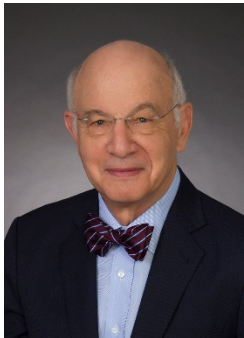




# DOJ Procurement Collusion Strike Force: Preventing Collusion and Antitrust Violations in Federal Contracting

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# PANELISTS



## **John S. Pachter**

Member, Smith Pachter McWhorter PLC

A practitioner of government contract law for over 50 years, John has engaged in litigation before the Boards of Contract Appeals, U.S. Court of Federal Claims, Federal District Courts, and the U.S. Court of Appeals for the Federal Circuit. In addition to dispute resolution in all areas of government contract law, he counsels clients on fraud and compliance investigations, audits, corporate governance and ethics, and defense of *qui tam* actions.



## **Cormac T. Connor**

Member, Smith Pachter McWhorter PLC

Cormac is a trial lawyer and litigator with nearly 20 years of experience in a wide variety of criminal and civil litigation matters, including FCA, FCPA, criminal fraud and antitrust investigations. Cormac served as an Assistant United States Attorney in Washington, D.C., acting as lead prosecutor on 24 criminal trials and investigating hundreds of criminal cases.



## **Patricia Becker**

Deputy General Counsel, Chemring Group

Patricia advises on all areas of government contracts, compliance and business decision-making for CHG Group, Inc., the U.S. lead company for the Chemring Group entities, as well as the four separate business units in the U.S. Prior to joining Chemring, she served as Corporate Director and Division Counsel at Northrop Grumman Corporation.



## **G. Zachary Terwilliger**

U.S. Attorney, Eastern District of Virginia

Zachary supervises the prosecution of all federal crimes and the litigation of all civil matters in the Eastern District of Virginia, leading a staff of over 250 prosecutors, civil litigators, and support personnel located in Alexandria, Newport News, Norfolk, and Richmond.

# Preventing Collusion and Antitrust Violations in Federal Contracting

## Topics for Discussion:

- ▶ Background: Federal Antitrust Law
- ▶ Overview of the DOJ Procurement Collusion Strike Force (PCSF)
- ▶ Antitrust Issues in Government Procurement
- ▶ Teaming Arrangements
- ▶ “No-Poach” Agreements
- ▶ Communicating/Sharing Information
- ▶ Q&A

# Background: Federal Antitrust Law

# What Do Federal Antitrust Laws Prohibit?

- ▶ Anticompetitive Agreements (Sherman Act § 1)
- ▶ Unilateral Monopolistic Conduct (Sherman Act § 2)
- ▶ Price Discrimination That Substantially Reduces Competition (Clayton Act § 2)
- ▶ Mergers and Acquisitions Likely to Lessen Competition (Clayton Act § 7)
- ▶ Unfair or Deceptive Acts or Practices (Federal Trade Commission Act)

# Anticompetitive Agreements: Sherman Act § 1

- ▶ Sherman Antitrust Act of 1890 was enacted in response to the rise of monopolies and anticompetitive business practices in the Gilded Age, and was famously wielded by “trust-buster” Teddy Roosevelt
- ▶ “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1

# Anticompetitive Agreements: Sherman Act § 1

- ▶ Violation of Sherman Act is a felony, subject to severe civil and criminal penalties, including:
  - Fines as great as \$100 million for corporations/\$1 million for individuals
  - Imprisonment for up to 10 years
  - Subject to alternative fine provision in 18 U.S.C. § 3571, permitting fine up to twice the gross financial loss or gain from violation
- ▶ Clayton Act Section 4A provides that **USG can recover treble damages for antitrust violations when it is the victim**, in addition to criminal fines

# Antitrust Basics

- ▶ “Rule of Reason” – Default Standard:
  - Review “all of the circumstances of a case” to “distinguish[ ] between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest” *Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703, 711 (E.D. Va. 2019) (citations omitted)



# Antitrust Basics

## ▶ “Per Se” Violations

- **Bid Rigging** – agreement among competitors to influence the outcome of competitive bidding
- **Price Fixing** – agreement among competitors to raise, fix, or otherwise maintain prices
- **Market Allocation** – agreement to divide markets by customer or type of customer, product, or geographic area

