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Beware Gov't Contract Practices That May Signal Collusion

By **Gail Zirkelbach and Eric Ransom** (December 6, 2019, 4:52 PM EST)

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On Nov. 5, the U.S. Department of Justice announced the formation of the new interagency Procurement Collusion Strike Force, putting government contractors on notice that the U.S. government has identified the public procurement system as a major focus area for ongoing antitrust enforcement efforts.

The strike force will include prosecutors from the Justice Department's Antitrust Division and 13 U.S. Attorney's offices, as well as investigators from the U.S. Federal Bureau of Investigation and four major federal Offices of Inspector General.

In announcing the new initiative, Assistant Attorney General Makan Delrahim of the Antitrust Division explained that the strike force will harness these partners to deter, detect, investigate and prosecute efforts by government contractors to rig bids, fix prices or allocate bids, or otherwise undermine the integrity of the government procurement process. The strike force's efforts will pursue procurement collusion in connection with any use of federal funds, whether contract, grant or other program, and at any level — federal, state or local.

Delrahim stated that to deter and prevent collusive behavior on the front end, the strike force "will conduct outreach to federal, state and local government procurement officials to educate them on how to identify potential indicators, or red flags, of collusion." He added that increased education efforts "will facilitate the detection and reporting of suspicious behavior to help agents and prosecutors investigate and vigorously prosecute crimes when they occur."

The strike force will also adopt and improve data analytics programs to identify potential collusion from government procurement data. In addition, the strike force has launched a new public website featuring antitrust training materials and legal resources, as well as a citizen complaint form that members of the public can use to report suspected violations.

What do government contractors need to know?

First, government contractors at all levels should expect an increase in the level of scrutiny applied to the bid and proposal process by law enforcement, inspectors general, procurement officials, and the public. The Justice Department appears to believe that the government procurement process can be

vulnerable to collusion, and targeted the industry for enforcement. Importantly, government contractors should be aware that the conditions the Antitrust Division considers indicative of potential collusive activity (and will train procurement officials to identify and report) are frequently present in typical government procurements.

For example, the new Procurement Collusion Strike Force public website states[1] that collusion is more likely to occur:

- Where there are few sellers or a small group of major sellers who control large fractions of the market;
- Where it is difficult for new competitors to enter the market;
- Where products are standardized and few substitutes are available;
- Where purchases are repetitive or regularly scheduled; and where there is rush or emergency work.
- Where competitors know each other well through social connections, trade associations and legitimate business contacts;
- Where competitors have joint ventures, teaming agreements or subcontracting relationships; and
- Where employees frequently shift from one competitor to another.

Second, because the conditions identified by the strike force are likely to be present in normal procurement activity, government contractors at all levels would be well-advised to understand identified red flags for price-fixing agreements, bid-rigging agreements, or award-allocation agreements.

Specifically, government contractors will need to be alert to, and carefully review arrangements which could be considered price-fixing — such as where it appears competitors agreed in advance the prices or terms under which their products or services are sold — including agreements that may raise prices, set a range of prices, or add fees or eliminate discounts. Red flags for price-fixing include identical line-item pricing between offerors, sudden increases in prices or price ranges, and similar changes in fees or discounts between offerors.

Similarly, government contractors should be alert to and carefully review arrangements which could be perceived as bid-rigging, where it could appear that competitors agreed in advance which company will win a contract. Bid-rigging could involve competitors attempting to rotate contract awards, submitting high-priced or unacceptable proposals in exchange for subcontracting opportunities, or agreeing not to submit a proposal.

Red flags for bid-rigging include the same companies winning and losing over periods of time, the winning company subcontracting to losing companies, regular offerors unexpectedly failing to submit proposals, suspicious differences in pricing between the winning proposal and losing proposals, or similar language or mistakes in competitors' proposals.

Government contractors should also be alert to situations that could provoke allocation concerns —

anti-competitive agreements among competitors to divide opportunities, such as by geographic region, customer or product. Red flags for allocation include companies not submitting proposals to certain customers or for certain products or services that they typically provide.

Missteps in these areas are most likely to occur when a company is selecting which procurement opportunities to pursue, and during proposal preparation activities. However, a contractor's actions after proposal submission or after contract award could also raise concerns among procurement officials or law enforcement.

With respect to selecting procurement opportunities and proposal preparation, government contractors should exercise caution when communicating with competitors in connection with these decisions. Contractors should be especially careful when initially exploring joint-venture, teaming or subcontracting arrangements. Although the DOJ has recognized that such collaborations are often procompetitive, and not typically subject to criminal investigation, in this era of increased scrutiny contractors may want to provide their employees with legal advice on how to communicate with any potential competitors.

When negotiating such collaborative efforts, contractor employees should exercise caution in sharing proposal materials, communicating with potential competitors intentions to submit a competing offer (or not submit a competing offer), engaging in actions that could be perceived as influencing price competition, or exchanging pricing strategy or prices to be submitted to the government.

After submitting a proposal, contractors should be mindful that there could be heightened scrutiny on attempts to withdraw a proposal, especially where the withdrawing company later becomes a subcontractor to the awardee — such a situation is a DOJ red flag for bid-rigging. Finally, after award, contractors should also be cautious of subcontracting with unsuccessful offerors in the same procurement — the other side of the same red flag.

