Chapter 8

Governmental Procurement: “FAR” from a Competitive Process

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INTRODUCTION

The Federal Acquisition Regulation (FAR, 2005) and the coinciding practices of federal procurement officials and government contractors are perilously vulnerable to antitrust abuses. As the world’s single largest purchaser of goods and services (Carrier, 1997), the United States government should take greater care to ensure that its procurement practices, the actions of its procurement officials, and the contracting companies with whom it contracts, abide by and protect the antitrust regulations governing American commerce.

Of the myriad of antitrust vulnerabilities, the government should be particularly concerned by the arrangements and practices affecting the fundamental pricing structure of goods and services, and by the many situations allowing for and promoting competitive contractor collaboration (Nash & Cibinic, 1989). Since government purchasers spend approximately $300 billion annually (Govexec.Com, 2005), substantial concern and analysis is required to ensure that the goods and services purchased by the government are priced competitively and fairly (Haberbush, 2000). Bid rigging, price fixing schemes, and predatory pricing are all antitrust issues affecting and possibly artificially inflating prices (Nash & Cibinic, 1989). Further, since many government contracting projects promote, if not require contractor collaboration, antitrust vulnerabilities are inherent. Joint ventures and teaming agreements between normally competitive contractors frequently appear to, if not actually reduce competition and thereby violate antitrust regulations (Nash & Cibinic, 1989).

ANTITRUST BACKGROUND

Section 1 of the Sherman Antitrust Act makes every contract or conspiracy to restrain trade or commerce illegal (15 U.S.C. § 1(2000;221 U.S. 1, 65). Most conduct, however, does not violate Section 1 unless it: 1) affects interstate or foreign commerce; 2) is performed by two or more persons; 3) is the result of concerted action; 4) constitutes a restraint on trade or commerce; and 5) is unreasonable (Dameron & Sherry, 1988). The Supreme Court instituted a "rule of reason" analysis for determining antitrust violations. This analysis takes into consideration, among other factors, the totality of the situation, balancing the pro-competitive and anticompetitive ramifications of the situation in the context of the affected industry, the parties' intentions, and the business justifications for conduct ("National Soc'y of Prof'l Eng'rs," 1978); "Board of Trade of City of Chicag," 1918; Dameron & Sherry, 1988). Certain circumstances are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they cause or the business excuse for their use ("Northern Pacific Ry.", 1958; Kovacic, 1997). These inherently unscrupulous and effectively indefensible activities are deemed to be "per se" violations of Section 1 of the Sherman Act and prevent the defendant from attempting to demonstrate a legitimate commercial justification or any pro-competitive aspects of the activity (Dameron & Sherry, 1988; Kovacic, 1997). Coincidentally, for the purpose of this analysis, courts have specifically found bid rigging ("United States v. Flom," 1977; "United States v. Finis," 1975), horizontal agreements to fix prices ("United States v. Socony-Vacuum Co.," 1940); "Arizona v. Maricopa County," 1982); "Catalano v. Target Sales," 1980; United States v. Container, 1969), and collusive bidding ("United States v. WF Brinkley," 1986); "United States v. David E. Thompson," 1980) to be illegal and per se violations of the Sherman Act. Unfortunately, many of the practices and procedures within the federal procurement process facilitate opportunities for price fixing, collusive bidding and bid rigging, resulting in potential antitrust violations.

PRICE FIXING

Federal Procurement is Vulnerable to Bid Rigging Schemes

The United States Sentencing Guidelines specifically acknowledge the severity of bid rigging as an antitrust violation by requiring a one-level increase in the sentence for an offense of such nature (FAR 18 U.S.C § 2R1.1). Courts even note that the drafters of the Sentencing Guidelines singled out bid rigging as being particularly detrimental to commerce and thereby worthy of a more stringent sentence ("United States v. Heffernan," 1994). Further, the FAR specifically uses bid rigging as an example of a prohibited anticompetitive practice [FAR 3.301(a)].

