Recognizing Antitrust Conspiracies and Working with the Antitrust Division

U.S. Department of Justice, Antitrust Division

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The Problem

From: robert.malintent@ContractorsUnitedCorp.com
To: fred.smith@FixIt.com
Subject: Update

Evening buddy,

When I spoke to Melissa at the the conference earlier this week, she said she got some supplemental funds for additional projects at the hospital. She needs three bids in order to award the contracts, but she said you already know the drill. Melissa would like to keep each contract under one million this way she is sure she can get them approved with minimal effort.

There are a lot of million dollar opportunities at the hospital this year. I am working up a template for the bids now. Will send it to you ASAP.

Best,
Bobby

Vice President of Contracting
Contractors United Corp.

"robert.malintent@ContractorsUnitedCorp.com" and "fred.smith@FixIt.com"

"three bids"

"keep each contract under one million"

The Costs of Collusion
Why Do We Care?

- Victims: overcharged & defrauded
- Victims: aggregate harm in $$$ and number of victims
- Conspiracies: lengthy in time and effect
- Conspiracies: often spread to other related goods/services

Overview

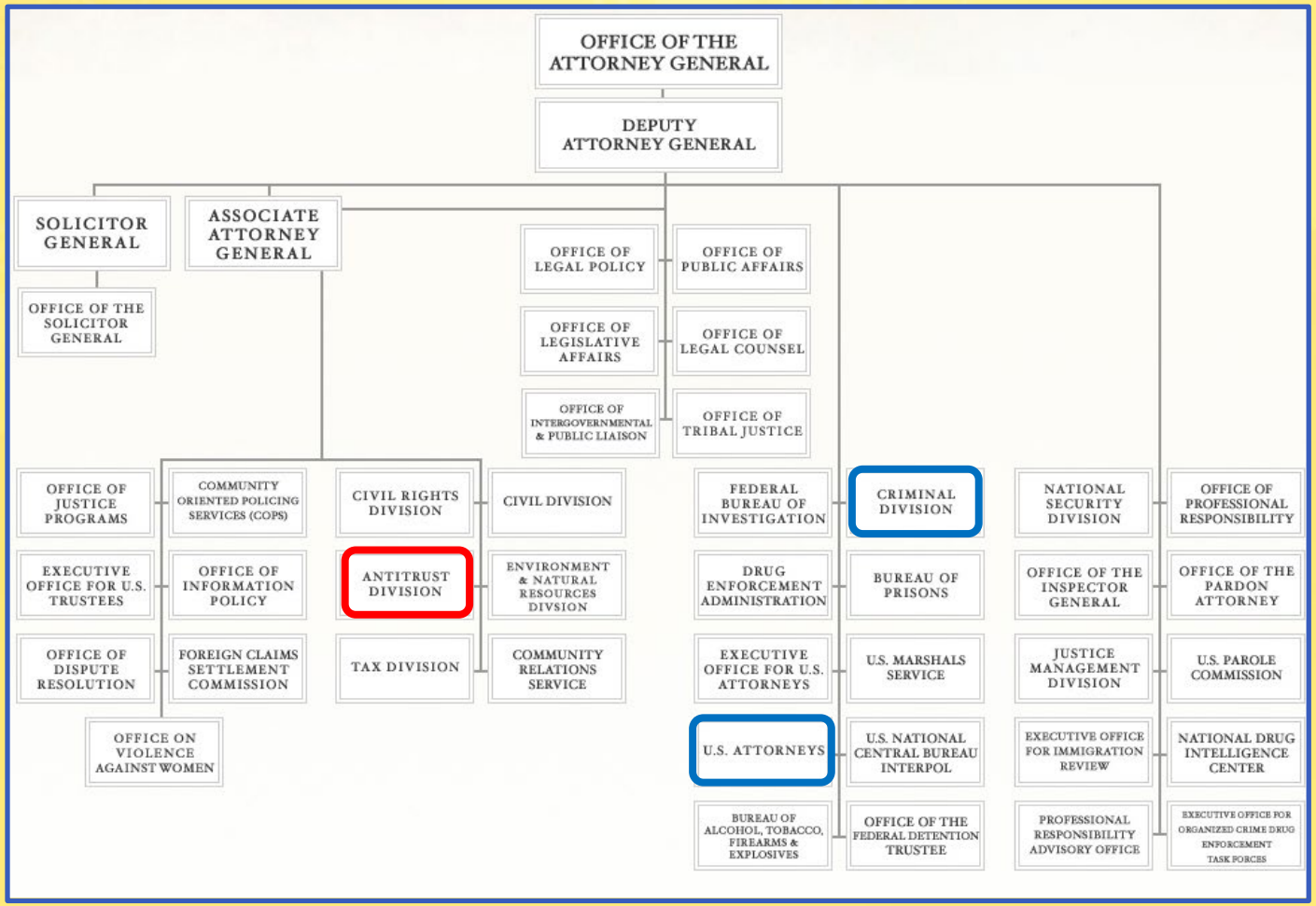
- The Antitrust Division
- Criminal Antitrust Violations
- Criminal Antitrust Enforcement
- Detecting Antitrust Violations

