

**IN THE MATTER OF:
FAR Case 2015-038
Reverse Auction Guidance**

**COMMENT OF THE UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION**

The Antitrust Division of the Department of Justice (“the Division”) enforces the federal antitrust laws and promotes competition and thereby consumer welfare, including in the procurement context through the Procurement Collusion Strike Force. To this end, the Division often files statements of interest or amicus briefs in cases throughout the federal courts and engages in competition advocacy with other federal, state, and local agencies via comments on rulemakings and legislation, among other means. In this comment, the Division urges the removal of the proposed regulation’s documentation deletion requirements because they would require the destruction of information relevant to investigations of bidder misconduct.

One critical aspect of the Division’s mission is to investigate and prosecute antitrust crimes that harm competition. American consumers, as purchasers and as taxpayers, benefit from free and open competition that drives firms to offer the best goods and services at the lowest prices. When competitors conspire to rig bids, fix prices, or allocate the markets they serve instead of competing, prices go up, quality goes down, and consumers are harmed. These consumers include federal, state, and local governments that put projects out to bid or buy goods and services from the open market.

Federal, state, and local agencies often rely on competitive bidding to obtain the best goods and services and the lowest prices. Combatting collusion that disrupts this competition and steals taxpayer dollars is a top priority of the Division. Indeed, the Department of Justice formed the Procurement Collusion Strike Force as a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government. These prosecutions can result in significant recoveries for government agencies. For example, the Division recently prosecuted Korean fuel and transportation companies who, for more than a decade, rigged bids for fuel supplied to Department of Defense bases in South Korea. As a result, five companies pleaded guilty and paid more than \$150 million in criminal fines and more than \$200 million in civil damages and penalties.

The Division and its law enforcement partners often use bid data as evidence to open and pursue investigations and prosecutions. For example, bid data can help show agreements to raise prices by submitting artificially inflated bids; to rig bids at an auction by agreeing in advance which company will win and which others will lose; or to allocate geographic markets or customers. Evidence of these sorts of agreements can come from the prices submitted, the timing of the bids, the identity of the bid submitters, and many other circumstances surrounding bid submissions often retained in auction providers’ business and computer systems.

The Division has concerns regarding FAR Case 2015-038 because bid data can be critical evidence in an Antitrust Division criminal investigation into corruption in the procurement process. Specifically, in §§ 17.802(d)(5) and 52.217-ZZ(b)(5)(iii), the amendment requires that when a reverse auction provider has completed an auction, the provider “removes all

documentation received from offerors in response to the reverse auction from its business and computer systems.” Yet reverse auction providers would otherwise later be able to provide that information to law enforcement in response to lawful requests, shedding light on the bidding process and supporting the discovery and deterrence of crimes.

The proposed mandatory deletion of these records would destroy information relevant to investigations into bid-rigging conspiracies and would likely delay or eliminate important investigative steps otherwise available to law enforcement officers during those investigations. Imposing an affirmative obligation on reverse-auction providers to delete this information neither advances enforcement equities nor maximizes taxpayer value. Thus, the Division requests that should the proposed regulation move forward, §§ 17.802(d)(5) and 52.217-ZZ(b)(5)(iii) be struck.

Dated: February 4, 2021

Respectfully submitted,



DAVID B. LAWRENCE
Chief,
Competition Policy and Advocacy Section
David.Lawrence@usdoj.gov | 202-532-4698

RICHARD A. POWERS
Deputy Assistant Attorney General and
Senior Supervisory Official

DANIEL GLAD
Director,
SANDRA TALBOTT
Assistant Director,
Procurement Collusion Strike Force

RYAN DANKS
Chief,
JASON JONES,
Trial Attorney,
Washington Criminal I Section

Antitrust Division
U.S. Department of Justice