Bid rigging schemes come in many forms, including but not limited to market division, bid rotation, bid suppression, and complementary bidding. All bid rigging schemes involve a certain degree of pre-bid and anticompetitive collaboration. Market division, as a bid rigging scheme, for example, involves the collaborative agreement that contracts will be divided among contractors based on independent market conditions, such as the geographic location of the contract or the monetary value of the contract (Haberbush, 2000). Bid rotation involves a cyclical agreement between contractors through which certain contractors are allowed to win certain bids with the understanding that they will not be a competitive bidder on future contracts for a specific time period ("United States v. Dynalectric," 1988; "United States v. Champion," 1977). These rotational agreements act as a restraint on commerce and therefore antitrust violations, due to their anticompetitive nature. Contractors have little incentive to make their bids as low as possible and consequently save the government money if they know that no other competitive contracts will be submitted. Similarly, bid suppression and complementary bidding schemes involve an agreement between contractors where one or more contractor agrees to either not bid or bid excessively high to ensure that a specific contractor will win (Haberbush, 2000).

Ways the Government is Vulnerable to Bid Rigging Schemes

Contractors Have a Means to Communicate

The viability and sustainability of a bid rigging scheme is directly reliant on several factors. Initially, the market dynamics must facilitate communication among and between potential contractors. The government contract procurement process specifically facilitates this initial step by frequently holding pre-bid meetings among potential contractors to discuss contract specifications (Haberbush, 2000). Such meetings provide the perfect forum for contractors to notice who else might be bidding on a specific contract and therefore, whom to contact regarding potential collusion (Haberbush, 2000). The government, in an effort seemingly intended to promote contractor coordination, frequently goes so far as to even publicize a list of potential bidders (Haberbush, 2000).

Contractors Have a Means to Detect and Hold Accountable Scheme Violators

Secondly, the contractors must have a means of detecting and holding accountable any specific contractor who violates the bid rigging scheme ("United States v. Heffernan," 1994). Without the ability to identify and punish a bid rigging "cheater," the contractors would have little incentive to hold up their end of the anticompetitive bargain (Kovacic, 1997). Once again, the government easily facilitates the recognition of "cheaters" by publicly opening bids. This mechanism conveniently provides contractors with an external "checks & balances" tool for ensuring that fellow contractors abide by their agreements. Being able to instantly detect a violation of an agreement is an essential tool for any bid rigging scheme (Kovacic, 1997). Similarly, contractors must also have a means of holding "cheaters" accountable for their violations. A primary tool for enforcing the bid rigging agreements and punishing violators is a contractor's ability to subcontract (Haberbush, 2000). Since many contractors have reciprocal agreements regarding issuing subcontracts with fellow bid rigging cartel members, contracting firms know that if they violate the bid rigging scheme, they risk being excluded from any and all such subcontracts ("United States v. All Star Indus," 1992).

Similarity among Bids

Lastly, in order for a bid rigging scheme to be successful, all bids must be identical except for the price (Haberbush, 2000). If contractors' bids are differentiable on substantive issues and specifications, the government would be more likely to accept a bid based on a perceived difference in quality as opposed to simply on price. The more issues and specifications that must be mirrored between contractors substantially increases the difficulty of communicating regarding executing similar bids as required in the bid rigging scheme. The government, specifically on the many

Department of Defense (DoD) contracts, limits the autonomy required by contractors in drafting their bids (Victorino, 1993). Due to the complexity of many of these contracts, the government furnishes the full and specific data requirements and technical specifications of the contract along with the invitation to bid (Victorino, 1993). This strict control allows the contractors in a bid rigging scheme to focus simply on price agreement as opposed to coordinating the specifications of the contract itself. This additional simplicity further facilitates pricing agreements between contractors and requires the government to accept bids based on cost alone.

Other Vulnerabilities

Artificially Limiting Competition

Although the prerequisite elements for a bid rigging scheme are met, the government further facilitates price fixing through bid rigging in its procurement process. For example, competition is artificially limited due to the various restrictions placed on the pool of bidders [15 U.S.C. § 631 (2000)]. Specifically, the FAR implements the Buy American Act, which under most circumstances limits the government to only accepting bids and using supplies from American companies (FAR §§ 25.1-2). While the Buy American Act certainly promotes American commerce through public policy, it artificially limits the competitive contractor pool, thereby potentially excluding a more efficient contractor and bid. Government-mandated restrictions such as the Buy American Act and other restrictions further narrow the potential contractor pool to specific state and local regions (Kovacic, 1997, p. 105). These act as a direct and prohibitive restraint on commerce and trade, and should therefore be considered violations of the antitrust regulations.

