**ANTITRUST ENFORCEMENT IN :**

**A MANUAL FOR PUBLIC PROCUREMENT OFFICIALS**

**DEPARTMENT OF JUSTICE**

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INTRODUCTION

As a government purchasing agent, you stand at a pivotal point in the enforcement of antitrust laws. You receive and review bids and make recommendations regarding the award of substantial government contracts. You are in a unique position to observe a variety of unfair and anticompetitive practices. If you possess a working knowledge of the types of antitrust abuses and how to identify them, you can make a great contribution to antitrust enforcement.

As a major purchaser of goods and services, your agency can be a victim of antitrust violations. But you can prevent proliferation of collusive practices by being sensitive to anticompetitive conduct. If you detect an antitrust violation, you can perform a three-fold public service:

# You can end a practice which is directly or indirectly costing you money as a public purchaser.

# You can bring monies to the public treasury. Damages collected in antitrust enforcement by the Attorney General go into the state or local treasury general fund.

# You can help rectify practices which can cost consumers and taxpayers many millions of dollars cumulatively and thus improve the efficiency of the local economy. The benefit of your vigilance is magnified in the deterrent effect it will eventually have.

This manual is designed to outline the basic elements of antitrust law in layperson’s language. It also describes the kinds of violations you would be most likely to detect, with some examples drawn from past court cases. At the back of the manual there is a form which you should fill out and return to the Criminal Litigation and Antitrust Unit, whenever you observe a suspected violation. The form and the checklist of questions with it help to bring into focus some of the more common indications of unlawful activity.

The Attorney General’s office investigates suspected antitrust violations and can institute either civil or criminal proceedings for violations of the law. The Attorney General can also bring a civil action for an injunction to halt anticompetitive practices, to recover damages, penalties and prosecution costs, and to dissolve a business organization found to be violating antitrust laws. You should be aware of what constitutes suspected anticompetitive behavior and have the confidence to bring such matters to the attention of our office.

1.  PRICE FIXING.

Any agreement or informal arrangement by which prices or bids are fixed between competitors is illegal. Whether the agreement or arrangement is to raise or lower prices, or to charge the same or different prices, is irrelevant. Motive too is irrelevant.

Any pattern of concerted action by competitors with respect to pricing or bidding could be such an unlawful arrangement or combination. Concerted action need not mean that the competitors have explicitly agreed among themselves to fix prices. For there to be concerted action, it is not necessary to expressly fix prices or even verbally agree to do so. It is not necessary to show that competitors have held secret meetings otherwise acted surreptitiously.

The common indicators of price fixing include the pricing patterns set forth on the checklist at the back of this manual. In addition to those patterns, often the marketing representatives of the suppliers you deal with will make statements or give you advertising materials which will suggest that price fixing is afoot.

Horizontal Price Fixing. Horizontal price fixing occurs when direct competitors on the same level of distribution, such as competing cement manufacturers, agree on prices. The following are examples of statements or representations that are highly suspicious and may be indicative of horizontal price fixing:

a. Any reference to “association price schedules,” “industry price schedules,” “industry suggested prices,” “industry-wide” or “market-wide” pricing, *etc*.

b. Justification for the price or terms offered “because they follow industry pricing or terms,” or “because they follow the industry leaders’ pricing or terms,” or “follow (a named competitor’s) pricing or terms,” *etc*.

c. Any reference to “industry self-regulation,” *etc*., given as justification for price or terms “because they conform to the industry’s guidelines” or “standards,” or “because they are necessary to further industry standards.”

d. Any reference that the representative’s company “has been meeting with” its competitors for whatever reason.

e. Any reference that the representative’s competitors offer identical or highly similar prices, discounts, markups, *etc*.

f. Any reference that the suppliers of the representative’s company, and those of its competitors, charge identical or very similar prices.

g. Justification for price or terms “because out suppliers, *etc.*, require it” or “because our suppliers, *etc.*, charge about the same,” *etc*.

Vertical price Fixing. In addition to horizontal price fixing, an agreement between two or more people at different levels of the chain of distribution, *e.g.*, manufacturer, wholesaler, set or control the resale price can be unlawful. This practice is variously called “vertical price fixing” or “resale price maintenance.”

**It can be unlawful for a manufacturer to require a downstream reseller to charge a particular price to its customers.** While a manufacturer may lawfully recommend or suggest a resale price, in situations where a manufacturer has a large market share (market power) any additional actions by the manufacturer which force or coerce retailers to charge those prices could be unlawful. Although these cases have become rarer since the law was changed by the U.S. Supreme Court in 2007, our office would still like to hear about these cases. Any indications from vendors that they are unable deviate from the manufacturer’s pricing policies should be reported for further investigation.

