SHERMAN ANTITRUST AND CLAYTON ACTS

AVOIDING VIOLATIONS OF PRICE FIXING, BID RIGGING, AND OTHER COLLUSION

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Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity. Criminal prosecution of Sherman Act violations is the responsibility of the Antitrust Division of the United States Department of Justice. The U.S. Supreme Court said in *Spectrum Sports, Inc. v. McQuillan* 506 U.S. 447 (1993):

> "The purpose of the [Sherman] Act . . . is to protect the public from the failure of the market. The law directs itself . . . against conduct which unfairly tends to destroy competition itself."

The purpose of the Clayton Act was to give more enforcement teeth to the Sherman Antitrust Act. Passed in 1914, the Clayton Act regulates general practices that may be detrimental to fair competition. Some of these general practices regulated by the Clayton Act include price discrimination, exclusive dealing contracts, tying agreements, or requirement contracts; and mergers and acquisitions. Treble damages can be enforced and a portion provided to private individuals for identifying and bringing these violations to Court.

The most common violations Contractors should be aware of are price fixing and bid rigging. These can arise during innocent discussions with friendly competitors. Competing Contractors call each other and talk frequently, but this is not necessarily collusion or conspiracy. However, if Contractors call each other to discuss their bid prices, discuss and agree whether they will stay out of a competition to let the other contractor win "this one", or agree to let the other contractor win the competition with a deceptive agreement to obtain all subcontract work, they can be violating the Sherman Anti Trust Act.

For example, bid rigging is one way that conspiring competitors effectively raise prices where federal, state, or local governments acquire goods or services by soliciting competing bids. Bid rigging also takes many forms, for example Bid Suppression. In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding so that the designated winning competitor's bid will be accepted.

IDENTIFYING SHERMAN AND CLAYTON ACT VIOLATIONS

The most common violations of the Sherman Act and most likely to be prosecuted are:

Price fixing,
Bid rigging, and
Territorial or customer allocation among competitors

We will identify and describe some of the various types of price-fixing, bid-rigging market-allocation agreements, as well as describe some methods used in detecting these violations.

IDENTIFYING PRICE-FIXING ACTIVITIES:

Price fixing generally involves any agreement between competitors to tamper with prices or price levels, or terms and conditions of sale (e.g., interest rates for consumer credit), for commodities or services. Generally speaking, price fixing involves an agreement by two or more competing producers of a specific commodity, or competing providers of a particular service, in a defined geographic area, to raise, set or maintain prices for their goods or services.

Other manifestations of price fixing include the following:

A. Agreements for uniform price discounts;

B. Agreements to eliminate discounts to all customers or certain types of customers;

C. Agreements to adopt a specific formula for the computation of selling prices;

D. Agreements on terms and conditions of sale, including uniform freight charges, quantity discounts, or anything that affects the actual price of the product; and

E. Agreements not to advertise prices.

The fact that all competitors charge the same price, or use the same terms of sale, is not, by itself, evidence of a price-fixing conspiracy because similar prices may in fact be the outcome of competition. However, where price increases are announced by all competitors at the same time, or prior to a uniform effective date, there is a substantial likelihood of collusion.

Further, the fact that all prices are not identical does not indicate the absence of a conspiracy. For example, one company may have traditionally sold at a price lower than the others and, when a general increase in price occurs, the company with the lower price may adopt the same percentage or absolute increase as the others.

Records of changes or prices, including price lists, price-change notices and company memoranda relating to price analysis, are all helpful in determining the existence of a conspiracy. In addition, evidence of competitors' meetings or telephone conversations raise the possibility of collusion, and such evidence usually comprises the most effective circumstantial form of proof in price-fixing cases. Antitrust conspiracy cases generally require testimony from a member of the conspiracy.