The FAR further artificially restricts the potential bidding pool by the implementation of the Small Business Act and the Federal Property Administrative Services Act (FAR Part 19). Both acts recommend that the government set aside a certain portion of its contracts and purchases for the benefit of small businesses [15 U.S.C. § 631 (2000)]. While facially, these provisions seem to suggest that the government will have a more diversified pool of bidders, the restrictions restrain the contracting officer's (COs) freedom to contract with the most efficient bidder (Haberbush, 2000). Due to varying economies of scale, many larger, more frequent government contracting companies will naturally have an efficiency-based advantage when bidding on contracts (Haberbush, 2000). Similar to the Buy American Act, the Small Business Act and the Federal Property Administrative Services Act serve a reputable public interest by promoting small business ingenuity and public contract involvement. From a competitive standpoint however, any regulation specifically requiring the government to contract with any sub-group of bidders substantially limits and restrains the competitive commerce that the antitrust regulations strive to enforce.

The Sealed Bidding Process

The sealed bidding process which the government frequently uses to solicit bids is particularly susceptible to bid rigging ("United States v. Heffernan," 1994). As the name suggests, this process requires contractors to submit their best and final bid to the contracting agency in a sealed form. This form of bid submission lacks the active negotiation phase frequently associated with contracting. Due to the fact that taxpayer dollars are being spent and the inherent fear of corruption, the government has attempted to invoke a certain degree of transparency in the sealed bidding process (Haberbush, 2000). The sealed bids are opened publicly, giving the appearance of an unbiased and ethical bid selection ("United States v. Heffernan," 1994). The Comptroller General held that "the purpose of public opening of bids for public contracts is to protect both the public interest and bidders against any form of fraud, favoritism or partiality…." (U.S. General Accounting Office, 1975, p. 451). As mentioned above, this public opening only further facilitates any bid rigging scheme by publicizing the winning bidder and the bid itself, thereby giving the other contractors due notice of scheme cooperation or deviance (Porter & Zona, 1993). The sealed bidding process also further acts as a facilitator for bid rigging by binding the government to accept the lowest bid (FAR 14.408-1; Cibinic & Nash, 1986). Unlike a private corporation accepting bids for a private contract, the gvernment, in the sealed bidding process, lacks the flexibility to negotiate with contractors if it believes the contractors' bids are too high (FAR 14.408-1; Cibinic & Nash, 1986). The rigidity of the sealed bidding process provides the perfect opportunity for bid rigging schemes to artificially inflate their bids since the government has very little recourse to downwardly mobilize price.

Bid Rigging Schemes are Difficult to Detect

Further challenging the antitrust regulations' goal of pure competition and unrestrained trade is the fact that bid rigging schemes are cloaked in anonymity and often very difficult to detect. With the aforementioned prerequisites in place, collaborative efforts by contractors to fix prices through bid rigging become remarkably easy to conceal. Despite the fact that the FAR specifically lists practices and events which COs should use as indicators of potential price fixing (FAR 3.303(c)) the detection and linking of such indicators to price fixing schemes remains difficult (Haberbush, 2000). Many indicators, such as similar line items among bids, might appear conspicuous to the CO but might actually be natural and innocent aspects of the bid. For example, if several contractors bidding on the same contract received and used quotes from the same subcontractor as part of their respective bids, the illusion would be that there is an element of collusion among the contractors when in all actuality, the subcontractor might have been the only feasible one for the contractors to use (Haberbush, 2000).

Investigating and/or Prosecuting Bid Rigging Schemes is Often Not Justified

Another difficulty in detecting and preventing bid rigging schemes lies with the COs themselves, since "procuring agencies are not very vigorous advocates of antitrust policies" (Nash, 1993, p. 9), The market incentives usually associated with private contracts, such as price reduction and quality assurance, are frequently absent when COs award government contracts ("United States v. Heffernan, 1994). Frequently, COs will not thoroughly investigate a contractor's bid, particularly if the contractor is a strong and reputable company (Nash & Cibinic, 1989). Since time is of the essence in many government contracts and the investigation of unsubstantiated suspicions of unscrupulous activity is not only costly but time consuming, COs are often pressured to award the contracts without raising antitrust issues (Haberbush, 2000). Therefore, minus material evidence substantiating a suspicion of an antitrust violation, the onerous and time-consuming task of investigating and potentially enforcing the violation is not justified (Haberbush, 2000).

