

## **Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Bakersfield Associated Plumbing Contractors, Inc.; Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc.; and Kern County Electrical Contractors Association, Inc., U.S. District Court, S.D. California, 1958 Trade Cases ¶69,087, (May 26, 1958)**

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United States v. Bakersfield Associated Plumbing Contractors, Inc.; Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc.; and Kern County Electrical Contractors Association, Inc.

1958 Trade Cases ¶69,087. U.S. District Court, S.D. California, Northern Division. Civil Action No. 1479-ND. Filed May 26, 1958. Modified Judgment entered on December 22, 1958, CCH [1959 TRADE CASES ¶ 69,266](#). Case No. 1242 in the Antitrust Division of the Department of Justice.

### **Sherman Antitrust Act**

**Combinations and Conspiracies—Practices—Bid Depository—Price Tampering.**—Three associations of plumbing, sheet metal, and electrical subcontractors were held to have engaged in price tampering by adopting and enforcing rules for the operation of their bid depository which (1) required subcontractors to submit separate bids for the plumbing, heating, and ventilating portions of a construction contract and discount no more than 5 per cent of the total in a combination bid, (2) required the successful bidder on a construction contract to pay a fee to the depository, and (3) permitted the withdrawal of a bid, upon the payment of a withdrawal fee, in the interval between the opening of the bids by the depository and submission of the bids to the general contractor. The limitation on the combination bid discount restricted the bidder's freedom to submit a truly competitive bid, the depository fee produced more revenue for the depository than its operation required and to that extent constituted an unreasonable restraint of trade, and the rule concerning the withdrawal of bids invited collusion between the bidding subcontractors. While those rules constituted price tampering and were illegal *per se*, the depository's other rules, which were designed to eliminate bid peddling, did not constitute a boycott or an unreasonable restraint of trade. There was no coercion to induce or compel the use of the bid depository and a non-member could use the facility to submit his bid if he agreed to be bound by its rules.

For the plaintiff: James M. McGrath, Edward R. Minor, and Thomas R. Sheridan of the Antitrust Division, Department of Justice.

For the defendants: Mack, Bianco, King and Eyherabide, Bakersfield, Cal., by D. Bianco and Harvey H. Means.

### **Findings of Fact**

[ *Nature of Action* ]

GILBERT H. JERTBERG, District Judge [ *In full text except for omissions indicated by asterisks*]: This is a proceeding filed by the Government on June 28, 1955, against Bakersfield Associated Plumbing Contractors, Inc., Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc., and Kern County Electrical Contractors Association, Inc., alleging an unlawful combination and conspiracy in unreasonable restraint of interstate trade and commerce in plumbing, heating and ventilating, sheet metal, and electrical supplies, materials and fixtures, in violation of Section 1 of the Sherman Antitrust Act. The relief sought is of an equitable nature. The issues are raised by the complaint and by the joint and several answers of the defendants.

Federal jurisdiction is invoked on the ground that these proceedings are instituted under [Section 4 of the Sherman Act](#), in order to prevent and restrain continuing violations by defendants of [Section 1 of the Sherman Act](#). It is alleged in the complaint that each of the corporations named as defendants has an office, transacts business, and is found within the Southern District of California, Northern Division, and that the alleged violations of law described in the complaint have been and are being carried out within the said district and division.

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The case was tried by the Court sitting without a jury. Pre-trial proceedings resulted in the filing of a pre-trial conference order, in which the parties reached agreement upon many of the facts. The evidence consisted of the pre-trial conference order and oral and documentary evidence.

[ *Attorneys*]

The plaintiff was represented by James M. McGrath, Edward R. Minor, and Thomas R. Sheridan of the Antitrust Division, Department of Justice. The defendants were represented by Mack, Bianco, King & Eyherabide, of Bakersfield, California, D. Bianco and Harvey H. Means appearing.

[ *Findings of Fact*]

Having considered the evidence presented, the proposed findings and counterfindings prepared respectively by counsel for plaintiff and defendants in accordance with the Court's Order of December 30, 1957, and having held hearings on April 25, 1958 and May 2, 1958 for the purpose of settling the findings and judgment in this matter, the Court now makes the following findings of fact and conclusions of Law:

[ *Defendants' Offices*]

1. Each of the defendants has an office in the City of Bakerfield, County of Kern, State of California.

[ *Definitions*]

2. As used herein and by stipulation during the course of the trial, the term "Bakers-field Trade Area" refers to the City of Bakersfield and the County of Kern, State of California.

3. The term "construction supplies" as used herein refers to plumbing, heating and ventilating, sheet metal, and electrical supplies, materials, and fixtures which are furnished by subcontractors in connection with the performance of construction contracts.

