

The Feds Strike Back: The Interagency Procurement Strike Force Ramps Up Efforts Against Government Contracts Collusion, Price-Fixing

Association of Corporate Counsel: National Capital Region

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Agenda

- **What Is The PCSF?**
- **What Is It Doing?**
- **What Are The Issues?**
 - Laws
 - Violations
 - Examples
- **What Can You Do About It?**



What is the PCSF?

What is the PCSF?

- Procurement Collusion Strike Force
- Interagency strike force
 - Federal prosecutors from the Antitrust Division of the Department of Justice
 - 22 U.S. Attorneys' Offices
 - Law enforcement agents from seven national partner agencies:
 - FBI
 - Two Offices of Inspector General of the DOD
 - Department of Homeland Security
 - DOJ (non-antitrust)
 - General Services Administration
 - Postal Service
- Collaborates with many state, local and foreign government agencies

What is the PCSF Doing?

- The PCSF's primary mission is to deter, detect, investigate, and prosecute public procurement collusion and fraud cases at all levels of government—federal, state, and local—focusing on antitrust crimes that target government procurement
- In 2022, the Antitrust Division brought 25 criminal cases against 29 individual and 14 corporate defendants
 - Has approximately 145 open grand jury investigations — the most in 30 years
- Penalties are severe
 - Individuals involved in criminal antitrust offenses face imprisonment, fines, and potential debarment from government programs
 - Companies face debarment

What are the issues?

Antitrust Law 101

- The Sherman Act: 15 U.S.C. § 1

“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 hereby declared to be illegal.”
- Courts have interpreted that to have two categories of behavior:
 - Automatically or *per se* illegal – “naked” agreements in restraint of trade with no actual or potential benefit to competition
 - Subject to a test of balancing risk of competitive harm against pro-competitive benefits – the “rule of reason” test for agreements in support of pro-competitive arrangements, such as joint ventures or teaming agreements
- *Per se* offenses are the hardcore offenses that might result in criminal penalties

Criminal Penalties

- Individuals:
 - Imprisonment up to 10 years (15 U.S.C. § 1) (current average 19-20 months)
 - Fine up to \$1 million (15 U.S.C. § 1)
- Corporations:
 - Fine up to \$100 million (15 U.S.C. § 1); or
 - Twice the gross financial gain/loss resulting from the offense (i.e., all conspirators) (18 U.S.C. § 3571)
 - Allows DOJ to obtain fines that exceed statutory maximum of \$100 million
- U.S. Sentencing Guidelines:
 - The “volume of commerce attributable to the defendant” drives the sentence for both individuals and corporations (U.S.S.G. § 2R1.1)
- Restitution paid to identified victims

Collateral Consequences

- Civil lawsuits for treble damages, plus attorneys' fees
 - A criminal conviction is “prima facie” evidence in follow-on private damages actions (15 U.S. C. 5 16(a))
- Suspension or Debarment
 - Federal government may suspend or debar a contractor convicted of a Sherman Act violation pursuant to FAR
 - 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 pursuant to DFARS
- For the individual – stigma for future job seeking
- For the company – possible ongoing monitoring

Elements of a Violation

1. Conspiracy to restrain trade
 2. An agreement
 3. Interstate or foreign commerce
- Most cases hinge on element 2

Agreements

- **Any** contract, combination or conspiracy
- No formal agreement required: “conscious commitment to a common scheme designed to achieve an unlawful objective”
 - Do not need piece of paper or email
 - Need not say “I agree”
 - “Knowing wink” enough
- Circumstantial evidence can be enough
 - Meetings or discussions among competitors
 - Parallel conduct plus some other evidence (e.g., motive to conspire, actions against self-interest)

No Excuses

Bit player with small
market share

Conduct has minimal
market impact

Agreed upon prices were
reasonable

Company is losing
money on product

Trying to ensure
fair shares

Customers wanted/
benefited from conduct

Stabilizes the
market

Merely doing what
others did

What Are the Issues?