The Nature of the Contracts Themselves

The government contracts themselves have many characteristics that make them vulnerable to price fixing. Many government contracts are repetitive and generally involve the purchase of homogeneous and/or standardized goods and services. The repetitive nature of the contracts supports price fixing by adding the element of predictability of price and contract structure (Haberbush, 2000). Also, the repetitive nature of many of these contracts provides contractors more incentive to cooperate in a rotational bidding scheme since their "turn" to contract with the government will come around more frequently. Further, the homogenous and standardized goods and services usually have substantially lower technological requirements, thereby making bid rotation schemes more feasible (Haberbush, 2000). Since less technology and individual ingenuity is usually required, contractors can more easily "take turns" contracting for the more conventional contracts. Conversely, if contractors are required to expend a substantial amount of money on contract "start up" costs such as research and development for a highly specified contract, they will be less likely to recoup the costs sunk by participating in a rotational scheme.

High Barriers to Entry

Another factor that makes the government contract procurement process more vulnerable to price fixing schemes is the high barriers to entry ("Is Uncle Sam," 1998). For many militaristic goods and services for example, the government, specifically the DoD, is the only domestic purchaser. Therefore, instead of being able to market goods and services on a smaller economic scale, if a company wants to compete in that specific field they must be prepared to produce and market their goods and services at the highest level with the largest companies. Further, the production of many of the products themselves such as fighter aircraft, submarines and satellites, have inherently high barriers to entry (Haberbush, 2000). These barriers provide a comfortable environment for the current market leaders and government contractors to execute price fixing schemes without the fear of upstart companies foiling them with lower bids. Also, due to the high specificity and barriers to entry on many of the government contracts, companies in other product markets will not be able to “wait in the wings” with the ability to easily enter the market to undercut a price fixing scheme.

Why the Government Allows Itself to Remain Vulnerable to Price Fixing Schemes

Acknowledging that the federal procurement process is vulnerable to antitrust violations seems like a simple enough analysis. Price fixing among horizontal contractors as an anti-competitive practice is a per se antitrust violation under Section 1 of the Sherman Act (“United States v. Socony-Vacuum,” 1940). A price fixing scheme has several prerequisite elements. Those prerequisite elements, along with many other consequential factors, are easily satisfied by the federal procurement process. Why then, does the government continue to subject itself to such antitrust vulnerabilities?

The answer, in part, likely rests with the government’s relative defenselessness in enforcing price fixing violations (Haberbush, 2000). As mentioned above, investigating and/or prosecuting suspected price-fixing schemes can be both costly and time consuming. Therefore, such an undertaking is frequently not justified. Also, since the government vests its responsibility of detecting price fixing schemes with the respective COs, any oversight or misconduct on the part of the CO reflects negatively against the government’s overall ability to enforce price-fixing violations. The fact that COs are frequently unfamiliar with the specific intricacies of the products and services on which the contractors are bidding makes it even less likely that the COs will identify potential price-fixing schemes (Haberbush, 2000). The government’s frequent inability to detect, and corresponding reluctance to investigate and prosecute price-fixing schemes, leaves the government dangerously susceptible to the continuance of price- fixing schemes and other antitrust violations.

The entire responsibility for detecting price-fixing schemes does not rest with the government, however, as private companies may also bring legal actions against price-fixing schemes and the involved companies (31 U.S.C. §3553, 2005; Haberbush, 2000). Private companies have historically had several available fora for bringing actions to challenge the legality of the bidding process (Dameron & Sherry, 1998). The General Accounting Office (GAO) has been deciding so-called “bid protests” since the 1920s (Cibinic & Nash, 1986; Dameron & Sherry, 1998). The government specifically vested the GAO with the statutory authority to adjudicate bid protests by the Competition in Contracting Act of 1984 ("Public Law No. 98-369"). The General Services Administration Board of Contract Appeals (GSBCA) is another administrative forum available for legally disputing the bid process ("Public Law No. 98-369"). Contractors may also challenge contracts in a federal district court or the United States Claims Court (Dameron & Sherry, 1988). These challenges are frequently known as "Scanwell" suits "Scanwell Laboratories v. Shaffer" (Dameron & Sherry, 1988). These three legal forums have traditionally been unsuccessful options due to the fact that courts will generally grant substantive relief only if the agency action lacks a rational basis for their contracting decision (Dameron & Sherry, 1988).