4. As used herein and as defined in the pre-trial conference order, the term "bid depository," unless otherwise specified, refers to the "Bakersfield Construction Industry Bid Depository," which is a facility established, maintained, and operated by the defendants, through which bids of subcontractors are received and processed and made available to general contractors in accordance with the rules for the operation of such bid depository.

5. The terms "process" and "deliver" as used herein have the same meaning as when used in the bid depository rules and in the correspondence of the bid depository with both general and subcontractors. It is intended that as used herein these terms shall have their usual and ordinary meaning.

6. As used herein and as defined in the pre-trial conference order, the term "bid peddling" refers to the disclosure, for the purpose of obtaining a more favorable bid, by a general contractor of one subcontractor's bid to a competing subcontractor prior to the time the awarding authority has made an award to the general contractor, and the term "bid shopping" refers to such disclosure for the same purpose after an award has been made to the general contractor.

[ *Defendants*]

7. The defendant, Bakersfield Associated Plumbing Contractors, Inc., is a corporation organized and existing under the laws of the State of California, chartered as a non profit business league. Said defendant has its office and principal place of business at Bakersfield, California, and transacts business within the Southern District of California, Northern Division. Said defendant is composed of the following member sub contractors who are the major plumbing subcontractors in the Bakersfield Trade Area. The name, address, date of membership, and date each member signed the bid depository agreement follows: \* \* \*

8. The defendant Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc. is a corporation organized and existing under the laws of the State of California, chartered as a non-profit association. Said defendant has its office and principal place of business at Bakersfield, California, and transacts business within the Southern District of California Northern Division. Said defendant is composed of the following member subcontractors, who are the major sheet metal subcontractors in the Bakersfield Trade Area. The name, address, date of membership, and date each member signed the bid depository agreement follows: \* \* \*

9. The defendant, Kern County Electrical Contractors Association, Inc., is a corporation organized and existing under the laws of the State of California, chartered as a non-profit association. Said defendant has its office and principal place of business at Bakersfield, California, and transacts business within the Southern District of California, Northern Division. Said defendant is composed of 25 member subcontractors, who are the major electrical subcontractors in the Bakersfield Trade Area. The name, address, date of membership, and date each member signed the bid depository agreement follows: \* \* \*

[ *Contracting Practices*]

10. The awarding authority who plans a major construction project usually enters into a single comprehensive contract with a general contractor who assumes responsibility for the entire project. This is the practice in the Bakersfield Trade Area as well as throughout the United States. Generally, the awarding authority advertises for bids and awards the contract to the lowest and most responsible bidder. General contractors, after they have received the award, usually subcontract specialized portions of the construction, such as plumbing, heating and ventilating, electrical, and sheet metal work. The general contractor customarily seeks to obtain the most favorable subcontractor bids possible. The general contractor, after receiving bids from subcontractors, frequently attempts to obtain a more favorable price for the work.

General contractors, in bidding on projects of the type within the depository rules, generally submit to the awarding authority a sealed written bid, accompanied with a deposit, which the general contractor forfeits if he fails to enter into a contract after his bid is accepted. At the time and place specified in the invitation for bids, the awarding authority opens the bids in public. The bids are tabulated and, as a general rule, the job is awarded to the lowest responsible bidder.

In the preparation of the bids referred to in the next preceding paragraph hereof, the general contractor makes his estimate of labor, materials, overhead and profit, and submits an offer to the awarding authority to furnish the material and perform the work in accordance with the plans and specifications for one lump sum amount.

As a general rule, general contractors do not perform the mechanical or specialty work, such as plumbing, electrical, heating and ventilating and sheet metal. They submit bids to the awarding authority based on sub-bids received from the specialty subcontractor. Before the general contractor submits his bid to the awarding authority, he invites and obtains bids from such subcontractors.

11. In advance of requesting bids on any construction project, the awarding authority causes specifications to be drawn describing, among other things, in detail the supplies to be furnished in such project. In many instances, the specifications describe such supplies by brand name, and in many other instances the specifications describe such supplies by a brand name as a standard, and substitutions are permitted with the approval of the architect.

12. The specifications referred to in the next preceding paragraph hereof, describe items of construction supplies manufactured outside the State of California, and items of construction supplies manufactured within the State of California.

13. In order to properly make up his bid to the awarding authority, it is necessary that the general contractor have the bids of the subcontractors submitted to him sufficiently in advance of the time for filing general bids, in order to permit adequate analysis and compilation.

14. In order to properly prepare his bid for submission to the general contractor, the subcontractor should obtain plans and specifications of the work, study them to familiarize himself with the details, make an examination of the job site, itemize and price the materials required for the job, and estimate the labor, overhead, and profit.