IDENTIFYING BID-RIGGING ACTIVITIES:

Bid rigging generally involves an agreement or arrangement among companies to determine the successful bidder in advance of a bid letting at a price set by the successful bidder. The agreed-upon winning bidder customarily advises the other potential bidders of a bid amount they must exceed. The higher bids submitted by the other bidders are generally known as complementary bids. Also, some potential bidders may agree to refrain from bidding on a particular project. In most bid-rigging situations, the conspirators try to submit three or more bids on the project to create the appearance that competitive bidding has occurred.

Other Examples:

(a) rotate the projects among themselves, thereby ensuring that each gets some work,

(b) allocate geographic areas, or

(c) divide the project by granting subcontracts to their competitors for portions of the work.

The DOJ's Antitrust Division has identified that the most useful bid analysis techniques usually require careful study of bid records, including a screening of bid submissions to determine:

A. Whether there was any cost estimate for the project prepared by the governmental or private authority letting the bids, and if so, whether the low bidder's final price exceeded the estimate. It is also important to know whether the bidders and potential bidders knew the Government estimate prior to bidding to use that information to set their agreed-upon low bid; and

B. Whether there was a small number of proposed bidders for a project. As a practical matter, when there are a large number of bidders for a project, it is more difficult, although not impossible, to rig the bids.

After this initial screening, the Government may analyze suspicious bids for the following practices, which are frequently indicators of collusion:

A. Qualified bidders fail to bid or, more specifically, the logical bidders for the job fail to bid;
B. Certain contractors repeatedly bid against one another or, conversely, certain contractors never bid against one another;
C. Successful bidders repeatedly subcontract work to companies that submitted higher bids on the same project, or to companies that requested or received proposals for bids but did not submit bids;
D. Different groups of contractors appear to specialize in winning bids from certain kinds of customers to the exclusion of others, suggesting that customers have been allocated among the bidders;
E. A particular contractor appears to bid substantially higher on some bids than on other bids within the same period of time and geographic area.
F. A particular contractor always wins the projects in a certain geographic area and there are no obvious competitive reasons why this should be so;
G. Identical bid amounts on particular line items are submitted by two or more contractors. In some instances, identical line-item bids can be explained, since suppliers often quote the same prices to several bidders;
H. Joint-venture bids are submitted where either contractor in the venture could have bid individually as the prime contractor; and

I. The original bidders fail to rebid when the original bids were rejected for being too far over estimate, or a rebidding results in the same bidders being ranked in the same order as on the original bidding.

In addition to the analysis of data that is essential in a bid-rigging investigation, the most important evidence the Federal agents develop relates to meetings or discussions of bids among the competing bidders. To determine what actually occurred at these meetings, it is frequently necessary to rely on the testimony of participants in the conspiracy who are willing to testify.

THE CLAYTON ACT

The purpose of the Clayton Act was to give more enforcement teeth to the Sherman Antitrust Act. Passed in 1914, the Clayton Act regulates general practices that may be detrimental to fair competition, such as price discrimination, exclusive dealing contracts, tying agreements, or requirement contracts.

Substantively, the act seeks to capture anticompetitive practices in their incipiency by prohibiting particular types of conduct, not deemed in the best interest of a competitive market. These include:

a. price discrimination between different purchasers if such a discrimination substantially lessens competition or tends to create a monopoly in any line of commerce;
b. sales on the condition that (A) the buyer or lessee not deal with the competitors of the seller or lessor ("exclusive dealings") or (B) the buyer also purchase another different product ("tying") but only when these acts substantially lessen competition;
c. mergers and acquisitions where the effect may substantially lessen competition or where the voting securities and assets threshold is met;
d. any person from being a director of two or more competing corporations, if those corporations would violate the anti-trust criteria by merging .

Procedurally, the Act empowers private parties injured by violations of the Act to sue for treble damages under Section 4 and injunctive relief under Section 16. Under the Clayton Act, a provision "permits a suit in the federal courts for three times the actual damages caused by anything forbidden in the antitrust laws", including court costs and attorney's fees.

For additional information regarding this article, or questions regarding compliance with Federal Contracts and Regulations, please contact James E. Krause in Jacksonville, Florida. Telephone 904.353.5533; email jimkrause@krauselaw.net .

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