

with its members to restrain competition by adopting and enforcing certain rules that restrict bidding on construction projects in Hawaii. The United States and each of the nine defendants have agreed to Final Judgments in settlement of the cases. The Complaints and proposed Final Judgments in the nine cases are similar.

Defendant Mason Contractors Association of Hawaii ("MCAH") is a Hawaii corporation with its principal place of business in Honolulu, Hawaii. MCAH modeled its bidding rules on those of General Contractors Association ("GCA"), the first construction trade association in Hawaii to adopt bidding rules.

Plaintiff and defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless plaintiff withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to interpret, modify, enforce, and punish violations of the Final Judgment.

II

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

A. The Bid Depository System in Hawaii

A bid depository is a system for the collection and dissemination of bids or sub-bids for the performance of construction services. A bid depository collects and compiles bids submitted by a date certain and then disseminates them to bidding authorities or general contractors seeking the bids or sub-bids, respectively. By facilitating the bidding process, bid depositories can improve the efficiency of the contracting process

and thereby promote rather than harm competition. The complaint in this case alleges, however, that the defendant adopted a number of rules governing the operation of its bid depository that restrained competition for subcontracts on construction projects governed by the MCAH bidding procedures, by prohibiting and precluding negotiation of sub-bids once they were submitted to the bid depository.

On most major construction projects in Hawaii, including most government projects, the governmental and private entities that contract for construction services (known as "awarding authorities") do so by soliciting and accepting bids from general contractors. In preparing their respective bids, general contractors usually solicit and accept bids from the various specialty contractors (e.g., plumbing, electrical, masonry contractors) and material suppliers whose work will be needed on the project. A bid to a general contractor by a specialty contractor or material supplier to provide services or materials for a construction project is known in the trade as a "sub-bid."

Since 1949, GCA has maintained and enforced rules that regulate bidding by specialty contractors to general contractors on a substantial number of construction projects in Oahu, Hawaii. The rules, known collectively as the "GCA bidding procedure," govern the operation of GCA's bid depository. Two other general contractor associations in the State of Hawaii operate bid depositories: the Hawaii Island Contractors' Association (since 1972) and the Maui Contractors Association (since 1977).

Six specialty contractor associations operate bid depositories in conjunction with the three general contractor associations in Hawaii. These associations are defendant MCAH, Gypsum Drywall Contractors of Hawaii, Pacific Electrical Contractors Association, Painting & Decorating Contractors Association of Hawaii, Plumbing & Mechanical Contractors Association of Hawaii, and Sheet Metal Contractors Association. All of these bid depositories have rules similar to the GCA bidding procedure.

Under its rules GCA determines which construction projects will be subject to its bid depository rules. If GCA chooses a particular project, then pursuant to the rules of the other associations, that project is also subject to the depository rules of those other associations. Under the controlling MCAH rules, the MCAH bid depository rules apply to all construction projects that are listed in the GCA Weekly Bid Bulletin. GCA selects the projects to be included in the Bulletin on its own and without the authorization or direction of the affected awarding authorities. In fact, GCA selects almost exclusively government construction projects for inclusion in the GCA Weekly Bid Bulletin and seldom includes any private projects. All significant construction projects in Hawaii that are awarded by federal, state, or local governmental entities are listed in the GCA Weekly Bid Bulletin.

All significant general contractors operating on the island of Oahu are members of GCA and abide by the bidding procedure for projects on Oahu that are listed in the GCA Weekly Bid Bulletin. The bidding rules are only suspended by GCA if non-Hawaiian

general contractors who may be unwilling to abide by the procedures appear on the bidders list for a project. On construction projects to which the GCA bidding procedure applies, in almost all instances the only bids received by awarding authorities from general contractors are bids developed in accordance with that procedure.

Similarly, the membership of each of the six defendant specialty contractor associations includes all significant specialty contractors in each of the trades in Hawaii, and all association members abide by the rules and procedures of their association's bid depository. Thus, even if a general contractor were not a member of GCA and did not want to go through the bid depository procedures, it generally would be forced to agree to the procedures because, if it did not, the Hawaiian specialty contractors would be precluded by their rules from dealing with that general contractor. Hence, the general contractor would not be able to obtain an adequate number of sub-bids from qualified specialty contractors. Indeed, on construction projects to which the associations' bidding procedures apply, in almost all instances the only bids received by awarding authorities from general contractors are bids based on sub-bids submitted in accordance with those procedures. (In a small number of projects, non-Hawaiian general contractors bring in mainland subcontractors to work on Hawaiian projects.)

The three general contractor and six specialty contractor associations are interrelated. Many specialty contractors are members of both their specialty trade association and a general

contractor association. The general contractor associations have virtually identical bid procedures, and they cooperate with one another by transmitting or receiving bids from members of one depository for construction projects on an island under the jurisdiction of another. The six specialty contractor associations have bidding procedures modeled after the GCA's rules. The general and specialty contractor associations often cooperate in enforcing their bidding procedures.

