BakerHostetler

Antitrust Division's Renewed Focus on Bid Rigging Promises to Be Perilous

Now that car parts and auction cartel prosecutions are winding down and the transition to the new Trump Department of Justice and Antitrust Division has finally ended, the DOJ's Antitrust Division has vowed to continue criminal cartel investigations and prosecutions.

By Carl W. Hittinger and Jeanne-Michele Mariani

"Where antitrust violations target the U.S. government – and, by extension, the U.S. taxpayer – we will not hesitate to bring civil and criminal charges and seek damages using these tools."

This was the message from Makan Delrahim, assistant attorney general in charge of the Antitrust Division of the U.S. Department of Justice, at the annual ABA Antitrust Conference held in Washington, D.C. only a few weeks ago. Now that car parts and auction cartel prosecutions are winding down and the transition to the new Trump Department of Justice and Antitrust Division has finally ended, the DOJ's Antitrust Division has vowed to continue criminal cartel investigations and prosecutions. Indeed, Richard Powers, the new head of the Antitrust Division's cartel enforcement section, recently stated that there are 91 grand juries sitting currently examining cartel behavior and the division is now preparing for six criminal trials.

Just last fall, Delrahim reported that within the past decade only a few bid-rigging cases had been the subject of prosecution where the federal government was the victim, but he expected that to change – and it looks like it has. Last March, two South Korean companies, agreed to plead guilty and pay nearly $127 million in fines for a bid-rigging case involving fuel-supply contracts which served U.S. military bases. The two companies, Hyundai Oilbank and S-Oil Corp., were just the latest to be charged in a massive investigation into allegations that companies conspired to suppress and eliminate competition during the bidding process for lucrative fuel-supply contracts. Because of the rigged bids, the government was forced to pay substantially more for fuel-supply services than under a normal bidding process. Beyond paying the massive fine, the two companies also agreed to cooperate in the ongoing criminal investigations.

Bid rigging can take multiple forms including bid suppression, complementary bidding, bid rotation, and customer or market allocation. The first form, which is arguably the most used, occurs where one or more competitors agree not to bid, or withdraw a previously submitted bid, so that a designated bidder will win. In return, the nonbidder may receive a subcontract or payoff. In complementary bidding, co-conspirators submit token bids that are intentionally high, or that intentionally fail to meet all of the bid requirements in order to lose a contract. These types of bids are designed to give the appearance of competition. In bid rotation, all co-conspirators submit bids, but by agreement, take turns being the lowest bidder on a series of contracts. And finally, in customer or market allocation bidding, co-conspirators agree to divide up customers or geographic areas, which results in designated "bid" or "no bid" areas for each contractor, meaning that if a solicitation for bids is made by a customer in a "no bid" area for a contractor, they will refuse to submit a bid causing artificially heightened market prices. Bid rigging usually results in only one loser, the party soliciting the offer for a bid, as the contracting parties, for their participation in the scheme, are often given direct payouts, subcontracts, or even a future promised winning bid. Particularly for large-scale contracts, such as those with the U.S. government, bid-rigging can cause the loss of millions of dollars to the American taxpayer due to overinflated contracts across multiple industries.

The uptick in bid-rigging cases being taken on by the Antitrust Division is designed to stop those losses, both in contracts overseas and here at home. Earlier this month, as a result of a government investigation, a large Chicago-based commercial flooring contractor was charged individually for his role in a conspiracy to rig bids and fix prices for commercial flooring services and products sold in the United States. In bringing the charges, Delrahim reported that "This is the first of what we expect to be many in this ongoing investigation into bid rigging … Any collusion by commercial flooring contractors exploits local communities whose schools, hospitals, charities and businesses are entitled to the benefits of competitive bidding. The Justice Department and our law enforcement partners will bring contractors to justice when they cheat rather than compete."

Because bid rigging can seriously disrupt an otherwise competitive free marketplace, the penalties for the illegal conduct are severe. Here, in the United States, a violation of the Sherman Act carries maximum penalties of a $100 million criminal fine for corporations and up to 10 years in prison and a $1 million criminal fine for individuals. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine. Convictions for bid rigging can usually lead to debarment from bidding future government contracts and makes future merger approval problematic. And bid rigging is certainly not a problem confined to the 50 states. Many other countries are faced with the same anticompetitive schemes, one of the worst being Great Britain, who estimates that nearly 31 percent of all businesses are subject to contract bid rigging. While U.S. levels are not reported that high, the problem is one with long historical roots, often plaguing the construction industry, auto parts industry, sale auctions, foreclosed home auctions and road construction industry.

The Antitrust Division's renewed focus on bringing these criminal charges suggest that they recognize the huge impact the problem can have on federal resources and the wallets of American taxpayers. The latter impact being particularly compelling in an election cycle and with an administration vowing to save taxpayers money where the federal government is being taken advantage of. As FBI Special Agent Charge Sallet said, "The FBI has no tolerance for contractors who seek to profit by criminally exploiting innocent businesses and communities … We will continue to use every tool at our disposal to hold these offenders accountable for their crimes and restore equity to the bidding process."

As criminal antitrust investigations increase, companies should be mindful of what one CEO told his sales force during an antitrust compliance program, "We do not pay you enough to violate the antitrust laws." Stay tuned.

Carl W. Hittinger is a senior partner and serves as Baker & Hostetler's antitrust and competition practice team leader and is the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. He can be reached at 215.564.2898 or chittinger@bakerlaw.com.

Jeanne-Michele Mariani is an associate in the firm's Philadelphia office in its litigation group. Her practice focuses on complex commercial and antitrust litigation matters. Her experience also includes a judicial clerkship with Judge Thomas I. Vanaskie of the U.S. Court of Appeals for the Third Circuit. She can be reached at 215.564.1509 or jmariani@bakerlaw.com.

This article is reprinted with permission from the May 8, 2019, edition of The Legal Intelligencer.