2007 – 533), 2007Kah-Jung[카정]2674 (Nov. 1, 2007), available at http://www.ftc.go.kr

[9] SCDS, Case 2008No[노]862, at 17-19.

[10] Art..25 (1) If it is deemed necessary for a contract for construction work, manufacture, etc., the head of each central government agency or the public official in charge of contracts may conclude a joint contract with two or more parties to the contract.

[11] Art..19(5) of MRFTA allows the judicial body to presume collusive behaviors violating Art..19(1). This provision enables KFTC or prosecutors to verify involved companies' collusion with insufficient or lack of concrete evidence. Seoul District Court in this case did not formally mention or apply Art..19(5) but resulted in judgment which applied the presumption provision in an informal and actual way. Art..19(5) prescribes that where two or more enterprisers are conducting an act falling under any of subparagraphs

of paragraph (1), it shall be presumed that the enterprisers have agreed to conduct an act in association falling under any of subparagraphs of paragraph (1) when it is highly probable to reckon that they did the act in association regarding the characteristic of the relevant transaction, goods or services, economic reasons and ripple effects of the relevant activity, frequency, mode , etc. of contact among enterprisers.

[12] According to Korea's Act on Court Institution Art..32(1) no.3, the first-level criminal cases, supposed to be treated with penalty of capital punishment, life imprisonment, and no less than one-year imprisonment, shall be judged by bench trial made up of three judges. All the other criminal cases shall be judged by a single judge. An appellate review of the decision by the single judge shall be decided by bench trial while that of the decision by bench trial shall be decided by the Court of Appeals. This case followed the former procedure.

[13] Criminal Code Art.. 20 (Justifiable Act) : An act which is conducted in accordance with Acts and subordinate statutes, or in pursuance of accepted business practices, or other action which does not violate the social rules shall not be punishable.

[14] Seoul Central District Court, 2007godahn[고단]6399 decision, at 18-19 (2008.2.14)

[15] Antonio Estache, Atsushi Imi, Joint Bidding in Infrastructure Procurement, Ecore Discussion Paper 2008/65, p.26-27 (Aug. 19, 2008)

[16] Estache & Imi, id., at 11 & 17, 25 (It illustrates road procurements in China or other developing countries, e.g. Philippines, for benefits of joint-bidding between foreign and local company. Meanwhile collaboration between local companies rather than between foreign and local companies can make more competitive effect in water projects)

[17] *See id.*, at 17.

[18] *Id*. at 26.

[19] Atsushi Iimi, (Anti-)Competitive effect of joint bidding: evidence from ODA procurement auctions, 18 Japanese Int'l Economies 422-

424 (2004)

[20] Albano, *supra* note 1, 5.

[21] OECD, Policy Round Tables: Competition in Bidding Markets, 30, DAF/COMP(2006)31, (2006)

[22] Iimi, *id.* at 430-431.

[23] *See id.* at 422-424.

[24] Falconi, *supra* note 1, at 116 (citing OECD, Competition in bidding markets, at 29, DAF/COMP(2006)31 (Jun. 4, 2007))

[25] European Communities(EC) Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, para. 30, 2001/C 3/02 (Jun.1.2001)

[26] Particularly in developing countries, see Sanghyun Lee, Effective Approaches of International Law regarding Cartels, 80-120, SJD thesis (Golden Gate Univ. School of Law) (unpublished, the file on the author) (2008)

[27] Dae-Sik Hong, Enforcement of Cartel Regulation, vol.12 Comp. L.R.[경쟁법 연구] 92-93 (2005).

[28] When Companies Act of United Kingdom penalized leveraged buy-out with exceptions, called whitewash, a magnificent amount of money was spent for legal counsel's advices regarding fulfillment of whitewash. US$ 39 million was spent for the purpose in 2000. International Finance Law Review, United Kingdom: Liberating LBOs (2008.1.1)

[29] Hong, id. at 90.

[30] The Supreme Court of Korea, Judgment 2002Do[도]4229 (2004.7.22); Judgment 2002Do[도]3131 (2004.10.28)

[31] Iimi, *supra* note 16, at 425.

