UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 97-1507-CIV-T-17E
	)	
SEMINOLE FERTILIZER CORPORATION,	)	Filed: June 18, 1997
	)	
Defendant.	)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Seminole Fertilizer Corporation in this civil antitrust proceeding.

I.
NATURE AND PURPOSE OF THE PROCEEDING

On June 18, the United States filed a civil antitrust complaint alleging that defendant and others conspired unreasonably to restrain competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that defendant, Norsk Hydro USA Inc.("Norsk USA"), and Farmland Industries, Inc.("Farmland") met on March 5, 1992, and discussed sharing pipeline capacity and the cost of bidding on an ammonia tank and pipeline interest, hereinafter referred to as the Tampa Facility. At the conclusion of the meeting, defendant, Norsk USA, and Farmland reached a tentative agreement, which was later reduced to writing. The Complaint also alleges that on March 9

and March 10, 1992, defendant and Norsk USA discussed the terms of the agreement by telephone on several occasions and that they executed the written agreement two hours before the scheduled auction of the Tampa Facility on March 12, 1992. The agreement provided that defendant would give bid support of up to $2.5 million to Norsk USA, if necessary, to defeat a competing bid. In exchange, Norsk USA agreed to give defendant increased pipeline capacity if Norsk USA was the successful bidder.

This agreement had the effect of eliminating defendant, Norsk USA's chief rival, as a viable competing bidder for the Tampa Facility. Almost immediately after signing the agreement, defendant stated that it was no longer going to attend the auction of the Tampa Facility. At the auction on the afternoon of March 12, there were no bids for the Tampa Facility other than the one previously submitted by Norsk USA.

On June 18, the United States and defendant filed a Stipulation by which they consented to the entry of a proposed Final Judgment following compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment, as will be discussed in detail in Section IV.A., would order defendant to refrain from soliciting, entering, or attempting to enter any agreement to submit any jointly determined bids for the acquisition of any fertilizer asset (as defined in the Final Judgment) located in the United States with any other person that is known or reasonably should be known to defendant to be a potential bidder on the sale of that fertilizer

asset. The Final Judgment would also enjoin defendant from soliciting, entering, or attempting to enter any agreement to set or establish the price or other terms and conditions of any bids for the acquisition of any fertilizer asset located in the United States.

II.
DESCRIPTION OF DEFENDANT

Defendant, a wholly owned subsidiary of Tosco Corporation, sold all of its assets in May 1993. Before its assets were sold, defendant maintained its corporate offices in Stamford, Connecticut, and was a manufacturer and distributor of phosphatic fertilizer. It operated production and storage facilities in central Florida, near Tampa.

III.
THE TAMPA FACILITY AND EVENTS LEADING UP TO THE ALLEGED VIOLATION

A. The Tampa Facility

The Tampa Facility, which consists of an ammonia terminal located in the Port of Tampa, Florida, and a one-half interest in a pipeline system connected to the ammonia terminal,[1] is used for storing, handling, and delivering anhydrous ammonia, one of the raw materials used in the manufacture of phosphatic fertilizers. Located on approximately 17-1/2 acres of land leased from the Tampa Port Authority, the Tampa Facility has a single tank with a 35,000 metric ton storage capacity. It

[1]Defendant owned the other one-half interest in the pipeline, along with a separate ammonia terminal (consisting of two ammonia tanks) that also was connected to the pipeline.

services five nearby phosphatic fertilizer plants,[2] where the ammonia is combined with phosphoric acid to create diammonium phosphate. The Tampa Facility is able to service by truck or rail other phosphatic fertilizer plants not connected to it. During the early 1990's the Tampa Facility was owned by the Royster Company ("Royster"), now known as Mulberry Phosphates, Inc. ("MPI").

B. The Bankruptcy of Royster and the Failed Auction

Royster was a manufacturer of phosphatic fertilizers and related products for the domestic and export markets. Its principal facilities included a plant for the production of diammonium phosphate, located in Mulberry, Florida, and the Tampa Facility. Royster filed for bankruptcy protection on April 8, 1991, after months of experiencing financial hardships. Under the reorganization plan submitted to the Bankruptcy Court, Royster proposed to liquidate certain assets, including its Tampa Facility. Shortly after news of the potential sale of the Tampa Facility went public, Norsk USA and defendant separately expressed interest in acquiring it. After extensive negotiations with Royster officials, Norsk USA agreed to purchase the property for $15.5 million and executed an asset purchase agreement for the property on September 25, 1991. The agreement guaranteed Royster the right to purchase a continuing supply of ammonia from the terminal for its Mulberry plant and contained a through-put

[2]If defendant had been successful in acquiring the Tampa Facility, it would have been the exclusive supplier to those five plants.

provision that permitted it to put the ammonia through the pipeline from the terminal to the plant. In November of that same year, the Bankruptcy Court ordered that the Tampa Facility be sold by auction and that bids be taken against Norsk USA's offer of $15.5 million. The auction was scheduled for March 12, 1992. It was not until the auction was announced that a third company, CF Industries ("CF")[3], publicly expressed any interest in acquiring the Tampa Facility.