[ *Interstate Commerce*]

15. The subcontractors, including members of the defendant trade associations, do not customarily carry on hand sufficient construction supplies for large construction projects. After receiving the award of a subcontract, the subcontractor orders from wholesalers or directly from manufacturers, for his own account, the construction supplies needed for the contract on which he has bid. Large quantities of construction supplies sold and installed

in the Bakersfield Trade Area are manufactured in States other than California and are shipped in interstate trade and commerce from such States to the Bakersfield Trade Area. A substantial part of the construction supplies sold and installed in the Bakersfield Trade Area is shipped by manufacturers from plants located outside the State of California direct to the job site in said area. Other such construction supplies are ordered by wholesalers from manufacturers located outside the State of California to fill orders placed by subcontractors. These construction supplies are shipped by manufacturers from plants located outside the State of California to job sites in the Bakersfield Trade Area.

16. In order to perform construction contracts, member subcontractors and other subcontractors who have used the bid depository, have placed practically all orders for construction supplies with companies having offices located in California. Many of such companies are independent, locally-owned jobbers or wholesalers. Many of such companies, some of whom are listed in Document No. 2417 of Exhibit No. 16, are wholly-owned and controlled subsidiaries, operating divisions, or local agents of corporations whose principal offices and manufacturing plants are located outside the State of California. Quantities of such construction supplies are shipped pursuant to such orders from points outside the State of California to the California offices or warehouses of the companies from which such supplies were ordered. Quantities of such construction supplies are also shipped pursuant to such orders from points outside the State of California directly to the job sites of construction projects in the Bakersfield Trade Area.

17. The cost to the subcontractor of the construction supplies furnished in connection with the performance of a subcontract bid on through the bid depository, usually amounts to approximately 50 per cent, more or less, of the total amount of the subcontractor's bid.

18. Substantially all of certain types of construction supplies, as well as many brand name products furnished by subcontractors in performing construction contracts resulting from bids made through the bid depository, are manufactured only outside the State of California.

19. Invoices and shipping documents establish that in the year 1955 there were shipments totaling \$340,000 from points outside the State of California delivered to the job sites of construction projects bid on through the bid depository. In addition, shipments from points outside the State of California to subcontractors who were successful bidders through the bid depository in the calendar year 1955, but which shipments were not definitely tied in with specific bid depository projects, amounted to \$350,000. On one uncompleted project processed through the bid depository in 1956, out-of-state shipments of construction supplies directly to the job site amounted to approximately \$150,000.

20. Quantities of construction supplies are shipped into warehouses in the State of California from points outside the State of California in response to orders placed by subcontractors, for the purpose of performing construction contracts awarded to said subcontractors as a result of bids made through the Bakersfield Construction Industry Bid Depository. Such construction supplies are shipped from said warehouses directly to the job sites of such construction projects, or directly to such subcontractors who subsequently furnish such supplies in the performance of said construction contracts. Such supplies, when received in California, are not reshipped or intended to be reshipped outside the State of California.

21. The sale and installation of construction supplies in the Bakersfield Trade Area by subcontractors, including members of the defendants and users of the bid depository are interrelated with and necessary to the movement in interstate commerce, of a substantial volume of construction supplies which flows in a continuous uninterrupted stream from points of origin in States other than California, to the ultimate owners or builders at the site of installation.

[ *Bid Depository Rules* ]

22. During 1954 the three defendants, acting in concert, adopted rules for the operation of a bid depository known as the Bakersfield Construction Industry Bid Depository. These rules are dated October 27, 1954. Since the adoption of the rules for the bid depository, the bid depository has been operated by the defendants in accordance with said rules, and the defendants intend to continue to operate the bid depository under said rules

unless restrained by order of this Court. A copy of these rules is attached to the complaint as Exhibit "A". Such rules are as follows:

"Bakersfield Construction Industry Bid Depository "Bakersfield Associated Plumbing Contractors, Inc.

"Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc.

"Kern County Electrical Contractors Association, Inc.

"27, October, 1954

"1. *Purpose*: These rules are established for the purpose of providing fair and open competition between the members of the plumbing, heating and ventilating, sheet metal and electrical industries and to eliminate the unfair practice of bid peddling.

"2. *Applicability*: The rules herein established shall govern any proposal tender or offer to contract the installation of plumbing, heating and ventilating, sheet metal or electrical, upon all projects within the Counties of Kern, Inyo and Mono for the plumbing, heating and ventilating, and sheet metal industries, and the County of Kern for the electrical industry, wherein the awarding authority has designated and advertised a specific time for the opening of contract bids for the performance of work upon said project by an user of the bid depository or member of the associations.