## ▶ Third Category: “Quick Look”

- Structured, truncated analysis for anticompetitive conduct, primarily in civil cases, that is not a “per se” violation but is found to be “inherently suspect”

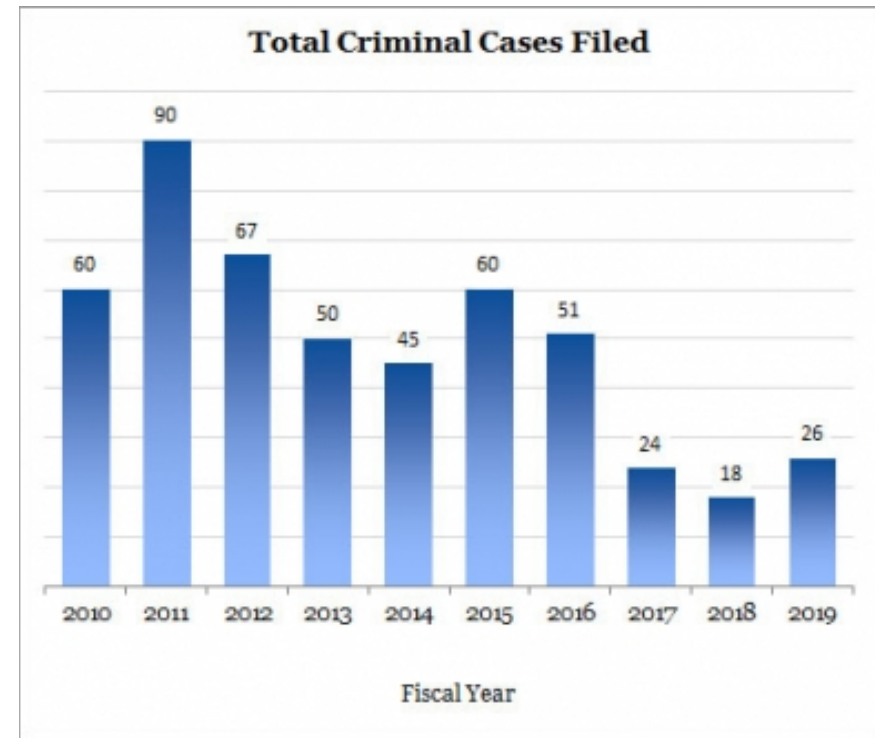
# Justice Manual, 7–1.100 Antitrust Policy

- ▶ Mission: “[T]o promote economic competition through enforcing and providing guidance on antitrust laws and principles”
- ▶ Enforcement Policy: “[T]he Division’s policy, in general, is to proceed by criminal investigation and prosecution in cases involving **horizontal, “per se” unlawful agreements such as price fixing, bid rigging, and market allocation**” (emphasis added)
- ▶ Justice Manual’s exceptions where “per se” violations may not be appropriate for criminal investigation or prosecution:
  - (1) case law is unsettled or uncertain; or
  - (2) truly novel issues of law or fact presented