The Antitrust Division

Our mission is the promotion and maintenance of competition in the American economy.

Antitrust Division Within DOJ

Only component of DOJ that can authorize prosecution of Sherman Act (15 U.S.C. § 1) violations.



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Antitrust Division Criminal Offices

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The Sherman Act: 15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Penalties Are Significant

Criminal Penalties

- Individuals: Incarceration up to 10 years
- Corporations: Fines up to $100 million or twice gain/loss
- Volume of commerce drives the sentence for both individuals and corporations

Other Penalties

- Restitution paid to identified victims
- Civil lawsuits for three times the damages
- Because plea or conviction is based on beyond a reasonable doubt standard, debarment from federal and other contracts is often a foregone conclusion

Criminal Antitrust Violations

1. Price Fixing Agreements
2. Bid Rigging Agreements
3. Allocation Agreements

Elements of a Sherman Act Violation:

- **Conspiracy to restrain trade**
  - Price Fixing
  - Customer/Market Allocation
  - Bid Rigging
- **Knowingly joined—intended to agree**
- **Interstate or foreign commerce**
- **Statute of limitations:** Generally 5 years

Per Se Violations

- Criminal antitrust focuses on "*per se*" or "hardcore" violations
- Categorically illegal agreements
- **Agreement is the crime**
- Must be **horizontal** agreement

Per Se Violations – Don't Have to Prove

- That agreement was successful
- Loss or harm as a result of the agreement
- That conduct was unreasonable or lacked economic justification

Price Fixing Agreements

- Competitors agree to fix or otherwise determine the prices at which their products or services are sold

Price Fixing Agreements

- **Include agreements to**:
  - Charge the same price or raise prices together
  - Add fees or other surcharges
  - Eliminate discounts or have uniform discounts
  - Establish minimum or floor prices
  - Establish a standard pricing formula
  - Coordinate and not compete on other commercial terms (i.e., credit terms, warranties, etc.)

Price Fixing: Example

Competitor A: “Will you agree to raise your price for salted peanuts to $1.99 a pound?”

Competitor B: “Yes. Let’s raise the price at noon tomorrow.”

Photo credit: unknown1861/iStock/Getty Images Plus

Bid Rigging Agreements

Competitors agree in advance who will win the bid.

Bid Rigging Agreements

Types of Bid Rigging:

- Bid Rotation or Allocation - competitors agree to take turns winning bids
- "Complementary" or "Cover" Bids - competitors agree to submit intentionally high bids, or otherwise unacceptable bids
- Bid Suppression or Limitation - competitors agree to refrain from bidding

Bid Rotation Example

Cover Bid Example

Bidder 1: “I’d like to win the bid to demolish the Water Street Bridge. If I get the job for $850,000, I can make some good money. Can you submit a bid above mine?”

Bidder 2: “Sure. I’ll come in at $900,000 if you’ll let me have the next one.”

Bidder 1: “Okay. I’ll plan on it.”

