DEPARTMENT OF JUSTICE

Remarks as Prepared for the American Bar Association Public Contract Law Section's 2019 Public Procurement Symposium

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San Diego, California

October 25, 2019

Introduction

Good afternoon. It's great to be here in San Diego, and I appreciate the kind invitation from the ABA's Public Contract Law Section to speak with you all today as part of the 2019 Public Procurement Symposium. In particular I'd like to thank Linda Maramba, the Chair of the Section, for hosting me.

It's a privilege to be here representing the Antitrust Division of the Department of Justice. As Linda mentioned, I serve as the Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division, supervising the antitrust criminal program and working under Assistant Attorney General Makan Delrahim, who presides over all of the Division's work, both civil and criminal.

In a moment I'm going to give you a bit more background about the Division and our criminal program, but I want to note at the outset that I view it as both a privilege and an important opportunity to speak to this gathering of public procurement lawyers and professionals. It will come as no surprise that the Antitrust Division has frequent interactions with the ABA's Antitrust Law Section on both civil and criminal topics. Our interactions with the public contract law bar, by contrast, have been more limited historically. Yet I believe the Antitrust Division can—and should—be contributing to the important dialogue about public procurement issues, in which the ABA's Public Contract Law Section has been a leading voice for over six decades.

Competition is the touchstone of the American economy—and that is no less true in the field of public procurement. Accordingly, part of the Antitrust Division's mission is to safeguard taxpayer money by deterring and prosecuting bid rigging and other anticompetitive conduct in this area. In fact, my colleagues and I at the Division are working on some new initiatives regarding the public procurement space, and I will share more about that later in my remarks.

Who We Are: Background on the Antitrust Division

First, let me step back and give you some brief background about the Antitrust Division and our programs, as we may not be as familiar to some of you in the audience as other components of the Department of Justice.

The mission of the Antitrust Division is the promotion and maintenance of competition in the American economy. We aim to ensure that markets function properly—full of healthy competition and free of the corrosive effects of collusion. We seek to protect not only American consumers from the negative effects of anticompetitive conduct, such as artificially high prices, but also the government itself, whose various agencies spend billions of dollars of taxpayer money per year to purchase goods and services.

How do we fulfill that mandate? The Antitrust Division is responsible for both the civil and criminal enforcement of federal antitrust laws relating to the protection of competition and the prohibition of restraints of trade and monopolization. While our six civil sections handle merger reviews and civil investigations into anticompetitive conduct, I will not be discussing the civil side of the house today.

Instead, I will focus my comments on the criminal program. As the DAAG responsible for criminal enforcement, I supervise approximately 100 prosecutors who are located in Washington, DC, New York, Chicago, and San Francisco. Divided into five sections that are responsible for different regions of the country, these dedicated prosecutors conduct grand jury

investigations into possible violations of antitrust laws and related criminal conduct, and prosecute resulting criminal cases in federal district courts across the nation.

Much like our fellow prosecutors in other parts of the Department of Justice, we work with several law enforcement partners to investigate suspected criminal violations, including the Federal Bureau of Investigation and agents from the Offices of Inspector General from agencies like the Department of Defense, Postal Service, Department of Transportation, and Internal Revenue Service, among others.

What We Do

So that is who we are, and now I'll turn briefly to what it is we do on the criminal side of antitrust law enforcement. In the words of a former Assistant Attorney General who headed the Division, Anne Bingaman, "[c]riminal enforcement against the most serious antitrust offenses is our core mission."[1]

The heart of our criminal program is the 1890 Sherman Act, which provides that "[e]very . . . conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[2] In practice, we prosecute criminally only certain types of conspiracies to restrain trade. Specifically, we prosecute conspiracies between horizontal competitors to fix prices, rig bids, or allocate markets. These are the types of agreements the Supreme Court has recognized as categorically or "per se" illegal. And these are the types of agreements "that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system."[3]

Over the years, we have found that the range of industries, products, and services affected by criminal antitrust conspiracies is as expansive as peoples' temptation to cheat for profit.