# DOJ Antitrust Criminal Enforcement

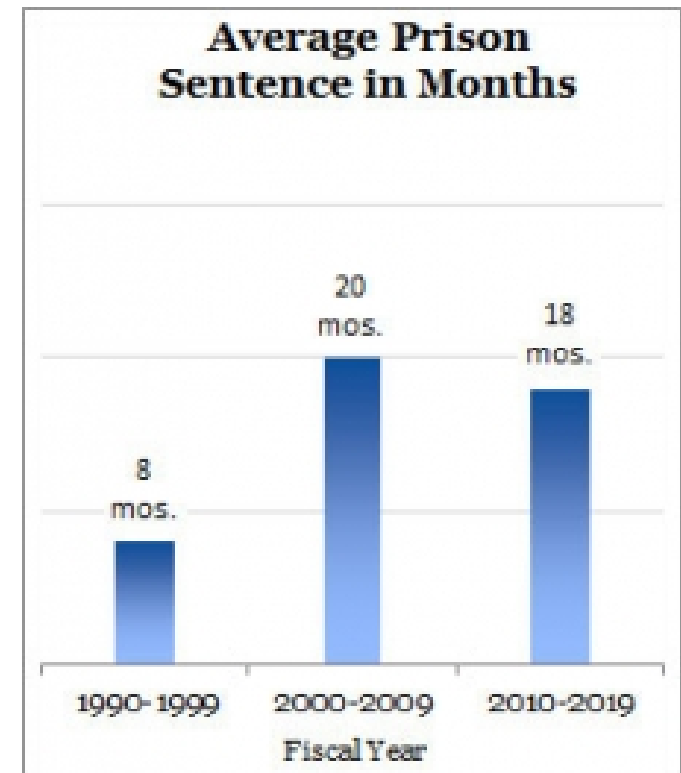
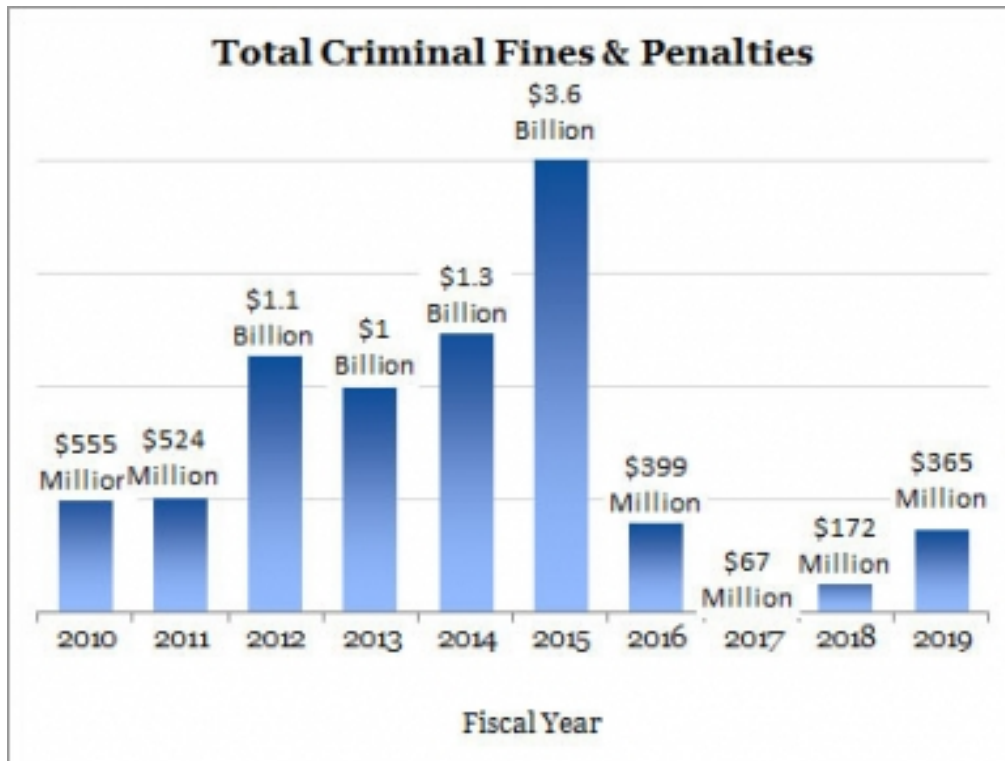


**Criminal enforcement actions have been trending down in recent years**



# DOJ Antitrust Criminal Enforcement

Prison sentences, fines, and penalties have also been falling



# Overview of DOJ's Procurement Collusion Strike Force (PCSF)

# DOJ Procurement Collusion Strike Force

- ▶ Overall Mission of the Antitrust Division:
  - Promotion and maintenance of competition in the American economy
    - (key theme to remember)
- ▶ DOJ Announced the PCSF November 5, 2019
- ▶ Objective to "**deter**, detect, investigate, and prosecute antitrust crimes and related criminal schemes that affect procurement, grant, and program funding at all levels of government—federal, state, and local"
- ▶ Interagency partnership among:
  - DOJ Antitrust Division
  - 13 U.S. Attorneys Offices
  - Inspectors General of DOD, DOJ, and USPS
  - FBI