"3. *Depository*: To achieve the objects of this agreement, the Bakersfield Associated Plumbing Contractors, Inc., Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc., and the Kern County Electrical Contractors Association, Inc., hereinafter referred to as the associations will establish and maintain a bid depository at 1420 24th Street, Bakersfield, California. The bid depository box shall be equipped with two locks; the first two persons depositing bids on any specified project that will be present for the opening of such bids will lock the depository box and retain the keys thereto; upon the specified time for the opening of such bids, the persons retaining the keys will unlock the box; all bids will then be announced and tabulated by the respective associations secretaries.

"4. *Deposit of Bids*: The bid depository maintained by the associations shall be available to all plumbing, heating and ventilating, sheet metal and electrical contractors desiring to bid upon the designated project.

"5. *Time of Deposit*: All bids must be received by the depository normally not later than six hours prior to the time designated for the opening of bids by the awarding authority; provided, however, that if the time designated by the awarding authority for opening bids is such that deposit six hours prior thereto would not be during normal working hours, then the Board of Directors of each association shall coordinate and designate the time at which bids must be deposited; in the event of time designation by the association Board of Directors. All bidders known to be interested in bidding the project shall be notified sufficiently in advance of the time of deposit by the office of the depository. Bids received later than the time hereinabove provided shall be returned to the bidding contractor unopened.

"6. *Combination Bids (Plumbing, Heating & Ventilating)*: Contractors submitting bids to the depository must submit separate bids for plumbing and heating and ventilating, and may submit a bid representing a combination of the plumbing and heating and ventilating; provided, however, that the combination bid so submitted may not be reduced more than five per cent (5%) of the separate bids so combined. All bids are to be submitted to the depository upon the condition that either the plumbing or heating and ventilating portion of any bid may be used by the general contractor with any other plumbing or heating and ventilating bid, or portion of a bid, submitted through the depository. Any bid purporting or attempting to restrict such use in combination with other depository bids shall be invalid.

"7. *Bid Opening*: The procedure for submission and opening of bids shall be as follows:

"A. To assure uniformity of bids, all bids must be submitted upon the bid forms supplied by the depository; forms will be mailed by the depository to all contractors indicating an intent to bid the project; bids not submitted upon the depository bid form will not be recognized.



“B. Bidders shall submit to the depository a separate, sealed bid addressed to each general contractor with whom the bidding contractor intends to bid, and shall submit an additional bid addressed to the depository.

“C. Bids addressed to the depository will be opened at 1421 24th Street, Bakers-field, California, six hours prior to the bid opening of the awarding authority, unless a different time has been designated in paragraph 5; bids will be opened at such time solely for the purpose of determining whether the bids conform to depository requirements; bids so opened shall not be deemed an offer to any general contractor at the time of such opening.

“D. Bids addressed to the general contractors shall be available to the general contractors one hour following the opening of bids addressed to the depository; provided, however, that no bid shall be delivered to a general contractor until said contractor has agreed in writing to accept the bid if it is the low bid accepted through the depository.

“8. *Depository Fee*: The successful bidder or bidders shall pay to the depository fund, as a depository fee, a sum equal to one per cent (1%) of the contract awarded to each bidder for plumbing, one per cent (1%) of the contract for heating and ventilating, one per cent (1%) of the contract for sheet metal, and one per cent (1%) of the contract for electrical; provided, however, that the depository fee pertaining to any one of the aforementioned subcontracts shall not exceed \$1,000.00. The depository fee shall be paid at the time the contractor receives the first payment on the contract. A contractor failing to pay the required depository fee within thirty (30) days of the date specified herein shall be denied the privileges of the depository until the fee has been paid.

“9. *Collection of Delinquent Fees*: In the event of litigation to collect a delinquent depository fee, or to collect a delinquent withdrawal fee, the delinquent contractor shall pay all attorney fees, costs of suit, and other expenses reasonably incurred in connection with such litigation.

“10. *Reopening of Projects*: When bids for a specified project are once opened, there shall be no further bidding on said project for a period of one hundred twenty (120) days by contractors who did not bid such project in the first instance unless the plans and specifications have been revised in an amount exceeding twenty-five per cent (25%) of the work and/or materials prescribed in the original plans and specifications.

“11. *Conditions of Bid*: All plumbing and heating and ventilating bids shall be submitted upon the condition that the bid may be used only in combination with a plumbing and heating and ventilating bid which has been submitted through the depository. Said condition of bid will be printed upon the bid form provided by the depository.

“12. *Withdrawal of Bid*: The procedure for withdrawal of bid shall be as follows:

“A. Any bid in the depository may be withdrawn without penalty at any time prior to the opening of bids as outlined in paragraph 7 hereof.