Third, contractors should be reminded that the same practices the DOJ is focused on can also be violations of the Certificate of Independent Price Determination under FAR §52.203-2[2] required in connection with each bid or proposal, and also required for a government contractor's registration in the System for Award Management.[3]

Under this clause, the offeror must certify that:
(1) Prices in the offer have been arrived at independently without consultation, communication, or agreement with any other competitor; (2) Prices in the offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other competitor before bid opening or contract award unless otherwise required by law; and (3) No attempt has been made or will be made by the offeror to induce any other competitor to/not to submit an offer for the purpose of restricting competition.

To the extent a contractor knowingly provides a false certification under FAR §52.203-2, it will have violated the civil False Claims Act,[4] with far-reaching consequences, including damages and statutory penalties in addition to potential contract termination, and suspension and debarment.

Moreover, in the context of an FCA action, a knowing false certification under FAR §52.203-2 (which only would require more than mere negligence as to the falsity) would constitute fraudulent inducement to the contract award. As a result, damages would be calculated as the entire value of the contract — notwithstanding the fact that the government obtained the benefit of contract performance

— which would then be trebled and, in addition, each request for payment under the contract would constitute an independent FCA violation with a per-claim penalty of up to $21,536.

In addition, any indictment for a fraud or antitrust crime, or an action under the FCA, is likely to trigger an administrative exclusion from government contracting through the suspension and debarment process. Increased coordination among the Department of Justice, inspectors general and procurement officials through the strike force makes it nearly certain that information on criminal proceedings and investigations will be shared with suspension and debarment officials.

Agencies may not solicit offers from, award contracts to or consent to subcontracts with suspended or debarred companies, and companies are also likely to experience collateral impacts on, for example, state and local procurements, security clearances and export licenses. Suspension and debarment may apply to individuals or entities, and may extend to parent companies or affiliates, and prime and subcontractors at any tier, as warranted.

How can government contractors avoid these risks?

To protect themselves, government contractors should review existing compliance and training programs and develop enhancements to ensure they fully cover antitrust issues that are the subject of the new strike force. Moreover, these programs should be designed with the understanding that even if collusive activities are not successfully avoided, the programs should permit the detection of potential violations, as early detection of potential violations will be key to a company's ability to avoid prosecution under the Justice Department's leniency programs (and the resulting risk of suspension and debarment).

The Antitrust Division leniency program is a formal, written policy, which provides that the first company or individual to self-report a criminal offense may obtain immunity from prosecution, in exchange for ongoing cooperation in the investigation.[5] Leniency is available before or after an antitrust division investigation has begun. However, as only one company may be granted leniency for an antitrust conspiracy, a company may be in a race to report with its co-conspirators, or even its own employees, to obtain the benefits of this program.

Yet, even if a contractor is not the first to report a violation, a well-designed compliance program can be a positive factor during investigation of an antitrust violation. Specifically, in July, Delrahim announced that the Antitrust Division will consider compliance programs at the charging stage. It is anticipated that the DOJ manual will be updated to allow for deferred prosecution agreements when factors,[6] including the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision, are met.

Although the Justice Department does not provide specific requirements for compliance programs, the DOJ manual does set out general considerations which suggest that prosecutors will question whether a compliance program is well-designed, is applied earnestly and in good faith, and is effective in detecting and reporting violations. Consequently, it is anticipated that factors that prosecutors will consider include:

- Design, comprehensiveness, and accessibility of the program.

- Culture of compliance within the company, including management and leadership.

- Responsibility for the compliance program, including the autonomy, seniority, and resources of program leadership.
- Whether the program is tailored to avoid and detect antitrust risks.
- Effectiveness of training and communication with personnel.
- Periodic review of the program, monitoring and auditing.
- Reporting mechanisms that are accessible, confidential, and understood.
- Incentives for compliance and disciplinary actions incorporated into company operations.
- Remediation of violations and impact of the compliance program in detecting an offense.[7]

In sum, the Justice Department's announcement of the new strike force should serve as an opportunity for companies that bid on government contracts with federal, state or local entities to review their compliance programs and employee training plans in light of the identified conditions in the industry for collusion and the red flags described by the Antitrust Division. Companies can further ensure that existing programs are updated to adequately and effectively avoid and detect behaviors that could appear to indicate collusion and to position themselves to take advantage of the leniency program if necessary.

Clarification: This article has been modified to updated to clarify that certain processes and arrangements in procurement do not necessarily need to be avoided, but should be carefully reviewed for red flags and compliance.

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[1] Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are And What To Look For, Sept. 28, 2005, https://www.justice.gov/atr/file/810261/download.

[2] FAR § 52.203-2.

[3] 48 C.F.R. §52.203-2.

[4] 31 U.S.C. §§ 3729 — 3733.

[5] U.S. Department of Justice, Corporate Leniency Policy, August 10, 1993, https://www.justice.gov/atr/file/810281/download).

[6] See Department of Justice, Justice Manual § 9-28.300.

[7] See Department of Justice, Justice Manual § 9-28.800.