- The hard core or “per se” antitrust offenses:
- Price Fixing
- Bid Rigging
- Territorial or other Customer Allocation
- No Poach/No Solicit

Price-Fixing

- Agreement with competitor (or potential competitor) on price or terms for customers or suppliers
 - Minimum prices
 - Price differentials
 - Timing & announcement of price changes
 - Limits on output, production, or supply
 - Uniform terms of sale
 - Uniform advertising
 - Method of pricing
 - Discontinuation of products

Bid Rigging

- Agreement as to who will submit:
 - Bid on particular project (bid rotation)
 - Lowest bid (likely “cover” bids from co-conspirators)
- Includes:
 - Sham bidding – e.g., knowingly including unacceptable terms
 - Agreement not to bid (bid suppression)

Allocation

- Agreement as to which conspirator will sell in which territory
 - Applies to any geographic market – local, regional or national
 - Note: internal company decisions about how to allocate sales territories among internal sales reps is acceptable
- Agreement as to who will sell to particular customer or customer type or how much each will sell to particular customers
 - Also covers agreement as to who purchases from which suppliers

No Poach / No Solicit / Wage-Fixing Agreements

- Naked no poach, no solicit and wage-fixing agreements are *per se* illegal, just like price fixing
- No PCSF cases to date (and may never be)
- However, these were historically civil violations, now also criminal
- DOJ says: “From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”
- These agreements may legally be part of legitimate collaborations, though – this is not a “naked” agreement
 - Such as to support and make effective teaming agreements, joint ventures, etc.
 - These are judged under the rule of reason

Not Legitimate Teaming

- Generally, teaming arrangements are legal
- Teaming agreements are not *per se* illegal except under exceptional circumstances
 - Such as a sham to cover a price fixing or bid rigging agreement, or part of a pattern, such as taking turns in leading or winning
- Judged under rule of reason, balancing risk of competitive harm against pro-competitive benefits
- Teaming agreements safest when:
 - Necessary or at least materially better for an effective bid/contract delivery
 - That rationale is clearly documented
 - Not between the otherwise top likely bid winners (raises specter of locking out others)
 - One time (repeats raise specter of taking turns or allocation)
 - Not made after one bidder loses (such as the winner then subcontracting to the loser)

Teaming Agreements

- FAR 52.203-2 requires bidders in federal agency procurements to certify that the bidder has not colluded with its competitors in connection with the RFP.
- Teaming agreements may receive antitrust scrutiny as competitor collaborations.
- The Government “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 Agreements

- FAR Subpart 3.3 and DFARS 203.070 place an affirmative obligation on contracting officers to report suspected antitrust violations to DOJ and the agency's suspension and debarment official.
- Evidence of antitrust violations include:
- Sudden changes from competitive bidding to identical bidding;
- Rotation of bids so that each competitor takes a turn in sequence as low bidder;
- The filing of a joint bid by two or more competitors when one of the competitors has sufficient capability for contract performance; or
- Assertions by employees, former employees or competitors that an agreement to restrain trade exists.

Recent Case – Insulation Contractors

- Insulation contractors (at least three) in Connecticut formed a conspiracy to rig bids on projects for universities, hospitals and other public and private entities for over 5 years
- So far, one company was sentenced to pay a \$1,001,989 criminal fine and \$313,121 in restitution
 - Another company sentenced to \$150,000 criminal fine plus restitution
- One person sentenced to fifteen months' imprisonment and restitution of \$1,062,155
 - Another person sentenced to one year and a day's imprisonment
- At least three companies involved, so likely more to come

Recent Case - Caltrans

- Conspiracy to cheat the California Department of Transportation
- At least two conspirators
- The ringleader recruited others to submit sham bids on Caltrans contracts
 - One conspirator formed a second company in his wife's name that submitted worse bids each time
- Conspirators also bribed the procurement officer, who also pled guilty
- Sentences not published by DOJ

Recent Cases - Military

- A military contractor pled guilty to rigging bids for public contracts in Texas and Michigan
- He entered into an agreement with other conspirators to submit coordinated, non-competitive, and complementary bids on certain government contracts
- In another case, security services companies and their executives rigged bids for Department of Defense security contracts
- The conspirators were creative and enterprising and rigged bids, fixed prices, and allocated customers for defense-related security services contracts in Belgium.
- The allocated contracts included those for guarding, mobile monitoring, and surveillance services with the United States, through the Department of Defense, and those with the North Atlantic Treaty Organization (NATO) Communications and Information Agency
- Long arm of the law - Some defendants are Belgian companies and Belgian nationals residing in Belgium

What can you do?