Examples of statements suggestive of vertical price fixing might include:

a. Complaints by bidders that suppliers require them to charge a fixed markup or a minimum price.

b. Comments that the prices of materials are set by others and must be passed on as set by agreement.

Price fixing can take many forms. As to public agencies, however, it generally occurs through subversion of the competitive bidding process. For example, concerted action not to bid below a minimum price constitutes price fixing. Agreements to follow the “suggested” or “list” prices of a competitor or of a trade association may be price fixing. Agreements to establish uniform prices or establish discounts or fixed mark-up percentages may be price fixing. Similarly, agreements to eliminate discounts, restrict production, or limit advertising may be price fixing.

2.  BID RIGGING.

Bid rigging can take many forms. For example, in “rotating bidding, “ competitors designate on a rotating basis, which one will present the low bid, while the rest present a spread of bids all high enough above the low bid to induce the buyer to accept the low bid.

“Bid suppression” or “bid limiting” involves one or several competitors, who would otherwise be likely to bid, who refrain from any bidding, or drop out of the bidding to enable a competitor’s bid to be accepted.

“Complementary bidding” involves competitors who submit token bids too high to be accepted (or if competitive in price, then only on special terms that would not be acceptable). Complementary bidding may be used by bidders to get around rules of the purchasing agency (state, county, local) that all the agency to require re-bidding where they receive only one bid on a project. The competing bidders would have an added reason in these cases to have a competitor throw in a phony complementary bid. Simply put, this type of bid rigging, indeed all bid rigging, is a form of fraud on the purchasing agency: it presents the bids as competitive despite being rigged.

A favorite trick of bid riggers is to allocate (or agree as to how to divide) certain business. For example, the suppliers of water meters may find themselves bidding before several cities or water districts within a county. Manufacturer A may bid at 20 percent above normal competitive levels in a water district around a particular city. Manufacturers B and C may be the only competitors and they may hid at 30 percent above competitive levels in order to assure that Manufacturer A receive the business at a high profit margin.

Why? Because next time when the bids are made for another water district, Manufacturer B will get the bid at 20 percent above the normal competitive cost and Manufacturers A and C will bid at 30 percent above cost to assure that B gets “its share” of the business. Under the agreement, Manufacturer C will get its turn on the next job.

Bid rotation can be done by geographic area, can occur on the same contract (first one, then the other), or by jurisdiction (one manufacturer gets one water district and another gets a second, *etc.*). Because of the agreement to divide, these bid rigging violations often involve general “division” or “allocation” of customers or territories.

Purchasing agents can detect patterns that indicate these kinds of antitrust violations over a period of time. Receiving bids from fewer bidders than you would expect is one indicator of a potential antitrust violation. Those who are not bidding may be withholding bids as part of a bid rigging scheme. Inexplicably large gaps between the winning bids and all other bids may also be an indicator.

Receiving low bids on a regular basis from the same manufacturer such as Manufacturer A always winning a bid in a given area or on a given order may be an indicator. Or, you might notice that Manufacturer A appears to be bidding substantially higher on some jobs than on other similar jobs, with no accountable cost difference.

Allocation of Markets. In addition to allocating customers in bidding, **some firms agree not to compete at all in certain territories or for certain kinds of business in return for reciprocal treatment.** For there to be an unlawful allocation of markets, customers or territories, there must be at least two or more competitors “combining” for that purpose. However, just as in straight price fixing, there need not be explicit or written agreements to divide markets, customers, *etc*. In other words, the combination or agreement can be direct or indirect, and need only tacit understanding not to impinge on another territory, market, or customer.

Statements by marketing representatives or in their promotional materials may suggest the existence of this violation. Highly suspicious examples are:

1. Statements that the representative’s company “does not sell in that area” or that “only a particular firm sells in that area” or “does that kind of business.”
2. Statements to the effect that a salesman (of a competitor) should not be making a particular proposal to you, or should not be calling on you, *etc*.
3. Any reference to the effect that a particular competitor only sells outside (or inside) a particular county, or only sells to public agencies in other regions of \_\_\_\_\_\_\_\_, *etc*.

3.  GROUP BOYCOTTS AND CONCERTED REFUSALS TO DEAL.

Any combination or agreement among competitors not to sell or particular business entity, only upon certain conditions, may be an unlawful concerted refusal to deal. Of course, an individual business generally has a right to choose with whom it wishes to deal. However, two or more businesses cannot refuse another business.

In a typical example, Bank A and Bank B agree not to supply credit to Contractor X until some condition is fulfilled. It could be a demand to put in a parking lot for them, to join a trade association they support, or keep all business their banks. Again, the involvement of two or more competitors in a combination or agreement is necessary to constitute an illegal refusal to deal.