# DOJ Procurement Collusion Strike Force

- ▶ Why Even Launch the Strike Force Focused on Procurement?
  - Safeguard taxpayer funds by promoting and safeguarding competition
  - Government Contracting as:
    - High % of Spending
    - Regulatory requirements make new entry difficult
    - Repetitive, regularly scheduled purchase schedule
    - Quantity makes monitoring and oversight difficult for Gov't
    - Focus on area where can have biggest impact

# DOJ Procurement Collusion Strike Force

## Features of PCSF

- ▶ Virtual Strike Force:
  - Partnership for outreach and investigation/prosecution
- ▶ Decentralized, district-based structure
- ▶ Local, in-district working partners
- ▶ Training and outreach emphasis
- ▶ Use of data analytics to identify violations

## Precursors

- ▶ Operation Ill Wind (1986)
- ▶ National Procurement Fraud Task Force (2006)
- ▶ Medicare Fraud Strike Force (2007)
- ▶ Financial Fraud Enforcement Task Force (2009)



# DOJ Procurement Collusion Strike Force

## The 13 U.S. Attorneys Offices:

1. Central District of California
  2. Eastern District of California
  3. District of Colorado
  4. District of Columbia
  5. Southern District of Florida
  6. Northern District of Georgia
  7. Northern District of Illinois
  8. Eastern District of Michigan
  9. Southern District of New York
  10. Southern District of Ohio
  11. Eastern District of Pennsylvania
  12. Northern District of Texas
  13. Eastern District of Virginia
- Large military installations
  - Government presence
  - Major contractor locations
  - Nationwide coverage

# PCSF U.S. Attorney Partner Locations



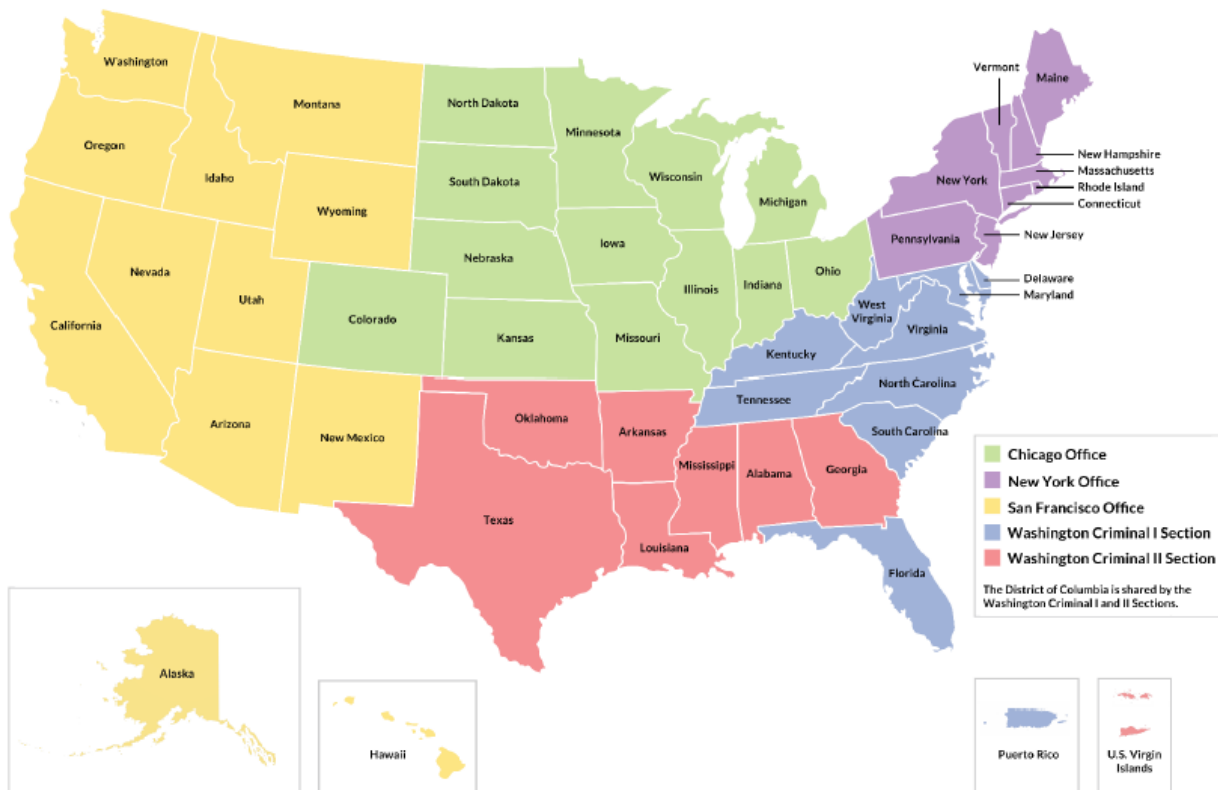
Continental U.S. image credit: Olga Turkas / iStock / Getty Images Plus