Photo credit: Nomadsoul1/iStock/Getty Images Plus

Red Flags of Bid Rigging

- Rotation of winning bids among competitors—taking turns winning
- Same firm wins bids over time (may also indicate market allocation)
- Losing firm receives sub-contract award
- Bid prices for all companies suddenly increase without explanation
- Similarities in the actual bids (e.g., same typos) or metadata may indicate all bids prepared by designated winner
- Statements that a bid was a courtesy, complementary, token, or cover bid

Bid Suppression Example

Bid 1	Bid 2	Bid 3	Bid 4	Bid 5
Company A		Company A	Company A	**Company A**
Company B	**Company B**		Company B	Company B
Company C	Company C	**Company C**		Company C
Company D	Company D	Company D	**Company D**	

= winning bidder

Allocation Agreements

Competitors agree to divide up a market, usually by geographic area, customer, or type of product.

May also include a bid rigging component to implement the allocation scheme.

Photo credit: Thomas Northcut/iStock/Getty Images Plus

Allocation Agreements: Red Flags

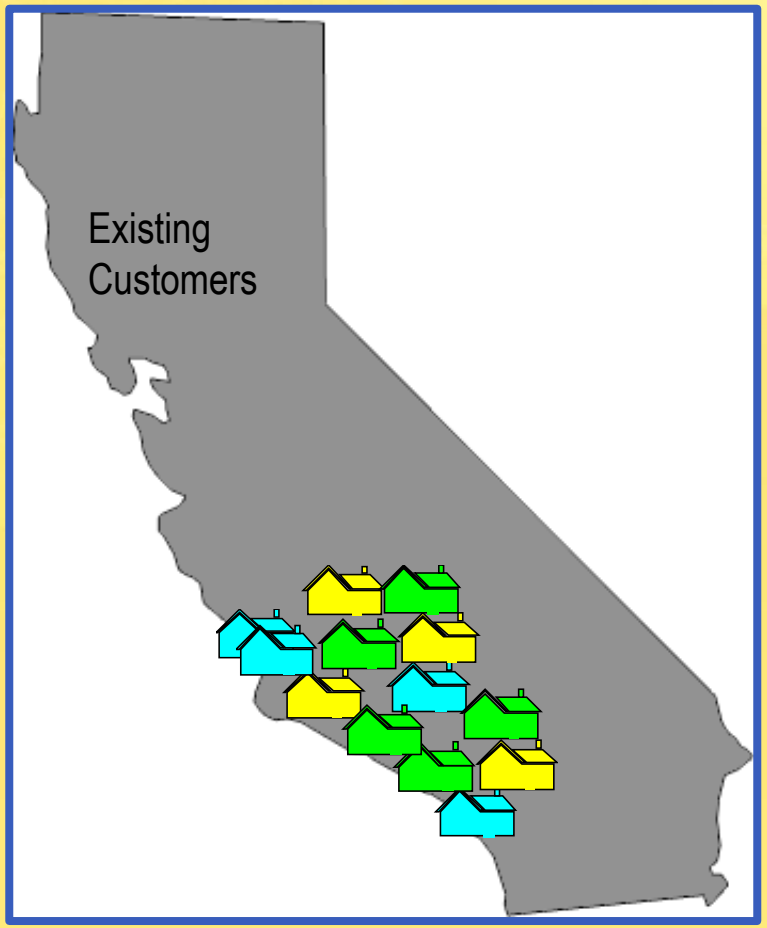
- Competitors suddenly stop selling in a territory
- Competitors suddenly stop selling to a customer
- Competitor refers customers to other competitors
- Salesperson/prospective bidder says that a customer or contract “belongs” to a competitor

