Unclassified **DAF/COMP/GF/WD(2014)19**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **16-Jan-2014**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2014)19
Unclassified

Global Forum on Competition

FIGHTING CORRUPTION AND PROMOTING COMPETITION

Contribution from the United States

-- Session I --

This contribution is submitted by the United States under Session I of the Global Forum on Competition to be held on 27-28 February 2014.

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JT03351193

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FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- United States --

1. In the experience of the United States antitrust agencies, the most common intersection of corruption and anticompetitive conduct occurs in government procurement, when bid rigging can be combined with or facilitated by bribery of public officials or unlawful kickbacks. These are serious offenses that are prosecuted criminally in the U.S. Bid rigging (15 U.S.C. § 1) can be punished by jail sentences of up to 10 years, theft and bribery in federally funded programs (18 U.S.C. § 666) by 10 year sentences, and bribery of a public official (18 U.S.C. § 201(b)) by 15 years. In the U.S., the Antitrust Division of the U.S. Department of Justice ("Division") investigates and prosecutes criminal antitrust violations.

2. The Division often uncovers evidence of both bid rigging and corruption in the course of an investigation. In such cases, the Division must determine where to focus the investigation and prosecution.[1] This will depend on factors such as what evidence is available, which crimes can be proved, and the type of cooperation, if any, the investigated party or parties are providing. The crimes have different elements[2] that must be proven beyond a reasonable doubt to a judge or jury, and investigatory procedures can differ (e.g., leniency is a tool that applies only to antitrust offenses). The Division can then decide whether it should take the lead or allow other components of the Department of Justice to oversee the prosecution (e.g., Criminal Division or the U.S. Attorneys located throughout the U.S.).

3. In cases where corruption is combined with criminal antitrust violations, the Division will cooperate closely with other law enforcement entities. As noted in the U.S. Attorneys' Manual, 7-1.100,[3]

> *it may be more advantageous for the United States Attorney's office to investigate and prosecute a matter, particularly where localized price-fixing or bid-rigging conspiracies are involved, or where the antitrust violations are part of an overall course of criminal conduct being investigated by the United States Attorney's office. There may also be important mutual benefits to be derived in situations where a United States Attorney's office and the Antitrust Division can coordinate the prosecution and disposition of criminal matters that involve both antitrust offenses and other offenses.*

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[1] See Antitrust Division Manual, Fifth Edition, Chapter III.F.13, available at http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf: "The Division typically investigates other substantive offenses when they occur in connection with an anticompetitive scheme or impact the competitive process. The Division exercises its prosecutorial discretion when determining whether the prosecution of crimes in addition to a Sherman Act violation is warranted. The Division also charges other crimes independently when appropriate."

[2] For example, the critical element of a bid-rigging charge (15 U.S.C. § 1) is the *agreement* between conspirators to restrain competition; bribery (18 U.S.C. § 201(b)) involves the giving or accepting of anything of value to or by a public official, if the thing is given "with intent to influence" an official act, or it if is received by the official "in return for being influenced."

[3] Available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title7/1mant.htm.

4. Evidence of corruption and of bid-rigging can be very similar. For example, records of communications between conspirators and a paper trail of unlawful payments to a procurement official may surface in the same document or file. The same investigators are therefore well-placed to examine both offenses. As the Assistant Director of the FBI's Criminal Investigative Division noted recently in testimony before Congress,[4]

> *The FBI assists the Antitrust Division through its International Corruption Unit (ICU), which, in addition to antitrust offenses, investigates allegations of corruption of U.S. public officials and fraud against the U.S. Government (among others). The FBI found conceptual and analytical synergy in grouping these activities since investigations in any one of these areas has the potential to lead to operational intelligence in another, and its robust liaison relationships with foreign law enforcement and regulatory officials often aid the investigations.*

1. Outreach and Training Programs for Procurement Officials

5. As described in previous Global Forum submissions,[5] Division attorneys have for many years conducted outreach and training programs for public procurement officials and investigators who work for agencies that solicit bids for various projects. These outreach programs help develop an effective working relationship between Division officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials, and government investigators who are best placed to detect and prevent bid rigging on public procurement contracts. Division officials advise procurement officials on how their procedures might be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behavior they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide key evidence leading to successful bid-rigging prosecution.

6. Our experience has been that this team effort among public procurement officials, government investigators, and Division attorneys has contributed to a significant decrease in bid rigging on public procurement in the U.S. over the last twenty to thirty years. Outreach and training programs are particularly useful when governments are engaged in large procurement programs, such as economic stimulus packages or major infrastructure projects (e.g., subway or stadium construction). In 2009, for example, the Division began a Recovery Initiative to prepare government officials and contractors to recognize and report efforts by parties to unlawfully profit from stimulus projects awarded as part of The American Recovery and Reinvestment Act of 2009 ("ARRA"). The ARRA, a multi-billion dollar economic stimulus program, was an effort to jumpstart the economy and create or save jobs. As part of the Recovery Initiative, the Antitrust Division conducted training on antitrust awareness and collusion detection for more than 25,000 individuals in 20 federal agencies, 36 states, and two U.S. territories receiving ARRA funds.

7. Similarly, the National Procurement Fraud Task Force (NPFTF) was created in 2006 to promote the prevention, early detection, and prosecution of procurement fraud. The NPFTF includes 58 prosecutorial and investigative agencies, including 35 Offices of Inspectors General, and is chaired by the Department of Justice's Criminal Division; one of its objectives is to "increase coordination and strengthen

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[4] Statement of William J. Baer, Ass't Att'y Gen'l, Antitrust Division, and Ronald T. Hosko, Ass't Dir., Criminal Investigative Div., FBI, before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, United States Senate (Nov. 14, 2013), available at http://www.justice.gov/atr/public/testimony/301680.pdf.

[5] See, e.g., Collusion and Corruption in Public Procurement: Outreach and Training Programs, US Submission to the Global Forum on Competition, February 2010.

partnerships among Inspectors General, law enforcement agencies, and DOJ to more effectively address procurement fraud."[6]

8. Much of the Division's effort in outreach and training programs is focused on the *Red Flags of Collusion* and helping procurement officials to identify signs of bid rigging. At the same time, however, the training will sensitize procurement officials to the seriousness and risks of corruption, and to the need to report signs of corruption as well as of bid rigging to authorities.

2. Examples of Division Enforcement Actions Involving Corruption

9. After Typhoon Paka hit Guam in 1997, leaving thousands of people homeless, the U.S. Federal Emergency Management Agency (FEMA) made more than $70 million in federal funds available for disaster relief. The Division conducted a bid-rigging and public corruption investigation jointly with the U.S. Attorney's Office in Guam and agents from the FEMA Office of Inspector General, the FBI, the Internal Revenue Service, and the Department of Interior. The investigation resulted in numerous convictions, including that of Austin J. "Sonny" Shelton, who was the Director of Guam's Department of Parks and Recreation and was responsible for awarding contracts to repair typhoon damage. Shelton was convicted after trial of organizing three separate bid-rigging conspiracies, soliciting and receiving bribes in return for the award of contracts, committing wire fraud, and conspiring to launder money. Shelton violated competitive bidding regulations and conspired with contractors to award Paka clean-up related projects through rigged bids. He allocated these projects in return for substantial bribes out of the contract proceeds and as a favor to a close friend. Shelton was sentenced to serve 100 months in prison, the longest sentence ever imposed for an individual convicted on at least one Sherman Act count.[7] Following that successful partnership, the Division also worked with FEMA to provide proactive assistance to the State of New Mexico following the Los Alamos fires in 2000.

10. *U.S. v. McNair* involved a Division prosecution of county officials and government contractors who were convicted after trial of conspiracy to commit bribery, bribery, and public corruption relating to a $3 billion repair and rehabilitation project for a sewer and wastewater treatment system in the Birmingham, Alabama area.[8] The defendant sewer rehabilitation contractors and engineering firms sought to subvert the competitive bid process by making more than $1 million in bribes to corrupt officials responsible for oversight of the project in the form of cash, gifts, or services to obtain contracts. Twenty-one defendants -- seven county officials, nine individual contractors, and five firms -- were convicted, and the Division obtained over $45 million in criminal fines, 16,000 jail days, and $2 million in restitution to the county. The bribery scheme cost county taxpayers tens of millions of dollars in losses due to fraud, overcharges, and misappropriated resources. The indictment in this case did not charge a Sherman Act violation, but due to the anticompetitive nature of the underlying conduct, Division attorneys investigated and prosecuted the case.

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6 A Guide to Grant Oversight and Best Practices for Combating Grant Fraud, National Procurement Fraud Task Force (February 2009), available at http://www.nsf.gov/oig/grant_fraud.pdf.

7 *U.S. v. Shelton*, 193 Fed.Appx. 711 (9th Cir. (Guam) 2006).

8 *U.S. v. McNair*, 605 F.3d 1152 (11th Cir. 2010).