# Antitrust Division: Criminal Enforcement

Five criminal sections:

- Chicago
- New York
- San Francisco
- Washington I
- Washington II



# DOJ Procurement Collusion Strike Force

## District-Based Model

- ▶ Virtual Taskforce (by design not due to COVID)
- ▶ Districts selected for a reason
- ▶ Tailored to each of 13 districts
  - Each District knows their territory and industry the best
- Teams Approach
  - POC Liaison at ATR
  - POC at USAO
  - POC at FBI
  - POC at OIGs
    - All geared toward efficiency, expertise, and streamlined decision-making
    - Huge difference in ATR investigations & All Fraud on Government Cases
- ▶ Educate new audiences about “red flags” of collusion
- ▶ Facilitate reporting of suspected violations
- ▶ Partner on resulting investigations/prosecutions

# DOJ Procurement Collusion Strike Force

## Status Update Fall 2020

- ▶ More than one-third of Antitrust Division's open investigations relate to public procurement
- ▶ Almost 25 grand jury investigations opened
  - National Security/Defense
  - Public Works
  - Domestic and International
    - (latter allows for work with FBI's International Corruption Unit)
- ▶ Non-Exclusive List of new partnerships w/EDVA
  - ARMY CID
  - Air Force OSI
  - Washington Metropolitan Area Transit Authority (WMATA)

# DOJ Procurement Collusion Strike Force

## Status Update Fall 2020

### ► Training

- “Buy Side” procurement officials & “Sell Side” contractors
- Trained more than 5,500 criminal investigators, data scientists, and procurement officials
- More Specifically: 500 different federal, state, and local government agencies trained
  - Training is geared toward audience, not one size fits all (FEMA & CDC vs GSA & BOP)
- Of Note: 50 of these 500 proactively reached out to PCSF to request training

# DOJ Procurement Collusion Strike Force

## Additional Resources Available Online:

- ▶ <https://www.justice.gov/procurement-collusion-strike-force>



# Antitrust Issues in Government Procurement



# General Risk Factors for Collusion

- ▶ Specialized goods and services
- ▶ Few qualified competitors
- ▶ Limited substitute goods or services
- ▶ Small group of major vendors controls a large share of the market
- ▶ Lowest price technically acceptable source selection
- ▶ Good or service is standardized, so determining factor in award is price rather than other competitive factors (such as design, quality, or service)

# Reasons Government Procurement Process Is Vulnerable to Collusion

- ▶ USG purchases specialized goods and services, for which there are often relatively few qualified sellers
- ▶ USG makes purchases in emergencies or other urgent circumstances (contingency contracting in war zones, disaster relief, pandemics...) and bad actors take advantage of the extreme circumstances
- ▶ USG buys wide variety of goods and services, and in a large volume, making it challenging to monitor for collusive activity
- ▶ USG spends a huge amount of money on procurement contracts, averaging more than \$500 million per year
  - According to the PCSF website "the sheer monetary value of government projects presents an enticing opportunity for greed to prevail over ethical conduct"