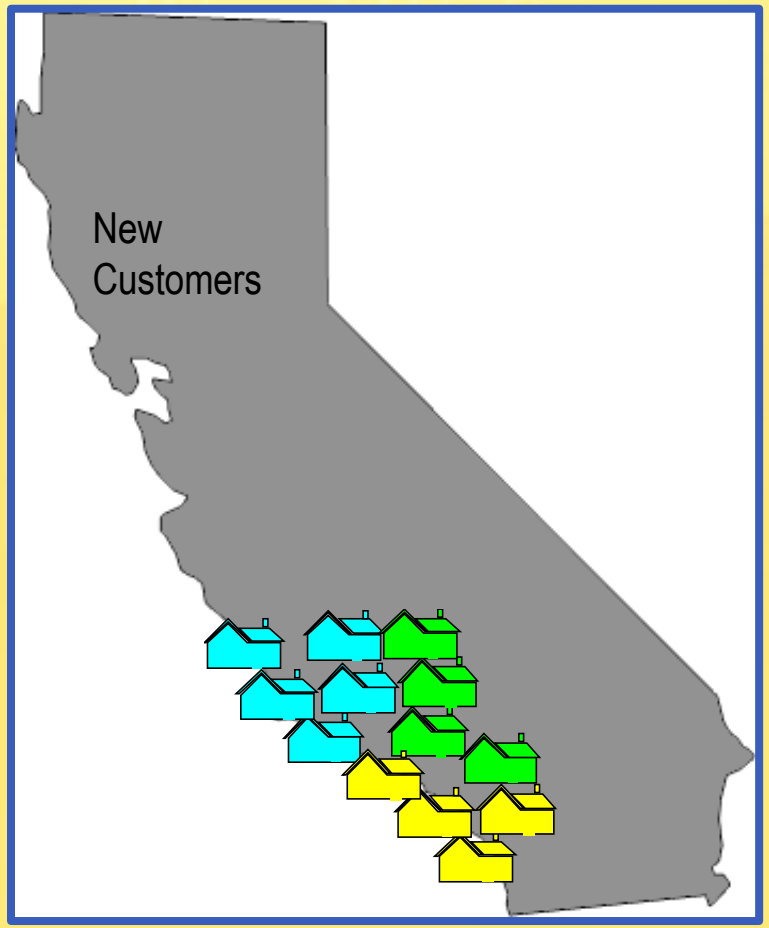
Geographic Allocation Example

Company A

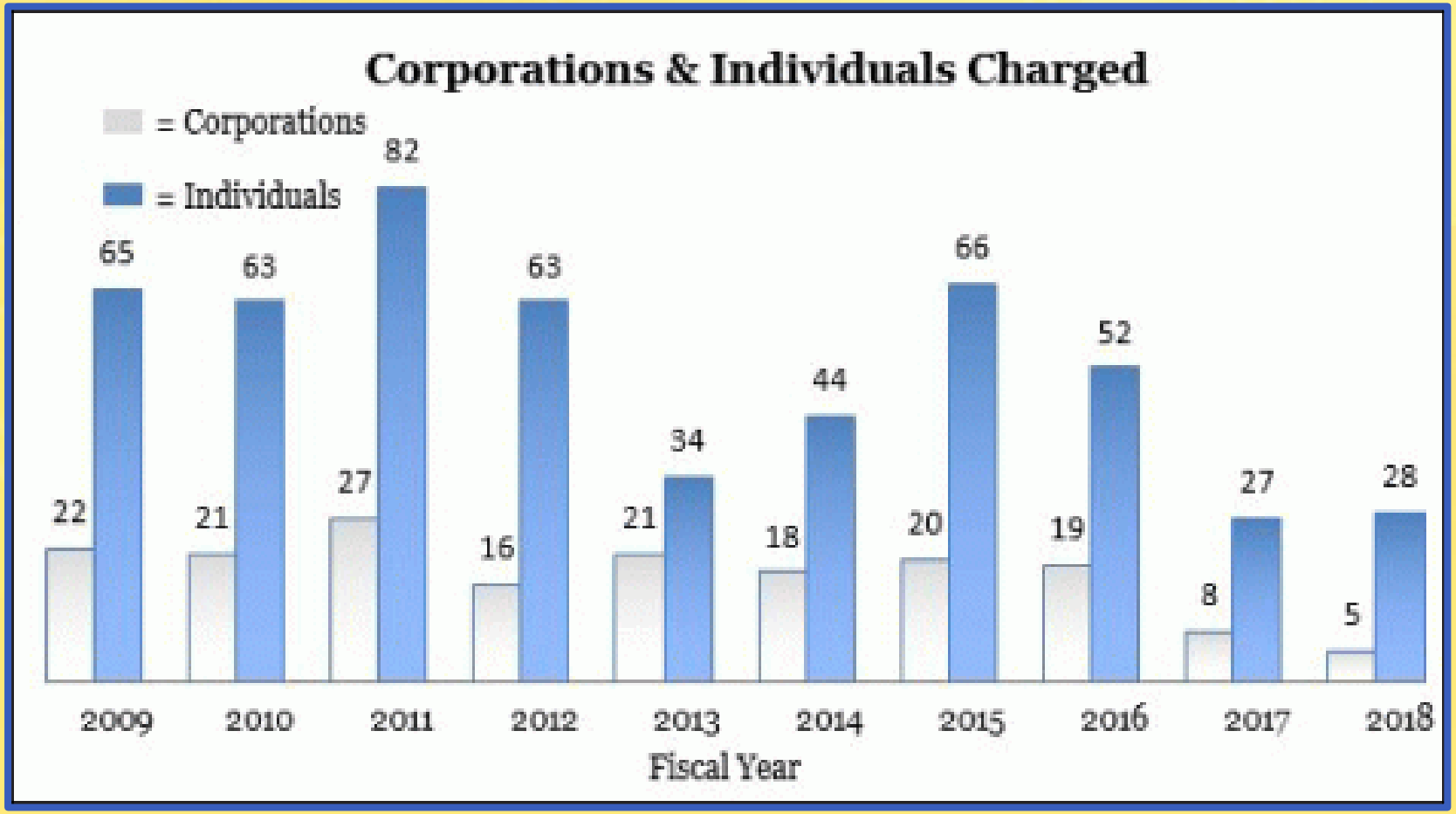
Company B

Company C





