

BID RIGGING DETECTION IN GOVERNMENT CONSTRUCTION CONTRACTS¹

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¹ The views and opinions in these written materials are not necessarily the positions of the United States Department of Justice Antitrust Division or the Oregon Attorney General

THINK ANTITRUST:

THE ROLE OF CRIMINAL 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 or 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 enforcement.¹

This paper, prepared by the Justice Department's Antitrust Division, is designed primarily for procurement and contract specialists, and for investigative and audit personnel. 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

¹Although 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.

competition and inhibit anticompetitive behavior. Finally, we suggest 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**.

II. ANTITRUST VIOLATIONS AND PUBLIC AGENCIES

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 prices.² 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

²The 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 both . . . [2 July 1890, Chap. 647, sec. 1, 2b Stat. 209, as amended, 15 U.S.C.A. sec. 1.

\$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 mail fraud statute (18 U.S.C. § 1341) 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.

The Antitrust Division offers certain incentives to the business and legal communities to encourage prompt self-reporting of suspected violations. One important incentive that has been used with increasing frequency is the Division's Revised Amnesty Program.

In August 1993, The Antitrust Division expanded its Amnesty Program to increase the opportunities and raise the incentives for companies to self-report and cooperate with the Division. Under the old policy that was put into place in 1978, the grant of amnesty was not automatic, but rather an exercise of prosecutorial discretion, and was not available to any company once an investigation had begun. In 1993, The Amnesty Program was revised in three major respects: (1) Amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. The Division's revised Amnesty Program was, and is, unique. No other U.S. government voluntary disclosure program offers as great an opportunity or incentive for companies to self-report and cooperate.

Today, the Amnesty Program is one of the Division's most effective and important generators of large cases, and it is the Department's most successful leniency program. Prior to 1993, the Division received amnesty applications at the rate of approximately one per year. Over the past several years, we have received, on average, more than one per month. Moreover, in the last two years, cooperation from amnesty applications has resulted in dozens of convictions and over one billion dollars in fines.

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. Bid rigging occurs when competitors reach any understanding not to compete. The understanding or agreement may involve a single contract or a series of contracts. The agreement or conspiracy may involve a single customer in the geographic area or multiple customers in a number of geographic areas. Competitors may agree not to bid or to limit their bidding to favor a firm they have selected to win the award.

Complimentary bids are frequently used to give the appearance of competition. Winning bids often are rotated among firms.

Collusion 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) Agreement 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 chance 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 got contracts valued above a certain figure, while others got 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

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. Competitors meet as a group to 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 exchange may take quite subtle forms, such as public discussion of the "right" price.)
11. A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor.
12. Competitors submit identical bids or frequently change prices at about the same time and to the same extent.
13. Bid prices appear to drop whenever a new or infrequent bidder submits a bid.
14. Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.
15. 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.)

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.

B. SUSPICIOUS STATEMENTS

Sometimes, statements made by marketing representatives of suppliers suggest that price fixing is afoot. Example of such statements, and other representations that are suspicious and may be indicative of price fixing, include:

- a. Any reference to “Association price schedules,” “industry price schedules,” “industry suggested prices,” “industry-wide” or “market-wide” pricing.
- b. 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.”
- c. 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.”
- d. Any references that the representative’s company has been meeting with its competitors for whatever reason.
- e. 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:

- a. 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."
- b. 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.
- c. 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 may suggest a customer allocation scheme.

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 fewer 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 a 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) proceeding 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. Explain.³ As this

³ 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 should appear on a computer printout as follows:

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 items 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.

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

	Co. Winner From Estimate	Bid
A.	Co. \$110,000	+10%
B.	Co. \$120,000	+20%
C.	Co. \$130,000	+30%

(If the pattern cannot be explained in economic terms, there may be an 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 price 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 finding of any special investigation 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 not-collusion submitted by the bidders.⁴
 - (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

⁴Such documents are need to determine if an additional federal crime of making false statements to the government under 18 U.S.C. § 1001 has been committed.

and notices to proceed.⁵ 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.

⁵This documentation will determine whether the federal crime of mail fraud (18 U.S.C. § 1341) was committed.

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 buyer'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 (base 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); mail fraud (18 U.S.C. § 1341) or conspiracy to fraud (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.