In addition, five of the six defendant specialty contractor associations have a rule not found in the general contractor association bidding procedures. This rule requires that any bidder whose bid is "considerably" lower than other bids shall be contacted by the bidder's association and requested to review its bid. (Of these five rules, only the MCAH rule specifies that a bidder shall be contacted if its bid is a certain percentage (10%) below most other bids.) After notification, the bidder is permitted to stand by the bid or withdraw it, but not change it. The rule also provides for tabulation and dissemination among specialty contractors of sub-bid prices after general contractors have opened bids.

B. The MCAH Bidding Procedure

The Complaint filed against MCAH alleges that MCAH's bidding procedure provides, among other things, that:

1. Confirmation bids for masonry subcontracts or material supplies must be filed with the MCAH bid depository as well as with the relevant general contractor association bid depository;
2. Filed bids may not be altered or changed after the deadline for their filing;
3. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;
4. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository; and
5. If any filed bids are in excess of 10 percent below most other bids, such low bidders are so notified.

The Complaint also alleges that beginning at least as early as 1980 and continuing to the present, the defendant engaged in a conspiracy consisting of an agreement, the substantial terms of which were to:

1. Assure that a substantial number of construction projects in the State of Hawaii would be governed by the MCAH bidding procedure and other rules and procedures established by bid depositories operated by other associations of contractors in the State of Hawaii;

2. Restrain and prohibit the negotiation of sub-bids on masonry subcontracts governed by the MCAH bidding procedure by, among other things, inhibiting the seeking of lower prices by general contractors or the offering of lower prices by masonry contractors or material suppliers;
3. Restrain and prohibit the offering of sub-bids, or the acceptance of subcontracts, by masonry contractors or material suppliers that do not comply with the MCAH bidding procedures; and
4. Review masonry contractor and material supplier bids prior to the time bids are due to general contractors and advise any bidders whose sub-bids are in excess of 10 percent below most other bids of that fact.

In addition, the Complaint alleges that the conspiracy had the following effects:

1. Competition among masonry contractors and material suppliers in the sale of masonry contracting services and materials to general contractors on construction projects governed by the MCAH bidding procedure has been unreasonably restrained, suppressed, and eliminated; and
2. Competition among general contractors in negotiating sub-bids for masonry contracting services and materials for construction projects governed by the MCAH bidding procedure has been unreasonably restrained, suppressed, and eliminated.

The regulation of negotiations between general contractors and subcontractors is not anticompetitive in all situations. Here, however, as explained above, the general contractor associations and the specialty contractor associations each possess market power for construction projects in Hawaii. In addition, the decision to limit negotiations between general contractors and specialty contractors was not the decision of the awarding authority, but rather was the decision of the general contractors acting in concert and the decision of the specialty contractors acting in concert. In this context we concluded that the association rules were anticompetitive because they unreasonably deprived the awarding authority of free and open competition in negotiations between general contractors and specialty contractors and material suppliers, for the performance of subcontracts on construction projects subject to the bidding procedures.

The specialty contractor associations' rules requiring notification of bidders whose sub-bids are considerably lower than other bids are anticompetitive and result in increased prices for specialty contract work. The rules permit a bidder who has submitted an accurate bid to withdraw the bid simply because it is "too low." When the low bidder withdraws a bid after being notified as required by the association rules, the second lowest bidder wins the job with an increased profit margin.

The only purported justification for these rules is that notifying low bidders that they are significantly lower prevents

the award of a bid to a specialty contractor who made a mistake in calculating its bid, and who, in performing the job at the mistaken bid price, may go bankrupt, leaving the general contractor and the project owner with an unfinished job. This justification fails on two points. First, it appears that specialty contractors have regularly withdrawn bids that contain no mistake (other than being too low). Second, the justification advanced is a concern of the general contractors that, to the extent it exists, can and should be addressed by the general contractors who have a strong incentive to ensure that a specialty contractor is able to complete its job. General contractors routinely screen low bids for errors. Thus it is unnecessary for competitors to screen each other's bids to address this concern.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment enjoins MCAH from continuing or renewing the anticompetitive conduct alleged in the Complaint. Specifically, Section IV prohibits MCAH from maintaining, directly or indirectly, any written or unwritten rule that has the purpose or effect of:

1. Suppressing, restraining, or discouraging general contractors and specialty contractors or material suppliers from negotiating at any time masonry sub-bids on construction projects;

2. Suppressing, restraining, or discouraging masonry contractors or material suppliers from offering sub-bids to, or accepting subcontracts from, a general contractor on any project;
3. Stating that negotiation of sub-bids is contrary to any policy of MCAH; or
4. Providing for review of masonry contractor and material supplier bids prior to the time bids are due to general contractors, or notification of any bidder of where its bid stands in relation to other bids.