Results of Antitrust Division Efforts



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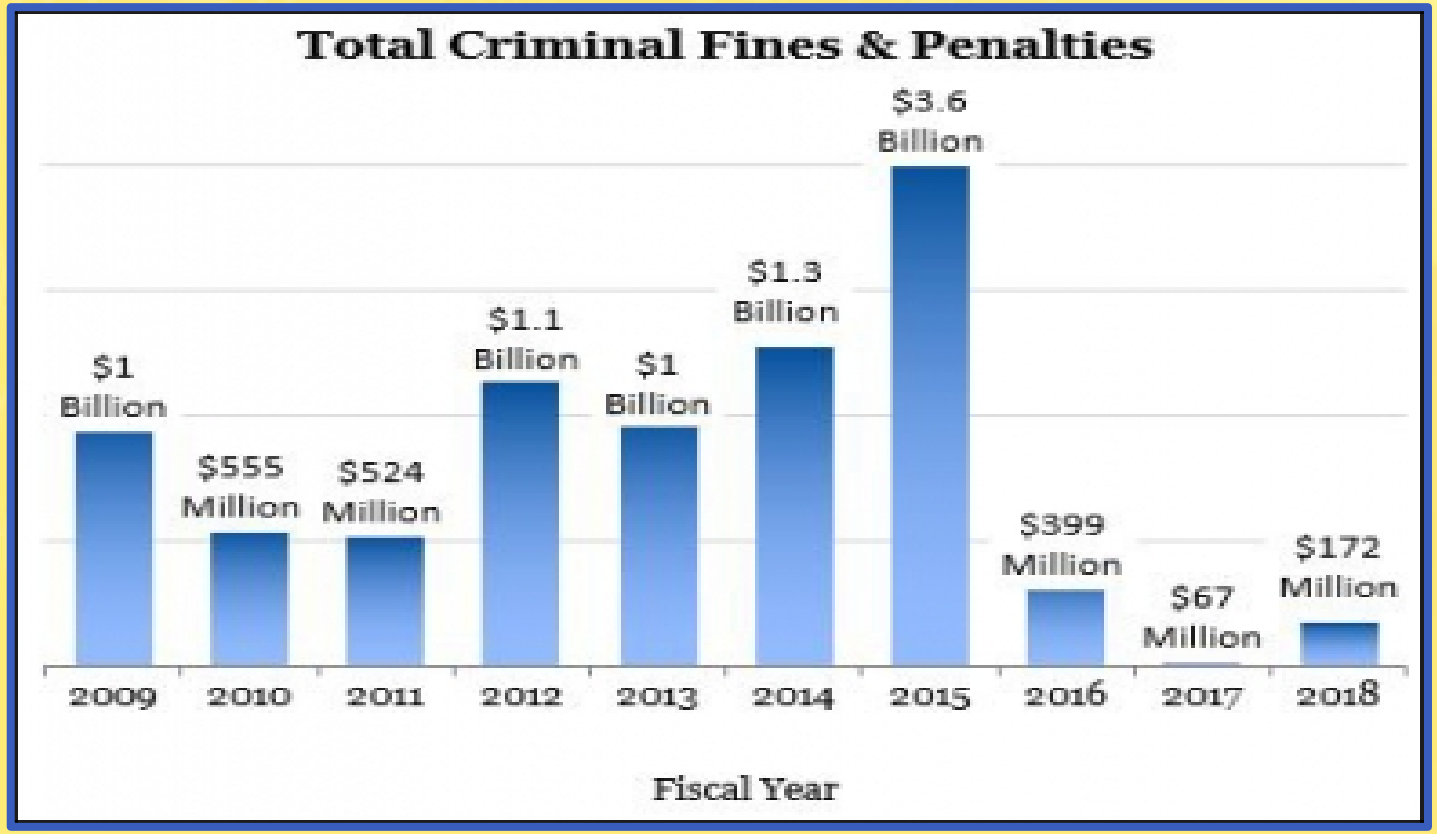