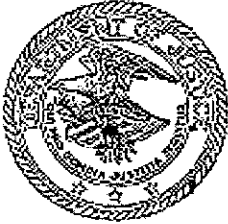
5. The agency should consider rewarding agency employees responsible for detecting and developing information that may result in antitrust or fraud prosecutions.

IX. CONCLUSION

The Antitrust Division of the Department of Justice is interested to hear from you with your comments and suggestions on how to detect and prevent collusive and fraudulent conduct and help to maintain a vital and competitive marketplace in all areas of commerce. In the event you would like to discuss matters raised in this paper, please contact our Washington headquarters or one of our conveniently located field offices. The names, addresses, and telephone numbers are listed on the next page. If you have comments on this paper, please contact Peter H. Goldberg at the Department of Justice, Antitrust Division, National Criminal Enforcement Section, 1401 H Street, NW, Suite 3700, Washington, D.C. 20530; or Peter.Goldberg@usdoj.gov; or by telephone at (202) 307-5784.

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FORMER NEW YORK HBO EXECUTIVE PLEADS GUILTY TO BID-RIGGING, CONSPIRACY, AND TAX CHARGES

New Jersey Printing Company and Owner Also Plead Guilty to Related Conspiracy Charges

WASHINGTON, D.C. — A former Home Box Office Inc. (HBO) executive today pleaded guilty to charges relating to her receipt of approximately \$439,000 in kickbacks from printing vendors, and her role in orchestrating a bid-rigging scheme involving those vendors, the Department of Justice announced. A New Jersey printing company and its owner also pleaded guilty today to related conspiracy charges.

Michele Komack of Scarsdale, New York, the former Director of Print Services at HBO, pleaded guilty today in U.S. District Court in Manhattan to bid-rigging, conspiracy, and tax charges.

Westbury Press Inc. (Westbury), an Englewood, New Jersey printing company and its owner and president, Sanford Zenker of Manhattan, also pleaded guilty today to separate conspiracy charges involving their payment of kickbacks to Michele Komack in exchange for HBO printing contracts. Both Zenker and Westbury are cooperating with the government's ongoing investigation.

HBO is a pay television service company, headquartered in Manhattan, providing two 24-hour premium television services, HBO and Cinemax, to subscribers principally in the United States by way of cable, direct broadcast satellite, and microwave technologies.

Komack had primary responsibility for purchasing printing at HBO. The Department said that she received kickbacks from individuals associated with four printing vendors in exchange for steering printing contracts to those companies. Court papers also state that Komack did not report her receipt of the kickbacks on her income tax returns.

"This type of scheme demonstrates the harm to American businesses when companies are deprived of the honest services of their employees and of the fair and competitive pricing afforded by a truly competitive bidding process," said R. Hewitt Pate, Assistant Attorney General in charge of the Department's Antitrust Division.

According to the court papers, Komack was charged with one count of conspiracy to rig bids and allocate contracts for the sale of commercial printing to HBO from approximately September 1997 until approximately February 1999. She was also charged with one count of conspiracy to commit commercial bribery, mail fraud, and to make false and fraudulent statements on her U.S. Income Tax Returns, from approximately 1993 until approximately March 2000. Additionally, she was charged with one count of subscribing to false and fraudulent U.S. Income Tax Returns for the years 1997 through 1999 that failed to report as income kickbacks that she received from those vendors in those years.

In separate court papers, Zenker was charged with one count of conspiracy to commit commercial bribery, mail fraud, and to make false and fraudulent statements on U.S. Income Tax Returns from approximately September 1997 until approximately March 2000.

In additional court papers, Westbury was charged with one count of conspiracy to commit commercial bribery, mail fraud, and to make false and fraudulent statements on U.S. Income Tax Returns from approximately 1993 until approximately March 2000.

The bid-rigging charge, a violation of the Sherman Act, 15 U.S.C. § 1, carries a maximum penalty of three years' imprisonment, one year of supervised release, and a \$350,000 fine for an individual. The conspiracy charge, a violation of 18 U.S.C. § 371, carries a maximum penalty of five years' imprisonment, three years' supervised release, and a \$250,000 fine for an individual and a \$500,000 fine for a corporation. The count of subscribing to false and fraudulent tax returns, in violation of 26 U.S.C. § 7206(1), carries a maximum penalty of three years' imprisonment, one year of supervised release, and a \$100,000 fine, together with the costs of prosecution. The maximum fine on each count may be increased to twice the gain derived from the crime or twice the loss suffered by the victim of the crime, if either of those amounts is greater than the statutory maximum fine. In addition, the defendants could be ordered to pay restitution to the victim for the full amount of that victim's loss.