Concerted refusals to deal take two basic forms:

1) Primary boycotts involve combinations or agreements not victim.

2) Secondary boycotts involve refusals to deal with customers, sellers, or suppliers of the targeted victim. A might therefore the indirect victim of boycott.

Refusal to deal may be motivated by the desire to impose conditions of purchase or resale such as pricing requirements, credit terms, warranty, servicing, parts replacement and shipping.

Indications that this type of violation exists include some of the bidding patterns on the checklist at the end of this manual particularly those where regular bidders suddenly stop bidding for no apparent business reason. Statements by marketing people also may indicate that this activity is occurring. In the absence of apparently valid business reasons, the following situations may indicate a concerted refusal to deal:

1. Statements to the effect that a competitor or competitors will not be submitting a bid as usual.
2. Any reference to the effect that the bidder’s company is no longer dealing with a particular supplier when you know the bidder’s company is supplying other businesses or agencies with the particular supplier’s products.
3. Statements that the representative’s company “has been cut off” from certain suppliers or by certain suppliers.
4. Any reference to trade associations or industry leaders “recommending” that certain parts or products not be carried by dealers, or that certain parts or products “do not meet industry standards.”
5. Statements that the representative’s company no longer supply” your agency.

4.  TIE-INS.

Tie-ins involve the use of market power by a commercial entity to require the purchase of additional articles or services the buyer may not want. For example, the manufacturer of a certain kind of reproducing machine may hold a patent on a process allowing easy and clear reproductions of manuscripts and documents. You may also be required to buy its paper in conjunction with the purchase of its machine. The paper may not be patented and may not be necessary to the operation of the machine. Moreover, its paper may be three times the cost of a competitor’s paper.

The courts consider tie-in to be presumptively unlawful except in extraordinary circumstances. Further, if a buyer has to buy an additional unwanted product at higher prices, a court will tend to draw the inference that the buyer accepted the arrangement because of the market power of the seller. The market power can derive from a patent, from having a unique product, or because of the unavailability of a competitor’s product.

The major defense to this offense is that the additional product the seller is requiring the buyer to purchase (or lease) is not a separate product but part of the same product. Some courts have accepted the argument that additional products may be needed for the safe operation of a basic article. Therefore, the court might allow a seller to require buyer to take training course in order to properly and safely use a complicated piece of machinery. Such arguments have greater weight where the product is leased and where it is very complicated or dangerous to operate without special training or equipment.

As major purchasers, you are directly vulnerable to tie-in requirements which may be unlawful and may cost you money. Examples of statements from sellers or lessors which may suggest there is a tie-in would include:

* 1. Statements that you exclusively use “their” paper, supplies or other equipment, or the “machines will not work.”
  2. Statements that broken parts must be replaced by a part or product that only they carry.
  3. A requirement that you buy several different products as part of a “package” for a “special discount.”
  4. A refusal to break up a “package” or items for sale or lease because “we sell these all together or not at all.”
  5. An offer to sell you supplies at a very competitive rate if you will simply buy another product at a rate higher than a competitor offers.

5.  MONOPOLIES AND ATTEMPTS TO MONOPOLIZE.

State and federal antitrust laws make monopolies or an attempt to monopolize a given market illegal. Court decisions tend to require some kind of unfair business practice used to the intended monopoly. Simply stated, this means pricing an article at or below cost in order to drive a competitor out of business. Once competition is eliminated, it is then theoretically possible for the violator to abuse the unlawfully obtained market position by overcharging.

Unlike the violations previously described, the offenses of monopolization and attempted monopolization do not require that two or more parties be involved. Rather, one entity acting entirely alone can attempt to drive a competitor out of a market unfairly in order to achieve monopoly power.

As major purchasers, you will be among the most important detectors of this kind of violation. It may be tempting for you to welcome pleasantly low bids from a large firm in the short run. But failing to monitor bids which may be priced below cost can be devastating to long-run interests. Where three or four competitors dominate a given market to which entry requires substantial investments of time and capital, the elimination of even one competitor can mean higher prices for you in the months or years ahead.

Signs of possible predatory pricing practices include bids that fall well below usual levels, such as more than 15 percent. Occasionally after a bid is accepted, additional work will be required and the successful bidder will be allowed to make an additional bid in connection with the project. If this latter bid is much higher in relation to the cost of doing the job than the original bid, it may be an indication that the initial bid was made deliberately low. If a bidder submits very low bid for the same work, it is another sign.

The following are the kinds of comments you might hear suggesting predatory practices:

1. Comments to the effect: that the bids of a competitor are “driving me out of business.”
2. Complaints that a given bid could not “even pay for the cost of doing the job.”
3. Boasts that “we’re doing this job below cost in order to get the business and move up in the industry.”
4. Comments to the effect that a competitor is “all washed up” or that the company is “on the run” and will soon be “finished” or “taken care of.”