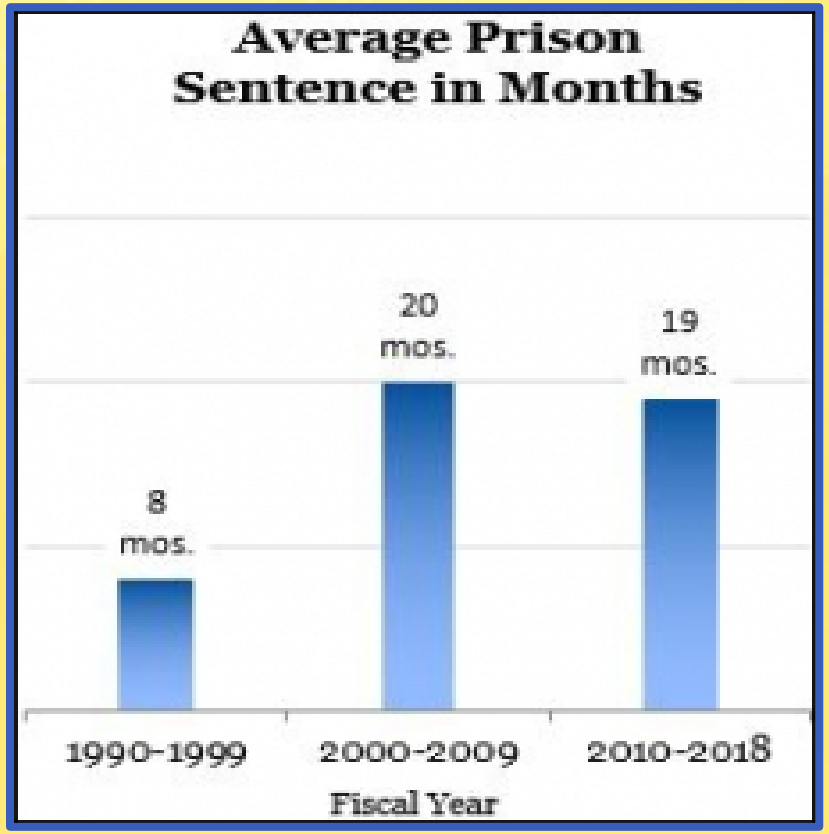

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Antitrust Leniency Program

- Unique investigative tool to Antitrust Division
- First company and/or individual to self-report its involvement in criminal antitrust offense obtains immunity from prosecution by the Antitrust Division ("Race to the Government")