These charges arose from an ongoing federal antitrust investigation of bid-rigging, bribery, fraud, and tax-related offenses in the advertising and printing and graphics industries. The investigation is being conducted by the Antitrust Division's New York Field Office, with the assistance of the Federal Bureau of Investigation and the Internal Revenue Service Criminal Investigation.

Anyone with information concerning bid rigging, bribery, tax offenses, or fraud in the advertising and printing and graphics industries should contact the New York Field Office of the Antitrust Division at (212) 264-9308 or the New York Division of the FBI at (212) 384-3252.

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04-065

Bid Rigging Detection in Government Construction Contracts

I. Bid Rigging is a Form of Price Fixing in Violation of Federal and State Antitrust Laws

- A. Agreement (explicit or implicit) between two or more competitors to not compete for a bid on a contract or to limit competition when bidding on a contract.
- B. Price fixing between competitors is a per se violation under the law. Defendants are not entitled to offer justifications for their conduct once the agreement has been established. In a criminal prosecution, the government need not prove specific intent to produce anticompetitive effects. *United States v. Alston*, 974 F 2d 1206 (9th Cir. 1992); *United States v. Brown*, 936 F 2d 1042 (9th Cir. 1991).
- C. An unlawful agreement can be proven by direct evidence of a conspiracy (*i.e.*, testimony or documentation that points directly to an agreement to rig bids) or circumstantial evidence.
- D. More often than not, the existence of an unlawful agreement is inferred from circumstantial evidence. Merely coincidental behavior that can be explained on legitimate business grounds does not establish a conspiracy if it is equally indicative of a series of unilateral actions. *City of Long Beach v. Standard Oil Co.*, 872 F 2d 1401 (9th Cir. 1989). Therefore, when relying on circumstantial evidence to make the case, the plaintiff must come forward with sufficiently unambiguous evidence that tends to exclude the possibility that defendants were acting lawfully. *Monsanto Co. v. Spray-Rite Serv. Corp.* 465 U.S. 752 (1984).
- E. See, *Pacific Gas and Electric Company v. Howard P. Foley Company, Inc.*, 79 F.3d 1154 (9th Cir. 1996). Note that this is in unpublished decision. However, the case provides a good discussion about the type of circumstantial evidence that present a question of fact for the jury on the issue of

agreement, and how damages suffered from artificial overcharge in initial bid rigging conspiracy can be passed through in subsequent negotiations and agreements between plaintiff Pacific Gas and Electric and defendant Howard Foley Company. The opinion also discusses the elements of a federal RICO claim and RICO conspiracy claim, 18 U.S.C. §§ 1961 and 1962.

II. Who Can Bring An Antitrust Action?

- A. United States Department of Justice Antitrust Division has authority to bring civil and criminal actions under federal law. The Oregon Department of Justice (Oregon DOJ) and local government agencies also may bring civil actions for treble damages and injunctive relief under federal antitrust law.
- B. Under the Oregon Antitrust Act, ORS 646.705, et seq, the Oregon DOJ is authorized to bring civil actions for injunctive relief, monetary penalties, and to recover damages sustained by state and local government agencies caused by the unlawful conduct. ORS 646.760, 646.770, 646.775 and 646.780. Oregon DOJ can bring indirect purchaser actions on behalf of government entities. ORS 646.775 and 646.780. Oregon DOJ also has exclusive authority to bring criminal actions. ORS 646.990(2)
- C. Local government agencies may bring actions for damages and injunctive relief under the Oregon Antitrust Act. ORS 646.770 and 646.780.
- D. Competitors can bring actions for damages if they have suffered antitrust injury. Employees fired for refusing to participate in the unlawful conduct do not have an antitrust claim. Limited exception in the Ninth Circuit: Dismissed employee has standing to bring an antitrust claim in the Ninth Circuit when the employee was (a) an "essential participant" in an antitrust scheme, (b) the dismissal is a "necessary means" to accomplish the scheme, and (c) the employee has the greatest incentive to challenge the antitrust violation. *Vinci v. Waste Management Inc.* 80 F 3d 1372 (9th Cir. 1996), [discussing

limits of the Ninth Circuit's decision in *Ostrofe v. H.S. Crocker Co.* 740 F. 2d 739 (9th Cir. 1984) ("Ostrofe II"). NB: This decision has been widely criticized and rejected by other circuits.

