

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 OWENSBORO RIVER SAND & GRAVEL)
 CO., INC.; and)
 TRANSIT-MIX CONCRETE CO.,)
)
 Defendants.)

Civil No. 77-0110-0-(G)

filed! NOV 2 1978

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 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 22, 1977, the United States filed a civil antitrust Complaint alleging that two corporations conspired to fix prices in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The Complaint alleged that beginning at least as early as March 1973, and continuing thereafter up to and including the date of the filing of the Complaint, the defendants had engaged in a combination and conspiracy to fix, raise, stabilize, and maintain the prices of ready-mix concrete in the Owensboro area.

The Complaint sought a judgment by the Court declaring that defendants had engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act and an Order by the Court to enjoin and restrain the defendants from such activities in the future.

The corporations named in the Complaint were Owensboro River Sand & Gravel Co., Inc.; and Transit-Mix Concrete Co.

Both of these defendants to this action have previously pleaded nolo contendere to criminal felony charges with respect to this alleged conspiracy. A fine of \$100,000 was levied against Owensboro River Sand & Gravel Co., Inc. and a fine of \$10,000 was levied against Transit-Mix Concrete Co.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

The defendants are engaged in the production and sale of ready-mix concrete in the Owensboro area to governmental agencies, general contractors, home builders, owners of homes and buildings, and others on the basis of written or oral price quotations rendered to said customers. These customers use ready-mix concrete in the construction, repair, alteration, and improvement of highways and governmental, industrial, institutional, commercial and residential foundations and structures.

Defendants are two of the four largest ready-mix concrete companies in the Owensboro area.

The Complaint alleges that the defendants engaged in a combination and conspiracy beginning at least as early as March 1973, that consisted of a continuing agreement, understanding, and concert of action among themselves and co-conspirators, to fix, raise, stabilize, and maintain the prices of ready-mix concrete in the Owensboro area.

The Complaint further alleges that the combination and conspiracy had the following effects, among others:

- (a) prices of ready-mix concrete in the Owensboro area were fixed, raised, stabilized, and maintained at artificial and non-competitive levels;
- (b) competition in the sale of ready-mix concrete in the Owensboro area was restrained; and
- (c) customers in the Owensboro area were deprived of the benefits of free and open competition in the market for ready-mix concrete.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States 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 between the parties 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 Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest.

The proposed Final Judgment enjoins any direct or indirect renewal of the type of conspiracy alleged in the Complaint. Specifically, Section IV provides that the defendants are enjoined and restrained from entering into, adhering to, participating in, maintaining, furthering, enforcing or claiming, either directly or indirectly, any rights under any contract, agreement, understanding, arrangement, plan, program, combination or conspiracy with any person to determine, fix, raise, stabilize or maintain prices or other terms or conditions

for the sale of ready-mix concrete or any other product to any third person in the Commonwealth of Kentucky.

Section V further enjoins each defendant from directly or indirectly:

(A) communicating to any person prices at which, or terms or conditions upon which, ready-mix concrete or any other product is then being sold or offered for sale by said defendant;

(B) communicating to any person information concerning:

(1) future prices at which, or terms or conditions upon which, ready-mix concrete or any other product will be sold or offered for sale by said defendant;

(2) consideration by said defendant of changes or revisions in the prices at which, or the terms or conditions upon which, said defendant sells or offers to sell ready-mix concrete or any other product;

(C) requesting from any person any information which said defendant could not communicate without violating subparagraphs (A) and (B) of this Section V.

The injunctions in Sections IV and V run perpetually.

For a period of five (5) years from the date of entry of the Judgment, each defendant is required to affix to every written bid or quotation submitted by said defendant for ready-mix concrete or any other product or any combination thereof a written certification signed by an officer or employee of such defendant having authority to determine the price or prices bid or quoted and responsible for the preparation of bids or quotations, that said bid or quotation

was not the result, directly or indirectly, of any discussion, communication, agreement, understanding, plan or program, whether formal or informal, between such defendant and any other person, which is prohibited by the provisions of this Final Judgment.

Section VIII of the proposed Judgment orders and directs each defendant to:

(A) Furnish a copy of the Judgment, within thirty (30) days after the date of entry of the Judgment, to each of its officers and directors, and also to any employee having pricing authority or responsibility in connection with the sale of ready-mix concrete or any other product in the Commonwealth of Kentucky;

(B) Furnish a copy of the Judgment to each new officer, director, and also to any employee having pricing authority or responsibility in connection with the sale of ready-mix concrete or any other product in the Commonwealth of Kentucky within thirty (30) days after employment;

(C) Attach to each copy of the Judgment furnished pursuant to subsections (A) and (B) of this Section VIII a statement, in substantially the form set forth in Appendix B attached hereto, advising each person of his obligations and of such defendant's obligations under the Judgment, and of the penalties which may be imposed upon him and/or upon such defendant for violation of the Judgment; and

(D) To file with the Court and serve upon the plaintiff within sixty days after the date of entry of the Judgment, an affidavit as to the fact and manner of its compliance with subsections (A) and (C) of Section VIII.