Section V orders MCAH to eliminate within 60 days all written and unwritten rules that are inconsistent with the Final Judgment, including provisions in its bidding procedure which provide that:

1. Confirmation bids for masonry subcontracts or material supplies must be filed with the MCAH bid depository as well as with the relevant general contractor association bid depository;
2. Filed bids may not be altered or changed after the deadline for their filing;
3. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;

4. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository; and
5. If any filed bids are in excess of 10 percent below most other bids, such low bidders are so notified.

Section V.B orders MCAH to include in any MCAH rules on bidding for contracts on construction projects a statement that no MCAH policy prohibits negotiation of sub-bids, or requires that subcontracts be awarded only on sub-bids filed in accordance with MCAH rules.

Section VI.A provides, however, that defendant is not enjoined from complying with any requirement of an awarding authority regarding the procedures general contractors must follow in obtaining sub-bids for the preparation of prime bids. This provision ensures that the proposed Final Judgment does not in any way limit awarding authorities' ability to establish bidding requirements for contractors. If the awarding authority decided that a regulated bidding system which prevented post-filing negotiations between contractors and subcontractors was appropriate, it could insist on it, and the contractors and subcontractors could comply without violating the decree.

Section VI.B further states that defendant is not enjoined from maintaining a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them

to general contractors, so long as use of the services it provides is voluntary. This provision ensures that the proposed Final Judgment does not prohibit MCAH from operating a bid depository so long as the services provided are voluntary and do not prohibit negotiations between general and specialty contractors.

Sections VII and VIII ensure that full notice of the requirements of the Final Judgment is given to all of MCAH's officers, directors, managers, and members.

Section IX requires MCAH to establish and implement a plan for monitoring compliance with the terms of the proposed Final Judgment. MCAH is also required to file with the Court and the United States within ninety (90) days after date of entry of the Final Judgment, an affidavit explaining the steps it has taken to comply with the Final Judgment. MCAH is required to file similar affidavits each year the Final Judgment is in effect.

Section XII makes the Final Judgment effective for ten (10) years from the date of its entry.

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 the person has suffered, as well as costs and reasonable attorney fees. Entry of the Final Judgment will neither impair nor assist the

bringing of any private antitrust damage action. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The APPA provides that any person wishing to comment on the proposed Final Judgment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. Any person who believes that the proposed Final Judgment should be modified, may submit written comments within the statutory 60-day period to Gary R. Spratling, Chief, San Francisco Office, Antitrust Division, United States Department of Justice, 450 Golden Gate Avenue, 16th Floor, Box 36046, San Francisco, California 94102 (Telephone: 415/556-6300). These comments and the Department's response 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. Further, Section XI provides that the Court retains 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, interpretation, or enforcement of the Final Judgment.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Antitrust Division was a full trial on the merits and on relief. The Division considers the proposed Final Judgment to be of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violations alleged in the Complaint.

The effect of the proposed Final Judgment should be to eliminate entirely the alleged restraints on competition that are set forth in the Complaint. In particular, under the proposed Final Judgment, general contractors and specialty contractors and material suppliers can no longer agree to limit negotiations on the terms of sub-bids with each other. General contractors will be able freely to consider bids from any and all capable specialty contractors and material suppliers. Moreover, specialty contractors will be prohibited from notifying bidders whose bids are considerably lower (or more than 10% lower) than the next lower bids. In sum, price competition among general contractors and among specialty contractors and materials suppliers will be facilitated, to the benefit of awarding authorities and, indirectly, to the benefit of federal and state taxpayers. The proposed Final Judgment adequately redresses all aspects of the government's Complaint in this case.

The Division also considered including in the proposed Final Judgment an injunction against the specialty contractor associations' practice of tabulating and disseminating the prices

contained in bids submitted to their depositories. Such exchanges of price information can be procompetitive in that, by providing firms with information about competitors, they ultimately can help firms identify ways in which to lower their costs. But in some circumstances where a market is otherwise prone to collusion, such exchanges of price information can be used to police pricing agreements and can have an anticompetitive effect. The Division chose not to impose an injunction against such information exchange in this case because it cannot be predicted that an exchange of information, on balance, would be anticompetitive in this market after entry of the proposed Final Judgment with its injunctions against anticompetitive practices by the depositories. The Division concluded that such an injunction is not now necessary to restore full and vigorous competition to the affected markets.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

The United States considered no materials or documents to be determinative in formulating this proposed Final Judgment.

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Accordingly, none are being filed pursuant to the APPA, 15 U.S.C.
§ 16(b).

Dated:

Respectfully submitted,

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