III. Penalties and Relief Available for Violations of Federal and State Antitrust Laws.

- A. Under federal criminal law, corporations may be fined up to \$10 million and individuals may be fined up to \$350,000 and go to prison for up to three years. 15 U.S.C.A. §1.
- B. Federal civil law remedies include three times (treble) the damages caused by the unlawful activity.
- C. Under the Oregon Antitrust Act, the Oregon DOJ can seek civil penalties against individuals and corporations up to \$250,000 per violation and also can seek forfeiture of the company's franchise or license to do business in Oregon. ORS 646.760.
- D. Violation of the Oregon Antitrust Act also can be a Class A misdemeanor crime, carrying a fine of \$2,500 and up to one year in jail. ORS 646.990(2).
- E. Defendants also can be required to pay up to three times the damages caused by the unlawful conduct under state law. ORS 646.780.

IV. Defense To Bid Rigging

- A. Partial Defense: Withdrawal from bid rigging conspiracy. Subsequent acts of conspirators do not bind the conspirator who was withdrawn. *Morton's Market v. Gustafson's Dairy, Inc.*, 198 F 3d 823 (11th Cir. 1999). Note exception when continuing conspiracy is alleged.
- B. Complete Defense: Withdrawal plus running of statute of limitations for time when conspirator was involved in conspiracy. *Id.*

- C. Note possible tolling of statute of limitations based on fraudulent concealment if the unlawful conduct was concealed and until the plaintiff is on notice of his claim. *Lundy v. Union Carbide Corp.*, 695 F 2d 394 (9th Cir. 1982) (question of fact for the jury.)

V. Other Laws that May Apply to Activity in Question

A. Federal

1. False Claims Act, 31 U.S.C. 231, et seq,
2. Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §1961, et seq.
3. Mail Fraud, 18 U.S.C. §1341
4. Making False Statement to Government Agency, 18 U.S.C. §1001.
5. Wire Fraud, 18 U.S.C §1343.
6. Other crimes of dishonesty such as perjury, bribery, obstruction of justice and tax matters.
7. See also *United States v. Basim Omar Sabri*, 326 F. 3d 937 (8th Cir. 2003) (whether federal bribery statutes are unconstitutional and exceeds Congress' constitutional powers to regulate conduct).

B. State

1. Possible violations under Chapter 279, public contracts and purchasing laws.

VI. Bid Rigging Methods

- A. Rotating the lowest bids among construction contracts
- B. Refraining from bidding on a contract
- C. Withdrawing previously submitted bids
- D. Eliminating discounts
- E. Adopting standard formulas for computing prices
- F. "Shadow bidding" to give appearance of competitive bidding

G. Market allocation – refraining from competing in certain geographic markets

VII. Market Conditions or Bid Processes That Can Foster Bid Rigging

- A. Highly concentrated markets because they easier to enter into, monitor, and maintain an unlawful agreement when there are fewer competitors
- B. Less concentrated market but with only a few major sellers because small sellers do not act as competitive threat or price discipliners in this context.
- C. Products are not easily substituted because there is less product interchangeability which, in turn, makes the government agency more dependent on those companies that have access to the necessary products.
- D. Product standardization because standardization can lead to an agreement on a price structure of standardized products.
- E. Markets where competitors meet regularly because this provides competitors with opportunity to exchange sensitive information on their respective bids
- F. Encouraging tie bids between competing bidders because it tends to stabilize the differences between bids (price stabilization is a form of price fixing).

VII. Bid Process That Can Deter Bid Rigging Activity

- A. Reduce contract opportunities by combining orders whenever possible
- B. Create processes, timelines and standards that encourage more rather than fewer bidders

- C. Avoiding conflicts of interests involving public officials. See Oregon Department of Transportation Conflict of Interest Guidelines and Disclosure Process, which can be found at:
<http://www.odot.state.or.us/otia/pdfs/otia3conflict.pdf>