There are several limited exceptions to the prohibitions against exchange of information set forth in Section V of the Judgment. These exceptions, found in Section VI of the

Judgment, relate to possible bona fide joint bids or quotations, bona fide purchases and sales, and advertisements.

The proposed Final Judgment is applicable to each of the defendants and to the officers, directors, agents, and employees of each defendant, as well as to the subsidiaries and successors to any defendant corporation.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any potential private plaintiffs who might have been damaged by the alleged violations will retain the same right to sue for monetary damages and any other legal and equitable remedies which they may have had if the Judgment had not been entered. The Judgment may not be used, however, as prima facie evidence in private litigation pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to John A. Weedon, Chief, Cleveland Field Office, Antitrust Division, United States Department of Justice, 995 Celebrezze Federal Building, Cleveland, Ohio 44199 (telephone: 216-522-4070), within the 60-day period provided by the Act. These comments, and the Department'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 Judgment at any time prior to its entry if it should determine that some modification of it is necessary. The proposed

Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for such order as may be necessary or appropriate for its modification, interpretation or enforcement.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Judgment considered by the Antitrust Division was a full trial of the issues on the merits and on relief. The Division considers the substantive language of the Judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the Judgment provides appropriate relief against the violations charged in the Complaint.

In reaching an agreement on the proposed Final Judgment, five matters were the principal subject of negotiation. These matters were the questions of whether:

1. the scope of Section IV of the Judgment should be statewide or local;
2. the injunctive provisions of Section IV of the Judgment should include activities which were not specifically alleged in the Complaint;
3. the injunctive provisions of Sections IV and V of the Judgment should apply for five years or in perpetuity;
4. the injunctive provisions of Sections IV and V of the Judgment should apply only to each defendant's dealings with other defendants, or should apply to each defendant's dealings with all "persons" as defined in Section II of the Judgment; and
5. the certification which defendants must attach, for a period of five years, to every bid or quotation they submit, as required by Section VII of the Judgment, should be treated as a sworn statement made under oath, and be subject to the

provisions of Title 18 U.S.C. § 1001 relating to the making of false statements, and to the provisions of Title 31 U.S.C. §§ 231-233, relating to the making of false claims.

The first matter, concerning the geographic scope of the Judgment, arose because the defendants had proposed limiting the Judgment to only those sales occurring in the Owensboro, Kentucky area. The government insisted, however, that the coverage of the section include all sales occurring in the Commonwealth of Kentucky. Inasmuch as both companies make almost all of their sales within the Commonwealth of Kentucky, the government considers that the geographic coverage is sufficient.

The second matter, relating to the types of activities enjoined by Section IV of the Judgment, was raised because the government had proposed that the defendants be enjoined from engaging in not only price fixing but also other activities such as the allocation of customers and markets. The government agreed that the proscriptions provided for in Section IV would be limited to those activities alleged in the Complaint because the evidence in this case did not require enjoining other activities.

The third matter, involving the length of time for which the defendants would be enjoined by the provisions of Sections IV and V, arose because the defendants proposed limiting the applicability of these Sections to five years. The government refused to agree to this time limitation. The government's position is reflected in the Judgment.

The fourth matter related to whether the injunctive provisions of Sections IV and V of the Judgment should apply to each defendant's dealing only with the other defendants or to each defendant's dealing with any person. Because of the

frequent interaction between sellers of ready-mix concrete and suppliers of its component parts, some of which also sell ready-mix concrete, the government insisted that the applicability of Sections IV and V include dealings with all persons.

The fifth matter, relating to the certification required by Section VII of the Judgment, arose because the government had sought to have included in the certification form set out in Appendix A of the Judgment, a statement of the applicability of Title 18 U.S.C. § 1001 and Title 31 U.S.C. §§ 231-233. The defendants refused to accept the government's proposed language. The government agreed to delete this proposed language because, if the defendants violate the provisions of the Judgment, they will still be subject to substantial criminal penalties.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No other material or document of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16) was considered in formulating this proposed Judgment. Consequently, none is submitted pursuant to that Section.

JOHN A. WEEDON

DONALD S. SCHERZER

DAVID F. HILS

WILLIAM A. LEFAIVER

Attorneys,
Department of Justice

ROBERT M. DIXON

Attorneys, Department of Justice
Antitrust Division
995 Celebrezze Federal Building
Cleveland, Ohio 44199
Telephone: (216) 522-4082