UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 02-80703
	)	
v.	)	
	)	
NATIONAL ASSOCIATION OF POLICE EQUIPMENT DISTRIBUTORS, INC.	)	
	)	
Defendant.	)	

COMPETITIVE IMPACT STATEMENT

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature And Purpose Of The Proceeding

On July 29, 2002, the United States filed a civil antitrust Complaint alleging that the defendant had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The defendant, the National Association of Police Equipment Distributors, Inc. ("NAPED"), is a trade association. Its members are competing distributors and dealers of police equipment products such as body armor, batons, uniforms, and handcuffs. The Complaint alleges that, from 1998 to 1999, the defendant engaged in an unlawful group boycott of manufacturers who participated or considered participating in the United States General Services Administration program under Section 1122 of the National Defense Authorization Act of 1994 ("GSA Program") to make

police equipment products available to state and local law enforcement agencies at reduced prices.

On July 29, 2002, the United States and the defendant filed a Stipulation in which they consented to the entry of a proposed Final Judgment that requires the defendant to eliminate the anticompetitive conduct identified in the Complaint. Specifically, the proposed Final Judgment provides that the defendant may not enter into, adhere to, or enforce any agreement with any distributor or dealer to hinder any manufacturer's participation in the GSA Program. The proposed Final Judgment also provides that the defendant may not enter into, adhere to, or enforce any agreement with any distributor or dealer to retaliate against any manufacturer for participating or considering participating in or seeking information about the GSA Program. Defendant is also prohibited from recommending that any distributor or dealer: (1) suggest to any manufacturer that it discard Section 1122 purchase orders or commit any other misrepresentation to circumvent the requirements of the GSA Program; or (2) refrain from conducting business with any manufacturer for participating in, considering participating in, or seeking information regarding the GSA Program. The defendant is prohibited from recommending that any distributor, dealer or manufacturer do business only with particular people or organizations, or types of people or organizations, or do business only on specified terms.

The United States and the defendant have agreed that the proposed Final Judgment may be entered after compliance with the APPA, provided that the United States has not withdrawn its consent. Entry of the Final Judgment would terminate the action, except that the Court would

retain jurisdiction to construe, modify, or enforce the Final Judgment's provisions and to punish violations thereof.

II. Description Of Practices Giving Rise To The Alleged Violation Of The Antitrust Laws

A. Background on the GSA Program and the Defendant

GSA negotiates contracts with manufacturers of police equipment products that allow federal agencies to purchase such products at a discount. The GSA Program is authorized by Section 1122 of the National Defense Authorization Act of 1994, which permits state and local law enforcement entities to purchase products directly from manufacturers at prices negotiated by the GSA, as long as the equipment is used for drug interdiction.

Although the GSA Program was enacted into law in 1994, it was initially a pilot program. At first, any manufacturer that sold to federal entities under the GSA schedule was required to honor Section 1122 orders. In 1998, only a few states were fully operational participants and order volume was low. On January 1, 1999, the program was changed and manufacturers' participation in Section 1122 became voluntary. By 1999, over half of the states had committed to work on the GSA Program rollout, and order volume increased accordingly. Currently, most states are participants in the GSA Program.

Prior to the GSA Program, state and local governments purchased most law enforcement equipment from distributors or dealers at prices reflecting their mark-ups. After the GSA Program, manufacturers selling police equipment at GSA-negotiated prices competed with distributors for sales of police equipment to state and local law enforcement agencies. Thus,

state and local law enforcement agencies could choose to buy police equipment directly from the manufacturers under the GSA Program at negotiated prices, or from distributors who often provided them with certain services not provided by manufacturers.

Defendant's members specialize in selling and servicing police equipment products to state and local law enforcement agencies and carry a small inventory. Generally, they do not have GSA contracts for federal sales. The typical NAPED member is a distributor or dealer who operates his or her own business, although a few large catalog houses are also members. The large catalog houses carry a significant inventory and sell by mail order. When state and local governments purchase directly from manufacturers under a discounted GSA schedule, distributors and dealers lose those sales.

B. Illegal Agreement to Boycott Manufacturers

In the spring of 1998, the defendant, through its officers, directors, and members, engaged in conduct to prevent manufacturers' participation in the GSA Program and thereby limit competition in the sale of police equipment to state and local law enforcement agencies. This conduct spanned approximately eighteen months.

