UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NORSK HYDRO USA INC. and FARMLAND INDUSTRIES, INC. Defendants.	)	CASE NO. 98-361-CIV-T-24C Filed: February 19, 1998

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Norsk Hydro USA Inc. ("Hydro") and Farmland Industries, Inc. ("Farmland") in this civil antitrust proceeding.

I.
NATURE AND PURPOSE OF THE PROCEEDING

On ____________, the United States filed a civil antitrust complaint alleging that defendants and others conspired unreasonably to restrain competition in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that defendants Hydro and Farmland met with representatives of Seminole Fertilizer Corporation ("Seminole")[1] on March 5, 1992,

[1]Seminole, a wholly owned subsidiary of Tosco Corporation, sold all of its assets in May 1993. Before its assets were sold, defendant maintained its corporate offices in Stamford, Connecticut, and was a manufacturer and distributor of phosphatic fertilizer. It operated production and storage facilities in central Florida, near Tampa. The staff filed a complaint, a proposed Final Judgment, and related papers against Seminole on

and discussed sharing pipeline capacity and the cost of bidding on an ammonia tank and pipeline interest, hereinafter referred to as the Tampa Facility, then being auctioned pursuant to bankruptcy proceedings. At the conclusion of the meeting, defendants and Seminole reached a tentative agreement, which was later reduced to writing. The Complaint also alleges that on March 9 and March 10, 1992, Defendant Hydro and Seminole further discussed the terms of the agreement by telephone on several occasions and that they executed the written agreement two hours before the scheduled auction of the Tampa Facility on March 12, 1992. The agreement provided that Seminole would give bid support of up to $2.5 million to Defendant Hydro, if necessary, to defeat a competing bid. In exchange, Defendant Hydro agreed to give Seminole increased pipeline capacity if Defendant Hydro was the successful bidder.

This agreement had the effect of eliminating Seminole, Defendant Hydro's chief rival, as a viable competing bidder for the Tampa Facility, because it required Seminole to assist Hydro in bidding up the price in the face of any bid -- including a bid by Seminole alone -- against Hydro. Almost immediately after signing the agreement, Seminole stated that it was no longer going to attend the auction of the Tampa Facility. At the auction on the afternoon of March 12, there were no bids for the Tampa Facility other than the one previously submitted by

---

June 18, 1997. The Final Judgment was entered by the Honorable Elizabeth A. Kovachevich and filed on September 19, 1997.

Defendant Hydro, a bid which the bankruptcy trustee had hoped to top.

Defendants' intentions were to have the Tampa Facility become an asset of their joint venture, Farmland Hydro L.P. ("FHLP"), if Defendant Hydro was the successful bidder. Defendant Farmland participated in the negotiations leading to the March 12 agreement, assented to Defendant Hydro's execution of the agreement on its behalf as a partner in FHLP, and directly benefitted from the agreement because of its partnership with Defendant Hydro.

On ________________________, the United States and defendants filed a Stipulation by which they consented to the entry of a proposed Final Judgment following compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment, as will be discussed in detail in Section IV.A., would order defendants to refrain from submitting any jointly determined bid for the acquisition of any ammonia asset (as defined in the Final Judgment) located in the United States that is being sold by or under the auspices of a court or agency of the United States, unless defendants disclose to the seller of the asset and the person administering the sale of the asset that a jointly determined bid is being submitted and with whom the joint bid is being submitted. The Final Judgment also prohibits defendants from violating any of the terms or conditions for bidding imposed by the seller of the asset, or from violating any of the terms or conditions for bidding imposed

by the person administering the sale of the asset, without disclosing such to the seller in advance of the sale. By its terms, the Final Judgment does not apply to any purchases by defendants, either jointly or separately, that are for the benefit of, on behalf of, or in the name of FHLP. The judgment does, however, apply to any jointly determined bid submitted by either defendant and any third person or to any jointly determined bid submitted by defendants that is not made for the benefit of, on behalf of, or in the name of FHLP.

II. DEFENDANTS

Defendant Hydro is a subsidiary of Norsk Hydro a.s ("Norsk AS"), a Norwegian corporation, which is majority owned by the Norwegian government. Hydro is headquartered in New York City, New York, and is a holding company for various subsidiaries. One of the indirect subsidiaries of Hydro, Hydro Agri Ammonia, Inc. ("Hydro Agri"), is a wholesale distributor of ammonia headquartered in Tampa, Florida. At the time of the alleged violation, Norsk AS controlled approximately twenty-five percent of the world trade of ammonia.

