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DOJ Announces New 'Strike Force' to Root Out Government Bid Rigging

By Adam C. Hemlock and Anthony Duh*

"I want to send the message loud and clear that the Antitrust Division's criminal program is training its focus on the government procurement space."

— Deputy A.G. Richard A. Powers.¹

On November 5, 2019, the Department of Justice ("DOJ") Antitrust Division announced the creation of a new task force focusing on procurement collusion and other types of anticompetitive conduct impacting government contracting. Procurement collusion occurs when competitor companies that are bidding for government contracts prearrange the winning price or the winner of the contract. The new task force will begin immediately in thirteen jurisdictions and will expand nationwide over time. The DOJ's announcement indicates that procurement collusion will be a priority for criminal antitrust enforcement in the near future.

Procurement Collusion

In recent months, the DOJ has brought several cases targeting horizontal agreements between government contractors. For example, five South Korean oil companies recently pled guilty to charges stemming from an alleged decade-long bid-rigging conspiracy that targeted fuel contracts for U.S. military bases.² Those guilty pleas were coupled with \$156 million in criminal fines, \$205 million in civil settlements, and seven indictments.³ The Antitrust Division also has secured guilty pleas stemming from an ongoing investigation into a bid-rigging conspiracy for online public auctions of surplus federal government equipment.⁴ These specific cases are being touted as the first of many to come. The Antitrust Division has said that one-third of its open grand jury investigations involve alleged antitrust violations that have potentially injured the government.⁵

The sheer size of government contracting—roughly \$550 billion in 2018—and the potential overcharge to taxpayers makes procurement collusion a priority for antitrust enforcers.⁶ The government also is empowered under Section 4 of the Clayton Act to seek treble damages if it has been injured by an antitrust violation, giving the DOJ even more incentive to prosecute procurement collusion.⁷ In addition to the prospect of treble damages, criminal convictions or pleas may lead to suspension and debarment proceedings.⁸ These discretionary administrative proceedings can disqualify firms from doing business with the government. Depending on the industry, suspension and debarment may cost firms millions in lost potential contracts.

Procurement Collusion Strike Force

The DOJ's newest effort to target procurement collusion is the Procurement Collusion Strike Force ("PCSF"), an interagency partnership consisting of the Antitrust Division, investigators from the FBI, the Department of Defense, the U.S. Postal Service, and thirteen U.S. Attorneys' Offices.⁹ DOJ officials have indicated that the goals of the PCSF are to "deter,

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detect, and prosecute individuals and organizations that collude and undermine competition.”¹⁰ To achieve these goals, the PCSF will allocate new resources, train local U.S. Attorneys’ Offices, and use innovative data analytics.¹¹ The U.S. Attorney Offices in the following jurisdictions will be the first to partner with the PCSF:

- Central District of California
- Eastern District of California
- District of Colorado
- District of Columbia
- Southern District of Florida
- Northern District of Georgia
- Northern District of Illinois
- Eastern District of Michigan
- Southern District of New York
- Southern District of Ohio
- Eastern District of Pennsylvania
- Northern District of Texas
- Eastern District of Virginia¹²

Over the next several years, the PCSF will expand across the country.

The PCSF’s interagency resources will afford it access to substantial volumes of data on government contractors, allowing it to better flag and investigate procurement collusion schemes. The PCSF also is training U.S. Attorneys’ Offices to flag rotation systems, where the “winners” of government contracts seem to alternate along predictable sequences.¹³ There are other “red flags” the PCSF is targeting, including contractors winning similar amounts of work over time, the same contractor always winning, subcontracts from the winning contractor being awarded to losing contractors, and a decreasing number of contractors bidding for projects.¹⁴

The training of U.S. Attorneys’ Offices and local officials will also bring more specialized, sophisticated, and national capabilities to antitrust enforcement agencies across the country. The inclusion of personnel from the Defense Department in the PCSF suggests that defense contracting will be one of the first areas of focus for enforcement. However, going forward, multiple sectors of government contracting are likely to come under increased scrutiny.

Importantly, the PCSF investigatory effort will not be limited to direct contracting with the federal government. State and local contracts that rely on the federal government’s \$696 billion in grants will also be scrutinized by the PCSF.¹⁵ Thus, firms submitting bids to states or their subdivisions may also be within the ambit of the PCSF.

Conclusion

The prospect of treble damages, criminal charges, and the footprint of federal government procurement across multiple industries makes the PCSF a major development for firms’ antitrust compliance programs. Firms that bid on government contracts should consider updating their antitrust compliance policy, instituting new training materials to address specific government procurement rules and regulations, and auditing existing government sales programs.

In short, the DOJ's announcement on the PCSF makes clear that firms bidding on government contracts should anticipate increased antitrust scrutiny and plan accordingly.

- ¹ Richard A. Powers, Deputy Assistant Attorney General, Dep't of Justice, Remarks at the American Association Public Contract Law Section's 2019 Procurement Symposium (Oct. 25, 2019), available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar>.
- ² See Department of Justice, Office of Public Affairs, *Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding* (Nov. 5, 2019), available at <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>.
- ³ See *id.*
- ⁴ See Department of Justice, Office of Public Affairs, *Online Bidder Pleads Guilty to Antitrust Charge for Rigging Bids at Government Auctions*, (Sept. 23, 2019), available at <https://www.justice.gov/opa/pr/online-bidder-pleads-guilty-antitrust-charge-rigging-bids-government-auctions>.
- ⁵ See *supra* note 2.
- ⁶ See Makan Delrahim, Assistant Attorney General, Dep't of Justice, Remarks at the Procurement Collusion Strike Force Press Conference (Nov. 5, 2019), available at <https://www.youtube.com/watch?v=unhH-bKHxr0>.
- ⁷ See Powers, *supra* note 1 (emphasizing this point when announcing the new task force).
- ⁸ See generally OECD, *Competition and Procurement: Key Findings* 28 (2011) ("In many jurisdictions, a conviction for participation in collusion and/or corruption in public procurement leads to debarment from future procurement procedures for a certain period of time.").
- ⁹ See *supra* note 2.
- ¹⁰ Powers, *supra* note 1.
- ¹¹ See *id.* ("Next, we are working with our law enforcement partners to explore using data analytics on the vast troves of contracting data housed in government agencies in order to more effectively uncover signs of possible anticompetitive collusion for further investigation.").
- ¹² See *supra* note 2.
- ¹³ See Department of Justice, Antitrust Division, "Red Flags of Collusion," (June 25, 2015), available at <https://www.justice.gov/atr/red-flags-collusion>.
- ¹⁴ *Id.*
- ¹⁵ See *supra* note 2.

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