



## Recent Criminal Antitrust Risks for Government Contractors

Jeffrey S. Jacobovitz and David L. Hobson

The business of government contracting is a high-risk, high-reward activity. Many contractors, large and small, relish the opportunity to profit while also directly providing critically needed products and services to the government.

That opportunity, however, comes with a risk many would-be government contractors may be unaware of: the increasing presence and aggressiveness of the U.S. Department of Justice (DOJ) in prosecuting bid-rigging, collusion, and price-fixing cases in this area. These criminal cases often result in jail time for the executives of these companies.

This article will focus on the Sherman Act (15 U.S.C. §1), specifically the criminal antitrust considerations that government contractors face. The Sherman Act prohibits competitors from agreeing to fix prices or rig bids. A violation of the Sherman Act is a felony and may be punishable by a fine of up to \$100 million and/or ten years in jail.

The implications of the Sherman Act are critical for government contractors to understand because of the unique aspects of their business. Also, these characteristics of the business of contracting with the government make the antitrust analysis more complex. This article will focus on recent cases in this area and the ramifications for contractors. The article will conclude with some practical tips for antitrust and government contract counsel.

### BACKGROUND

The Sherman Act is designed to ensure fair competition by attempting to eliminate or limit a market participant's ability to monopolize the market or otherwise improperly decrease competition through, e.g., price-fixing<sup>1</sup> or bid-rigging.<sup>2</sup> Additionally, the Federal Acquisition Regulation (FAR),<sup>3</sup> which governs the executive agencies in their procurement of goods and services, includes "promoting competition" in its statement of guiding principles.<sup>4</sup>

Antitrust enforcement statutes and regulations establish a panoply of public (criminal) and private (civil) enforcement regulations and laws to ensure compliance with competition rules.<sup>5</sup> The FAR complements the Sherman Act by noting "[c]ontracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offerors and contractors."<sup>6</sup>

The FAR also obligates contracting personnel to file a report that notifies the Attorney General of any bids or proposals they believe evidence a violation of antitrust laws.<sup>7</sup> In addition to this supporting role to the U.S. DOJ and Federal Trade Commission, the procurement regulations include the authority to suspend or debar contractors for antitrust violations.<sup>8</sup> Frequently, criminal antitrust defendants face debarment proceedings after a plea of guilty or a conviction at trial.

1 See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

2 See, e.g., *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502 (4th Cir. 2005), *cert. denied*, 547 U.S. 1002 (2006).

3 C.F.R. Title 48 (2013).

4 48 C.F.R. § 1.102(b)(1)(iii).

5 See William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements involving Government Contractors*, 58 *Antitrust L.J.* 1059 (1989).

6 48 C.F.R. § 3.301(b).

7 *Id.*

8 See generally, FAR Subpart 9.4.

## LEGAL IMPLICATIONS

The Antitrust Division of the DOJ is responsible for criminal enforcement of the antitrust laws. The division has obtained numerous convictions in prosecuting contractors under the Sherman Act for the per se offenses of price-fixing and bid-rigging. Price-fixing is an agreement among competitors to raise, fix, or otherwise maintain a price at which goods are sold. Bid-rigging is a multifarious offense and can include comparing bids before submission, bid depositories, rotating bids, agreements to refrain from bidding, subcontracting agreements, and submitting noncompetitive bids.<sup>9</sup>

Many antitrust criminal convictions result from plea agreements, which are not readily accessible in public legal case reports. Notwithstanding, contractors have been investigated or prosecuted for violations in areas as diverse as road building, furniture, dredging, and clothing.<sup>10</sup> Even a mere indictment of a government contractor could lead to a suspension of any new government contracts for the accused contractor.<sup>11</sup> This suspension could last until the criminal charges are resolved and, for a small company, that can cause considerable economic harm.

There are a number of recent cases that are indicative of the division's aggressiveness in this area:

In *United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003), the defendant was convicted of participating in an antitrust conspiracy to rig bids on foreign construction contracts financed by USAID and was sentenced to 36 months in jail. The co-defendant, Bilhar International Establishment, pled guilty before trial and agreed to pay a fine of \$54 million. The case involved construction projects in Egypt to improve the treatment of drinking and waste water. The defendants manipulated the bidding process by designating which company would win in advance, and they then arranged lucrative subcontracts and "loser's fees." The Court of Appeals upheld the conviction.