During the summer of 1998, the defendant, through its members, contacted manufacturers under the guise of taking a survey of manufacturers' attitudes towards the GSA Program and pressured them to avoid their legal obligations to accept orders from state and local law enforcement and not to participate in the GSA program. The defendant monitored activities of manufacturers and encouraged its members to express their displeasure with 1122 sales and to discourage manufacturers' participation in the GSA Program.

In the spring of 1999, defendant's officers told at least three manufacturers that distributors would not do business with them if they participated in the GSA Program. These manufacturers believed that these officers were speaking directly or indirectly on behalf of NAPED and its members. Defendant's efforts caused at least some manufacturers to eliminate their participation in the GSA Program.

For example, one manufacturer, fearing that it would be "blackballed" by defendant's members for participating in a GSA Program event to attract purchasers and vendors, withdrew its registration for the event from the GSA web site. Another manufacturer, which attended the GSA Program event, was excluded from the mail order catalog of one of NAPED's members as a result of its participation. Also, during a meeting with executives of a large manufacturer, defendant's then-president stated that the trade association would not "support" manufacturers that engaged in 1122 sales under the GSA Program. The executives understood this to mean that the members of NAPED would no longer do business with their company if it participated in the GSA Program.

C. Effects of the Agreement

The purpose and effect of the boycott agreement between defendant and its members was to prevent participation by manufacturers in the GSA Program and thereby preventing them from competing with distributors or dealers for the sale of police equipment to state and local law enforcement agencies. As a result of the agreement, participation by manufacturers in the GSA Program was significantly less than it otherwise would have been. Thus, state and local law enforcement agencies were deprived of some of the benefits of free and open competition in the purchase of police equipment products.

III. Explanation Of The Proposed Final Judgment

A. Prohibited Conduct

The proposed Final Judgment prohibits the defendant from engaging in five (5) categories of prohibited conduct. These prohibitions are intended to deter the defendant from using the threat of a group boycott by its members to pressure manufacturers to decline participation in the GSA Program, or any other program under which state and local governments are able to purchase products through a GSA schedule. These provisions will also bar the defendant from urging its members to reduce or eliminate the amount of business they do with manufacturers engaged in the GSA Program.

Section IV.A of the proposed Final Judgment contains a general prohibition against any agreement by the defendant with any distributor or dealer to hinder any manufacturer's participation in the GSA Program. Section IV.B contains a similar prohibition against any agreement by the defendant with any distributor or dealer to retaliate against any manufacturer for participating or considering participating in the GSA Program. Section IV.C prohibits the defendant from urging, encouraging, advocating, or suggesting that any distributor or dealer urge, encourage, advocate, or suggest to any manufacturer that it discard 1122 purchase orders or commit any other misrepresentation to circumvent the requirements of the GSA Program. Section IV.D prohibits the defendant from urging, encouraging, advocating, or suggesting that any distributor or dealer refrain from conducting business with any manufacturer for participating in or considering participating in the GSA Program. Finally, Section IV.E prohibits the defendant from urging distributors, dealers, or manufacturers to refuse to do business or

reduce their business with particular types of persons, or do business with particular persons only on specified terms.

B. Limiting Conditions

Section V of the proposed Final Judgment contains certain limiting provisions that clarify the scope of the prohibitions in Section IV. Section V identifies specific activities that are unlikely to restrict competition and are not prohibited by the decree. Specifically, Section V.A provides that the defendant may: (1) continue to disseminate public statements regarding contemplated changes in the laws affecting the GSA 1122 Program, GSA policies, or procurement of police equipment by state and local branches of government; (2) engage in collective action to procure government action, such as lobbying activities, when those actions are immune from antitrust challenge under the *Noerr-Pennington* doctrine; and (3) present the views, opinions, or concerns of its members on topics to manufacturers, distributors or dealers, consumers, or other interested parties, provided that such activities do not violate any provision contained in Section IV. Section V.B clarifies that nothing in the proposed Final Judgment limits individual distributors' or dealers' rights to act independently.