Antitrust Leniency Program

- Applicant provides ongoing cooperation to assist Division in prosecution of co-conspirators
- Additional information about the Leniency Program is available at www.justice.gov/atr/leniency-program

Detecting Antitrust Violations

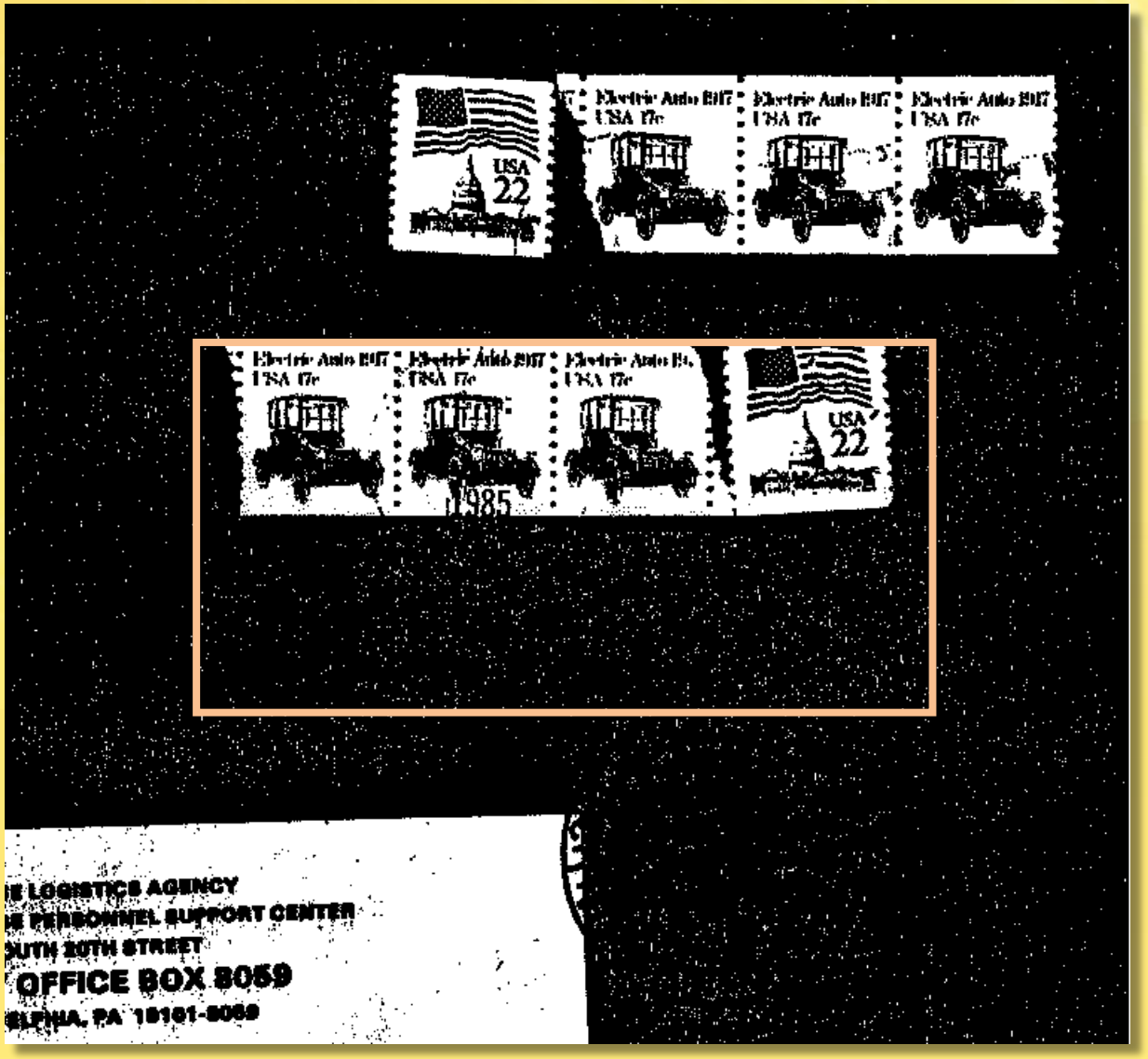
- Favorable Conditions for Collusion
- Bid Patterns
- Warning Signs in Pricing
- Suspicious Statements and Conduct

Favorable Conditions for Collusion

- Few sellers
- Limited number of qualified bidders
- Difficult for new competitors to enter the market
- Few substitute products
- Standardized products
- Repetitive or regularly scheduled purchases
- Rush or emergency work

The Not-So-Clever Criminal

- Similar applications – handwriting; typeface; stationery; typos; mathematical errors
- Last-minute changes – white-outs or physical alterations to prices
- Vendor picks up an extra bid package for another vendor OR submits a competing vendor's bid


USA
22
Electric Auto 1917
USA 17c
1985
LOGISTICS AGENCY
PERSONNEL SUPPORT CENTER
SOUTH 20TH STREET
OFFICE BOX 8059
PHILADELPHIA, PA 19101-8059

[redacted]

MR. [redacted], Director
Department of Parks and Recreation
Tiyan, Guam.

Subject: Repair of one Paseo Stadium Light Tower

Dear Mr [redacted]

Please find our estimate for the Restoration of one ligthing tower at the Paseo Stadium damage by Typhoon Paka. The total amount of our estimate is **"One Hundred Forty Five Thousand Eight Hundred Fifty Dollars and 00/100 ($ 145,850.00)".** Including the supply and installation of Lighting fixtures and power hook up.

We sincerely hope that this is according to your requirements. Please give us a call us if you have any question. Thank you very much.

Sincerely,

[redacted]

President

[redacted]

MR. [redacted], Director
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We hope that the above quotation is satisfactory. Please give us a call us if you have any question. Thank you very much.

Sincerely,

[redacted]

Project Engineer

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[redacted]

Project Engineer

Suspicious Bid Patterns

- Same company always wins or loses
- Certain companies only submit bids in certain geographical areas
- Companies appear to take “turns” winning
- Winning company subcontracts to losing company
- Regular suppliers/vendors fail to bid for work they typically perform, but continue to bid for other work
- Bids are much higher than estimates or previous bids
- Large differences between price of winning bid and other bids
- All companies end up winning the same amount of work over a series of bids

Warning Signs in Pricing

- Sudden and identical increases in price or price ranges that cannot be explained by cost increases
- Anticipated discounts or rebates disappear unexpectedly
- Similar transportation costs specified by local and non-local companies
- Attempts to “shop around” stonewalled

Federal Acquisition Regulation (FAR 48 C.F.R. § 52.203-2)

Bid offeror must certify that:

(1) Prices in the offer have been arrived at independently without consultation, communication, or agreement with any other competitor;

(2) Prices in the offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other competitor before bid opening or contract award unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other competitor to/not to submit an offer for the purpose of restricting competition.

What to Watch For: Suspicious Statements

- A customer or territory “belongs” to a supplier
- References to “respecting” the customers or territories of competitors
- References to “courtesy” bids or “throwing in a number”
- Use of same terminology or rationales by companies when explaining price increases
- Statements indicating advance knowledge of competitor’s pricing

Other Suspicious Conduct and Behavior

- Companies meet privately before bids
- Company submits bid for work it cannot perform
- Bids contain last minute changes
- Procurement official regularly exempts competitive bidding because of “emergency” work

Other Suspicious Conduct and Behavior

- Invoicing for work awarded contains charges for “consulting” work (when not reasonably within scope of work)
- Procurement officials associated with “consulting” vendors

Other Resources

Antitrust Primer for Federal Law Enforcement Personnel:

www.justice.gov/atr/criminal-enforcement

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Phone: 1-888-647-3258 (toll free in the U.S. and Canada) or 202-307-2040
E-mail: antitrust.complaints@usdoj.gov
Mail: Citizen Complaint Center
Antitrust Division
950 Pennsylvania Ave., NW, Room 3322
Washington, DC 20530

*To report suspected antitrust violations that affect government procurement, grant, and/or program funding, please contact the **Procurement Collusion Strike Force** by e-mail at: pcsf@usdoj.gov