Contractors may also challenge contract awards specifically on antitrust grounds, under the auspice of Section 1 and/or Section 2 (15 U.S.C. §2) of the Sherman Act ("National Reporting Co. v. Alderson Reporting," 1985; "Triple M Roofing Corp. v. Tremco," 1985; "F. Buddie Contracting," 1984). Despite contractors' frequent perception that they have a valid Sherman Act claim against a fellow contractor, their chances of success are as slim as they would be before the GAO, the GABCA, or in an action in a district court or the Claims Court (Dameron & Sherry, 1988). Additionally, if a contractor does get a favorable ruling, it is likely in the summary judgment phase of the proceeding as a result of a specific technicality, not an anticompetitive claim (Dameron & Sherry, 1988).

Further, private legal actions are not easy to initiate, as bid protests must be brought by an "interested party" (31 U.S.C. §3553; 31 U.S.C. § 3551). Therefore, only those companies that could have bid on the contract would have standing to bring an action (Haberbush, 2000). Consequently, if a bid-rigging scheme is actually in place, those participating members are likely to be the only entities with standing to sue (Haberbush, 2000). Since the members of the scheme all have something to gain based on the sustainability of the scheme, it is unlikely that any member would bring an action (Haberbush, 2000). If a company was entitled to bid on the contract and therefore has standing to protest, but is not a member of the scheme, it still might be reluctant to bring an action for fear of retaliatory action from the members of the scheme (Haberbush, 2000). Since most government contractors operate in highly concentrated industries and markets, it is unlikely that one company would intentionally disenfranchise itself from the others since there is frequent contractor interaction on not only government contracts, but also contracts in the private sector.

Another obstacle to enforcing antitrust violations is the reliance on testimony of employees from within the violating companies (Nash & Cibinic, 1989). This dependency is a factor in both governmental and privately initiated actions. Employees are hesitant to testify and "blow the whistle" for fear of losing their jobs ((Haberbush, 2000). As mentioned above, since these employees work in a highly concentrated industry, they feel as if testifying might jeopardize not only their current job but also their ability to move laterally between companies and jobs within the industry due to "blackballing" (Haberbush, 2000, p. 112).

Minus an effective means of enforcing the antitrust rules in the federal procurement arena, government contractors will likely find price fixing schemes to be easily sustainable. The government seemingly handcuffs itself by not having an efficient means of punishing these violations. The limitations of the government in not only detecting, but also enforcing the antitrust rules, teamed with the inadequate means for contractors to initiate private actions, provide the perfect environment for the antitrust rules to be broken. While the government certainly could not condone the seemingly permissible nature by which the federal procurement process deals with antitrust violations, its apathetic attitude to providing a means for antitrust accountability suggests otherwise.

HORIZONTAL CONTRACTOR COLLABORATION

As illustrated above, the federal procurement process is perilously vulnerable to price-fixing schemes. Not only are the prerequisite elements for a price-fixing scheme easily satisfied, federal procurement, through many of its practices and procedures, further facilitates such unscrupulous behavior. This furtherance of favorable circumstances for a price-fixing scheme, teamed with the government's struggles to enforce the antitrust regulations in the federal procurement arena, provide a perfect environment for anticompetitive behavior. As if these vulnerabilities weren't enough, the government makes itself even more vulnerable to antitrust violations by allowing and frequently promoting competitive contractor collaboration (Burnett & Kovacic, 1987).

Antitrust Rational for Analysis

Horizontal contractor collaborations in government contracting, such as teaming agreements and joint ventures, are subject to the same antitrust scrutiny as mergers are in private commerce (See Sherman Antitrust Act of [1994], Clayton Act 1994, Federal Trade Commission Act [1994], and Kattan [1993]). Like mergers, of course, not all horizontal contractor collaboration violates antitrust regulations (Polk, 1999). Many collaborations are legitimate business functions and serve vital and principled commercial roles (Kattan, 1993). However, others are distinguishable by their anti-competitive intentions and consequences (Polk, 1999). The United States Supreme Court suggested the implementation of the "rule of reason analysis," similar to the one used in determining Sherman Act violations, to determine the legitimacy of collaborations ("United States v. Penn-Olin Chem," 1964). Similar to the aforementioned rule of reason analysis, the factors considered under this analysis include: (1) the structure of the industry; (2) the facts peculiar to the firms' operation in that industry; and (3) the history of the duration of the restrain (Polk, 1999) and the rationale for the restraint (Polk, 1999). Therefore, the question for antitrust analysis is simply, whether the collective behavior represents an efficiency-enhancing integration of economic functions or a thinly disguised effort to restrict output without any redeeming efficiency consequences (Kovacic, 1997).