Defendant Farmland is a cooperative headquartered in Kansas City, Missouri, which provides products and services to its members, who are primarily farmers and ranchers. Through FHLP, which Farmland formed with an affiliate of Hydro in November 1991, Farmland is also engaged in manufacturing and distributing phosphatic fertilizers.

III.
THE TAMPA FACILITY AND EVENTS LEADING UP TO THE ALLEGED VIOLATION

A. The Tampa Facility

The Tampa Facility, which consists of an ammonia terminal located in the Port of Tampa, Florida, and a one-half interest in a pipeline system connected to the ammonia terminal,[2] is used for storing, handling, and delivering anhydrous ammonia, one of the raw materials used in the manufacture of phosphatic fertilizers. Located on approximately 17-1/2 acres of land leased from the Tampa Port Authority, the Tampa Facility has a single tank with a 35,000 metric ton storage capacity. It services five nearby phosphatic fertilizer plants,[3] where the ammonia is combined with phosphoric acid to create diammonium phosphate. The Tampa Facility is able to service by truck or rail other phosphatic fertilizer plants not connected to it. During the early 1990's the Tampa Facility was owned by the Royster Company ("Royster"), now known as Mulberry Phosphates, Inc. ("MPI").

B. The Bankruptcy of Royster and the Failed Auction

Royster was a manufacturer of phosphatic fertilizers and related products for the domestic and export markets. Its principal facilities included a plant for the production of diammonium phosphate, located in Mulberry, Florida, and the Tampa

---

[2]Seminole owned the other one-half interest in the pipeline, along with a separate ammonia terminal (consisting of two ammonia tanks) that also was connected to the pipeline.

[3]If Seminole had been successful in acquiring the Tampa Facility, it would have been the exclusive supplier to those five plants.

Facility. Royster filed for bankruptcy protection on April 8, 1991, after months of experiencing financial hardship. Under the reorganization plan submitted to the Bankruptcy Court, Royster proposed to liquidate certain assets, including its Tampa Facility. Shortly after news of the potential sale of the Tampa Facility went public, Defendant Hydro and Seminole separately expressed interest in acquiring it. After extensive negotiations with Royster officials, Defendant Hydro agreed to purchase the property for $15.5 million and executed an asset purchase agreement for the property on September 25, 1991. The agreement guaranteed Royster the right to purchase a continuing supply of ammonia from the terminal for its Mulberry plant and contained a through-put provision that permitted it to put the ammonia through the pipeline from the terminal to the plant. In November of that same year, the Bankruptcy Court ordered that the Tampa Facility be sold by auction and that bids be taken against Hydro's offer of $15.5 million. The auction was scheduled for March 12, 1992. It was not until the auction was announced that a third company, CF Industries ("CF")[4], publicly expressed any interest in acquiring the Tampa Facility.

On December 18, 1991, the Bankruptcy Court issued an order approving bidding procedures in connection with the proposed sale of the Tampa Facility. Any third party offer had to: (1) be substantially similar to the one contained in the Hydro Asset

---

[4]CF is a cooperative which has been a major participant in the fertilizer business since the mid-1960's and has operated world-scale phosphatic fertilizer plants in Florida since 1969.

Purchase Agreement; (2) be at least $1 million more than Defendant Hydro's offer of $15.5 million; (3) include an offer to enter into a through-put agreement with Royster; and (4) include a confidentiality agreement with Royster and Defendant Hydro regarding disclosure of the terms of the Royster/Hydro Through-put Agreement. In addition, the Order required that the third party deposit $1 million in escrow no later than the time at which it submitted an offer. The money deposited was to remain in escrow pending the earlier of (a) the closing of the sale to the third party if its offer was approved by the Bankruptcy Court or (b) the entry of an order approving the sale of the Tampa Facility to either Hydro or another third party bidder. After depositing the $1 million, the third party was entitled to receive documents setting forth the results of the inspection of the Tampa Facility's tank, the cost of repair, the terms of the Royster/Hydro Through-put Agreement, and the terms of any through-put agreements submitted by any other third parties.