“B. After the opening of bids as outlined in paragraph 7 hereof, a bid may be withdrawn prior to the time that bids are made available to the general contractors; provided, however, that a bid may be withdrawn at that time only upon payment of one per cent (1%) of the total amount of said bid, said penalty not to exceed \$1,000.00. Payment of the penalty herein provided must be made within ten (10) days of the withdrawal. Notification that a bid is to be withdrawn must be made by the contractor or his agent.

“C. In the event that a bid is not withdrawn prior to delivery to the general contractor, the bid shall become an irrevocable offer to the general contractor and shall not be withdrawn thereafter; the consideration for the option herein provided shall be the execution by the general contractor of the agreement to accept low bid at the time of receipt of the subcontract bid.

“13. *Naming of Subcontractors*: In the event that any plumbing, heating and ventilating, sheet metal, or electrical contractor intends to subcontract a part of his bid to another contractor signatory to this agreement, such contractor shall designate the name of said subcontractor to be used by him on the bid

form; subcontractors so named shall not be changed thereafter in the absence of showing good cause therefor.

“14. *Recordation of Bids*: All bids submitted through the depository shall be accurately recorded and placed on file in the office of the depository; said bids will be available for inspection by any participant or user of the depository or any other person or persons approved by the Board of Directors. All such bids shall be maintained in the files of the depository for a period of one year after date of opening.

“In consideration of the observance of the foregoing rules by other participants in the depository, and in consideration of the maintenance of the bid depository, I hereby agree to abide by the rules and conditions hereinabove prescribed, and to pay any fee or fees provided in said rules and conditions.

“Date

“Name of Firm

“Signature”

[ *Antitrust Charges*]

23. The main thrust of the Government is against the establishment and operation by the defendants of the bid depository in accordance with said rules. The complaint alleges that the unlawful combination and conspiracy in unreasonable restraint of interstate trade and commerce has consisted of a continuing agreement and concert of action among the defendants

- (a) To organize and operate a depository for bids relating to the selling and installing of construction supplies for building projects in the Bakersfield Trade Area;
- (b) To adopt and enforce rules governing said depository;
- (c) To induce and compel their members to use said depository in submitting bids relating to the sale and installation of construction supplies for building projects in the Bakersfield Trade Area;
- (d) To induce and compel others to use said depository in submitting and in obtaining bids;
- (e) To induce and compel general contractors to limit contract awards to bids submitted through said depository, and to induce and compel their members to boycott and refuse to deal with general contractors who do not undertake so to limit such awards; and
- (f) To channel to subcontractors submitting to the rules of said depository the sale and installation of construction supplies for building projects in the Bakersfield Trade Area, and to exclude others from engaging in such selling and installation.

The complaint alleges that the purpose, intent and necessary effect of the organization and operation of the bid depository have been and are:

- (a) To eliminate competition among those engaged in the sale and installation of construction supplies in the Bakersfield Trade Area;
- (b) To deprive general contractors and awarding authorities in the Bakersfield Trade Area of the opportunity to contract for the purchase and installation of construction supplies in a free and competitive market;
- (c) To impose unreasonable restraint upon interstate trade and commerce in construction supplies.

[ *Enforcement of Rules— Area*]

24. Rule 2 of the rules of the bid depository provides that the rules therein established “shall govern any proposal, tender, or offer to contract the installation of plumbing, heating and ventilating, sheet metal or electrical, upon all projects within the Counties of Kern, Inyo and Mono for the plumbing, heating and ventilating, and sheet metal industries, and the County of Kern for the electrical industry, wherein the awarding

authority has designated and advertised a specific time for the opening of contract bids for the performance of work upon said project by any user of the bid depository or member of the associations.”

25. It has been stipulated that the rules of the bid depository are enforced by the defendants only with respect to the Bakers field Trade Area, which includes the city of Bakersfield and the county of Kern, State of California.

[ *Non-Members*]

26. A subcontractor may bid through the Bakersfield Construction Industry Bid Depository, even though he is not a member of any of the defendant trade associations, if he signs an agreement to be bound by the bid depository rules. He is not required to sign a new agreement each time he bids through the bid depository.

27. Any subcontractor who bids through the bid depository must agree to abide by the rules and regulations of said bid depository with respect to all bids submitted by such subcontractor through the bid depository. Customarily, each subcontractor evidences his adherence to the agreement mentioned in the preceding paragraph by signing a form similar to that which is attached to the complaint as Exhibit “A.”

[ *Bidding— Depository*]

28. Member subcontractors who place bids on a construction project through the bid depository, bid only through the depository.

29. It is the general practice of member subcontractors and in accordance with the rules of the bid depository that in each instance in which any project is bid on through the bid depository, member subcontractors will not knowingly submit bids, except through the bid depository, on those features of the project which are bid on through the bid depository.

