

Minimizing Damages In Gov't Procurement Antitrust Cases

By **Juan Arteaga** (May 13, 2020, 5:29 PM EDT)

During the past year, the Antitrust Division of the U.S. Department of Justice has made rooting out collusive conduct during the government procurement process a top priority.

In November 2019, for example, the Antitrust Division announced the creation of the Procurement Collusion Strike Force to "combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government — federal, state, and local."^[1]



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This collusion strike force includes investigators and prosecutors from the FBI, the inspector general offices for the U.S. Department of Defense, U.S. Postal Service, U.S. General Services Administration, and Department of Justice, and 13 U.S. attorney's offices in key districts such as the Eastern District of Virginia, District of Columbia, Southern District of New York and Central District of California.

Recently, the head of the Antitrust Division, Assistant Attorney General Makan Delrahim, stated that one-third of the Antitrust Division's 100 open grand jury cases involve allegations of procurement collusion and that state officials have expressed significant interest in working with the division's task force to prosecute antitrust conspiracies that target state agencies.

In addition to launching its procurement collusion strike force, the Antitrust Division has begun employing a powerful, yet historically underused, enforcement tool when prosecuting antitrust crimes that impact the government procurement process: the ability to seek civil treble damages where the federal government itself is the victim of an antitrust conspiracy.

The Antitrust Division has used this enforcement tool in its ongoing investigation into a bid rigging conspiracy for the supply of fuel to U.S. military bases in South Korea, which thus far has resulted in several companies having to pay hundreds of millions in civil damages to the federal government in addition to entering guilty pleas and paying significant criminal fines.

In discussing these civil settlements, Delrahim made clear that this was not a one-off occurrence:

[T]hese cases will serve as a blueprint for future [investigations and prosecutions] as [the Division] expands its [treble damages] recovery efforts. Where antitrust violators 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 [all of our enforcement] tools.[2]

The Antitrust Division's top criminal enforcer has reinforced this message by noting that the government procurement process is an area where the division will be particularly vigilant about seeking both civil damages and criminal penalties in order to deter and punish antitrust cartels that target federal government agencies:

I want to send the message loud and clear that the Antitrust Division ... is training its focus on the government procurement space. Protecting government victims—and thus taxpayers—has been, and will continue to be, a top priority for the ... Antitrust Division. In fact, when we are deciding whether to open an investigation, the fact that the suspected criminal antitrust conduct impacted the federal government is typically dispositive.[3]

The Antitrust Division's renewed focus on seeking civil treble damages — on top of criminal charges and fines — when prosecuting antitrust conspiracies that directly harm federal government agencies significantly increases the stakes for companies and individuals involved in such conspiracies.

Moreover, the Antitrust Division's statement that this parallel civil and criminal enforcement will focus on the government procurement process makes it more important than ever for government contractors to take proactive measures — including instituting robust antitrust compliance programs, policies and trainings — that minimize the risk that their employees will participate in such conspiracies and that strongly position them to detect and terminate any such conduct.

These proactive measures could also help government contractors mitigate any penalties imposed by the Antitrust Division — including securing a deferred prosecution agreement rather than a guilty plea — by showing that the company made a good faith effort to create a culture of antitrust compliance.

The Antitrust Division's Authority to Seek Civil Treble Damages for Antitrust Violations That Target Federal Government Agencies

In prosecuting civil violations of the Sherman Act, the Antitrust Division is typically limited to seeking nonmonetary equitable relief.[4] However, Section 4A of the Clayton Act expressly authorizes the Antitrust Division to seek civil treble damages on behalf of the U.S. whenever a federal government agency has been directly harmed by an antitrust conspiracy.

Until its current South Korea fuel supply bid-rigging investigation, the Antitrust Division had rarely exercised its Section 4A authority. Indeed, the Antitrust Division had only sought treble damages under Section 4A in three cases between 1990 (the year Congress conferred this authority) and November 2018 (when the Antitrust Division brought its first prosecution in its ongoing South Korea fuel supply bid-rigging investigation).[5]

- In 1991, the Antitrust Division required two companies to pay a combined total of \$250,000 in damages for rigging bids to purchase surplus gunpowder.
- In 1994, the Antitrust Division required two companies to pay \$4 million in damages and agree to an \$8 million discount on the bid price for participating in a "teaming" arrangement that eliminated competition in the supply of cluster bombs to the Department of Defense.