On December 18, 1991, the Bankruptcy Court issued an order approving bidding procedures in connection with the proposed sale of the Tampa Facility. Any third party offer had to: (1) be substantially similar to the one contained in the Norsk USA Asset Purchase Agreement; (2) be at least $1 million more than the Norsk USA offer of $15.5 million; (3) include an offer to enter into a through-put agreement with Royster; and (4) include a confidentiality agreement with Royster and Norsk USA regarding disclosure of the terms of the Royster/Norsk USA Through-put Agreement. In addition, the Order required that the third party deposit $1 million in escrow no later than the time at which it submitted an offer. The money deposited was to remain in escrow pending the earlier of (a) the closing of the sale to the third party if its offer was approved by the Bankruptcy Court or (b) the entry of an order approving the sale of the Tampa Facility to either Norsk USA or another third party bidder. After depositing

[3]CF is a cooperative which has been a major participant in the fertilizer business since the mid-1960's and has operated world-scale phosphatic fertilizer plants in Florida since 1969.

the $1 million, the third party was entitled to receive documents setting forth the results of the inspection of the Tampa Facility's tank, the cost of repair, the terms of the Royster/Norsk USA Through-put Agreement, and the terms of any through-put agreements submitted by any other third parties.

In February 1992, CF deposited $1 million in escrow. Defendant made its escrow deposit on March 9, 1992, three days before the auction. At the time of the auction, there were four bidders who were qualified to bid: Norsk USA, CF, defendant, and Superfos Investments Limited ("Superfos")[4]. CF informed Royster shortly before the auction that it would not be bidding, because of environmental concerns raised by a just-completed study it had done. Only Norsk USA appeared at the auction site on the afternoon of March 12 to bid on the Tampa Facility. There having been no new bids tendered, Norsk USA's standing offer of $15.5 million was accepted, pending approval by the Bankruptcy Court. In a meeting later that afternoon to finalize the details of the sale before a March 13 court hearing, Royster representatives discovered that Norsk USA and defendant had executed a joint bidding agreement approximately two hours before the auction was scheduled to begin.

At the hearing the following day, Royster representatives advised the Bankruptcy Court of the agreement between defendant

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[4]Since Superfos was a major creditor of Royster, the Bankruptcy Court exempted Superfos from the $1 million escrow requirement and gave it permission to submit a credit bid. Thus, Superfos could deduct from its bid offer the amount it was owed by Royster.

and Norsk USA. The Bankruptcy Court deferred ratification of the sale and ordered discovery to be taken. A few days later, the Bankruptcy Court received two anonymous communications regarding the bidding agreement. One communication was a letter alleging that defendant had agreed to backstop Norsk USA's bid and that defendant's bid supplement was leaked to CF, causing them to withdraw. The letter pinpointed Steve Yurman, defendant's president, as the villain in the alleged deal. The other communication was one of defendant's internal memoranda written by Yurman describing the terms of the March 12 agreement. After reviewing the information obtained during discovery in light of the anonymous correspondence, the Bankruptcy Court, at a hearing on March 20, refused to ratify the sale of the Tampa Facility to Norsk USA and ordered that a second auction be held. At the second auction, on June 17, 1992, CF and Norsk USA submitted bids, and CF won the Tampa Facility with a final bid of $21.6 million. (By the time of the second auction, CF had been able to resolve its environmental concerns.)

C. Evidence of Collusion

On February 26, 1992, representatives of defendant, Norsk USA, and Farmland met at the Rihga Royal Hotel in New York to discuss an alleged "joint venture" proposal by defendant. The proposal involved Norsk USA buying the Tampa Facility and keeping the interest in the pipeline, but possibly selling the tank to CF. The meeting concluded with no agreements being reached.

The same par es met again on March 5, . 2, at the same hotel. They primarily discussed sharing pipeline capacity and the cost of bidding on the terminal. Specifically, Norsk USA, Farmland, and defendant proposed that Norsk USA and defendant enter into an agreement whereby defendant would supplement Norsk USA's bid and consent to Royster's transfer of its pipeline interest to Norsk USA in return for Norsk USA giving defendant extra pipeline capacity.[5] A tentative agreement was reached and Norsk USA indicated that it would have its attorneys reduce the agreement to writing and send defendant a draft to review. Norsk USA sent the first written draft to defendant on March 6, and on March 9 and March 10 representatives of Norsk USA and defendant discussed, via telephone on several occasions, the terms of the draft agreement.

On the morning of March 12, officials of Farmland, Norsk USA, Tosco, and defendant, along with their attorneys, met in Tampa, Florida, at the law offices of MacFarlane Ferguson, Norsk USA's local counsel, to resume negotiating the details of the proposed agreement. After hours of negotiations, the parties agreed, in part, that (a) defendant would supplement Norsk USA's bid up to $2.5 million and consent to Royster's assignment of its one-half interest in the pipeline lease to Norsk USA and (b) Norsk USA, in return, would give defendant the right to use an extra 40,000 tons of the pipeline's capacity. Almost immediately

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[5]As owner of the other one-half interest in the Tampa Facility's pipeline lease, defendant already had the right to use 450,000 tons of the pipeline's 900,000 ton capacity.

after signing the agreement, defendant stated that it was no longer attending the auction.