# Case Examples: Recent Government Contractor Per Se Antitrust Violations

- ▶ **Korean Fuel Cases** – Bid rigging scheme between contractors supplying fuel to military bases. Originated with FCA whistleblower. Six settlements from 2018–2020: GS Caltex Corporation, Hanjin Transportation Co. Ltd., Hyundai Oilbank Co. Ltd., SK Energy Co. Ltd., S-Oil Corporation, Jier Shin Korea Co. Ltd. DOJ recovered \$205 million
- ▶ **Insulation Cases** – Contractor and co-owner plead guilty to bid-rigging, fraud, on contracts for installing insulation around pipes and ducts on public and private construction projects. *See U.S. v. Thomas F. Langan; U.S. v. Langan Insulation, LLC* (latest of five convictions in 2019 and 2020, with investigation still ongoing)
- ▶ **Gordon D. McDonald Case** – Contractor project manager sentenced to 14 years for bid rigging, kickbacks, and other crimes in 2014. Longest prison sentence ever imposed involving antitrust crime. Employer, Severson Environmental Services, Inc., paid \$2.72 million to settle bid-rigging and kickback allegations

# Public Procurement Antitrust Risks/Consequences

- ▶ **Suspension and Debarment – Antitrust** violations can be the basis for temporary or fixed-term exclusion from federal contracting
  - “Violation of Federal or State antitrust statutes relating to the submission of offers” is one of the enumerated causes for debarment or suspension. FAR 9.406–2(a)(2), 9.407–2(a)(2)
  - Overseas suspending and debarring officials are authorized to suspend or debar if a foreign country finds that the contractor engaged in bid-rigging, price-fixing, or other anti-competitive behavior. DFARS 209.403(2)(iii)(A)

# Public Procurement Antitrust Risks/Consequences

## Federal Trade Commission (FTC)

- ▶ Parallel civil enforcement authority; also: M&A reviews
- ▶ Devotes most of its resources to particular segments of the economy: health care, pharmaceuticals, professional services, food, energy, IT
- ▶ Gov Con Example: In 2006, intervened in formation of United Launch Alliance, L.L.C. (ULA), a proposed joint venture between Boeing Company and Lockheed Martin Corporation to consolidate manufacturing and development of the companies' expendable launch vehicles. Settlement provided the following:
  - (1) Required JV to cooperate on equivalent terms with all providers of government space vehicles;
  - (2) Required Boeing and Lockheed's space vehicle businesses to provide equal consideration and support to all launch services providers when seeking any USG delivery in orbit contract; and
  - (3) Required JV and members to safeguard competitively sensitive information

# Public Procurement Antitrust Risks/Consequences

- ▶ **False Claims Act** – Antitrust violations may violate FCA
  - Antitrust violations may form the basis for false certification FCA liability because contractors bidding on most fixed price solicitations must certify they arrived at their pricing independently. FAR 52.203-2, "Certificate of Independent Price Determination")
  - Sherman Act § 1 bid-rigging conspiracy for construction projects in Egypt funded by USG was basis for successful FCA action. *Miller v. Holzmann*, 563 F. Supp. 2d 54, (D.D.C. 2008), *aff'd in part, vacated in part, remanded on other grounds*, 608 F.3d 871 (D.C. Cir. 2010)
  - Relator brought FCA action against contractors for bid-rigging in connection with a federal grant. *United States ex rel. McGee v. IBM Corp.*, 81 F. Supp. 3d 643 (N.D. Ill. 2015)

# Public Procurement Antitrust Risks/Consequences

- ▶ **Procurement Integrity Act (PIA) Violations** – PIA is another tool to address anticompetitive conduct
  - *Cajan Welding and Rentals* – Prime contractor employee conspired with sub employee to provide non-public cost and pricing info to sub. Plead guilty to conspiracy to defraud the USG and violate the PIA
  - PIA was response to *Operation Ill Wind*, 1980s scandal implicating many senior contractor executives and high-ranking military officials. Allegations involved sharing contractor pricing information among competitors to influence contract awards, among other offenses



# What Actions Can Contractors Take If Competitors Appear to be Colluding?

## Reporting suspected anti-competitive conduct

- ▶ DOJ's Antitrust Division reporting hotline
  - <https://www.justice.gov/atr/report-violations>
- ▶ PCSF reporting portal on website:
  - <https://www.justice.gov/procurement-collusion-strike-force>
  - Includes links for reporting (i) general procurement collusion allegations and (ii) allegations specific to COVID-19 procurement
- ▶ Private cause of action under Clayton Act allows potential recovery of treble damages, 15 U.S.C. § 15