IX. Communication Between Procurement Agents and Government Attorneys

- A. If procurement agent is suspicious of certain activity or if the agent has information regarding bid rigging, contact the state, county or city attorney immediately. Do not assume that someone else is handling the problem.
- B. Provide as much documentation as possible to support your concerns. Documentation often is the strongest type of circumstantial evidence used to establish a pattern of activity that is consistent with collusion among competitors.
- C. Put potential informants directly in contact with the government attorney. The list of contact attorneys for the State of Oregon is attached.
- D. Practice Tip for Government Attorneys: Confirm the informant is not represented by counsel on the particular matter before working directly with the informant. DR 7-104. Chances are the informant has an attorney on matters relating to informant's business operations. Whether the subject of discussion between the government attorney and the informant is one which is "on the subject of the representation [by an attorney] or on *directly related subjects*..."(emphasis added) may be a closer question than it initially appears.
- E. Practice Tip for Local Government Attorneys: While information provided by the client agency is protected under the attorney-client privilege, sharing that information with state enforcement officials will be subject to a public records test. See ORS 192.501 and 192.502. The exemptions that most likely apply are ORS 192.502(1) and (4). NB – each of these exceptions apply a

balancing test whether disclosure of the information is in the best interest of the public and outweighs the need for candid discussions within or between agencies.

X. Communication Between Government Attorneys, Informants, and Private Counsel Representing Informants

- A. Practice Tip for Potential Informants and Their Attorneys: Government attorneys are prohibited by law from providing legal advice to private individuals and businesses. Government attorneys may recommend that the informant seek counsel. DR 7-104(A)(2). The DR also prohibits government attorneys from providing legal advice to informants. Key Question: Is there a reasonable possibility that the interests of an informant are in conflict with the interests of the government?
- B. The United States Department of Justice Antitrust Division has an amnesty program to increase the opportunities for companies with knowledge of unlawful activity to cooperate with the federal government in prosecuting claims. *See* Goldberg written materials.
- C. Oregon DOJ does not have a formal amnesty program. However, Oregon DOJ has historically used its prosecutorial discretion in determining the extent to which an informant that has participated in unlawful conduct will be required to assume responsibility for its conduct. The decision is made on a case-by-case basis based on a number of factors including, but not limited to, (a) the level of involvement the participant had in the unlawful activity, (b) whether the participant withdrew from the unlawful activity at any time prior to approaching the state, (c) whether an investigation has already been initiated into the conduct in question, and (d) the level of cooperation and type of information the participant is willing to offer.
- D. Practice Tip for Attorneys Representing Informants: Before presenting your client for an interview, providing documents or responses to interrogatories, be sure to have a complete understanding of the scope of protection the government can give to information provided by your client, and with whom the

government can and will likely share that information. The federal and state laws are not uniform on this point.

- E. Under Oregon law, information can be compelled by the Attorney General pursuant to ORS 646.750 (civil investigative demand). The information is protected as confidential and exempt from the Public Records Laws pursuant to ORS 646.836. The information may be accompanied by a written request for the return of information at the conclusion of the investigation, which then requires Oregon DOJ to return the information to the party producing such information in accordance with ORS 646.836.
- F. The rules of protecting the information changes under state law if and when the information is used to support claims against defendants. Once litigation is initiated, the discovery rules and protective orders will determine the use and dissemination of the information previously produced.
- G. Note the possibility (if not likelihood) of a conflict if you represent two individuals, each of whom wish to gain amnesty in exchange for cooperation. If the government takes the position that it needs only one informant to make its case, both individuals may not be offered amnesty. See DR 5-105.

MARK ALEXANDER ANDERSON

LAW PRACTICE

Oregon Attorney General, Department of Justice, General Counsel Division,
Business Transactions Section, Senior Assistant Attorney General (2002 - present)

Pro bono publico (1983 - 2002) (miscellaneous matters - e.g., Oregon appellate court
amicus briefs, 1988 - 2000)

Dark Horse Comics, Inc., General Counsel & Assistant Secretary (1992 - 1998)

General duties including management of legal department and corporate records, involving contracts, copyrights & trademarks, insurance, relationships with outside counsel, litigation and claims; and counsel & corporate work for sister corporations including Dark Horse Entertainment, Things From Another World (retail merchandise), and Suburban Explorations (real estate)

Miller, Nash, Wiener, Hager & Carlsen (1983 - 1992)

Litigation & business counseling - including state and federal trial and appellate work; antitrust, trade regulation, and unfair business practices; health care; complex, class-action, and multidistrict litigation; securities; and federal banking regulatory issues (supervisory and receivership issues)

SELECTED CLERKSHIPS

United States District Court for the District of Oregon -
Law Clerk to the Honorable Owen M. Panner (1980 - 1982)

United States Court of Appeals for the Ninth Circuit -
Law Clerk, Staff Attorney's Office, San Francisco, California (1978 - 1979)

State of Arizona, Office of the Attorney General,
Special Prosecutions Section, Phoenix, Arizona (summer 1977)

Among other duties, prepared outline and draft of presentation before U.S. House Subcommittee Hearings on Federal Grand Jury Reform for Bruce Babbitt, then Attorney General, State of Arizona.