- In 2012, the Antitrust Division required two companies to pay a combined total of \$550,000 in damages for colluding during the bidding process for four natural gas leases at auctions run by the Bureau of Land Management.

The Antitrust Division Dusts Off its Section 4A Authority

In November 2018, the Antitrust Division announced that three South Korean companies agreed to plead guilty and pay approximately \$82 million in criminal fines for their involvement in a decade-long conspiracy to rig bids and fix prices for contracts to supply fuel to U.S. military bases in South Korea.

According to the Antitrust Division, these companies and their co-conspirators inflated their profit margins on the impacted fuel supply contracts by predetermining the winning bidder, and then fraudulently submitting collusive bids to the U.S. military.

Citing its authority under Section 4A of the Clayton Act, the Antitrust Division also announced that the companies agreed to pay the federal government approximately \$154 million in damages to resolve civil claims under the Sherman Act and the False Claims Act.

Since announcing these initial criminal prosecutions and civil settlements, the Antitrust Division has secured guilty pleas and settlement agreements with several additional companies. To date, the investigation has resulted in five corporations entering guilty pleas and agreeing to pay nearly \$160 million in criminal fines, as well as seven individuals being indicted.

The investigation has also resulted in six companies agreeing to pay nearly \$210 million in civil damages to the federal government. The most recent of these settlements was announced in April.

In announcing this recent settlement, Delrahim noted that this investigation has netted the biggest Section 4A damages awards in the Antitrust Division's history:

Together, these are the largest Section 4A settlements in American history, and we will continue to use this important enforcement tool when taxpayers are harmed by cartels.[6]

According to the Antitrust Division's press releases, the criminal portion of the investigation was opened based on a hotline tip to the Defense Logistics Agency's inspector general's office, which conducted certain initial investigative steps prior to referring the case to the Defense Criminal Investigation Service.

The civil portion of the investigation was opened based on a whistleblower lawsuit filed under the qui tam provisions of the False Claims Act.

Steps Companies Can Take to Limit Their Section 4A Civil Damages Exposure

Since announcing its intent to increasingly invoke its Section 4A authority, the Antitrust Division has identified several ways that companies can seek to minimize the damages they are required to pay the federal government:[7]

- If a company is the first to self-report a criminal antitrust conspiracy that targets a federal government agency through the Antitrust Division's Leniency Program, the division will seek single, rather than treble, damages, provided that the company satisfies its obligations as a leniency applicant and fully cooperates with the division's civil investigation into the conspiracy.

- Even if a company is not the first to self-report a criminal antitrust conspiracy that victimized a federal government agency, it will receive the benefit of paying a lower multiple of civil damages by providing meaningful cooperation during the early stages of the Antitrust Division's investigation because such cooperation tends to be much more valuable.
 - A company that reaches a civil settlement with the Antitrust Division will likely avoid having to pay treble damages, whereas the division will seek full treble damages if it has to litigate its claims against a company.
 - Companies that promptly self-report their unlawful conduct, fully cooperate with the Antitrust Division's investigation, and show that they have a robust antitrust compliance program can significantly lower their civil and criminal exposure. For instance, such companies — even if they are not a leniency applicant — can resolve the investigation through a deferred prosecution agreement rather than a guilty plea. For government contractors, such a resolution can avoid the risk of being debarred or suspended from the award of federal government contracts or grants.
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[1] www.justice.gov/procurement-collusion-strike-force.

[2] www.justice.gov/atr/division-operations/division-update-spring-2019/message-aag.

[3] www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar.

[4] 15 U.S.C. § 4.

[5] www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

[6] www.justice.gov/opa/pr/doj-agrees-civil-settlement-additional-firm-involved-bid-rigging-and-fraud-targeting-defense.

[7] www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.