SUMMARY

Those of you who are purchasing agents have the chance to give taxpayers their money’s worth in getting a good value for their tax dollars. At the same time, you can help preserve a healthy, competitive economy. A reporting form and checklist of questions is included for your use at the end of this manual.

REPORT TO DEPARTMENT OF JUSTICE

ANTITRUST UNIT

[Address and Contact Information]

Wherever bidding practices or other business dealings indicate collusion or unfair competition as described in this manual, please fill out this form. Add additional explanatory separate sheets if necessary.

REFERRING OFFICE:

PURCHASING AGENT OR CONTACT IN REFERRING OFFICE/PHONE:

SUBJECT MATTER OF BID:

NAMES OF BIDDERS AND AMOUNTS BID:

NAMES OF OTHER PERSONS RECEIVING BID SPECIFICATIONS:

BID OPENING DATE:

DESCRIPTION OF QUESTIONABLE CIRCUMSTANCES:

ANTITRUST CHECKLIST FOR PUBLIC PROCUREMENT OFFICIALS

If you answer yes to any of the following questions or if you desire information on the antitrust laws and their application to public procurement, please contact:

Antitrust Unit

  Department of Justice

[Address]

Tel.:

Email:

Also, this list is not all inclusive, and other incidents of questionable activity may occur to you.

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| --- | --- | --- | --- |
|  | 1. |  | Have you ever received identical bids for products? A high degree of uniformity or stability in bidding may mean bidders have an agreement. |
|  | 2. |  | Has any supplier ever issued a price list that seemed identical with respect to prices or terms to that issued by another supplier? |
|  | 3. |  | Have you ever felt that all of the prices quoted for an item were excessively high? Do you know of any instances where prices quoted you were higher than those quoted private industry for the same products? |
|  | 4. |  | Have you ever heard of trade-offs by sellers where one company quotes a price one time and another company quotes a price another time? |
|  | 5. |  | Have you ever heard of a bidder intentionally submitting a high bid so that some other bidder would win the contract? |
|  | 6. |  | Have you ever detected a pattern of rotated bids? |
|  | 7. |  | Have you ever noticed an abrupt change in bidding practices? |
|  | 8. |  | Have you ever heard of one or more bidders submitting dummy bids; that is, bids submitted merely for the purpose of fulfilling requirements on the number of bidders? |
|  | 9. |  | Have you ever had a situation where you received only one bid or price quotation when you knew there was more than one company in the industry? |
|  | 10. |  | Has an eligible supplier consistently failed to submit a bid? |
|  | 11. |  | Has any supplier ever declined to sell you a particular product for reasons not connected with credit or availability? |
|  | 12. |  | Has any wholesaler or distributor ever told you that he or she was forbidden by a manufacturer or another wholesaler or distributor to cut prices on a particular product, to sell the product to you, or to bid on the job? |
|  | 13. |  | Has any supplier ever told you that he or she was unable to out prices, to sell to you or to bid on the job because of an agreement with other suppliers? |
|  | 14. |  | Has any distributor or wholesaler told you that he or she “can’t” sell to the government because that is “reserved” for the manufacturer? That they would like to bid, but the manufacturer won’t deliver? |
|  | 15. |  | Some brands of products may be carried in your trading areas by two or more wholesalers or distributors who would be equally acceptable suppliers from the standpoint of price, distance, or convenience. In such instances, have you had the experience of any distributor or wholesaler refusing to sell to you and insisting or suggesting that you purchase from other wholesalers or distributors? |
|  | 16. |  | Some manufacturers market a given product under two different labels with different prices, even though the product may be otherwise identical. If you have had occasion to buy such a product from a manufacturer, have you encountered any refusal by the manufacturer to sell you the product under one label rather than the other? Under the lower priced label? |
|  | 17. |  | Some supplier may market functionally identical and otherwise equally acceptable products through two different divisions at different prices. Have you ever dealt with such a supplier? If so, has that supplier insisted upon selling to you only through the higher priced divisions? |
|  | 18. |  | Have you ever heard of any trade association or interest group having a hand in setting product specifications or requirements? Do these specifications fit some, but not all, of that type of merchandise on the market? |
|  | 19. |  | Have you ever received any indication that a particular supplier had advance knowledge of what a competitor was doing or going to do? |
|  | 20. |  | Have you ever attended a meeting where competitors discussed prices? Have you ever received an indication that competitors were discussing their prices (or other business practices) with each other? |
|  | 21. |  | Do the companies in any particular industry or area appear particularly “clubbish” or cooperative? |

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