U.S. Department of Justice
Washington, DC 20530

Preventing *and* Detecting Bid Rigging, Price Fixing, *and* Market Allocation *in* Post-Disaster Rebuilding Projects

An Antitrust Primer for Agents and Procurement Officials

1. Introduction

American consumers have the right to expect the benefits of free and open competition—the best goods and services at the lowest prices. Public and private organizations often rely on a competitive bidding process to achieve that end. The competitive process only works, however, when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice.

As a member of the National Center for Disaster Fraud Task Force, the Antitrust Division is committed to offering our expertise and assistance in the wake of the devastation caused by disasters, such as hurricanes. As FEMA and state and local government agencies with whom FEMA is coordinating begin to solicit competitive bids for rebuilding contracts, the Antitrust Division is prepared to provide assistance to these agencies to protect against bid rigging, price fixing and other collusive conduct among companies competing for rebuilding contracts.

Experienced Antitrust Division attorneys are available to provide training to law enforcement agents, auditors, and procurement personnel in the affected areas to assist them in identifying and preventing potential bid rigging and collusion in the competitive bidding process. If collusive conduct is discovered, the Antitrust Division stands ready to criminally prosecute the individuals and corporations seeking to unjustly profit from this tragedy.

The Antitrust Division, FEMA, and other Federal law enforcement agencies have collaborated successfully in the past on several occasions to detect and deter

anticompetitive conduct. For example, in 2005 Hurricane Katrina devastated the Gulf coast, from central Florida to Texas. Among other things, the hurricane caused extensive damage to the levee systems in New Orleans. The U.S. Army Corps of Engineers funded a project to reconstruct and enlarge one of these levees and solicited bids for this project in August 2006. An investigation by the Disaster Fraud Task Force, including the Antitrust Division, uncovered a conspiracy and bribery scheme, under which a subcontractor offered to pay two U.S. Army Corps of Engineers contractors in exchange for their attempt to steer a dirt, sand, and gravel subcontract on the levee reconstruction project to the subcontractor. The subcontractor planned to use part of the proceeds from the subcontract to pay bribes of approximately $299,000 to the U.S. Army Corps of Engineers contractors.

As a result of the investigation, one of the U.S. Army Corps of Engineers contractors pleaded guilty to a bribery charge, and the other U.S. Army Corps of Engineers contractor and the subcontractor were convicted at trial on conspiracy and bribery counts. The subcontractor was sentenced to 60 months in prison, and the U.S. Army Corps of Engineers contractor that went to trial was sentenced to 70 months in prison.

This primer contains an overview of the Federal antitrust laws and the penalties that may be imposed for their violation. It briefly describes the most common antitrust violations and outlines those conditions and events that may indicate anticompetitive collusion so that you might better identify and investigate suspicious activity.

2. Federal Antitrust Enforcement

The Sherman Antitrust Act prohibits agreements among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice.

Violation of the Sherman Act is a felony punishable by up to 10 years imprisonment and a $1 million fine for individuals and a fine of up to $100 million for corporations. In addition, collusion among competitors may also involve violations of the mail or wire fraud statute, the false statements statute, or other Federal felony statutes, all of which the Antitrust Division prosecutes.

In addition to receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims for all overcharges. Victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered.

3. Detecting Criminal Antitrust Violations

Most criminal antitrust prosecutions involve price-fixing, bid-rigging, or market division or allocation schemes. Each of these forms of collusion may be prosecuted criminally if they occurred, at least in part, within the past five years. To prove such a crime, we do not have to show that the conspirators entered into a formal written or express agreement. Price fixing, bid rigging, and other collusive agreements can be established either by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries.

Under the law, price-fixing and bid-rigging schemes are per se violations of the Sherman Act. This means that where such a collusive scheme has been established, it cannot be justified under the law, for example, by arguments or evidence that the agreed-upon prices were reasonable, that the agreement was necessary to prevent or

eliminate price cutting or ruinous competition, or that the conspirators were merely trying to make sure that each got a fair share of the market.

Bid Rigging

Basic Schemes

One of the most common violations the Antitrust Division prosecutes is bid rigging. In simple terms, bid rigging is fraud which involves bidding. It is an agreement among competitors as to who will be the winning bidder. Bid rigging occurs when a purchaser solicits bids to purchase goods or services. The bidders agree in advance who will submit the winning bid. The purchaser, which depends on competition between the bidders to generate the lowest competitive price, receives instead a “lowest bid” that is higher than the competitive market would bear.

There are four basic schemes involved in most bid-rigging conspiracies:

- Bid Suppression: In this type of scheme, one or more competitors agree not to bid, or withdraw a previously submitted bid, so that a designated bidder will win. In return, the nonbidder may receive a subcontract or payoff.
- Complementary Bidding: In this scheme, coconspirators submit token bids which are intentionally high or which intentionally fail to meet all of the bid requirements in order to lose a contract. “Comp bids” are designed to give the appearance of competition.
- Bid Rotation: In bid rotation, all coconspirators submit bids, but by agreement, take turns being the low bidder on a series of contracts.
- Customer or Market Allocation: In this scheme, coconspirators agree to divide up customers or geographic areas. The result is that the coconspirators will not bid or will submit only complementary bids when a solicitation for bids is made by a customer or in an area not assigned to them. This scheme is most commonly found in the service sector and may involve quoted prices for services as opposed to bids.

Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder, in exchange for a lucrative subcontract that divides the illegally obtained higher profits between them.

Almost all forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.

Determining the Winner

Participants can decide who wins a particular contract using a number of allocation standards, including:

- Rotating contracts so that each will win an equal dollar volume over time;
- Rotating so that each will win an equal number of contracts over time;
- Allocating based on overall market share;
- Dividing up by territory, such as giving each company the accounts closest to its headquarters;
- Dividing up by type of customer, such as one taking Federal accounts and the other taking state accounts; and
- On the basis of need—splitting up the business so that each company keeps its assembly line or equipment fully occupied.

Payback

If a company agrees to intentionally lose business, naturally it must be given some compensation by the winning company. That compensation can take several forms including:

- The loser will be promised that it can win another contract later (this is the most common payback);
- The winning contractor may give a subcontract or supply a contract to one or more of the losers; or
- There may be a direct payoff in the form of goods, cash, or check, normally disguised as a legitimate payment.

Suspicious Indicators

- You receive identical bids from different companies either as to individual line items or lump sum bids;
- Bids come in way above the agency's estimate for the value of the contract or way above comparable bids by the same companies in other areas;
- A winning bidder subcontracts part of the business to one or more losing bidders;
- There is some indication of a physical alteration of bids, particularly at the last minute;
- Particular line items for some bidders are much higher than for others (no relation to cost);
- The range of bids shows a clear gap between the winner and all others (an indicator of a number-to-bid-above situation);
- You notice that the bids of all companies are very close (an indicator that bidders knew each others' prices);
- You notice the same increment between the bids of each company;
- All companies submit high bids when work is known to be scarce;
- The company gives different bids for the same line item on different contracts that are close in time;
- The companies appear to have engineered a split of the contract by each bidding low on some aspect of it and inexplicably high on other parts;
- There is physical evidence of collusion, such as different companies submitting bids with the same handwriting, or in the same envelopes, or with the same mathematical or spelling errors, or from the same fax number;
- Qualified bidders do not bid, especially if they initially took steps to bid;
- If a contract is re-bid because all initial bids are unacceptable, the bidders come back in the same order or some bidders fail to re-bid;
- There are significant increases by most bidders over previous prices when there have been no substantial cost increases;
- Prices mysteriously drop when a new bidder appears on the scene; and
- Competitors are seen meeting shortly before or after the bids are submitted.

Quid Pro Quo

This is what you look for to spot payback patterns:

- Any kind of territorial pattern (draw out the area each company serves on a map);
- A company always bids for a contract but never wins it or conversely always wins it;
- All of the companies in the group win an equal volume of business over time;

- All of the companies win an equal number of contracts over time; or
- Any pattern (many are possible).

Price Fixing

Price Fixing impacts procurement when business is conducted through purchase order or direct purchase. In this situation, competitors may agree to raise or fix prices they will charge for their goods or services, set a minimum price that they will not sell below, or reduce or eliminate discounts.

Suspicious Indicators

- Look for situations where competitors always announce their price increases at the same time for the same amount or have staggered price increases with some pattern, such as appearing to take turns going first.
- Look for competitors reducing or eliminating discounts at about the same time.
- Generally, be alert to situations in which all prices seem to be uniform and all suppliers refuse to negotiate those prices.

Customer or Market Allocation

As mentioned earlier, allocation schemes may involve bidding or quoted prices for services or goods.