# What Actions Can Contractors Take If Competitors Appear to be Colluding?

## Antitrust Violations Not Grounds for GAO Bid Protest

- ▶ GAO will not consider allegations of collusive bidding by awardees to determine if a violation of antitrust laws has occurred because such criminal violations are the province of the Attorney General and the federal courts. *See, e.g., TFA, Inc.*, Comp. Gen. Dec. B-243875, 91-2 CPD 239
- ▶ GAO has acknowledged the CO should consider violation of Certificate of Independent Price Determination (CIPD) in making a responsibility determination. *Id.* But there do not appear to be any instances where a protest has been sustained because the awardee violated its CIPD

# Teaming Arrangements

- ▶ Contractor teaming arrangements may receive antitrust scrutiny as competitor collaborations
- ▶ “Competi-mates” phenomenon: today’s teaming partner is tomorrow’s competitor (and vice versa)
- ▶ USG “will recognize the integrity and validity of contractor team arrangements” if they are “identified and company relationships are fully disclosed” (FAR 9.603)
  - But: “Nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes” (FAR 9.604)

# Teaming Arrangements

- ▶ In the early 2000s, the USG made several attempts to restrict or eliminate exclusive teaming arrangements:
  - Gansler Memo – USD(A&T) memo directed COs and program managers to scrutinize exclusive TAs
  - DFARS Proposed Rules – Rejected proposed rule would have warned COs exclusive TAs could evidence antitrust violations
  - Agency-Specific Regulations – Former NRO clause banned exclusive teaming, and NAVAIR clause banned such teaming arrangements if they were anticompetitive; regulations were implemented

# Teaming Arrangements

- ▶ DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors
  - Guidance on USG analytical process for assessing competitor collaborations (including TAs)
  - "Safety Zones":
    1. Combined Market Share Not More Than 20%
      - But what constitutes the relevant "market"?
    2. R&D Collaborations in Innovative Markets
  - Factors: Exclusivity, control over assets, financial interests, control of competitive decision-making, likelihood of anticompetitive information sharing, duration

# Teaming Arrangements

## Case Examples

- ▶ In contractor dispute over TA, Ninth Circuit applied rule of reason (not “per se”) because, among other things: 1) USG directed the contractors to team; 2) no prior judicial experience with the market or practice; 3) competitors could not have bid separately, so TA enhanced competition. *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F. Supp. 1112 (C.D. Cal. 1980), *rev'd in part and aff'd in part*, 705 F.2d 1030 (9th Cir. 1983)
- ▶ DOJ filed a complaint alleging a Sherman Act violation because a TA had the purpose and effect of eliminating competition and inflating prices. Contractors settled for \$12 million, and agreed not to enter into any future collaborative agreements regarding CEM systems without advance USG approval. *United States v. Alliant Techsystems, Inc.*, No. 94-1026, 1994 WL 362247 (C.D. Ill. May 13, 1994)
- ▶ *See also* DOJ Press Release: Raytheon and DRS Global Modify Teaming Arrangement (Contractors narrowed scope of TA on infrared sights for military vehicle programs so as not to encompass future programs to alleviate DOJ antitrust concerns)

# Collusion Red Flags

The following authorities identify collusion red flags:

- ▶ DOJ Antitrust Division, Red Flags of Collusion
- ▶ FAR Subpart 3.3 – Reports of Suspected Antitrust Violations, ¶ (c)
- ▶ DCAA Contract Audit Manual, 4–705 Suspected Anticompetitive Procurement Practices
- ▶ DoD IG, Fraud Red Flags and Indicators

# Collusion Red Flags

Common red flags cited by the referenced authorities:

## ▶ Team Formation

- One or both team members could bid alone
- Exclusive TA with unique, essential sub
- Team eliminates or greatly reduces competition

## ▶ Patterns in Go/No-Go Decisions

- Fewer competitors than normal
- Qualified offerors do not bid for no apparent reason
- Certain bidders always or never bid at same time