30. A subcontractor bidding through the bid depository to more than one general contractor bids the same figure to each general contractor to whom he bids.

[ *Depository Costs*]

31. The expense of renting an office for the bid depository, and the expense of administering the bid depository are shared by the defendants.

32. Defendant Bakersfield Associated Plumbing Contractors, Inc. receives the depository fees so far as they pertain to bids for furnishing and installing plumbing, heating and ventilating, and sheet metal supplies, and the defendant Kern County Electrical Contractors Association, Inc. receives the depository fees so far as they pertain to bids for furnishing and installing electrical supplies.

[ *Bidding Costs*]

33. There is a substantial cost involved in the preparation of a bid by a conscientious subcontractor for submission to the general contractor. Such cost amounts to one per cent more or less of the total of such subcontractor's bid.

[ *Duplicate Bids*]

34. Each subcontractor who bids through the bid depository must submit to the bid depository a sealed bid addressed to each general contractor to whom he desires to submit a bid, and a duplicate bid addressed to the bid depository.

35. The duplicate bids addressed to the bid depository and referred to in the preceding paragraph, are opened by secretaries of the defendant associations prior to the delivery to the general contractors of the bids addressed to the latter. There was no evidence to the effect that the secretaries opened bids directed to the bid depository prior to the closing time.

36. The secretaries of the defendant associations prepare tabulations of the duplicate bids referred to in the preceding paragraph hereof, after such duplicate bids have been opened, and such tabulations are available to all subcontractors who bid on such construction project through the bid depository.

[ *Combination Bids*]



37. Rule 6 of the bid depository requires that subcontractors submitting bids to the bid depository must submit separate bids for plumbing and heating and ventilating, and may submit a bid representing a combination of the plumbing, heating and ventilating, provided that the combination bid so submitted may not be reduced more than five per cent of the separate bids so combined. This rule limits the freedom of the combination bidder to submit a truly competitive bid which might result in a decrease in the cost to the general contractor.

[ *Exclusion of Subcontractors*]

38. Rule 7 D originally provided that bids addressed to the general contractors should be available to the general contractors one hour following the opening of bids addressed to the depository. On or about June 1, 1955, the bid depository rules were amended to provide that the interval between the opening of the duplicate bids addressed to the bid depository and delivery of the bids to the general contractors should be lengthened to two hours.

39. In accordance with Rule 7 D, the defendants do not deliver to any general contractor the sealed bids addressed to him unless he signs an agreement that, if he receives the award of the general contract, he will not only accept the low bid delivered to him through the bid depository, but will use it. The effect of the enforcement of Rule 7 D precludes the subcontractors bidding through the bid depository from submitting bids on the particular project involved to those general contractors who do not sign the bid depository agreement, and precludes subcontractors who have not submitted bids through the depository from submitting any bid on the particular project involved to any general contractor who signs the agreement.

[ *Depository Fee*]

40. Rule 8 provides that the successful subcontractor shall pay as a depository fee a sum equal to one per cent of such subcontract award, provided that the aforementioned fee pertaining to a bid shall not exceed \$1,000. The fees collected under this rule produced substantially more revenue than is required for the ordinary operation and maintenance of the bid depository. Some of the subcontractor members of defendant associations considered this fee as an element of cost in computing their bids. Some of the subcontractors sometimes absorbed this cost. Ordinarily, such costs would be passed on to the general contractor and by him passed on to the project owner.

[ *Legislation*]

41. On or about June 21, 1955, Senate Bill S-1644 was favorably reported out of the Senate Judiciary Committee of the United States Congress. This bill was not enacted into law and died at the expiration of the 84th Congress. Hearings have been held on March 20, 27, and 28, 1957, before the Claims Subcommittee of the House Judiciary Committee on a proposed Federal Construction Contract Procedure Act, which act is directed substantially to the same purpose as Senate Bill S-1644. Since 1952, hearings have been held before committees of Congress on various bills directed to the same general purpose as Senate Bill S-1644.

42. Senate Bill S-1644, if enacted, would have required general contractors on federal works to list the bids of mechanical or specialty contractors such as plumbing, sheet metal, or electrical contractors. One purpose of S-1644 was to substantially reduce or eliminate the practice of bid peddling or bid shopping on federal construction after the award of the contract to the general contractor.