United States Attorney,
Felony 'B' & Fraud Sections, Washington, D.C. (summer 1976)

Among other duties, prepared outline and draft of Trial Manual Section on
Incompetency to Stand Trial and Civil Commitment in Criminal Settings.

BAR MEMBERSHIPS

States of California (1979) (Antitrust & Unfair Competition, and Intellectual Property)
Oregon (1982) (Antitrust, Trade Regulation & Unfair Business Practices, and
Energy, Telecom & Utility Law Sections)
Washington (1985)

United States Supreme Court (1989)
United States Court of Appeals for the Ninth Circuit (1979)
United States District Courts for the
Northern District of California (1979)
District of Oregon (1982)
Western District of Washington (1986)

SELECTED ORGANIZATIONS, OFFICES, AND RECOGNITION

City Club of Portland
(Research Board, 1999 - 2002)
Oregon State Bar Antitrust, Trade Regulation, and Unfair Business Practices Section
(Chair, 1991 - 1992; Secretary, 1990 - 1991; Treasurer, 1989 - 1990;
Executive Committee, 1988 - 1993; 1997 - present; legislative liaison, 2001 - present)
Who's Who in American Law (beginning 1990)

LAW ARTICLES

Competition Law Supreme Court review, Oregon State Bar ['OSB'] Antitrust, Trade
Regulation & Unfair Business Practices Meeting Materials (2000)
"Antitrust," Chapter 23, Oregon Health Law Manual (OSB 1990) (co-author)
"Antitrust Counseling," Antitrust Under the New Administration
and Private and State Responses (LCNSL 1989)
"Antitrust Law in a Nutshell," Developments in Antitrust, Health Care
and RICO (LCNSL 1989)
"Trade Associations," Chapter 67, III Advising Oregon Businesses (OSB 1985)

FORMAL EDUCATION

Yale Law School, New Haven, Connecticut -

Juris Doctor (1978)

State of California Fellowship Award (1974 - 1975)

University of Southern California, Los Angeles, California -

Arts Baccalaureate in Mathematics and Political Science, with Honors (1974)

Magna Cum Laude

Phi Beta Kappa & Phi Kappa Phi

Resident Honors Program (1970 - 1971)

Political Science Honors Program (1971 - 1973)

University Scholarship Award (1970 - 1971)

State of California Scholarship Award (1971 - 1974)

Blackstonians (pre-law honor society) (1972 - 1974)

(Board Member, 1973 - 1974)

ANDREW E. AUBERTINE



Andy Aubertine practiced in the public sector for nineteen years, first as a deputy district attorney where he tried over 100 cases and, for thirteen years, as an assistant attorney general for the Oregon Department of Justice. Mr. Aubertine served four Oregon Attorneys General as Oregon's lead antitrust attorney of the Oregon Attorney General's antitrust unit. Mr. Aubertine was advisor to the Attorneys General on the Department's antitrust policy and he provided legal advice on antitrust issues to Oregon state agencies and the Oregon Legislature. Mr. Aubertine managed the Department's antitrust investigations, litigation efforts and merger reviews, and served as co-lead counsel in several multi-state cases.

Mr. Aubertine drafted legislation amending several provisions of the Oregon Antitrust Act during the 1997, 1999 and 2001 legislative sessions. He also has testified before Congressional and state legislative committees on competition and trade regulation issues from the legal and policy perspectives.

Mr. Aubertine is the founding chair of the National Association of Attorneys General (NAAG) Western States Working Group, a past vice-chair of the NAAG Training & Education Committee, and a former member of the NAAG Pharmaceuticals Working Group. He is a past chair and current executive committee member of the Oregon State Bar Antitrust & Trade Regulation Section. He presents legal education seminars on antitrust and litigation topics.