From conspiring to fix the prices of the canned tuna you buy in the grocery store, to rigging the bids for financial products, we have seen a lot in the history of the program.

And our experience has taught us that this type of criminal behavior is not limited to commercial businesses that impact private consumers directly. Rather, we have seen—and continue to see—a large volume of cases affecting public procurement.

Along with other forms of fraud and public corruption, criminal antitrust conspiracies pose a grave threat to the integrity of government procurement processes.

From an enforcer's standpoint, we care about criminal antitrust conduct in this area because of the harm it poses to government agencies, and by extension the taxpayers. (I'll address that further in a moment.)

But why should you care, as professionals involved in public procurement?

I'll tell you: because your employer or client could be subject to severe penalties for illegal conduct.

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[1] Anne K. Bingaman, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Criminal Antitrust Enforcement, Address before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law, at 3 (Feb. 23, 1995), https://www.justice.gov/atr/file/519101/download.

[2] 15 U.S.C. § 1 (2018).

[3] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Statement as Prepared for Delivery Before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, at 4 (Sept. 17, 2019), https://www.justice.gov/opa/speech/file/1203266/download.

Violations of criminal antitrust laws result in significant fines for companies and prison time for individuals.

The maximum term of imprisonment is 10 years for individuals, and companies can face fines of up to $100 million or twice the gain or loss resulting from the conspiracy offense.[4]

To give you a recent example, just last month StarKist Co. was sentenced to pay a criminal fine of $100 million, the statutory maximum, for its role in a conspiracy to fix prices for canned tuna sold in the United States.[5]

And for individuals, the threat of jail time is real. To give another recent example, in June two executives were sentenced to 18 months and 15 months respectively for their role in an international freight forwarding price-fixing conspiracy.[6]

Moreover, in addition to criminal penalties, there are often other collateral effects, as well. Civil lawsuits often follow criminal investigations and can result in treble damages.

And, importantly for those in the public procurement field, a criminal conviction nearly always leads to debarment.

Unique Enforcement Tools

Having described the significant risks companies and individuals face when they collude to fix prices, rig bids, or allocate markets, I want to pause for a moment and highlight a unique enforcement tool used by the Antitrust Division that provides a significant incentive to self-report participation in these schemes.

Under the Division's Leniency Program, the first to self-report can receive a complete pass in return for cooperating with the Division's investigation and meeting the Program's other requirements. That means no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees. Moreover, companies that win the race to the door and receive leniency can achieve de-trebling and removal of joint and several liability under the Antitrust Criminal Penalty Enhancement and Reform Act for providing timely and satisfactory cooperation in any follow-on litigation.[7]

While the benefits of leniency speak for themselves, it's worth considering the other side of the equation. For those who don't win the race for leniency, the Division will pursue the prosecution of all remaining members of the conspiracy, especially the culpable executives.

So, the choice is stark: a complete pass, or else face severe monetary penalties, potential criminal conviction, and the associated risks such as debarment, lengthy prison sentences for culpable executives, and substantial exposure in private litigation.

The last point I want to make about our leniency program is our firm commitment to both the transparency of its application and the predictability of outcomes. To that end, our

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[4] 15 U.S.C. § 1 (2018).

[5] Press Release, U.S. Dep't of Justice, StarKist Ordered to Pay $100 Million Criminal Fine for Antitrust Violation (Sept. 11, 2019), https://www.justice.gov/opa/pr/starkist-ordered-pay-100-million-criminal-fine-antitrust-violation.

[6] Press Release, U.S. Dep't of Justice, Two Freight Transportation Executives Sentenced to Prison Terms for Price Fixing (June 25, 2019), https://www.justice.gov/opa/pr/two-freight-transportation-executives-sentenced-prison-terms-price-fixing.

[7] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661.

Division's public website contains a number of documents relating to leniency, including the Corporate Leniency Policy, the Individual Leniency Policy, a set of frequently asked questions, and other helpful documents.[8]

Procurement: The Statement of the Problem

Now that I've given you some background on who we are and what we do, I want to focus the rest of my remarks on the public procurement space and antitrust risks.