C. Additional Relief

Section VI of the proposed Final Judgment requires the defendant to publish a notice describing the Final Judgment in Law and Order, an industry trade publication, within sixty (60) days after the proposed Final Judgment is entered. Section VI also requires that written notice be sent to all distributors or dealers who are current members of NAPED within thirty (30) days after the proposed Final Judgment is entered. A copy of the written notice also must be sent to

each dealer or distributor who becomes a member of NAPED during the ten-year term of this Final Judgment.

Section VII requires the defendant to set up an antitrust compliance program to ensure that its members are aware of and comply with the limitations in the proposed Final Judgment and the antitrust laws. Section VII requires the defendant to designate an Antitrust Compliance Officer and to furnish a copy of the Final Judgment, together with a written explanation of its terms, to each of its officers, directors, and non-clerical employees who address issues related to the purchase and sale of police equipment products. The Antitrust Compliance officer is also required to review: (1) the final draft of each speech and policy statement by each officer, director, or employee; (2) the purpose for the creation of each committee and task force; and (3) the content of each letter, memorandum, and report written by or on behalf of each director in his or her capacity as a NAPED director, in order to ensure adherence to the Final Judgment.

Section VIII requires the defendant to certify the designation of an Antitrust Compliance Officer and the distribution of the Final Judgment as required by Section VII. It also requires the defendant to submit to the United States an annual statement regarding defendant's compliance with the Final Judgment.

Section IX of the proposed Final Judgment provides that, upon request of the Department of Justice, the defendant shall submit written reports, under oath, with respect to any of the matters contained in the Final Judgment. Additionally, the Department of Justice is permitted to inspect and copy all books and records, and to interview defendant's officers, directors, employees, and agents.

D. Effect of the Final Judgment

The parties have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the APPA. The proposed Final Judgment states that it shall not constitute any evidence against or an admission by either party with respect to any issue of fact or law. Section III of the proposed Final Judgment provides that it shall apply to the defendant and each of its officers, directors, agents, employees, successors, and assigns and to any organization to which it is to be merged or reorganized, or by which it is to be acquired.

The Government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violations of Section 1 of the Sherman Act alleged in the Complaint, and that disposition of this proceeding without further litigation is appropriate and in the public interest.

IV. Remedies Available To Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the defendant.

V. Procedures Available For Modification Of The Proposed Final Judgment

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's

determination that the proposed Final Judgment is in the public interest. The Department believes that entry of this Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Marvin N. Price, Jr., Chief
Chicago Field Office
U.S. Department of Justice
Antitrust Division
209 S. LaSalle St., Suite 600
Chicago, Illinois 60604

Under Section XI of the proposed Final Judgment, the Court will retain jurisdiction over this action, and the parties may apply to the Court for orders necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment. The proposed Final Judgment would expire ten (10) years from the date of its entry.

VI. Alternatives To The Proposed Final Judgment

As an alternative to the proposed Final Judgment, the Department considered litigation on the merits. The Department rejected that alternative for two reasons. First, a trial would involve substantial cost to both the United States and to the defendant and is not warranted

because the proposed Final Judgment provides all the relief the Government would likely obtain following a successful trial. Second, the Department is satisfied that the various compliance procedures to which the defendant has agreed will ensure that the anticompetitive practices alleged in the Complaint are unlikely to recur and, if they do recur, will be punishable by civil or criminal contempt, as appropriate.

VII. Standard of Review Under The APPA For The Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the Court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp*., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[2]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d at 1458. Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the*

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[1] 119 Cong. Rec. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9, *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States v. Mid-America Dairymen, Inc.,* 1977-1 Trade Cas. (CCH) ¶61,508, at 71,980 (W.D.Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

> *reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[4]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing the case in the first place," it follows that the court "is only authorized to review the decree itself," and not to

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[3] *United States v. Bechtel Corp*., 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.,* 858 F.2d at 463; *United States v. National Broadcasting Co.,* 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co*., 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied,* 465 U.S. 1101 (1984).

[4] *United States v. American Tel. & Tel. Co*., 552 F. Supp. 131, 150 (D.D.C. 1982), (*quoting United States v. Gillette,* 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *see United States v. Alcan Aluminum, Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.,* 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

"effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

VIII. Determinative Materials And Documents

There are no determinative documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 25, 2002

Respectfully submitted,

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