

Data-Driven Scrutiny Of Federal Deals May Yield False Flags

By **Daniel Wilson**

Law360 (May 10, 2021, 5:04 PM EDT) -- The U.S. Department of Justice's increased focus on data analytics to address collusion in government contracting may expose contractors to the risk of being falsely flagged for anti-competitive behavior under data models that have not been trained on public procurements.

Amid a steady stream of new initiatives announced since the DOJ established its Procurement Collusion Strike Force, or PCSF, in November 2019 to implement a "coordinated national response" to antitrust and related issues in public procurement, the department earlier this year formalized a program to use data analytics to detect potential collusion, looking for "suspicious bid patterns."

By using data analysis to pick up patterns of behavior that agency contracting staff haven't been able or even known to look for, contractors can expect to face a level of antitrust scrutiny they haven't encountered before.

The risk of being suspected of illegal behavior is possible since the department's existing analysis models have been developed with commercial practices in mind that are not necessarily typical of government contracting practices, according to Vinson & Elkins LLP government contracts practice vice chair Dan Graham.

"Those models and approaches, which were not developed for public procurement, [may] create false positives that industry has to respond to and say — maybe this is an indicator of a problem in a different industry, but this is perfectly normal given the nature of this industry," he said.

Contracting officials, usually not specifically trained on antitrust issues, often focus on competition within specific procurements, while data analysis can look at long-term or multi-agency trends, potentially leading to the DOJ flagging as suspicious a company that declines to bid on certain contracts when it has bid on similar deals in the past, for example.

That may be legitimately suspicious in industries like specialized types of construction, where it is more common for the same companies to bid on every relevant procurement, Graham said, using the example of overseas embassy construction where there is a "very small group of companies that are capable of doing that kind of work."

But in other contexts, like an information technology services contract in support of a national security

mission, a contractor declining to bid on a particular procurement may have a rational explanation, according to Graham.

"There are so many reasons why a company might decide, yes, this is right up my alley, this is exactly what I do on a day-to-day basis, but you know what? I'm not going to bid this one because I want to save my cleared people for this other procurement that's coming down the street," he said.

The DOJ said in a March update that more than 1,000 data scientists, analysts and auditors attended a series of webinars related to the PCSF's data analytics project in 2020. Attorneys on the project subsequently reached out to "dozens of agency analytics shops" to encourage them to build and use analytical tools to detect collusion, retain more bid data and use other procurement platforms to gather related data, according to the DOJ, which said more webinars are planned for this year.

That means even if contractors will be able to explain away issues that data analysis raises as potential red flags, they still need to expect more antitrust oversight from the government, whether that's an informal reach-out or a more in-depth investigation, said Crowell & Moring LLP counsel Alexis DeBernardis.

"I think that we are going to have more questions, inevitably, by these procurement officials who are using the data leveraged across various platforms and databases," she said. "I think that is certain."

Contractors may need to track and leverage more of their own data to defend themselves — and extensively document their reasons for decisions that may be considered unusual by the PCSF, said Vinson & Elkins partner Zach Terwilliger, a former U.S. attorney for the Eastern District of Virginia.

"If there's something that's going to be an aberration documented, whether it be a teaming agreement, whether it be a price increase or why we didn't bid on certain things, and if the data analytics are, 'Well, they always bid, but they didn't bid here' — have that documented somewhere why you didn't," he said.

That could include, for example, clearly specifying why a certain teaming agreement may be advantageous to the government and ultimately taxpayers in providing a better product for better value. Also helpful is avoiding language in those agreements or related documentation that could be misconstrued by investigators, Graham said.

"Don't use phrases in internal emails like 'taking a competitor off the street' or [other] stupid things that business development people will write without really thinking about it that can create a lot of headaches down the line," he said.

Reaching out to outside counsel or the government itself to seek training for procurement staff on antitrust issues can also help, according to Terwilliger.

"This may be a little bit pie in the sky, but if the government is still willing to come out and provide training to your procurement officials, I think that's a pretty good inoculation to make sure you hear directly from them or you can get your hands on their training materials," he said.

Adopting appropriate compliance measures based on that training can make a significant difference if and when a contractor does come in for scrutiny from the PCSF and "will be something that the government will look at if there is a problem," Terwilliger said.

Contractors should also continue to keep an eye on the DOJ's announcements to understand the scope of its antitrust focus, even if not directly linked to the PCSF, Graham said, noting the department's Antitrust Division has recently had a focus on potentially anticompetitive labor agreements, such as "no poach" deals between competitors in the same industry.

"This is an area where the Justice Department appears to be getting much more aggressive," he said. "And especially at the same time that they're looking at public procurement, this could be an area where the Justice Department focuses its efforts, particularly in services procurements."

While the PCSF spent much of its first year in building up its capacity by training agency officials and bringing on additional U.S. attorneys' offices and other agency investigative agencies as partners, cases involving or influenced by the strike force have also begun to emerge publicly beginning late last year, offering further clues as to what it is interested in investigating.

In October, the DOJ announced its first indictment stemming from the PCSF against an engineering company and its former executive for an alleged decade-long conspiracy to rig bids for contracts with the North Carolina Department of Transportation. In April, it announced a guilty plea in a case involving bid-rigging in online General Services Administration auctions for surplus government equipment.

The DOJ did not specifically mention the PCSF when announcing the latter case, but the fact it chose to specifically highlight a relatively low-value matter was a signal of how seriously it's taking the issues of maintaining competition and addressing collusion in federal procurement, with no case too small to pursue, according to DeBernardis.

"It's certainly sending a message that this is a priority for the Antitrust Division," she said. "We've seen similar types of press releases from the Antitrust Division before when they were promoting a particular priority, [and] it's wise to be paying attention to what the DOJ is touting."

More PCSF cases are likely to emerge later this year and in 2022, with the DOJ having said in March that there are roughly 30 related grand jury indictments and investigations under way, ranging from local public works projects to larger defense and national security matters.

Although the conclusion of investigations may vary based on issues such as resources and the complexity of an investigation, a timeframe of 18 months to two years from the PCSF's November 2019 establishment would be fairly typical for many of its initial investigations to start to be made public, said Baker & Hostetler LLP partner Jeff Martino, former chief of the DOJ Antitrust Division's New York Office.

"What we're seeing now is the beginning of some of the fruits of the strike force as they put it together," Martino said. "There was a ramp-up period, about training folks — [inspectors general], local U.S. attorney's offices, just making introductions, putting the different teams together [and] sharing information. With the strike force partnering with U.S. attorney's offices around the country, I think you're going to see more cases."

--Editing by Philip Shea.