Like any enforcer, the Antitrust Division's criminal program must decide where to allocate limited resources. What should we prioritize, and why?

I am an Infantry Officer by training, and one of the things I learned in the Army is that first you have to identify what the problem is before you can devise a plan to solve it. Having served as the DAAG for criminal enforcement for 18 months now, I have concluded that criminal antitrust conduct in the public procurement area is a distinct problem that demands attention. And I'm here to give you the message that we are giving a hard look at the public procurement space, and we will be devoting significant investigative resources to it going forward.

Why? Our experience investigating antitrust conspiracies in various industries, along with plain common sense, tell us that the public procurement space is particularly vulnerable to collusion. Moreover, when antitrust violations do happen, they result in significant financial harm to American taxpayers, due to the dollar values involved.

Let's talk about vulnerabilities first. Bid rigging is the typical form of collusion we see in public contracting—that is, an agreement among competitors that limits competition in the bidding process. In a typical scenario, bidders agree among themselves who should win the contract and then arrange their bids in a way—such as through complementary bidding or bid rotation—to ensure the designated company wins the bid. Since such conspiracies often last for years, government purchasers—and ultimately, the taxpayers—pay more for goods or services than they otherwise would have in a truly competitive market.

The bidding processes involved in public procurement make this area uniquely vulnerable to collusion for several reasons. For one, the sheer monetary value of government projects presents an enticing opportunity for greed to prevail over ethical conduct.

Next, regulatory requirements governing procurement procedures can make the process predictable and thus subject to manipulation through collusion.[9] Many agencies have repetitive or regularly scheduled purchases, for instance.

Another factor that makes it easier for sellers to collude is that there are often relatively few qualified sellers for a given project, given that government agencies often require specialized goods and services. In addition, rush or emergency projects arise in government procurement, such as disaster-relief projects, and the exigency creates opportunities to cheat.

Finally, the large volume of goods and services contracted by the government creates monitoring difficulties, even with the existence of 72 statutory Inspectors General across the U.S.

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[8] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., LENIENCY PROGRAM (1993), https://www.justice.gov/atr/leniency-program.

[9] *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, ROUNDTABLE ON COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT, at 10 (Feb. 2010), https://www.oecd.org/daf/competition/cartels/46235884.pdf.

federal government.[10] Given the growth in government spending over time, it is difficult for audit and investigation resources within agencies to keep pace.

So why do these vulnerabilities pose a problem? Setting aside the inherent importance of deterring, detecting, and prosecuting illegal conduct wherever it's found, those of you in the audience today know that the sheer amount of money flowing from the government to contractors to purchase a broad array of goods and services makes *any* criminal conduct that cheats the taxpayer especially impactful.

Let's look at a current snapshot. Roughly one out of every ten dollars of federal government spending is allocated to government contracting.[11] Following a brief downward trend between 2010 and 2015, federal contract spending rebounded and climbed from $440 billion in 2015, to $470 billion in 2016, to $510 billion in fiscal year 2017.[12]

The growth continues: in fiscal year 2018, the federal government spent more than $550 billion—or about 40% of all discretionary spending—on contracts for goods and services.[13] This represents more than a $100 billion increase from 2015, largely due to defense spending.[14] In 2018, the Department of Defense alone spent nearly $113 billion on procurement.[15]

Of course, federal money spent on goods and services is not confined to federal agencies. The 2018 federal budget included more than $696 billion in grants to state and local governments.[16] While healthcare accounts for much of that total, more than $79 billion of this money went to fund major public physical capital investment.[17]

Since we are in California today, I'll highlight that the state of California received approximately $84.6 billion in grants from the federal government in 2018, with about $21.9 billion for non-healthcare spending.[18]

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[10] *See id.*; COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, THE INSPECTORS GENERAL, at 1 (July 14, 2014), https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

[11] *The Office of Federal Procurement Policy*, OFFICE OF MANAGEMENT AND BUDGET, https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#_Office_of_Federal_3 (last visited Oct. 24, 2019).

[12] *Contracting Spending Analysis*, U.S.A. SPENDING DATA LAB, https://datalab.usaspending.gov/contracts-over-time.html (last visited Oct. 24, 2019).

[13] *Federal Government Contracting for Fiscal Year 2018*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE: WATCHBLOG, (May 28, 2019), https://blog.gao.gov/2019/05/28/federal-government-contracting-for-fiscal-year-2018-infographic/.

[14] *Id.*

[15] OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES, at 70 (2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/hist-fy2020.pdf.

[16] *Id.* at 238.

[17] *Id.*

[18] U.S.A. SPENDING DATA LAB, https://www.usaspending.gov/#/search/3af717a92e61ff2e03cde53252fb647c (last visited Oct. 24, 2019) (select the "Time" tab for total grant spending figure; then select the "Categories" tab, ensure the "Spending by:" section is set to "Awarding Agency", select the "Sub-Agencies" blue tab, and deduct

With all of this money flowing to government contracts, therefore, even a small percentage lost to bid rigging or price fixing or other types of related criminal conduct inflicts great harm on the government and the taxpayers.

So here is another eye-popping number: the Organisation for Economic Co-operation and Development (OECD) estimates that eliminating bid rigging could help reduce procurement costs by 20% or more.[19] Twenty percent. While precise estimates are hard to come by, if OECD's estimate is even half-way accurate, reducing illegal and anticompetitive collusion in procurement could save U.S. taxpayers tens of billions of dollars per year. In short, even the most conservative estimates of illegal conduct in the public procurement space lead one to the conclude that the aggregate harm to the public fisc is enormous.

But let's drill down past abstractions and generalities. We know collusion in public procurement is a problem. We know because "[w]hat's past is prologue"[20]: we have seen this conduct before, and we are seeing it now in our investigations.

The Antitrust Division has a long history of prosecuting criminal antitrust conspiracies that target government contracts, ranging from construction and disaster recovery projects to food and hardware. Let me point you to just a few examples from over the last few decades:

From the late 1970s into the 1980s, the Division prosecuted hundreds of corporations and individuals for bid rigging in road construction projects in multiple states around the country.[21]

In the early 1990s, we uncovered a decade-long conspiracy to rig bids on frozen seafood contracts awarded by a Department of Defense purchasing center and prosecuted the multiple individuals and companies responsible.[22]

After Typhoon Paka struck the island of Guam in December 1997 and caused hundreds of millions of dollars in damage, a government official conspired with contractors to award reconstruction projects through rigged bids and took bribes to line his pockets. As a result of our investigation, five individuals pled guilty to rigging bids for these emergency repair contracts, and that government official was convicted at trial and sentenced to 8 years in prison—one of the longest prison sentences ever imposed in an antitrust case.[23]

Moving to the early 2000s, we rooted out bid rigging in humanitarian aid water treatment construction projects in Egypt, which were funded by the U.S. Agency for International

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"Centers for Medicare and Medicaid Services (CMS)" unrounded figure from unrounded total figure to calculate non-healthcare spending).

[19] *Fighting Bid Rigging in Public Procurement*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, www.oecd.org/competition/bidrigging (last visited Oct. 24, 2019).

[20] WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

[21] *See, e.g.*, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EX OFFICIO CARTEL INVESTIGATIONS AND THE USE OF SCREENS TO DETECT CARTELS, at 212 (2013), http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf.

[22] *See, e.g.*, *United States v. Bordinaro*, 777 F. Supp. 1229 (E.D. Pa. 1991).

[23] *United States v. Pendon*, No. 01-00071 (D. Guam 2001); *United States v. Cho*, No. 01-00008 (D. Guam 2001); *United States v. Carlos*, No. 00-00123 (D. Guam 2000); *United States v. Yoon*, No. 00-00092 (D. Guam 2000); *United States v. Lee*, No. 00-00091 (D. Guam 2000); *United States v. Shelton*, No. 01-00007 (D. Guam 2001).

Development. The successful prosecution resulted in guilty pleas by four companies, fines of over $140 million, and a three-year prison sentence for a defendant who was convicted at trial.[24]

We uncovered yet more criminal conduct taking advantage of government aid programs in the mid-2000s, when the Division and our investigative partners prosecuted multiple individuals in multiple states for schemes to rig bids in connection with the E-Rate Program, which provides discounts to help schools and libraries in disadvantaged areas obtain internet access and telecommunication services. In one prominent case, a consultant was convicted at trial of 22 counts of bid rigging and fraud, sentenced to 7.5 years in prison, and debarred for 10 years.[25]

Which brings me to the present day. Recently, we prosecuted one of the more significant procurement-related cases in the Division's history—one that has helped inform our renewed focus on this area.

In November 2018 and March 2019, five South Korean oil companies agreed to plead guilty for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. In total, the companies have agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements. (These companion civil settlements are important for a reason to which I'll return in a moment.) The Division also indicted seven individuals in this case for conspiring to rig bids and to defraud the government, and one executive was also charged with obstruction of justice.[26]

This investigation is the latest example of our commitment to holding corporations and individual executives accountable when they defraud the U.S. government, victimize taxpayers, and interfere with the integrity of our investigations.

So, again, how do we know there's a collusion problem in public procurement?

Because we see the criminal conduct in this space.

And common sense tells us there's a lot more of it going on than we've detected.

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[24] *United States v. Bilhar Int'l Constr., Inc., Bilhar Int'l Establishment f/k/a Harbert Int'l Establishment, and Anderson*, No. CR-01-PT-0302-S (N.D. Ala. 2001); *United States v. ABB Middle East & Africa Participations AG*, No. CR-01-N-135-S (N.D. Ala. 2001); *United States v. Philipp Holzmann Aktiengesellschaft*, No. CR-00-N-0285-S (N.D. Ala. 2000); *United States v. American Int'l Contractors, Inc.*, No. CR-00-N-0298-S (N.D. Ala. 2000).

[25] *See United States v. Green*, 592 F.3d 1057 (9th Cir. 2010); Press Release, U.S. Dep't of Justice, Former Sales Representative in California Convicted for Role in Schemes to Defraud the Federal E-rate Program (Sept. 14, 2007), https://www.justice.gov/archive/opa/pr/2007/September/07_at_721.html.

[26] Press Release, U.S. Dep't of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids; Press Release, U.S. Dep't of Justice, More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea (Mar. 20, 2019), https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense.

Right now, the Antitrust Division has over 100 open grand jury investigations—more than at any point since 2010.[27] Of those, more than one third relate to public procurement or otherwise involve the government being victimized by criminal conduct.

And we intend to take measures to increase our detection rate going forward.

Tackling the Problem: Deterrence and Prosecution

Having identified the problem as we see it, let me now turn to what the Antitrust Division is doing about it. The mission of our criminal program overall is to aggressively deter, detect, and prosecute individuals and organizations that collude and undermine competition.

In the context of government procurement, specifically, our objective must be first to deter and prevent antitrust and related crimes on the front end of the procurement process. When crimes do happen, we must also effectively investigate and prosecute such conduct on the back end of the procurement process, both to punish the wrongdoers and deter others from following the same path.

Deterrence must be a primary aim of any prosecuting agency for a reason that is obvious but bears repeating: prosecution can never fully un-do the harm of a crime, whether it be a murder or a financial crime. Enforcement through prosecution is, inherently, of limited remedial value because the money is already out the door.

No matter how large the fine or restitution in a successful prosecution, it is impossible to reverse the harm that has been done by anticompetitive conduct and recover every cent on the dollar.

There are many ways government enforcers can seek to deter bad conduct. I want to talk about three:

First, one important way enforcers can deter crime is by giving clear notice of what conduct they will prioritize investigating and prosecuting. Through our public statements and actions, government enforcers should be as transparent as possible about our investigative priorities and the ways in which individuals and companies can steer clear of illegal conduct.

That is part of the reason why I am here today: I want to send the message loud and clear that the Antitrust Division's criminal program is training its focus on the government procurement space. Protecting government victims—and thus taxpayers—has been, and will continue to be, a top priority for the Department and the Antitrust Division.

In fact, when we are deciding whether to open an investigation, the fact that the suspected criminal antitrust conduct impacted the federal government is typically dispositive.[28] That's "[b]ecause the Division's mission requires it to seek redress for any criminal antitrust conspiracy that victimizes the Federal Government and, therefore, injures American taxpayers."[29]

I want to emphasize this factor and underscore its importance in how I and the Division view potential criminal cases. We will aggressively investigate and prosecute cases where criminal antitrust conduct intersects with government procurement.

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[27] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS FY 2009-2018 (2019), https://www.justice.gov/atr/file/788426/download.

[28] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL, Ch. 3 § B.1 (updated July 2019), https://www.justice.gov/atr/division-manual.

[29] *Id.*

Next, let me turn to a second important way in which we, as government prosecutors, can seek to deter criminal conduct: enforcement.

Aggressively and vigorously enforcing the criminal laws through investigation and successful prosecution of bad actors is perhaps the most obvious tool in the enforcer's toolkit. The Antitrust Division's criminal program is no different from the rest of DOJ's criminal enforcement components in this regard.

But enforcement is not only a retrospective exercise. Effective enforcement can serve the goal of general deterrence and prevent future misconduct.

How so? To achieve a deterrent impact, an effective enforcement program must do two things: (1) create a high probability of getting caught, and (2) impose stiff and certain punishment on those bad actors we do catch.

We in the Antitrust Division are working on ways to do both better.

As I mentioned earlier in my remarks, more than one third of the Division's active criminal investigations involve conduct that victimizes the government, and where we find credible evidence of criminal activity we will not hesitate to bring charges and hold individuals and companies accountable.

But in addition to these current investigations, we are actively working on ways to better detect criminal antitrust violations in public procurement.

This effort starts with committing more resources. Along with partners in the law enforcement community, we are in the process of planning increased outreach and education efforts to train procurement officials at all levels of government on antitrust risks in their procurement processes and how to identify potential signs of collusion. In fact, on my way out to California for this event, I stopped in Colorado to meet with the senior leadership of DCIS—the Defense Criminal Investigative Service—the component of the Department of Defense's Office of Inspector General responsible for conducting criminal investigations of matters related to DoD programs and operations, including crimes affecting procurement. DCIS is a frequent investigative partner of the Antitrust Division, and I stressed to them the importance of targeting collusion in public procurement in the defense industry.

Next, we are working with our law enforcement partners to explore using data analytics on the vast troves of contracting data housed in government agencies in order to more efficiently uncover signs of possible anticompetitive collusion for further investigation. Over the past few months, I have spoken to the Council of the Inspectors General on Integrity and Efficiency[30] about collaborating with various federal Offices of Inspectors General on such efforts.

Turning to the other side of the enforcement coin—the certainty and severity of sanction—we at the Division are committed to using the statutory tools at our disposal to seek appropriate penalties and damages to protect American taxpayers when the government is victimized by antitrust crimes.

Earlier in my remarks I mentioned the recent prosecution of South Korean fuel companies that conspired to rig bids on contracts to supply fuel to U.S. military bases. I want to return here to the penalties they faced: in total, the companies agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements.

[30] Additional information about the Council of the Inspectors General on Integrity and Efficiency (CIGIE) is available at https://ignet.gov.

These companion civil settlements are significant: they are the largest civil recoveries the Antitrust Division has obtained under Section 4A of the Clayton Act, which permits the United States to obtain treble damages when it has been injured by an antitrust violation.[31]

Assistant Attorney General Delrahim has made clear this was not a one-off occurrence. Rather, the Korea fuel cases "will serve as a blueprint for future cooperation efforts within the Department as it expands its Section 4A recovery efforts. Where antitrust violators target the United States Government—and, by extension, the U.S. taxpayer—we will not hesitate to bring civil and criminal charges and seek damages using these tools."[32]

Finally, I want to turn to a third important way in which we can seek to deter criminal conduct: creating positive incentives for companies and individuals.

As I've just discussed, enforcement is one way to incentivize behavior, through the negative threat of punitive sanction. But a companion approach is equally important: creating positive incentives for companies to abide by the law so that they never end up on DOJ's doorstep or, if that fails, to quickly stop the conduct, come back into compliance with the law, and assist us in our prosecution of fellow wrongdoers.

How do we do that? It starts with you. Those of you in this room who work at, or counsel, companies that contract with the government—you are the first line of defense. You are the people best positioned to protect competition, government purchasers, and American taxpayers from illegal antitrust conduct.

Given your roles in the field of public procurement, there are two particular incentives—two that go hand-in-hand—that I want to highlight for you today. The first is our leniency program, which I described earlier.

The second is how we as a Division now evaluate corporate compliance programs. For context, until recently, the Division did not consider compliance programs when making charging decisions for companies.

In July of this year, however, AAG Delrahim announced changes to how the Antitrust Division analyzes compliance programs.[33] Specifically, the Division will now consider and allow for crediting corporate compliance at the charging stage in criminal antitrust investigations. In other words, when considering corporate charges, Division prosecutors will now consider compliance together with all the other factors under the Principles of Federal

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[31] 15 U.S.C. § 15a (2018); U.S. Dep't of Justice, Safeguarding Taxpayer Dollars: The Antitrust Division Announces Criminal Charges and Civil Settlements for Bid Rigging and Fraud Targeting U.S. Military Bases in South Korea, Division Update Spring 2019 (Mar. 28, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/safeguarding-taxpayer-dollars.

[32] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., A Message from the AAG: Looking Back, Looking Forward, Division Update Spring 2019 (Mar. 27, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/message-aag.

[33] Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs, Remarks as Prepared for Delivery at New York University School of Law, Program on Corporate Compliance and Enforcement (July 11, 2019), https://www.justice.gov/opa/speech/file/1182006/download.

Prosecution and the Principles of Federal Prosecution of Business Organizations, as well as our Corporate Leniency Policy.[34]

So, what does this mean in practical terms? From a company's standpoint, there are several significant incentives to invest in compliance, detect, and self-report. First, a properly designed compliance program can help prevent the conduct in the first place and avoid the parade of horribles that is likely to follow. Falling short of that, if a company discovers evidence of a possible violation and is the first to self-report, then it can win the race for leniency and receive the associated benefits.

If a company loses the race for leniency, but demonstrates that it has a truly effective compliance program, then it can still avoid criminal conviction. That is, if after a non-leniency company becomes aware of an antitrust violation, it promptly self-reports and begins cooperating, then it has the potential to resolve the matter by a deferred prosecution agreement, rather than by guilty plea. But this option requires swift action—action consistent with a culture of compliance.

When it comes to government contracting and the risk of debarment, avoiding the criminal conviction can make all the difference.

Conclusion

So, thank you again for the opportunity to be here with you today discussing this important topic. As I said earlier, our job at the Antitrust Division is to promote and protect competition in all parts of the American economy, including and especially the significant sectors tied to public procurement.

And I hope that I've made it clear that we are devoting significant energy and resources to more effectively deterring, detecting, and prosecuting collusion in public procurement.

These costly crimes harm competition, they harm important federal programs, and they harm the tax payer. It's our job to stop it and we will do everything in our power to do so.

Thank you for your time.

[34] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (July 2019), https://www.justice.gov/atr/page/file/1182001/download. The Division also published this guidance document that focuses on evaluating compliance programs at both the charging and sentencing stages of criminal antitrust investigations. This guidance document is intended to not only assist Division prosecutors in their evaluation of compliance programs, but also provide greater transparency of the Division's compliance analysis to corporations and their in-house and outside counsel.