In *United States v. Air Van Lines International*, Crim. No. 1:07CR304, (E.D. Va. filed July 31, 2007), the defendant entered into a plea agreement for a violation of 18 U.S.C. § 1001, which makes it a crime to provide false or fraudulent statements to the government. (Note that this was not a claim for violation of the Sherman Act; the Antitrust Division also has the authority to prosecute non-antitrust-related offenses and they regularly do so). The defendant paid a fine of over \$140,000. The case involved the filing of rates with the Department of Defense (DOD) to transport the household goods of military and civilian DOD personnel between the U.S. and foreign countries. Air Van essentially rented its name to another company and took direction from that company on the rates it would file for service on particular routes. When Air Van won the contracts, the other company would service the shipments and pay Air Van a commission. This collusion led to a false certification of the Certificate of Independent Price Determination.

In *United States v. Griffiths*, Crim. No. 09-cr-506 (D.N.J. filed July 6, 2009), the defendant pled guilty to, *inter alia*, 18 U.S.C. § 1031, conspiracy to defraud the U.S. Environmental Protection Agency (EPA). The defendant and others conspired to provide kickbacks to a prime contractor for the purpose of securing a subcontract for the transportation, treatment, and disposal of contaminated soil at the Federal Creosote Superfund Site in Manville, N.J. The prime contractor included the fraudulently inflated amount as part of the costs it charged the EPA. This is another instance of the Antitrust Division obtaining a plea to a non-Sherman Act count. The subcontractor, Bennett Environmental, Inc. (BEI), paid a \$1,000,000 fine and \$1,662,000 in restitution to the EPA. The individual employee of BEI who was instrumental in orchestrating the conspiracy was sentenced to 46 months in prison and ordered to pay \$4,644,378.56 in restitution.

In April 2009, a former contract employee with the U.S. Army Corps of Engineers and a dirt, sand, and gravel subcontractor were convicted of conspiracy and bribery in connection with the \$16 million project for the reconstruction of the Lake Cataouatche Levee, south of New Orleans, and sentenced to 70 months and 60 months in prison respectively. The prosecution was part of the Hurricane Katrina Fraud Task Force, which has charged over 1,000 defendants.

Finally, not all of the Antitrust Division's criminal enforcement efforts against government contractors involve federal contracts. Anticompetitive activity involving state and local government contracts also comes in for scrutiny. For example, in late-2012, three executives at General Electric Co., and a number of other co-conspirators, were sentenced to prison and ordered to pay criminal fines for participating in a conspiracy to rig bids relating to state, county, and local government contracts for the investment of municipal bonds, which the public entities had sold to raise money for public projects. At trial, the DOJ asserted that the defendants had corrupted the bidding process for these contracts by seeking to deprive the municipalities of competitive interest rates for the investment of tax-exempt bond proceeds that were to be used for various public works projects, including schools, hospitals, and roads. According to the DOJ, this bid-rigging activity cost municipalities around the country millions of dollars.

<sup>9</sup> ABA Antitrust Law Developments (Sixth), Volume 1 at 89.

<sup>10</sup> See Ralph C. Nash & John Cibinic, "Antitrust Violations in Government Contracting," 3 No. 9 Nash & Cibinic Rep. ¶ 66 (1989)

<sup>11</sup> The FAR (48 C.F.R. § 9.407-2) provides that an indictment under the antitrust laws is a sufficient basis for suspension.

## CONCLUSION

If you are a government contractor, you must be cognizant of the fact that the Antitrust Division is sensitive to various aspects of public procurement. Any agreements or discussion between competitors will be scrutinized carefully. "Teaming arrangements"<sup>12</sup> and joint ventures, although lawful, should be entered into with caution. Also, the contractor-subcontractor relationship must be legitimate and not merely a sham for collusive price-fixing or bid-rigging behavior. As the above examples amply demonstrate, collusive bidding will be prosecuted aggressively. Jail sentences and significant fines, along with debarment, can and often do result when government contractors tempt the DOJ by failing to abide by the Sherman Act.

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<sup>12</sup> 48 C.F.R. § 9.601.

## Authors and Contributors

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**Jeffrey S. Jacobovitz**

Partner, DC Office  
202.677.4056  
jeffrey.jacobovitz@agg.com

**David L. Hobson**

Associate, Atlanta Office  
404.873.8588  
david.hobson@agg.com

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Miami, FL 33131

**Washington, DC Office**

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Washington, DC 20006

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