[32] Art.81 of EC Treaty has moved to Art.101. Art.101, formerly Art.81, prohibits anti-competitive agreement among competing enterprises, such as price-fixing, production limitation, or market share.

[33] European Communities(EC) Commission Notice, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para. 5 & 7, SEC(2010)528/2.

[34] EC Commission Notice, id., para. 28 & 42.

[35] Falconi, *supra* note 1, at 115-116 (Falconi argues that such agreement does not restrict competition).

[36] Falconi, *supra* note 1, at 116.

[37] EC Commission Notice states that the relevant market(s) have to be defined by using the methodology of the Commission's market definition notice so as to carry out this analysis. EC Commission Notice, *supra* note 33, para. 41.

[38] Gary R. Ballo & Kristin Ballo v. James S. Black Co. et. al, Inc. 692 P.2d 182, 39 Wash.App. 21 (C.A.Wa. 1984)

[39] HHI sums up the squares of the individual market shares of all competitors. When HHI is below 1000, the market concentration is considered low, between 1000 and 1800, as moderate, above 1800, as high.

[40] *See supra* note 31. para. 150.

[41] *Id*. para.28.

[42] 18 U.S.C. sec. 371 (conspiracy to defraud the U.S.)& sec.1001 (false statement) as well as 15 U.S.C. sec.1 (conspiracy to restrain inter-state transaction) can be applied. Additionally, 18 U.S.C. sec.1341(mail fraud) & sec.1343(wire fraud) can be applied. *See*

American Bar Association, Criminal Antitrust Litigation Handbook, 354 (2nd Ed. 2006).

[43] Iimi, *id.* at 425. The U.S. Dep. of Interior actually banned eight major oil companies from jointly bidding. *Id.* at 425.

[44] This paper accepts definition of a joint venture with the following four essential elements: (i)an express or implied contract, (ii)a common purpose, (iii)a community of interest, and (iv)an equal right to control. However, an ownership or proprietary interest in the subject matter of the enterprise by all parties is not essential to creation of a joint venture. *See* Ballo case, 692 P.2d. 182, at 187, 39 Wash.App.21.

[45] The Sherman Act is a representative antitrust law in the U.S.

[46] Columbia Broadcasting System(CBS), Inc. v. American Society of Composers, Authors, and Publishers(ASCAP) et. al, 620 F.2d 930 (C.A.2nd Cir. 1980) (blanket license does not violate sec.1 of the Sherman Act); Ballo case, 692 P.2d 182 (a joint venture of developers does not violate antitrust laws); State of Minnesota v. Road Constructors, Inc. 474 N.W.2d 224 (C.A.MN, 1991) (a joint bid for highway projects were neither so facially anti-competitive nor per se price-fixing)

[47] A blanket license is the right to perform copyrighted music by transmitting it to the networks' television audiences. The blanket license allows the licensee, which is a television network, to use any music in the repertory of the licensor, a separate entity consisting of individual composers or music companies, e.g. ASCAP or BMI, as often as desired, for a one-time license fee and for a period set before. CBS v. ASCAP et al. 620 F.2d 930, 933. The blanket license looks to have the more restrictive impact on a market's competition than a joint-bid by a consortium. However, the Court held that the blanket license is not anticompetitive under rule of reason. *Id*. at 935.

[48] CBS v. ASCAP, 620 F.2d 930, at 934.

[49] State of Minnesota v. Road Constructors, Inc. 474 N.W.2d 224, 226 (1991); Ballo case, 39 Wash.App.21, 27, 692 P.2d 182, 187.

[50] Road Constructors, Inc. case, 474 N.W.2d. 224, at 226.