One of defendant's representatives appeared at the auction moments before it started and advised Royster that it was withdrawing from the bidding. Later that evening, representatives of Norsk USA and defendant talked by telephone and agreed to instruct their counsel to confer with one another to prepare for the court hearing the next day.

In this case, there was virtually no evidence of covert activity, which indicated that the subjects of the investigation were not aware of, or did not appreciate, the full consequences of their actions. This lack of covertness is one of the main reasons this case is being filed civilly rather than criminally. See Antitrust Division Manual, Section III.E., at III-12 (October 18, 1987) (Second Edition).

IV.
EXPLANATION OF PROPOSED FINAL JUDGMENT

A. Prohibited Conduct

Section IV. A. enjoins defendant from directly, indirectly, or through any joint venture, partnership, or other device, entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or soliciting any agreement, understanding, contract, or combination, either express or implied, with any other person: (1) to submit any jointly determined bids for the acquisition of any fertilizer asset located in the United States; or (2) to illegally set or establish the price or other terms and

conditions of any bids for the acquisition of any fertilizer asset located in the United States.

Paragraph B. of Section IV. also enjoins defendant from directly, indirectly, or through any joint venture, partnership, or other device, communicating or inquiring about any intentions, decisions, or plans to refrain from bidding or to bid, including any intentions, decisions, or plans regarding any actual or proposed bid amounts, for the acquisition of any fertilizer asset located in the United States, where such communication or inquiry is to (1) any other person that is known or reasonably should be known by defendant to be a potential bidder on the sale of that fertilizer asset or (2) any other person that has announced an intention to bid on the sale of that fertilizer asset.

Paragraph C. of Section IV. enjoins the defendant from directly, indirectly, or through any joint venture, partnership, or other device, requesting, suggesting, urging, or advocating that any other person not bid on, or suggesting that it would not be profitable, desirable, or appropriate for any other person to bid on, the sale of any fertilizer asset located in the United States.

B. Compliance Program and Certification

The Final Judgment acknowledges that defendant currently is not engaged in the fertilizer business and, as a result, suspends all of defendant's compliance obligations under Section VII. of the Final Judgment until such time as defendant re-enters and engages in the fertilizer business during the term of the Final Judgment. If and when defendant re-enters the fertilizer business during the term of the Final Judgment, within thirty

(30) days of re-entry defendant must establish and maintain for as long as it engages in the fertilizer business an antitrust compliance program which shall include designating an Antitrust Compliance Officer with responsibility for accomplishing the compliance program. The Antitrust Compliance Officer is required to, on a continuing basis, supervise the review of the current and proposed activities of the defendant to ensure that it is in compliance with the program. The Antitrust Compliance Officer is also required to (1) distribute a copy of the Final Judgment to all officers and directors, and any person who otherwise manages defendant with respect to the fertilizer business, (2) distribute in a timely manner a copy of the Final Judgment to any person who succeeds to a position described in Section VII.B.1. of the Final Judgment, (3) brief annually defendant's officers and directors engaged in the fertilizer business on the meaning and requirements of the Final Judgment and the antitrust laws, and (4) obtain annually from each officer or employee designated in Section VII.B.1. and 2. of the Final Judgment a written certification that he or she: (a) has read, understands, and agrees to abide by the terms of the Final Judgment; (b) understands that failure to comply with the Final Judgment may result in conviction for criminal contempt of court; and (c) is not aware of any violation of the Final Judgment that has not been reported to the Antitrust Compliance Officer.

Moreover, defendant is required to distribute in a timely manner a copy of the Final Judgment to any person with whom the defendant enters into discussions or negotiations for the possible submission of a joint bid for the acquisition of any

fertilizer asset and file with this Court and serve upon plaintiff, within ninety (90) days after the date of defendant's re-entry in the fertilizer business, an affidavit as to the fact and manner of its compliance with this Final Judgment. Defendant is also required to take appropriate action to terminate or modify any activities it uncovers that violate any provision of the Final Judgment.

V.

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 the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any private lawsuit that may be brought against the defendant.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to John T. Orr, Chief, Atlanta Field Office, U.S. Department of Justice, Antitrust Division, 75 Spring Street, S.W., Suite 1176, Atlanta, Georgia, 30303, within the 60-day period provided by the Act. These

comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry.

VII.
ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The Department considered, as an alternative to the proposed Final Judgment, litigation seeking comparable equitable relief. In the view of the Department of Justice, a trial would involve substantial cost to the United States and is not warranted because the Proposed Judgment provides relief that will remedy the violations of the Sherman Act alleged in the Complaint of the United States.

VIII.
DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were used in formulating the proposed Final Judgment.

Respectfully submitted,

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