Regardless of the threshold qualifications for a collaborative venture to violate antitrust regulations, the government facilitates and frequently encourages contractors to collaborate. Despite the governmental encouragement for contractors to collaborate, the government provides only minimal antitrust immunity to those companies that do collude (Kovacic, 1997; Polk, 1999). The government provides a certain degree of antitrust protection to small businesses involved in research and development activities under the Small Business Innovation Research Program (SBIRP) [15 U.S.C. § 638(a) (1994)]. This specific program provides antitrust immunity to "any agreement between small-business firms providing for a joint program of research and development" so long as the program, "maintain[s] and strengthen[s] the free enterprise system and the economy of the Nation" Polk, 1999, p. 426). This program is rationalized because Congress believes that "small businesses perform an important role in advancing industrial and technological innovation but often require assistance" [15 U.S.C. §§ 3701(4), 3705]. Further, in circumstances involving technological innovation, Congress seems to realize that benefits resulting from cooperative arrangements between nonaffiliated businesses outweigh the potential antitrust risks and allocate minimal statutory protection (15 U.S.C. § 4302).

Why, then, if the government is willing to give only minimal antitrust immunity to government contractors, does the federal procurement process promote contractor collaboration which comes perilously close to violating antitrust rules? The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have even published the *Antitrust Guidelines for Collaborations aong Competitors* in an attempt to guide companies in forming collaborations under the antitrust laws (U.S. Department of Justice and Federal Trade Commission, 2000; Haberbush, 2000). The government does this knowing that collaborations and joint ventures can aid in facilitating illegal collusion (Haberbush, 2000; Kovacic, 1997). The FTC and DOJ, in their published antitrust guidelines, acknowledge that "[c]ompetitor collaborations may provide an opportunity for participants to discuss and agree on anticompetitive terms, or otherwise to collude anti-competitively" [.S. Department of Justice and Federal Trade Commission, 2000, §3.31(b)] Despite the acknowledgement by the government of the unnecessarily high potential for antitrust violations in collaborative arrangements, the FTC, DOJ, and federal procurement practices continue to provide opportunities for contractors to collude (Haberbush, 2000; Nash & Cibinic, 1989).

Why Contractors Want Horizontal Collaboration

From a contractor's standpoint, any leeway given by the government in regard to collaborative ventures is certainly welcomed. Joint ventures and collaborative arrangements provide the contractors with more power and flexibility in regard to what contracts they accept and with whom they accept them (Polk, 1999). Collaborative arrangements provide the participating members with the opportunity to share the financial costs and risks that individual contractors might not be able to undertake (Kattan, 1993; Polk, 1999). Also, members of a collaborative arrangement are able to gain entry into new and costly markets with substantially less risk (Kattan, 1993; Polk, 1999). By lowering the barriers to entry, collaborative arrangements consequently ensure that a greater number of contractors have the opportunity to participate in the limited number of government contracts (Polk, 1999).

Why the Government Allows Horizontal Collaboration

From the government's perspective, collaborative arrangements among contractors have the potential to save the government substantial amounts of money (Polk, 1999). The FAR even acknowledges that teaming agreements between contractors may be distinctly advantageous to the government, as potential efficiencies in contract fulfillment by the contractors may result in lower costs and higher quality output for the government (FAR 9.602(a)(2); Polk, 1999). Further, the government frequently encourages teaming agreements "to better address the different technological and scientific aspects" of many of its programs (Polk, 1999). The FAR also highlights this specific point by suggesting that collaborative efforts might be advantageous in larger scale research and development contracts and projects [FAR 9.602(b)].

From a policy standpoint, the government, as specifically explained in the FAR, does not seem to dissuade horizontal contractor collaborations (FAR 9.603) despite the obvious vulnerability for antitrust violations [FAR 9.604(a)(b)(c)(d)(e)]. In certain circumstances, however, the FTC acknowledged the propensity for and resulting antitrust vulnerability arising out of collaborative contractors sharing more than necessary for the satisfaction of the particular project or contract (Polk, 1999). