

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 78-3165,
)	Section H
)	
ANTHONY J. BERTUCCI CONSTRUCTION)	Filed: March 27, 1985
COMPANY, INC.;)	
W. H. CARDER, INC.;)	
DAVIS CONSTRUCTION COMPANY;)	
FORD CONSTRUCTION COMPANY;)	
LUHR BROS., INC.;)	
MASSMAN CONSTRUCTION CO.;)	
McALISTER CONSTRUCTION COMPANY,)	
INC.;)	
MIDWEST CONSTRUCTION COMPANY;)	
PATTON-TULLY TRANSPORTATION)	
COMPANY;)	
PENSACOLA CONSTRUCTION CO.;)	
PETER KIEWIT SONS' CO.;)	
PINE BLUFF SAND & GRAVEL COMPANY;)	
SOUTER CONSTRUCTION CO., INC.; and)	
SOUTHERN RIVER ROCK CO.,)	
)	
Defendants.)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act [15 U.S.C. § 16(d)-(h)], the United States of America hereby submits 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 September 27, 1978, the government filed a three-count civil complaint against the defendants herein as well as against Gibbar Bros., Inc. and Markham and Brown, Inc. which were dismissed from the civil case by mutual agreement in June 1981 and October 1984 respectively. An amended complaint, filed on January 30, 1979, alleged the same counts against the defendants and specified the amount of monetary damages allegedly suffered by the United States from the defendants' conduct.

The first count of the amended complaint charged that, from around 1964 until approximately September 1978, the defendants and other co-conspirators engaged in a combination and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), the substantial terms of which were: (a) to allocate among themselves bank stabilization jobs in the New Orleans, Vicksburg, Memphis, St. Louis, Kansas City and Omaha United States Army Corps of Engineers Districts; and (b) to submit collusive, noncompetitive and rigged bids on bank stabilization jobs in the six aforementioned Corps of Engineers Districts. Count One of the amended complaint sought a judgment declaring that the defendants had engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act. It also sought an order enjoining the defendants, and their respective officers and employees, from directly or indirectly continuing or renewing the unlawful conspiracy.

Count Two of the amended complaint stated a claim under Section 4A of the Clayton Act (15 U.S.C. § 15A), for the recovery of damages in the amount of \$11,970,403 allegedly suffered by the United States as a result of defendants' illegal conspiracy. The government claimed that the United States, through its Corps of Engineers, had to pay substantially higher prices for bank stabilization jobs during the period of September 27, 1974, through September 27, 1978, because of the defendants' bid rigging.

In Count Three of the amended complaint, the government alleged that, between September 27, 1972, and September 27, 1978, the defendants knowingly submitted 1,253 payment claims to the Corps of Engineers totalling approximately \$192,663,212, which were false, fictitious or fraudulent, and which the government paid without knowledge that these claims were false or fraudulent. The government alleged that the claims were false or fraudulent because the conspiracy resulted in the defendants being awarded bank stabilization contracts on the basis of knowingly false and fraudulent representations to the Corps of Engineers, in that the defendants attested that the bids were submitted competitively and without collusion when they knew such was not the case. Count Three of the amended complaint demanded judgment against the defendants [under 31 U.S.C. §§ 231-233, commonly known as the False Claims Act] for \$2,000 for each of the 1,253 claims as well as double the \$23,119,585 damages suffered by the government in the form

of higher bank stabilization prices that resulted from the defendants' unlawful conspiracy. The claims alleged in Count Three were asserted as alternatives to those alleged in Count Two to the extent that any transaction complained of gave rise to liability under both counts.

Counts Two and Three of the amended complaint have been compromised by the government in a series of separate settlements with each of the defendants between March 27, 1979 and July 1981. In all cases, the damages recovered, which totalled \$7,179,492, were paid in full satisfaction of Count Two of the amended complaint, Count Three being dismissed as part of the settlement agreement. The dispositions of these counts with regard to each party to the proposed Final Judgment are set forth below:

<u>Defendant</u>	<u>Damages</u>
Anthony J. Bertucci Construction Company, Inc.	\$ 550,000
W. H. Carder, Inc.	78,111
Davis Construction Company	360,000
Ford Construction Company	275,000
Luhr Bros., Inc.	1,350,000
Markham & Brown, Inc.	1,008,000
Massman Construction Co.	721,000
McAlister Construction Company, Inc.	450,000
Midwest Construction Company	94,270

Patton-Tully Transportation Company	\$ 420,000
Pensacola Construction Co.	665,000
Peter Kiewit Sons' Co.	300,000
Pine Bluff Sand & Gravel Company	800,000
Souter Construction Co., Inc.	78,111
Southern River Rock Co.	30,000

In some instances, provision was made in the Partial Settlement Agreement for payment of the damages in yearly installments until October 1, 1983. In these settlement agreements the parties also agreed to work for a mutually acceptable resolution of Count One of the amended complaint.

Entry by the Court of the proposed Final Judgment will terminate the proceedings with regard to Count One of this action, except insofar as the Court will retain jurisdiction for possible further proceedings which may be required to interpret, modify or enforce the judgment, or to punish alleged violations of any of its provisions.

On September 27, 1978, the day the original civil complaint was filed, a grand jury in the Eastern District of Louisiana returned a fifty-four count indictment against the fourteen companies which are parties to this proposed Final Judgment, as well as against Gibbar Bros., Inc. and Markham and Brown, Inc., and, in addition, against ten of the principal officials of some of the defendant companies. Count One of the

indictment charged the defendants with a felony violation of the Sherman Act (15 U.S.C. § 1) for engaging in a combination and conspiracy, the substantial terms of which were to allocate bank stabilization jobs among themselves and to submit collusive, noncompetitive and rigged bids on bank stabilization jobs to the U.S. Army Corps of Engineers. Counts Two through Thirty of the indictment charged a number of the criminal defendants with mail fraud in violation of 18 U.S.C. § 1341, and the remaining twenty-four counts alleged violations of 18 U.S.C. § 1001 (False Statements).

A number of the criminal defendants entered into plea agreements with the government disposing of the charges. At the time of sentencing, the government ordinarily refrained from making sentencing recommendations. The Court imposed a three-year suspended sentence with three years of supervised probation on most of the individual defendants; in addition, each defendant was ordered to engage in public service one day per week for two years and was fined between \$5,000 and \$36,000. Pursuant to the plea agreements, the agreed fines for the corporate defendants ranged from \$25,000 to \$200,000.

Four individuals and three defendant corporations, Anthony J. Bertucci Construction Company, Ford Construction Company and Luhr Bros., Inc., went to trial in May 1979 on the mail fraud and false statement counts, which the Court had earlier severed from the Sherman Act count. The jury rendered verdicts of guilty on all counts as to these defendants on

May 24, 1979. At sentencing, the Court levied fines of from \$40,000 to \$50,000 on the corporate defendants and sentenced the individual defendants in the same manner described earlier, except that the fines levied ranged from \$14,500 to \$48,000. No separate trial was held on the Sherman Act count, as all defendants had entered pleas of guilty by the time trial was scheduled to begin in May 1981. Fines were imposed ranging from \$25,000 to \$200,000.

II.

Description of the Alleged Violation

The defendants in this case are bank stabilization contractors who do contracting work along the Mississippi, Missouri and Red Rivers. Their work consists primarily of building and maintaining dikes, revetments and associated structures. Dikes, though of numerous kinds and designs, are typically rock structures which extend at right angles into a river to control its flow, to prevent undesirable channels and to encourage the river to maintain a desired depth and width; revetments are a form of retaining wall, usually made of stone, which prevents erosion and helps the river stay in desired alignment.

All bank stabilization work is commissioned by the United States Army Corps of Engineers, which determines where stabilizing structures are needed, what type of work will best suit the need and when the work must be done. To commission and supervise work on the rivers, the Corps operates from six

United States Army Engineer Districts: New Orleans, Vicksburg, Memphis, St. Louis, Kansas City and Omaha. Each district has a chief engineer responsible for preparing plans and specifications for jobs within its control, advertising those jobs and finally awarding the work to the lowest qualified bidder, pursuant to sealed, competitive bidding.

All bank stabilization work is competitively advertised and bid, pursuant to federal law and regulations. This procedure ensures that all interested and qualified companies are made aware of the work and that the award is made at the lowest cost to the government, consistent with performance standards. Normally, about thirty days prior to the bid opening, plans and specifications for the project and an invitation to bid are sent to interested firms. Before the bid opening, the Corps makes a detailed estimate of what the construction of the job, excluding profit, should cost; but the Corps does not reveal this estimate until all bids are opened, and the award is made. A bank stabilization contractor wishing to submit a bid does so by completing, executing and forwarding to the Corps of Engineers a standard "Bid Form" ("Standard Form 21") provided by the Corps. By executing and returning the "Bid Form", a bank stabilization contractor provides the Corps of Engineers with its proposed price for completing a job and certifies that the amount was arrived at independently and without consulting or agreeing with any other contractor.

The contractor who submits the lowest bid is awarded the contract, except if the lowest bid exceeds the Corps estimate by twenty-five percent, in which case all bids are rejected, and the job is readvertised.

There are seventeen companies that perform work on the Mississippi, Missouri and Red Rivers, and sixteen were made defendants in the amended complaint. Most of the companies have either been awarded, or bid on, work in several Corps districts, and a few perform or bid on work in all the districts. From September 27, 1974, through September 27, 1978, the United States of America made payments totaling approximately \$99,753,360 to these sixteen defendants for bank stabilization work.

The government was prepared to prove that bid rigging on Corps jobs began as long ago as the early 1960's in some districts and was common practice in all other districts by the late 1960's or early 1970's. The government further was prepared to prove as follows: the bid rigging was accomplished by the principals of the defendant companies through various types of conversations; sometimes the illegal discussions took place in meetings, sometimes in telephone calls, and at other times both types of communications were utilized; meetings took place in cities such as Memphis, Omaha, Kansas City and St. Louis, the actual sites of the meeting depending on the district and the river involved in the proposed project; in some districts, the discussions took place annually, after the Corps announced

all upcoming work for the year; in other districts discussions were on an as-needed basis; and in these meetings or telephone calls and other encounters, bank stabilization jobs would be discussed, the low bidder would be selected, information would be exchanged concerning bid amounts or bid ranges, and the defendants would agree to submit intentionally high bids, or to withhold bids, on projects on which another defendant had been designated as the low bidder. The government would have been prepared to demonstrate that, in most cases, by the time the Corps received all sealed bids, the winning contractor had already been selected.

The amended complaint alleged that the combination and conspiracy had the following effects, among others:

- (a) prices of bank stabilization jobs were fixed, maintained, and established at artificial and noncompetitive levels;
- (b) competition in the construction of bank stabilization jobs was restrained, suppressed and eliminated; and
- (c) the United States and the Corps of Engineers were denied the benefits of free and open competition in contracting for the performance of bank stabilization jobs.

III.

Explanation of the Proposed Final Judgment

The government and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The stipulation provides that there is no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon a determination by the Court that it is in the public interest.

A. Prohibited Conduct

The proposed Final Judgment would enjoin any direct or indirect renewal of the type of conspiracy alleged in Count One of the amended complaint. Specifically, Paragraph IV of the proposed Final Judgment enjoins any defendant from entering into, or adhering to, any agreement or plan with another bank stabilization contractor to submit or to solicit any noncompetitive, collusive or complementary bid for any bank stabilization job, or to refrain from bidding on such a job, or to fix or determine any bid, including any part of a bid, submitted for any bank stabilization job. Any agreement or plan between a defendant and a bank stabilization contractor to allocate contracts or to rotate or divide markets or territories with respect to bank stabilization jobs is also forbidden. The proposed Final Judgment also would prohibit any agreement by a

defendant to compensate unsuccessful bidders or those who refrained from bidding on a bank stabilization job, whether the compensation is money, a subcontract or some other thing of value. Paragraph IV further prohibits any agreement or plan to communicate to, or exchange with, any bank stabilization contractor information concerning bids, or any term, condition, component or part thereof, with regard to any bid the defendant or other bank stabilization contractor has submitted, intends to submit or is considering submitting.

There are limited exceptions to the prohibitions contained in Paragraph IV, particularly with regard to the exchange-of-information provisions. First, as Paragraph V(A) states, the Final Judgment is not applicable to a bona fide sale, lease, purchase or rental of equipment or supplies used in bank stabilization construction between a defendant and any other bank stabilization contractor. Second, the Final Judgment would not prohibit a bona fide joint venture arrangement or subcontract agreement between a defendant and any other person, so long as such bona fide joint venture or subcontract is not a subterfuge to avoid the injunction against compensating unsuccessful bidders or nonbidders on bank stabilization jobs. (See Paragraph V(B).)

B. Required Conduct

To facilitate monitoring of compliance with the provisions relating to competitive bidding, under Paragraph VI each defendant would be required, until September 1, 1991, to preserve all written price computations, estimating sheets,

worksheets and similar calculations actually performed or used by it in connection with the preparation of a bid, whether submitted or not and whether successful or not, for any bank stabilization job.

Paragraph VII of the proposed Final Judgment contains several provisions to ensure that the necessary employees of each defendant are made aware of their and the defendant's obligations under the antitrust laws and the Final Judgment and to prompt each defendant to establish or continue an antitrust compliance program to prevent future bid rigging. In addition, each defendant would be required, within 30 days, to serve a copy of the Final Judgment on each of its directors and officers, and upon each of its employees or agents who have any responsibility or authority for preparing, estimating, reviewing or submitting bids for bank stabilization jobs. Each defendant also would be required to serve a copy of the Final Judgment on new employees within 30 days of their being employed by the defendant. Each defendant would be obligated to obtain and keep receipts reflecting the service of the Final Judgment on corporate personnel and to establish a reasonable antitrust compliance program to advise those persons having duties in regard to the establishment or estimating of bids or parts of bids for bank stabilization jobs of the company's obligations under the Final Judgment and the criminal and other penalties for violation of the Final Judgment.

Paragraph VIII would require each defendant to submit a letter of intent to the plaintiff providing information sufficient to demonstrate that a proposed sale or disposition of all or substantially all of a defendant's assets that are used in bank stabilization construction is not for the purpose of avoiding the terms of the Final Judgment. The plaintiff has fifteen (15) days in which to indicate in writing its approval or disapproval of the proposed transaction. The plaintiff has seven (7) days in which to request supplementary information concerning the transaction. If the plaintiff objects to the proposed transaction, the transaction may not proceed unless the acquiring person agrees to be bound by the terms of the Final Judgment, the Court approves the transaction or the plaintiff withdraws its objection.

Under Paragraph IX of the proposed Final Judgment, the Department of Justice would be given access to the files and records of each defendant in order to examine such records for compliance. The Department also would be granted access to interview employees of each defendant to determine whether it and its employees are complying with the Judgment. Suitable provisions protecting the confidentiality of defendant's records are incorporated in the proposed Final Judgment.

The proposed Final Judgment is applicable to each of the defendants and to its affiliates, subsidiaries, officers,

directors, partners, employees and to all persons in active concert or participation with any of them who shall have received actual notice of the Final Judgment by personal service or otherwise.

The Court would retain jurisdiction of this case for the purpose of ensuring compliance with the Final Judgment.

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 such person has suffered, as well as costs and reasonable attorney fees. As the United States Army Corps of Engineers, an agency of the United States Department of Defense, was the only purchaser of bank stabilization construction in this case, there are no potential private plaintiffs who have suffered any equitable or monetary damage as a result of the alleged violation. Hence, there appear to be no potential private litigants who have standing to sue under Section 4 of the Clayton Act in this matter.

V.

Procedures Available for Modification of the Proposed 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 James A.

Backstrom, Jr., Department of Justice, Antitrust Division, Room 8C6, 1100 Commerce, Dallas, Texas 75242, within the 60-day period provided by the Act. The comments and the government's responses to them 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 its entry should the government determine that some modification of the Final Judgment is necessary. The proposed Final Judgment itself provides that the Court will retain jurisdiction over this action and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification or enforcement of the Final Judgment.

VI.

Alternatives to the Proposed Final Judgment

The relief in the proposed Final Judgment is designed to prevent a recurrence of any of the activities alleged in the amended complaint. The prohibitory language of the Final Judgment will ensure that all bidders' decisions on bank stabilization jobs are made independently by the individual competitors. The proposed Final Judgment contains sufficient record-keeping requirements and access to defendants' records to allow the Department to adequately monitor defendants' activities in the future.

Accordingly, it is the view of the Department of Justice that the proposed Final Judgment is fully adequate to

prevent any future antitrust violations by the defendants. Disposition of the case without additional litigation, the only alternative to the proposed Final Judgment considered by the Department, is appropriate in view of the fact that the proposed Final Judgment includes the form and scope of relief equal to that which might have been obtained after a full hearing on the issues at trial.

VII.

Determinative Documents

Attached as Exhibits 1 through 14 are Agreements of Partial Settlement between the parties affecting Counts I and II of the amended complaint. The government considers these documents determinative in formulating the proposed Final Judgment.

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DATED: