

THINK ANTITRUST:

THE ROLE OF ANTITRUST ENFORCEMENT IN FEDERAL PROCUREMENT

I. PREFACE

Price fixing, bid rigging and other typical antitrust violations have a more devastating effect on the American public than any other type of economic crime. Such illegal activity contributes to inflation, destroys public confidence in the country's economy, and undermines our system of free enterprise. In the case of federal procurement, such crimes increase the costs of government, increase taxes and undermine the public's confidence in its government.

Because government procurement officials receive bids and award government purchasing orders, they are in a good position to observe and identify violations of the antitrust laws. Other important players in the fight to maintain the free flow of competition include agency auditors-investigators, and local state administrators of federally funded projects, and federal supervisors of such state activities. If all those involved in procurement have a working knowledge of the antitrust laws and understand how to identify violations, they can make a significant contribution to law enforcement¹.

This paper, prepared by the Justice Department's Antitrust Division, is designed primarily for procurement and contract specialists, and for investigative and audit personnel². The text outlines the purposes of the antitrust laws, briefly describes what conduct violates the laws and what penalties may be imposed, and then focuses on how to detect price fixing and bid rigging. Steps that individual agency employees can take to seek out actual evidence of collusion are suggested, along with ways that agency procurement can be administered to stimulate competition and inhibit anticompetitive behavior. Finally, methods that can be implemented on an agency-wide basis to sensitize procurement and auditing employees to antitrust violations and encourage them to THINK ANTITRUST are suggested.

II. ANTITRUST VIOLATIONS AND PUBLIC AGENCIES

The Federal antitrust laws were enacted to preserve our system of free competition. They serve as our primary defense against unlawful attempts to limit competition and increase the purchase price of products and services.

As a major purchaser of goods and services, public agencies can be both prime targets for, and sensitive detectors of, antitrust violations. If you detect an antitrust violation, you can perform a triple public service: (1) you can end a practice that is costing your agency money and is costing consumers and taxpayers millions of dollars; (2) you can also bring monies to the treasury, since criminal penalties collected in antitrust enforcement go into the general treasury fund; and (3) you can help recoup the additional prices paid since the government may bring antitrust damage actions and actions under the False Claims Act.

III. FEDERAL ANTITRUST ENFORCEMENT

The Sherman Act (15 U.S.C. §1) prohibits any agreement among competitors to fix prices³. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the United States Department of Justice. Violation of the act is a felony punishable by a fine of up to \$10 million for corporations, or twice the loss caused to the victims or twice the gain derived from the conspiracy, whichever is greater, and three years imprisonment and up to \$350,000 or twice the loss or gain from the conspiracy, whichever is greater, for individuals. In addition to a criminal violation of the antitrust laws, collusion among competitors may also form the basis for violation of other Federal criminal statutes, including the frauds and swindles statute (18 U.S.C. §1341) (formerly the mail fraud statute) and making a false statement to a government agency (18 U.S.C. §1001). Both of these felony violations are punishable by a fine and imprisonment of up to 5 years.

Civil action for injunctive relief, for actual damages under 15 U.S.C. §15a and for double damages under the False Claims Act (31 U.S.C. §231 et seq.), are also effective enforcement tools.

IV. BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

Commencement of criminal prosecution under Section 1 of the Sherman Act, requires that the unlawful “contract, combination or conspiracy” have existed within the previous five years. The offense most likely to arise in a procurement context is commonly known as “price fixing” or “bid rigging”, and also referred to as “collusion.” An express agreement is not always necessary, and the offense can be established either by direct evidence (such as the testimony of a participant) or by circumstantial evidence (such as bid awards that establish a pattern of business being rotated among competitors). Any agreement or informal arrangement among independent competitors by which prices or bids are fixed is *per se* unlawful. Where a *per se* violation is shown, defendants cannot offer any evidence to demonstrate the reasonableness or the necessity of the challenged conduct. Thus, competitors may not justify their conduct by arguing that price fixing was necessary to avoid cut-throat competition, or that price fixing actually stimulated competition, or that it resulted in more reasonable prices.

Price fixing among competitors can take many forms. For example, competitors may take turns being the low bidder on a series of contracts, or they may agree among themselves to adhere to published list prices. It is not necessary that all competitors charge exactly the same price for a given item; an agreement to raise present prices by a certain increment is enough to violate the law. Other examples of price fixing include: (1) agreements to establish or adhere to uniform price discounts; (2) agreements to eliminate discounts; (3) agreements to adopt a standard formula for the computation of selling prices; (4) agreements not to reduce prices without prior notification to others; (5) agreements to maintain specified discounts; (6) agreements to maintain predetermined price differentials between different quantities, types or sizes of products; and (7) agreements not to advertise prices. Usually, but not always, price-fixing conspiracies include mechanisms for policing or enforcing adherence to the prices fixed.

V. TYPICAL ANTITRUST VIOLATIONS

The following section describes common bid-rigging patterns that agency personnel may be able to recognize.

A. BID SUPPRESSION

In “bid suppression” or “bid limiting” schemes, one or several competitors (who would otherwise be expected to bid or who have previously bid) refrain from bidding or withdraw a previously submitted bid, so that a competitor’s bid will be accepted. In addition, fabricated bid protests may be filed to deny an award to a non-conspirator.

B. COMPLEMENTARY BIDDING

“Complementary bidding” (also known as “protective” or “shadow” bidding) occurs when competitors submit tokens bids that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such bids are not intended to secure the buyer’s acceptance, but are merely designed to give the appearance of genuine bidding. This enables another competitor’s bid to be accepted when the agency requires a minimum number of bidders.

C. BID ROTATION

In “Bid rotation,” all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation defies the law of change and suggests collusion.

Competitors may also take turns on contracts according to the size of the contract. Many cases of bid rigging have been exposed in which certain vendors or contractors get contracts valued above a certain figure, while others get contracts worth less than that figure.

Subcontracting is another area for attention. If losing bidders or non-bidders frequently receive subcontracts from the successful low bidder, the subcontracts (or supply contracts) may be a reward for submitting a non-competitive bid or for not bidding at all.

D. MARKET DIVISION

Market division schemes are agreements to refrain from competing in a designated portion of the market. Competing firms may, for example, allocate specific customers or types of customers, so that one competitor will not bid (or will submit only a complementary bid) on contracts let by a certain class of potential customers. In return, his competitors will not bid on a class of customers allocated to him. For example, a vendor of office supplies may agree to bid only on contracts let by certain Federal agencies, and refuse to bid on contracts for military bases.

Allocating territories among competitors is also illegal. This is similar to the allocation-of-customers scheme, except that geographic areas are divided instead of customers.

VI. DETECTING BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

Certain patterns of conduct suggest that illegal restraints on trade have been established. The following is a checklist of some factors, any one of which may indicate collusion. Agency personnel should, therefore, be sensitive to their occurrence.

A. CHECKLIST FOR POSSIBLE COLLUSION

1. Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates. (This could indicate complementary bids.)
2. Fewer competitors than normal submit bids. (This could indicate a deliberate plan to withhold bids.)
3. The same contractor has been the low bidder and has been awarded the contract on successive occasions over a period of time.
4. There is an inexplicably large dollar margin between the winning bid and all other bids.
5. There is an apparent pattern of low bids regularly recurring, such as corporation "X" always winning a bid in a certain geographical area for a particular service, or in a fixed rotation with other bidders.
6. A certain company appears to be bidding substantially higher on some bids than on other bids, with no logical cost difference to account for the difference.
7. A successful bidder repeatedly subcontracts work to companies that submitted higher bids on the same projects.
8. There are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals, or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors had copies, discussed, or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or post metering machine marks.
9. Two or more competitors file a "joint bid", even though at least one of the competitors could have bid on its own.
10. A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor.
11. Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.
12. Competitors meet as a group with procurement personnel to discuss or review terms of bid proposals. (This may facilitate subtle exchange of pricing information.)
13. Competitors exchange any form of price information among themselves. (When this occurs among sellers in concentrated markets [markets with few sellers], it is suspicious. Note that such exchanges may take quite subtle forms, such as public discussions of the "right" price.)
14. There is industry-wide resale price maintenance⁴. (This could help manufacturers police collusion at the manufacturing level, since any reduction in the resale price, which is both easily observable and known to be controlled by the manufacturer, is readily detected by other manufacturers to account for the extra cost of the transportation expense.)
15. Competitors submit identical bids or frequently change prices at about the same time and to the same extent. (Regulations currently permit submission of identical bid data to the Antitrust Division.)
16. Bidders that ship their product short distances to the buyer charge the same price as those that ship long distances. (This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of the transportation expense.)
17. Local competitors are bidding higher prices for local delivery than for delivery to points farther away. (This may indicate rigged prices in the local market.)
18. Bid prices appear to drop whenever a new or infrequent bidder submits a bid.

B. SUSPICIOUS STATEMENTS

Sometimes, statements made by marketing representatives of suppliers suggest that price fixing is afoot. Example of such statement

1. Any reference to “Association price schedules,” “industry price schedules,” “industry suggested prices,” “industry-wide” or “market-wide” pricing.
2. Justification for the price or terms offered “because they follow industry (or industry leaders) pricing or terms,” or “follow (a named competitor’s) pricing or terms.”
3. Any reference to “industry self-regulation,” etc., such as justification for price or terms “because they conform to (or further) the industry’s guidelines” or “standards.”
4. Any references that the representative’s company has been meeting with its competitors for whatever reason.
5. Justification for price or terms “because our suppliers, etc., require it” or “because our competitors, etc., charge about the same,” or “we all do it.”

Statements by marketing representatives or in company promotional materials may also suggest the existence of agreements among competitors to divide territories or customers. (This is also known as market allocation.) Highly suspicious examples are:

1. Any references that the representative’s company “does not sell in that area,” or that “only a particular firm sells in that area,” or deals with that business.”
2. Statements to the effect that such and such salesman (of a competitor) should not be making particular proposals to you, or should not be calling on you.
3. Statements to the effect that it is a particular vendor’s “turn” to receive a particular job or contract.

Consultations among purchasing agencies that procure the same services or commodities can reveal whether vendors are selling to some agencies but not to others, or if vendors appear to be limiting their selling to particular or selective units within a given agency. Such behavior suggests customer allocation.

C. CONDITIONS FAVORABLE TO COLLUSION

While price fixing can occur in almost any industry, it is most likely to occur in industries where only a few firms compete, and where the products of those firms are similar.

The bread, milk, and steel industries are examples. Procurement officials should be sensitive to industry conditions that increase the probability of collusion. Thus:

1. Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices. Collusion may also occur when the number of firms is fairly large, but there are a small group of major sellers and the rest are “fringe” sellers who control only a small fraction of the market.
2. The probability of collusion increases if the product cannot easily be substituted for another product. The gains from colluding will be high if the product has few, if any good substitutes.
3. 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 such forms of competition such as quality or service.

D. COLLECTING RELEVANT INFORMATION

Certain information and types of documents are especially useful to agency investigators pursuing antitrust violations and to prosecutors at the Department of Justice. This list includes the documents and information that will be useful if a Justice Department investigation begins.

1. Information

- (a) Indicate the agency's annual dollar value of purchases of the item in each of the three calendar or fiscal years (depending on how you keep the data) preceding the year in which you received the suspect bids.
- (b) State whether the pattern of bidding in the three year period preceding the receipt of the suspect bids appears to indicate bid rigging, bid rotation, sharing of the business, collusive bidding, or any other form of joint action. Explain⁵.

As this information is collected, "suspect projects" can be identified. You will be able to focus on the most promising projects, i.e., those where there are few bidders and the bids seem suspiciously high in relation to the estimate or prior bids. You will also be able to identify the companies that consistently bid on particular contracts and determine whether they are taking turns being the low bidder.

- (c) If there are any known financial, personal, or other relationships among any of the suspect bidders, describe them.
- (d) Indicate whether the Government's specifications are such that only one or a limited number of potential bidders are capable of meeting them.
- (e) If there are any known manufacturers or suppliers of the item who consistently avoid bidding on Government contracts, identify them and indicate whether the procurement agency knows why these firms do not seek Government business.
- (f) Determine whether one bidder is uniformly low on bids to a particular awarding authority, on particular items, or in particular geographic areas. (If the pattern cannot be explained in economic terms, there may be unlawful allocation of customers or territories.)
- (g) Determine whether each bidder enjoyed a constant percentage of the total business over a period of years. (If so, there may be an unlawful division of total business.)
- (h) Indicate whether or not the prices bid by the suspect bidders are identical to their published list prices. If the prices quoted by the suspect bidders are not their published list prices, state whether the bids appears to have been derived by the application of a uniform "Government discount" from list prices, or by some other method of computation. If available, furnish photostatic copies of suspect bidders' and other bidders' standard price lists.
- (I) Indicate whether there appears to be a territorial division by competitors. One way to do this is to assign each competitor a different color. Then, using a map of the purchasing area, appropriately colored pins (or tabs) can be inserted for each location where a contract is awarded. If clusters of the same color are found throughout the area, there may be an illegal allocation of territories.

2. Documents

- (a) A copy of the invitation for bids, and any amendments thereto, and a list of all parties invited to bid.

- (b) An abstract of all bids received for each item covered by the bid invitation, showing for each such bid:
 - (I) The unit and total price bid
 - (ii) The net price to the Government after discounts and allowances for transportation, or other costs.
 - (iii) The destination of shipments, and whether the price quoted includes or excludes the cost of transportation to destination.
 - (iv) The identity of the successful bidder; where identical low bids were submitted by several bidders, indicate how the award was made.

- (c) Copies of documents filed by suspect bidders as part of the bid submission or obtained by the procuring agency, such as the following:
 - (I) Evidence of financial or other ties between suspect bidders (as revealed by Dun and Bradstreet or other reliable financial reports).
 - (ii) Copies of reports containing the findings of any special investigations conducted by the procurement agency concerning the bids at issue including inquiries related to any bid protests.
 - (iii) Copies of all correspondence between the procurement agency and the suspect bidders.
 - (iv) Copies of any certificates of independent price determination or non-collusion submitted by the bidders⁶.
 - (v) You should save the original bids, envelopes, and affidavits of non-collusion for all bidders. In addition, you should save the log recording government mailings to the bidders, including notice of awards, checks and notices to proceed⁷. These will be important as evidence in the event any action is taken.

VII. ENCOURAGING COMPETITION

Procurement officers can assist in the enforcement of the antitrust laws not only by playing an active role in the detection of collusive bidding, but also by taking positive steps to stimulate competition and prevent collusive behavior. This section discusses some of the procedures that can be established to discourage anticompetitive activity.

A. EXPAND LIST OF BIDDERS

It is much more difficult for a large group of competitors to collude than for a small group. To reduce the ability of conspirators to coordinate illegal activities, buyers should solicit as many reliable sources as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. Soliciting numerous suppliers will not necessarily prevent a conspiracy, but it can reduce the effectiveness of a conspiracy by providing a larger competitive base. While there is no magic number of bidders above which collusion does not occur, past experience suggests that collusion is more likely to arise where there are ten or fewer competitors.

B. CONSOLIDATE PURCHASES

Another defensive tactic available to agencies is to combine orders. The existence of a large number

of contract opportunities facilitates collusion among sellers. When buyers are numerous, and each purchases only a small amount, sellers have less incentive to grant price cuts. Consolidation of purchases tends to increase the value of winning the bid. A firm, even if part of a conspiracy, may be tempted to cheat and take the prize.

C. AWARDING THE BIDS

Not all identical bids are the result of a price fixing conspiracy. However, procurement officers should not inadvertently encourage tie bids by assuring identical bidders an equal or reasonable share of the buyers's business. From a seller's standpoint it may be better to share business equally with other suppliers at a significantly higher price than to have an uncertain share of the business at lower competitive prices. Thus, in a tie bid situation, agencies should consider reletting the contract, or some way to award the bid to one of the tied bidders. A lottery system of awarding contracts should not be used.

D. KEEP THE PROCESS SECRET

You should consider not publicly disclosing the identity of proposal holders or bidders. This will help prevent competitors from knowing who to contact. You should also consider not publicly disclosing the government's estimate so that bidders do not have an incentive to use that estimate as the floor for their bids.

VIII. SOME OVERALL STEPS TO TAKE TO DETECT AND DETER COLLUSION

All buyers and in particular federal agencies, have a tremendous stake in detecting and deterring price fixing. In fiscal 1999 federal procurement alone amounted to over \$198 billion of which about \$125 billion was competitively let or a follow-up to competed action. Without doubt, some contracts are the subjects of collusion like bid rigging. It is up to procurement personnel to understand the applicable law, to limit opportunities for collusion and to seek out evidence of violations for prosecution. If the vendor community realizes that you mean business in antitrust enforcement, the dollars saved can be spent on more worthwhile projects. This section summarizes programs that a buying authority should consider adopting as a matter of policy:

1. Assure that procurement and contract personnel, auditors and investigators understand the elements of collusion, such as bid rigging and market allocation. Provide instruction on how to detect collusion, etc. (The Antitrust Division can assist you.) Stress the importance (to the agency and to the taxpayer) of preventing and detecting collusion. In short, THINK ANTITRUST.
2. Have procurement records, e.g., bid lists, abstracts, awards, readily available. Looking at a single contract is not enough because records of past bids are needed to determine if a pattern of allocation or rotation is present. Data collection forms should be employed, with the raw information subsequently compiled and, where feasible, programmed for storage in a computer. This makes routine analysis simple and keeps you aware of patterns. It may also be prudent to advise the bidders that you conduct this type of analysis periodically.
3. Reports of suspected collusion (based upon a bid analysis, an audit, a complaint from other competitors, or statements by persons who appear knowledgeable, e.g., former employees) should be communicated within the agency and to the Antitrust Division along established,

readily available channels. If other federal violations also appear to be present, e.g., false statement (18 U.S.C. §1001); frauds and swindles (18 U.S.C. §1341) or conspiracy to defraud (18 U.S.C. §371), these offenses can also be prosecuted by the Antitrust Division if they are related to the types of collusion described here. If it does not, the Antitrust Division will refer it to an appropriate U.S. Attorney. If the Antitrust Division is contacted promptly, a determination can be made whether:

- (a) additional facts are needed;
 - (b) a formal Antitrust Division investigation should be commenced. If so, an appropriate Antitrust Division section or field office will be assigned to work with the agency and its investigators to develop the case; or
 - (c) the allegations do not suggest an antitrust violation. If other federal violations appear to be present, the agency will be advised to contact an appropriate U.S. Attorney or the Criminal Division within the Department of Justice.
4. Encourage informal communications between agency personnel (e.g., procurement, audit, investigative and legal staff) and Antitrust Division personnel whenever a potential bid rigging situation is encountered.
 5. The agency should consider rewarding agency employees responsible for detecting and developing information that may result in antitrust or fraud prosecutions.

IX. CONCLUSION

This paper is meant only as a beginning point. The Antitrust Division looks forward to working together with you to make antitrust enforcement a fundamental feature of your procurement activities. We warmly welcome your support. We solicit readers' views on this paper, and hope to incorporate suggestions in future revisions. Please contact Scott D. Hammond, the Director of Criminal Enforcement, with your comments and inquiries. He can be reached at (202) 514-3543. His address is Department of Justice, Antitrust Division, 950 Pennsylvania Ave., N.W., Washington, DC 20530.

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NOTES

1. Although these comments will be directed toward the purchasing process, they also apply to sales by the government of surplus items and other commodities on a competitive basis.
2. This paper draws extensively from: “Government Purchasing and the Antitrust Laws”, a joint publication of the National Association of Attorneys General and the National Association of State Purchasing Officials, May 1972; “A Treatise on State Antitrust Law and Enforcement: With Models and Forms”, Robert R. Fellmeth and Thomas A. Papagorge, Antitrust & Trade Regulations Report Supplement 1 Issue No. 892, December 7, 1978; and chapter 13 of the Department of Transportation’s Operating Procedures Manual, “Antitrust Investigations,” prepared by DOT’s Office of Inspector General in consultation with the Justice Department’s Antitrust Division, May, 1981.
3. The operative language of the act reads as follows:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation or if any other person, three hundred and fifty thousand dollars or by imprisonment not exceeding three years, or by both . . . [2 July 1890, Chap. 647, sec. 1, 2b State. 209, as amended, 15 U.S.C.A. sec. 1.

4. I.e., each manufacturer sets the price at which all of his distributors, resellers, etc. must sell the product to their customers.
5. In order to detect bid rotations, accurate records of bid tabulations over a period of time are essential. It is most helpful if you computerize the following data for each contract let: (1) the identity of each firm that received an invitation to bid, (2) the identity of a firm that submitted a bid, along with the amount of the bid and the variance between the bid and the agency’s estimate, if there is one, and (3) the identity of the winning bidder. A typical procurement action could appear on a computer printout as follows:

Project:_____ Date:_____ Estimate: \$100,000

	Co. Winner	Bid	Variance From Estimate
1.	Co.	\$110,000	+10%
2.	Co.	\$120,000	+20%
3.	Co.	\$130,000	+30%

6. Such documents are needed to determine if any additional federal crime of making false statements to the government under 18 U.S.C. § 1001 has been committed.
7. This documentation will determine whether the federal crime of frauds and swindles (18 U.S. C. §1341) was committed.