# Collusion Red Flags

- ▶ **Bidding and Award Patterns/Discrepancies**
  - Different bidders' bids are similar, or change in same way
  - Bidding changes when a new or infrequent bidder bids
  - Bidders offer different prices/rates under similar circumstances
  - Patterns in who wins by region, customer, type of job
  - Bidders submit non-competitive bids
  - Winning bid is high compared to cost estimates, published price lists, similar jobs, or industry averages
- ▶ **Awardee subcontracts work to other actual or prospective bidders**



# “No-Poach” Agreements

- ▶ Labor market collusion is a hot area in antitrust enforcement, with crackdowns in industries such as IT, railroads, fast food
  - DOJ/FTC issued “Antitrust Guidance for HR Professionals” (2016)
- ▶ “No-Poach” Agreement is an agreement with one or more other companies not to hire or recruit one another’s employees
  - “Naked” vs. ancillary to a larger legitimate collaboration
  - Not uncommon to have no-poach or non-hire clauses in subcontracts or TAs
- ▶ Government Contracts Case: *Hunter v. Booz Allen Hamilton, Inc.*, 418 F. Supp. 3d 214 (S.D. Ohio 2019) (ongoing class action lawsuit against Government Contractors alleging illegal “no-poach” agreements; survived motion to dismiss)

# Exchange of Competitively Sensitive Information

- ▶ Sharing information relating to price, output, costs, strategic planning, or other competitively-sensitive information can raise antitrust concerns; likewise wage and compensation information
  - Sharing information on current operations or future business plans is more likely to raise concerns than historical information
- ▶ Highly technical information is not usually problematic, e.g., cybersecurity/cyber threat information
- ▶ Exchange of information may have procompetitive benefits, so it is typically analyzed under the “rule of reason.” *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978)

# Exchange of Competitively Sensitive Information

## Risk Mitigation

- ▶ FTC/DOJ Safe harbor: data exchange managed by a third-party (e.g., trade association); info more than three months old; and five or more participants (none making up more than 25%) with statistics aggregated so participants cannot discern one another's data
- ▶ Carefully manage information provided to trade associations and industry groups
- ▶ Only exchange information with subcontractors and teaming partners as needed for the specific scope of the agreement
  - Distribute on a need-to-know basis

# DOJ Antitrust Criminal Enforcement Policies

# Leniency Policy

- ▶ DOJ policy aimed at discovering criminal antitrust violations
  - Most large DOJ Antitrust Division cases have originated from leniency applications
- ▶ Leniency is offered to the first companies and individuals that report their own involvement in illegal antitrust activities
- ▶ For such companies and individuals, the Antitrust Division may forego criminal prosecution and joint and several liability, and impose only single damages
- ▶ DOJ remains committed to policy, which it recently referred to as its “most important prosecutorial tool for the last 26 years, particularly when it comes to international cartels”

# Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019)

- ▶ In a major policy change, credit may now be given at the charging phase and not just the sentencing phase
  - Companies that are not first in under the leniency program may receive credit for robust compliance programs
  - Arguably provides another path to leniency (albeit more limited)
- ▶ Three fundamental considerations re compliance program evaluation:
  - [1] Is the corporation's compliance program well designed?
  - [2] Is the program being applied earnestly and in good faith?
  - [3] Does the corporation's compliance program work?"
- ▶ "[R]ebutable presumption that a compliance program is not effective when certain 'high level personnel' or 'substantial authority personnel' 'participated in, condoned, or [were] willfully ignorant of the offense'"

# Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

## Factors for Evaluating Effectiveness of Antitrust Compliance Programs

1. The program's design and comprehensiveness
2. Culture of compliance within the company
3. Responsibility for antitrust compliance
4. Antitrust risk assessment techniques
5. Compliance training and communication to employees
6. Periodic review, monitoring and auditing
7. Reporting mechanisms
8. Compliance incentives and discipline
9. Remediation and role of program in the case of violation

# Questions?

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## For More Information:

### PCSF Website

- ▶ <https://www.justice.gov/procurement-collusion-strike-force>

### DOJ's Antitrust Division

- ▶ <https://www.justice.gov/atr/>