[ *Ethics*]

43. Associated General Contractors of America, Inc. is a national association of general contractors. Section 3 of the Rules of Ethical Practice of the Associated General Contractors of America, Inc. contains a provision substantially as follows:

The operations of the contractor are made possible through the functioning of those agencies which furnish him with services or products, and in contracting with them he is rightfully obligated by the same principles of honor and fair dealing that he desires should govern actions toward him of architects, engineers and client owners. Ethical conduct with respect to subcontractors and those who supply materials requires that:

1. Proposals should not be invited from anyone who is known to be unqualified to perform the proposed work or to render the proper service.
2. The figures of one competitor shall not be made known to another before the award of the subcontract, nor should they be used by the contractor to secure a lower proposal from another bidder.
3. The contract should preferably be awarded to the lowest bidder if he is qualified to perform the contract, but if the award is made to another bidder, it should be at the amount of the latter's bid.
4. In no case should the low bidder be led to believe that a lower bid from his has been received.
5. When the contractor has been paid by a client owner for work or materials, he should make payment promptly, and in just proportion, to the subcontractor and others.

44. In submitting bids to general contractors of the type within the provisions of and contemplated by Exhibit "A" attached to plaintiff's complaint, subcontractors do not break down the component parts of their bids into labor, materials, overhead and profit.

45. Manufacturers' selling prices of construction supplies to jobbers and wholesalers are generally uniform throughout the State.

46. The plans and specifications of the awarding authority covering jobs of the type within the provisions of the Depository Rule, as applicable to the specialty portions thereof, that is, the plumbing, electrical, heating and ventilating and sheet metal work, are, as a matter of general practice, made available to subcontractors.

[ *Withdrawal Penalty*]

47. Rule 12 B provides that after the opening of the bids as outlined in Rule 7, a bid may be withdrawn prior to the time that the bids are made available to the general contractors, only on the payment of one per cent of the total amount of said bid, not to exceed \$1,000. There is evidence in the record that on at least two occasions the successful bidder reimbursed the withdrawing bidder in the amount of the penalty that such withdrawing bidder was compelled to pay. In the absence of other safeguards, such rule invites collusion, and constitutes an unreasonable restraint on commerce.

[ *Operation of Depository— Scope*]

48. On approximately fifty-two projects bid on through the bid depository in 1955, about twelve general contractors bid to the awarding authority without receiving any subcontractors' bids from the bid depository. These general contractors received no bids from subcontractors who bid through the bid depository. Only two of such general contractors were successful bidders. The total amount of the contract awards made to these two general contractors was about \$30,000.

49. During the year 1955, general contractors to whom bids were delivered through the bid depository, received awards totaling more than ten million dollars on the projects involved.

50. During the year 1955, substantially all work of the type performed by members of defendant associations on projects in the Bakersfield Trade Area, where the awarding authorities designated and advertised a specific time for the opening of contract bids for the performance of work upon such projects, has been bid through said bid depository and the successful bidders have been (a) subcontractors who submitted bids on such work through the bid depository; and (b) general contractors who received their bids from said bid depository.

51. During the year 1955, total subcontracts in the amount of more than three million dollars were processed through the bid depository, and practically all of the subcontracts on the projects involved were awarded to members of the defendant associations.

[ *Price Tampering*]

52. The adoption and enforcement of Rules 6 and 12 B constituted price tampering. As a consequence of such price tampering, there was unreasonable restraint on interstate trade and commerce in the sale and installation of construction supplies in the Bakersfield Trade Area.

53. The adoption and enforcement of Rule 8 constituted price tampering to the extent that more revenue was produced than was required for the ordinary operation and maintenance of the bid depository and, to this extent, the adoption and enforcement of Rule 8 had an unreasonable restraint on interstate trade and commerce in the sale and installation of construction supplies in the Bakersfield Trade Area.

[ *Reasonable Restraints*]

54. The rules of the bid depository, other than Rules 6, 8, and 12 B, imposed only reasonable restraints upon interstate commerce in that they were designed to and did eliminate the practice of bid peddling. The defendants established the bid depository primarily to eliminate bid peddling and, except as hereinbefore stated to the contrary, their purpose was not to place unreasonable restraints upon interstate commerce.

55. Except such evidence as was offered with respect to the adoption and enforcement of Rules 6, 8, and 12 B, and except as found herein to the contrary, there is no evidence that:

- (a) Building costs increased as a result of the operation of the bid depository;
- (b) Building activity in the area has in any way been adversely affected by the operation of the bid depository;
- (c) Any manufacturer or supplier of construction supplies has been coerced or intimidated by the defendants in connection with the operation of the bid depository;
- (d) The free flow of construction supplies in interstate commerce has been in any wise impeded or affected;
- (e) Any general contractor or subcontractor has been threatened or intimidated, or in any way coerced to use or not to use the bid depository; and
- (f) There was any dishonesty, collusion, or unfair practice on the part of those charged with the operation of the bid depository.