What Does the Future Hold?

- The Biden Administration issued an Executive Order on promoting competition in 2021, and his appointees are working to follow through
- There are multiple investigations in the PCSF's pipeline and more pleas and cases will follow
- The PCSF is of the view that government spending as a result of the \$1.2 trillion Infrastructure Investment and Jobs Act seems likely to attract bad actors
- In anticipation, the PCSF has expanded its roster of law enforcement partner agencies around the country and abroad
- In addition, the PCSF is focusing on outreach and training to a range of procurement officers, auditors, and accountants to broadly educate and inform the civil service on procurement crimes

What Can You Do?

- You are here!
 - Issue spotting
- Listen to water cooler chatter
- Check the “doors and corners”
 - Consider actively investigating potential trouble spots
- Implement/update/refresh/re-emphasize a compliance program
 - Prevention
 - Discovery could lead to leniency
 - Credit in sentencing
- If you smell smoke, call the fire department (in house or outside counsel)

Favorable Conditions for Collusion

- Few sellers
- Limited number of qualified bidders
- Difficult for new competitors to enter the market
- Few substitute products
- Relative few, large purchases/bids
- Repetitive or regularly scheduled purchases
- Rush or emergency work
- Competitors meet at conventions, trade association meetings, etc.
- Competitors have joint ventures, teaming arrangements, prime/sub-contractor relationships, etc.
- Revolving door for employees

Suspicious Signs in Pricing

- Sudden, identical, and/or contemporaneous increases in price or price ranges (that cannot be explained by cost increases)
- Anticipated discounts or rebates disappear unexpectedly
- Bidders have similar costs that should not be the same, e.g., same transportation costs specified by local and non-local bidders

Suspicious Bid Patterns

- Same company always wins or loses
- Certain companies only submit bids in certain geographic areas
- Companies appear to take turns
- Winning company subcontracts to losing company
- Regular suppliers/vendors fail to bid for work they typically perform, but continue to bid for other work
- Bids are much higher than cost estimates or previous bids
- Large differences between price of winning bid and other bids
- All companies end up winning the same amount of work over a series of bids

Suspicious Signs of Possible Market Allocation

- Competitors suddenly stop selling in a territory
- Competitors suddenly stop selling to a customer
- Competitor refuses to quote to a customer, then refers customer to competitor

Suspicious Statements

- A customer or territory “belongs” to a supplier
- References to “respecting” the customers or territories of competitors
- References to “courtesy” bids or “throwing in a number”
- Use of same terminology or rationales by companies when explaining price increases
- Statements indicating advance knowledge of competitor’s pricing

Suspicious Conduct

- Companies meet privately before bids
- Company submits bid for work it cannot perform
- Bids contain last minute changes
- Procurement official regularly exempts competitive bidding because of “emergency” work
- Invoicing for work awarded contains charges for “consulting” work (when not reasonably within scope of work)
- Procurement officials associated with “consulting” vendors

Antitrust Division Leniency Program

Antitrust Division Leniency Program

- First company and/or individual to self-report its involvement in criminal antitrust offense obtains immunity from prosecution by the Antitrust Division
 - “Race to the Government”
- Applicant provides ongoing cooperation to assist Antitrust Division in prosecution of co-conspirators

Corporate Leniency

- No criminal charges for corporation
 - Open to one corporation per conspiracy
- Type “A” Leniency: This type of leniency is granted before the Antitrust Division has received any information about the cartel
- Type “B” Leniency: This type of leniency is available if an applicant cannot meet all requirements of Part “A” leniency
 - Generally, the applicant reports the activity after the Division has already received information about the cartel

Type “A” Corporate Leniency Conditions

1. Antitrust Division has no information about the activity
2. Corporation took “prompt and effective” action to terminate participation in cartel upon discovery
3. Full cooperation and candor
4. Admission of criminal conduct - confession truly a corporate act, not isolated to individuals
5. Restitution commitment
6. No coercion; not the leader or the originator