[51] *See id.*

[52] Falconi, *supra* note 1, at 120 (citing Competition Commission, Vivendi SA and British Sky Broadcasting Group plc: a report on the merger situation, para. 2.89 (April 2000))

[53] Compact et al. v. The Metropolitan Government of Nashville & Davidson County, TN., et al. 594 F.Supp. 1567, 1574 (1984)

[54] *See* 594 F.Supp. at 1574 (The joint venture provides a method of organization enabling competitors to join together to produce what is beyond the productive capacity of its individual members)

[55] *Id*. (Compact decision cites BMI v. CBS, Inc. 441 U.S. 1, 21-22 (1979))

[56] Fees for drawing a design usually amount to around 5% of total construction costs, or several million U.S. dollars. If a bid-offering company lose the auction, the total costs cannot be recovered. Won Jung, The Views on the Systematic Improvement for the Prevention of Construction Bidding Collusion[건설입찰담합 방지를 위한 제도개선방안], Human Right & Justice[인권과 정의], 107(2008.03)

[57] *See* 594 F.Supp. at 1574. OECD, Policy Roundtables: Competition in Bidding Markets, 30, DAF/COMP(2006)31 (2006) (Klemperer argued that net effect of joint bidding is always anti-competitive. Levin particularly insisted that anti-competitive effect of joint bidding in a uniform price auction with multi-unit demand does not come out as much as that in a single-unit auction).

[58] *See* 594 F.Supp. at 1577.

[59] 594 F.Supp. at 1578 (U.S. v. . (New England Concrete Pipe Corp., 1959 Trade Cas. (CCH) P 69,481 (D.Mass. 1959) & U.S. v. General Electric Co. , 1962 Trade Cas. (CCH) P 70,367(E.D.Pa. 1962), among other cases, are cited)

[60] Albano et al., *supra* note 1, 7-9.

[61] Albano et. al, *id*. at 8.

[62] Falconi, *supra* note 1, at 117.

[63] 474 N.W.2d, at 226. The Court of Appeals rejected appellant(plaintiff, or the State of MN)'s motion to summary judgment because the impact of the joint bid agreement on competition in the market is not clearly demonstrated. The Court, on the other hand, affirmed the entry of summary of judgment for defendant(contractors).

[64] *See* Sec. 72(2) of the Presidential Decree & Art.. 25(1) of ACSP. The request for cooperation in the provisions is intended for relieving local construction companies' struggles and for reforming the existent multi-leveled sub-contracting system through which auction/bid-winning big companies pay relatively low fees to sub-contracting companies and postpone paying the fees.

[65] Art.56 prescribes that this Act shall not apply to lawful acts of an enterprise or an enterprisers' organization conducted in accordance with other Acts and subordinate statutes.

[66] Falconi, *id*. at 117.

[67] In Korea, Art..25(1) of ACSP, sec.72(2) of Presidential Decree, and sec.8 & 9 of Administrative Regulation(2200.04-136-18 (2009.6.29)) presuppose that a public construction bid is generally to be made through a joint contract of a consortium besides some exceptions.

[68] Jae-Yoon Yoon, Legal Affairs of a Joint-Consortium in Construction: Focus on Public Construction Project[건설공동수급체의 법률관계], 545 Bub-Jo[법조] 75 (2002.2); Jung Won, Legal Affairs of a Joint-Consortium in Construction & Reformative Views for Operation[건설공동수급체의 법률관계와 운영상의 개선방안], Research on Military Defense Procurement Contract, 599-632 (2005.12); Wan-Soo Lee, Report on Legal Characteristics of Construction-Consortium, in Construction Trial Practices Research, 359 (Seoul Central District Court, 2006)

[69] Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes, and Executive Materials, 1170 &1180 (2nd ed. West Pub., 2003) (Miller & Wright cites Commonwealth v. Webster, 59 Mass.295, 320(1850)). In South Korea, 'in dubio pro reo' principle as criminal procedure of civil law system replaces 'beyond a reasonable doubt' standard. 'In dubio pro reo' means that a defendant should not be decided as guilty when a judge is not clearly assured about, but doubts the conviction of the defendant after all the evaluations of evidences.

[70] University of Trento, International Competition Law, available at http://internationalcompetitionlaw.wikidot.com/system:public-procurement (visited on Mar.29th, 2010)