56. The effects, if any, on interstate commerce as a result of the enforcement of the rules of the bid depository, other than Rules 6, 8, and 12 B, are speculative and inconsequential.

#### **Conclusions of Law**

The Court concludes:

- (1) Rules 6, 8, and 12 B of the bid depository rules are price tampering rules and are illegal *per se* under [Section 1 of the Sherman Act](#).
- (2) As a consequence of the adoption and enforcement of said Rules 6, 8, and 12 B by the defendants, interstate commerce in the sale and installation of construction supplies was unreasonably restrained.
- (3) The adoption and enforcement of the bid depository rules other than Rules 6, 8, and 12 B, do not constitute a boycott, nor do they singly or collectively constitute any unreasonable restraint of trade, nor are they *per se* violations of the Sherman Act.
- (4) In adopting and enforcing the rules of the bid depository other than Rules 6, 8, and 12 B of the bid depository rules, the defendants have not contracted, combined, and conspired among themselves to violate [Section 1 of the Sherman Act](#).
- (5) In adopting and enforcing Rules 6, 8, and 12 B of the bid depository rules, the defendants have contracted, combined, and conspired among themselves to violate [Section 1 of the Sherman Act](#).
- (6) The Government is entitled to an injunction and other equitable relief as prayed for with respect to the bid depository rules Nos. 6, 8, and 12 B.

#### **Judgment**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed as follows:

I

[ *Jurisdiction* ]

The Court has jurisdiction of the subject matter hereof and of the parties herein. The defendants Bakersfield Associated Plumbing Contractors, Inc., Kern, Jnyo and Mono Counties Sheet Metal Contractors Association, Inc., and Kern County Electrical Contractors Association, Inc., by the adoption and enforcement of Rules 6, 8, and 12 B of the bid depository hereinafter described, have combined and conspired among themselves and with others to unreasonably restrain interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

II

[ *Definitions* ]

As used in this judgment:

(a) The term "Bakersfield Trade Area" shall refer to and include the city of Bakersfield, and the county of Kern, State of California.

(b) The term "construction supplies" shall refer to plumbing, heating and ventilating, sheet metal, and electrical supplies which are furnished by subcontractors in connection with the performance of construction contracts.

(c) The term "bid depository" shall refer to a facility through which bids of subcontractors are received and processed and made available to general contractors, in accordance with the rules for the operation of such bid depository.

(d) The term "Bakersfield Construction Industry Bid Depository" is a facility established, maintained, and operated by the defendants, through which bids of subcontractors are received and processed and made available to general contractors in accordance with the rules for the operation of such bid depository. A copy of such rules is attached to plaintiff's complaint as Exhibit A and has been incorporated in the findings of fact made by the Court in this action.

III

[ *Applicability* ]

The provisions of this judgment applicable to any defendant shall apply to such defendant, its officers, directors, managers, agents, employees, successors and assigns, and to all persons and corporations acting, or claiming to act, under, through, or on behalf of them, or any of them.

IV

[ *Practices Prohibited* ]

The defendants, and each of them, are enjoined and restrained from:

(a) engaging in or participating in agreements, understandings, practices, or arrangements having a purpose or effect of continuing, reviving, or renewing the aforesaid combination or conspiracy;

(b) adopting, enforcing, or continuing in effect any of the provisions of Rule 6, Rule 8, or Rule 12 B of the rules of the Bakersfield Construction Industry Bid Depository, or any rule for the operation of a bid depository which

(i) requires the submission of separate bids for plumbing, or separate bids for heating and ventilating;

(ii) attaches any condition with respect to the price at which any combination bid for plumbing and heating and ventilating may be submitted;

(iii) requires that the successful subcontractor bidding through such bid depository shall pay any fee to such bid depository, or to any person, partnership, firm, association, corporation, or other legal entity;

(iv) permits any subcontractor to withdraw any bid during the interval between the time such subcontractor's bid is opened at such bid depository, and the time when any such bid is available for delivery to any general contractor by such bid depository.

Provided, however, that the defendants may within a period of one year after the entry of this judgment, upon notice to the Government, present to the Court a plan for the operation of a bid depository, and if, after hearing, the Court approves of such plan or any modification thereof, the Court may, within said period of one year from the date of entry of this judgment, modify this judgment to permit the operation of a bid depository in accordance with such plan or modification thereof.

## V

### [ *Compliance* ]

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted (1) access during the office hours of such defendant to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant which relate to any of the subject matters contained in this judgment; and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present. No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized employee of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

## VI

### [ *Jurisdiction Retained* ]

Jurisdiction is retained for the purpose of enabling either party to this judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

## VII

### [ *Costs* ]

Judgment is entered against the defendants, and each of them, for all costs to be taxed in this proceeding.