Type “B” Corporate Leniency Conditions

1. First company in
2. Antitrust Division does not yet have evidence likely to result in sustainable conviction
3. Corporation took “prompt and effective” action to terminate participation in cartel upon discovery
4. Full cooperation and candor
5. Admission of criminal conduct - confession truly a corporate act, not isolated to individuals
6. Restitution commitment
7. Leniency would not be unfair, considering nature of activity, applicant's role, and timing
 - Burden increases with time and closer Antitrust Division is to evidence likely to result in sustainable conviction

Benefits to the Corporation

- Immunity for corporation
- Immunity for officers, directors, employees
- Reduced liability in civil litigation:
 - ACPERA: Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, 118 Stat. 661, § 213 (2004)
 - Civil damages limited to actual damages (ACPERA § 213)
 - No joint & several liability
 - Single damages instead of treble damages
 - To obtain ACPERA protection, leniency applicant must provide “satisfactory cooperation” to civil claimants, including:
 - Provide all documents and all facts known that are “potentially relevant to the civil action”
 - Make witnesses available

Individual Leniency Policy

- Type “A” only
- Conditions:
 1. Antitrust Division has no information about the activity
 2. Candor, and continuing and complete cooperation
 3. No coercion; not the leader or originator
 4. Not available after investigation has begun
- Corporate leniency could still be granted after

Leniency Process

1. Applicant seeks leniency
2. Antitrust Division confirms leniency is available
3. “Marker” given to secure place at front of line
 - Markers given for limited time on minimal amount of information to allow internal investigation
4. Applicant “perfects” marker by providing all the relevant information
 - Conditional leniency granted and letter provided to applicant
5. Investigation/prosecution of co-conspirators continues
6. Final leniency granted

Leniency Plus

- Company negotiating plea agreement in current investigation of Product 1 discloses its involvement in cartel involving Product 2
- Company receives leniency for Product 2 if it meets leniency requirements, plus it receives a substantial additional reduction in its fine for Product 1
- Must cooperate in prosecution of both conspiracies

Penalty Plus

- If a company is aware of a second offense and fails to self-report that offense, and the conduct is later discovered and prosecuted, the government may urge the court to consider the failure to self-report as an aggravating factor
- Also, if a company is involved in multiple conspiracies (and fails to self-report), the Sentencing Guidelines range could be increased based on prior criminal history

Compliance

Antitrust Compliance Program – Why?

- Prevent violations from occurring
 - No charges, no fines
 - In other words, costs of compliance are *investments*
- Detection of potential or incipient issues
- Facilitate early detection of violations
 - Increase likelihood of being first to report and request leniency
 - Maybe even Leniency Plus if discover one or more additional conspiracies
- Robust (sufficient) compliance program is a factor during sentencing/penalty

Elements of an Antitrust Compliance Program

- Commitment to compliance
- Comprehensive
- Tailored to line of business
- Corporate governance structure that ensures independence and accurate assessment whether corporation is in compliance with the law
- Training (ideally annual)
- Auditing
- Remedial action (ideally immediate)
- Reporting (immediate)
- Discipline of violators
- Reevaluation

(Justice Manual § 9-28.800)

Compliance Factors in Antitrust Penalty

- Does the company's compliance program address and prohibit criminal antitrust violations?
- Did the antitrust compliance program detect and facilitate prompt reporting of the violation?
- To what extent was a company's senior management involved in the violation?

Compliance Factors in Antitrust Penalty

1. Design and Comprehensiveness
 - Format, Accessibility
2. Culture of Compliance – Tone from the Top
 - Management Conduct/Leadership
3. Responsibility for the Compliance and Ethics Program
 - Autonomy, Seniority, Experience
4. Tailored for the relevant antitrust risks
5. Training and Communication
 - Obligations Understood
6. Periodic Review, Monitoring and Auditing
7. Reporting
 - Accessible, Confidential
8. Incentives and Discipline
9. Remediation and Role of Compliance Program in the Discovery of the Offense

Questions?

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