

Key Aspects Of DOJ's Gov't Procurement Antitrust Initiative

By Niall Lynch, Elizabeth Prewitt, Anne Robinson, Marguerite Sullivan and Ashley Bauer

(November 20, 2019, 4:14 PM EST) -- On Nov. 5, the Antitrust Division of the U.S. Department of Justice announced a major new initiative focused on antitrust enforcement in the area of public procurement. This new initiative, named the Procurement Collusion Strike Force, is focused on “detering, detecting, investigating and prosecuting antitrust crimes ... in government procurement, grant and program funding.”



Niall Lynch

The strike force unites Antitrust Division prosecutors, 13 U.S. Attorneys' Offices across the country and investigators from four of the major federal Offices of the Inspector General and the Federal Bureau of Investigation in a joint effort to deter and prevent collusion in government procurement. The initiative targets bid-rigging and other antitrust crimes at every level of government — federal, state and local.



Elizabeth Prewitt

With the creation of the strike force, individuals and companies involved in government procurement or grants will face increased scrutiny. Therefore, it is more important than ever that those companies ensure that they have compliance programs in place that are current and robust.



Anne Robinson

The strike force also increases the importance of the certificate of independent price determination that government contractors typically must sign when they conduct business with the government.[1]

This certification requires company officials to certify (1) that their prices and methods for calculating prices have been arrived at independently, (2) that the information has not been and will not be shared with any other offeror or competitor, and (3) that the contractor has not induced and will not induce “any other concern to submit or not to submit an offer for the purpose of restricting competition.”[2]



Marguerite Sullivan

Government contractors further certify compliance to these requirements in their annual online representations and certifications on the System for Award Management.

Violations of this provision — as well as other antitrust laws — carry serious consequences for government contractors, including breach of contract actions, allegations of violations under the False Claims Act[3] (which can result in substantial civil penalties and treble damages), criminal charges, and also suspension and debarment proceedings.



Ashley Bauer

This new enforcement effort is consistent with a long line of past government initiatives

targeting collusion in government procurement. As a member of the National Center for Disaster Fraud Task Force, the Antitrust Division works to prevent and identify criminal antitrust violations in procurement contracts following natural disasters.

Also, in 2009, the Antitrust Division established a citizen complaint center to identify collusion in procurement contracts awarded under the American Recovery and Reinvestment Act of 2009. In fact, there is a specific regulation requiring federal agencies and government procurement officials to identify and report to the DOJ any suspected potential collusive activity related to proposals and bids for government contracts.[4]

What sets the strike force apart is that it comes at a time when the Antitrust Division is aggressively seeking civil antitrust damages for criminal violations committed by government contractors — for the first time in decades.

After announcing its change in policy regarding Clayton Act damages in 2018, the Antitrust Division recently secured guilty pleas simultaneously with civil antitrust and FCA settlements from five South Korean oil companies for engaging in a bid-rigging conspiracy relating to the supply of fuel to U.S. military bases in South Korea. The companies agreed to pay \$156 million in criminal fines and \$205 million in civil settlements.

The Antitrust Division touted these settlements as the first of many to come, and promised that it will continue to pursue civil damages for violations involving sales to the U.S. government. The Antitrust Division's enhanced focus on collusion in government contracting is also evidenced by another set of recent prosecutions — and, as of now, two guilty pleas — stemming from an ongoing investigation into a bid-rigging conspiracy for online public auctions of surplus federal government equipment.

Recent cases also indicate an increased focus on initiating suspension and debarment proceedings in the bid-rigging procurement fraud context. Suspension and debarment proceedings are administrative actions seeking to protect the government's interest by prohibiting companies from doing business with the government.

While these proceedings are generally discretionary — in their initiation and their outcome — government agencies are required to consider suspension and debarment when a government contractor is convicted of a felony criminal violation.[5]

Recent companies convicted of antitrust violations, such as the South Korean companies discussed above, have indeed been suspended and required to enter into compliance agreements to avoid debarment. Government contractors facing allegations of antitrust allegations should be prepared to defend themselves in these actions.[6]

Roughly one-third of the 100-plus current open antitrust investigations involve government procurement — at either the federal or local level. By joining forces with 13 United States Attorneys' Offices and inspector generals from four separate agencies, the Antitrust Division has substantially increased the resources devoted to uncovering these types of antitrust crimes.

In addition to focusing on enforcement, the strike force will offer a reporting mechanism to the public on its website, and increase its outreach and training programs to educate procurement officials and government contractors on antitrust risks in the procurement process. As part of that training, the

Antitrust Division will promote heightened attention to red flags, which the division uses to identify potential collusive activity.

These red flags include the rotation of award winners between competing contractors, contractors winning similar amounts of work over time, the same contractor always winning, subcontracts from the winning contractor to losing contractors and an increasingly smaller number of contractors bidding for projects.

Similarities between proposals submitted by contractors and other types of suspicious behavior also indicate potential collusion. To better identify these red flags, the strike force will also enhance its ability to detect violations through increased use of data analytics programs.

The Procurement Collusion Strike Force promises a heightened focus on, and resource commitment toward, investigating and prosecuting collusion in government procurement.

Given that antitrust violations can result in criminal prosecution, with massive fines and jail terms, as well as civil damages and debarment, companies that contract with the government or receive grants or program funding should confirm that up-to-date and comprehensive antitrust compliance policies and procedures are in place to prevent collusive or fraudulent conduct and to detect any such conduct that may have occurred.

Importantly, this initiative follows the Antitrust Division's recent policy change to now consider the existence of a robust antitrust compliance program as a basis for declining to pursue criminal charges against a company that engages in criminal cartel conduct.

Conclusion

Companies and their employees can expect increased antitrust scrutiny regarding their government procurement practices in light of this new DOJ strike force. Accordingly, companies should review their government contract pricing practices, taking care to prevent, detect and remedy any potentially improper antitrust conduct or government contract violations.

Among steps to consider:

- Update your antitrust compliance policy and training programs to reflect a renewed focus on government procurement.
- Update or institute government contracts compliance and training materials to address specific government procurement rules and regulations.
- Initiate an audit of your government contracts business to expose any gaps in your current compliance policies.
- Review the policies and practices of your government procurement channel partners, including distributors, resellers and brokers, to ensure they are compliant with antitrust and government procurement laws.
- Reach out to experienced antitrust and government contracts counsel if you identify any gaps in your compliance efforts or identify a specific compliance violation.

Niall Lynch, Elizabeth Prewitt, Anne Robinson, Marguerite Sullivan and Ashley Bauer are partners at Latham & Watkins LLP.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 48 C.F.R. §52.203-2.

[2] 48 C.F.R. §52.203-2.

[3] 31 U.S.C. §§ 3729 — 3733.

[4] See 48 C.F.R. §3.303.

[5] 48 C.F.R. §52.209-11.

[6] This also comes at a time when government suspension and debarment actions are generally on the rise. Federal agencies this past year initiated nearly twice as many suspension and debarment actions as occurred in 2009. See Report by the Interagency Suspension and Debarment Committee to the Committee on Homeland Security and Governmental Affairs dated Oct. 30, 2019.