In March 2003, Darsee Staley and Mr. Aubertine established Staley Aubertine LLP to offer public and private entities quality legal services in antitrust, trade regulation, and commercial litigation matters. Staley Aubertine draws on a broad base of experience, from both prosecution and defense perspectives, in litigation planning and management, alternative dispute resolution and settlement strategy, and pre-trial and trial implementation.

Mr. Aubertine obtained his law degree from Lewis & Clark Law School and his undergraduate degree from the University of Iowa. For the past six years, he has volunteered his time to the Oregon State Bar Classroom Law Project.

PRACTICE HIGHLIGHTS

Carolina Tobacco Company v. Watson, et al.

USDC OR No. 03-423-KI

- Staley Aubertine LLP represents defendants the National Association of Attorneys General, a NAAG official, and sixteen states in this case involving the Tobacco Master Settlement Agreement and issues of due process, personal and subject matter jurisdiction, venue and abstention. The Oregon federal district court dismissed the action, and the plaintiff has appealed to the Ninth Circuit Court of Appeals.

Alabama, et al. v. Bristol-Myers Squibb, et al. (BuSpar Antitrust Litigation)

USDC SDNY No. 01 CV 11401 (JGK)

- As an assistant attorney general, Mr. Aubertine led portions of the litigation against Bristol-Myers on behalf of the thirty-five state plaintiffs, which resulted in a \$93 million settlement for consumers and government agencies around the country. As Special Assistant Attorneys General for Oregon, Staley Aubertine LLP prepared the plaintiff states' \$6.1 million attorney fee petition, which was awarded in full to the thirty-five states.

Connecticut v. Mylan Laboratories, et al., 205 FRD 369 (D.D.C. 2002)

- Mr. Aubertine was one of the lead attorneys in this thirty-three state action against pharmaceutical manufacturers, alleging unlawful monopoly conduct in violation of federal and state antitrust and unfair competition laws. This matter resulted in a \$100 million settlement for consumers and government agencies.

California, et al. v. Chevron Corp. & Texaco, Inc., USDC Cal 01-07746 (2001)

- Mr. Aubertine was one of the states' lead attorneys, and worked closely with attorneys from the Federal Trade Commission, in reviewing the merger and negotiating a settlement of merger issues designed to maintain the competitive balance in the affected retail gasoline and aviation gasoline markets.

New York v. Toys R Us, et al., 191 FRD 347 (E.D.N.Y. 2000)

- This case involved claims that Toys R Us illegally restrained trade through its use of supply agreements with several toy manufacturers. Mr. Aubertine was one of the lead attorneys responsible for negotiating a settlement and attorney fees award.

Legislation

- Mr. Aubertine worked with the Oregon Legislature and business and consumer groups to pass Oregon's indirect purchaser law. He also drafted and testified in support of legislation to increase civil penalties for violations of Oregon's antitrust laws, expand the scope of the laws to address interstate conduct that injures Oregonians, and clarify the scope of immunity offered to certain market participants under the Oregon Antitrust Act.

Peter Goldberg
Senior Trial Attorney
United States Department of Justice
Antitrust Division

Peter Goldberg is a senior trial attorney with the Department of Justice, Antitrust Division in Washington D.C. He has had extensive experience in the investigation and litigation of criminal antitrust violations, including price fixing and bid rigging, throughout the United States. He also has prosecuted a wide variety of related federal offenses and has served as a Special Assistant United States Attorney in the Fraud Section of the U.S. Attorney's Office for the District of Columbia. In addition, Mr. Goldberg has lectured extensively on the subject of criminal enforcement of the antitrust laws to federal and state officials in the procurement, investigative and audit fields and to officials of foreign governments. He is a graduate of the Harvard Law School and served as law clerk in the U.S. District Court for the Southern District of Florida.

Mr. Goldberg will speak on criminal enforcement of the antitrust laws--the role of antitrust enforcement in state and federal procurement. He will talk on the importance of preventing and detecting violations of the Sherman Act, 15 U.S.C. Section 1 and other important federal statutes. He will describe the stages of an investigation, the penalties involved and the civil and administrative action that can follow successful criminal prosecutions. He will stress how federal and state officials can work together to identify and investigate this important economic crime and emphasize the benefits to the taxpayer and honest competitor of free and open competition. He will describe particular cases brought by the Antitrust Division, both domestic and international.

Mr. Goldberg's contact information:

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