Suspicious Indicators

- Look for situations in which the same company seems to get your business over and over and the competitors never come around to solicit it. If you try to get other competitors interested in serving you, they may refuse to give you a quote or show reluctance in some way. If they do give you a quote, it may be ridiculously high to discourage you from changing suppliers. With bid rigging, look for situations where the competitors do not submit bids or submit complementary bids.
- Look for anything that makes it obvious that companies that should want your business are not interested in it.

Caution About Indicators of Collusion

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a company submits an intentionally high bid because of an agreement with a competitor does an antitrust violation exist. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question.

4. Conditions Favorable to Collusion

While collusion can occur in almost any industry, it is more likely to occur in some industries than in others. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion.

Collusion is more likely to occur if there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers and the rest are “fringe” sellers who control only a small fraction of the market. The probability of collusion increases if other products cannot easily be substituted

for the product in question or if there are restrictive specifications for the product being procured. The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service. Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work. Collusion is more likely if the competitors know each other well, through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another. Bidders who congregate in the same building or town to submit their bids, have an easy opportunity for last-minute communications.

5. What Agents and Auditors Can Do

Antitrust violations are serious crimes that can cost a company hundreds of millions of dollars in fines and can send an executive to jail for up to ten years. These conspiracies are by their nature secret and difficult to detect. The Antitrust Division needs your help in uncovering them, bringing them to our attention, and working with us to build prosecutable cases.

6. What Procurement Officials Can Do

If companies are conspiring to collude on prices, the purchasing agent is the last person in the world that they want to know about the scheme. For this reason, even the most conscientious buyer can be victimized. Nonetheless, here are some procedures that can be established to discourage anticompetitive activity.

- Expand the list of bidders to make it more difficult for bidders to collude. Buyers should solicit bids from as many suppliers as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. While there is no magic number of bidders above which collusion cannot occur, past experience suggests that collusion is more likely to arise where there are five or fewer competitors.
- Bid packages should require bidders to sign and submit a noncollusion affidavit stating that the bidder has not colluded and informing bidders of the penalties both for violating the Sherman Act and for signing a false noncollusion affidavit. (We can provide sample affidavits, if necessary).
- Ensure that all purchasing department employees are familiar with the indicators of bid rigging, price fixing, and other types of collusion.
- Maintain procurement records, e.g., bid lists, abstracts, and awards. When collusion is suspected, it is necessary for us to review the procurement history of a product to determine if a pattern of bid allocation or rotation is present.
- Ask questions. If the prices or bids submitted don't make sense, press your vendors to explain and justify their prices. You may be provided with a reasonable explanation or your suspicions may be heightened by a bogus answer. Either way, you learn more about your markets and demonstrate your interest in competitive prices.
- Know and understand the dynamics of the markets in which you make major purchases. A knowledgeable buyer may correctly suspect collusion from market behavior that may not arouse suspicions in an uninformed buyer.

7. Report Your Suspicions

We encourage all agents, auditors, and procurement officials to report suspicions of collusion through appropriate channels in your organization. Your observations may add to information we already have about an industry or, together with other reports, indicate a more widespread problem. Your call will always be appreciated and treated in accordance with our confidentiality policy, and, when warranted, we will conduct an investigation.

8. How the Antitrust Division Can Help

Our role as part of the National Center for Disaster Fraud Task Force is to assist Federal, state, and local government agencies in preventing and deterring fraud that subverts the competitive bid process. In that regard, Antitrust Division attorneys are available to provide training to law enforcement agents, auditors, and procurement personnel on the detection of criminal antitrust violations. We also are available to assist in the review of bids and contracts, as needed. If violations occur, we stand ready to investigate and prosecute those cases.

For Further Information

The Antitrust Division is committed to offering our experience and resources to help ensure that the communities hardest hit by disasters, such as hurricanes, are not further victimized by those that seek to subvert competition and divert Federal funds to their own pockets and away from the most needed rebuilding projects. Attorneys in the Antitrust Division are happy to answer any questions you may have about possible violations. Please report any suspicions you have of possible antitrust violations to:

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1-888-647-3258 (toll free in the U.S. and Canada) or 202-307-2040
E-mail: antitrust.complaints@usdoj.gov

Please contact us at the above telephone numbers or e-mail addresses if you would like one of our attorneys to give a presentation to your group regarding the antitrust laws and detection of criminal antitrust violations. We look forward to working with you!