In February 1992, CF deposited $1 million in escrow. Seminole made its escrow deposit on March 9, 1992, three days before the auction. At the time of the auction, there were four bidders who were qualified to bid: Defendant Hydro, CF, Seminole, and Superfos Investments Limited ("Superfos")[5]. CF informed Royster shortly before the auction that it would not be bidding,

[5]Since Superfos was a major creditor of Royster, the Bankruptcy Court exempted Superfos from the $1 million escrow requirement and gave it permission to submit a credit bid. Thus, Superfos could deduct from its bid offer the amount it was owed by Royster.

because of environmental concerns it had recently identified. Only Defendant Hydro appeared at the auction site on the afternoon of March 12 to bid on the Tampa Facility. There having been no new bids tendered, Defendant Hydro's standing offer of $15.5 million was accepted, pending approval by the Bankruptcy Court. In a meeting later that afternoon to finalize the details of the sale before a March 13 court hearing, Royster representatives discovered that Defendant Hydro and Seminole had executed a joint bidding agreement approximately two hours before the auction was scheduled to begin.

At the hearing the following day, Royster representatives advised the Bankruptcy Court of the agreement between Seminole and Defendant Hydro. The Bankruptcy Court deferred ratification of the sale and ordered discovery to be taken. A few days later, the Bankruptcy Court received two anonymous communications regarding the bidding agreement. One communication was a letter alleging that Seminole had agreed to backstop Defendant Hydro's bid and that Seminole's bid supplement was leaked to CF, causing the latter to withdraw. The other communication was one of Seminole's internal memoranda written by Steve Yurman, Seminole's president, describing the terms of the March 12 agreement. After reviewing the information obtained during discovery in light of the anonymous correspondence, the Bankruptcy Court, at a hearing on March 20, refused to ratify the sale of the Tampa Facility to Defendant Hydro and ordered that a second auction be held. At the second auction, on June 17, 1992, CF and Defendant Hydro

submitted bids, and CF won the Tampa Facility with a final bid of $21.6 million. (By the time of the second auction, CF had been able to resolve its environmental concerns.)

C. Evidence of Collusion

On February 26, 1992, representatives of Seminole and Defendants Hydro and Farmland met at the Rihga Royal Hotel in New York to discuss a "joint venture" proposal by Seminole. The proposal involved Defendant Hydro buying the Tampa Facility and keeping the interest in the pipeline, but possibly selling the tank to CF. The meeting concluded with no agreements being reached.

The same parties met again on March 5, 1992, at the same hotel. They primarily discussed sharing pipeline capacity and the cost of bidding on the terminal. Specifically, Seminole and Defendants Hydro and Farmland proposed that Defendant Hydro and Seminole enter into an agreement whereby Seminole would supplement Defendant Hydro's bid and consent to Royster's transfer of its pipeline interest to Defendant Hydro in return for Defendant Hydro giving Seminole extra pipeline capacity.[6] A tentative agreement was reached and Defendant Hydro indicated that it would have its attorneys reduce the agreement to writing and send Seminole a draft to review. Defendant Hydro sent the first written draft to Seminole on March 6, and on March 9 and March 10 representatives of Defendant Hydro and Seminole

[6]As owner of the other one-half interest in the Tampa Facility's pipeline lease, Seminole already had the right to use 450,000 tons of the pipeline's 900,000 ton capacity.

discussed, via telephone on several occasions, the terms of the draft agreement.

On the morning of March 12, officials of Tosco, Seminole, and Defendants Hydro and Farmland, along with their attorneys, met in Tampa, Florida, at the law offices of MacFarlane Ferguson, Defendant Hydro's local counsel, to resume negotiating the details of the proposed agreement. After hours of negotiations, the parties agreed, in part, that (a) Seminole would supplement Defendant Hydro's bid up to $2.5 million, if necessary to win the auction and consent to Royster's assignment of its one-half interest in the pipeline lease to Defendant Hydro and (b) Defendant Hydro, in return, would give Seminole the right to use an extra 40,000 tons of the pipeline's capacity. Almost immediately after signing the agreement, Seminole stated that it was no longer attending the auction.

One of Seminole's representatives appeared at the auction moments before it started and advised Royster that it was withdrawing from the bidding. Later that evening, representatives of Defendant Hydro and Seminole talked by telephone and agreed to instruct their counsel to confer with one another to prepare for the court hearing the next day.

In this case, there was virtually no evidence of covert activity, which indicated that the subjects of the investigation were not aware of, or did not appreciate, the illegal nature of their actions. This lack of covertness and the lack of criminal intent it indicates are the main reasons this case is being filed

civilly rather than criminally. See Antitrust Division Manual, Section III.E., at III-12 (October 18, 1987) (Second Edition).

IV.
EXPLANATION OF PROPOSED FINAL JUDGMENT

A. Prohibited Conduct and Limiting Conditions

Section IV enjoins defendants from submitting any jointly determined bid for the acquisition of any ammonia asset located in the United States that is being sold by or under the auspices of a court or agency of the United States. Under Section V, however, defendants are permitted to submit jointly determined bids if two conditions are met, i.e., defendants must (1) disclose to the seller of the asset and the person administering the sale of the asset that a jointly determined bid is being submitted and with whom the joint bid is being submitted, and (2) not, without disclosing to the seller in advance of the sale, violate any of the terms or conditions for bidding imposed by the seller of the asset or violate any of the terms or conditions for bidding imposed by the person administering the sale of the asset.

Similarly, Section V(B) allows jointly determined bids by defendants, submitted either jointly or separately, that are for the benefit of, on behalf of, or in the name of their joint venture, FHLP. This latter provision still does not exempt jointly determined bids that are submitted by either defendant and any third person or any jointly determined bids submitted by defendants that are not made for the benefit of, on behalf of, or in the name of FHLP.

B. Compliance Program and Certification

Under Section VI of the Final Judgment defendants are required, within thirty days of entry of the final Judgment, to establish and maintain an antitrust compliance program which shall include designating an Antitrust Compliance Officer with responsibility for accomplishing the compliance program. The Antitrust Compliance Officer is required to, on a continuing basis, supervise the review of the current and proposed activities of the defendant to ensure that it is in compliance with the program. The Antitrust Compliance Officer is also required to (1) distribute a copy of the Final Judgment to all officers and directors, and any person who otherwise manages defendant with respect to the fertilizer business, (2) distribute in a timely manner a copy of the Final Judgment to any person who succeeds to a position described in Section (VI)(A)(1) of the Final Judgment, (3) brief annually defendant's officers and directors engaged in the fertilizer business on the meaning and requirements of the Final Judgment and the antitrust laws, and (4) obtain annually from each officer or employee designated in Section (VI)(A)(1) and (2) of the Final Judgment a written certification that he or she:(a) has read, understands, and agrees to abide by the terms of the Final Judgment; (b) understands that failure to comply with the Final Judgment may result in conviction for criminal contempt of court; and (c) is not aware of any violation of the Final Judgment that has not been reported to the Antitrust Compliance Officer.

Moreover, prior to the submission of any jointly determined bid, defendants must distribute a copy of the Final Judgment to any person with whom defendants submit a jointly determined bid for the acquisition of any ammonia asset that is being sold by or under the auspices of a court or agency of the United States. Defendants are also required to file with the Court and serve upon plaintiff, within ninety (90) days after the date of the Final Judgment, an affidavit as to the fact and manner of its compliance with this Final Judgment. Defendants are also required to take appropriate action to terminate or modify any activities uncovered that violate any provision of the Final Judgment.

V.
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 attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any private lawsuit that may be brought against the defendants.

VI.
PROCEDURES AVAILABLE FOR
MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Nezida S. Davis, Acting Chief, Atlanta Field Office, U.S. Department of Justice, Antitrust Division, 75 Spring Street, S.W., Suite 1176, Atlanta, Georgia, 30303, within the 60-day period provided by the Act. These comments, and the Department's responses, 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 entry.

VII.
ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The Department considered, as an alternative to the proposed Final Judgment, litigation seeking comparable equitable relief. In the view of the Department of Justice, a trial would involve substantial cost to the United States and is not warranted because the Proposed Judgment provides relief that will adequately remedy the violations of the Sherman Act alleged.

VIII.
DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were used in formulating the proposed Final Judgment.

Respectfully submitted,

KAREN SAMPSON JONES

BELINDA A. BARNETT

Attorneys for Plaintiff
U.S. Department of Justice
Antitrust Division
75 Spring Street, S.W.
Suite 1176
Atlanta, Georgia 30303
(404) 331-7100

Date: ____________________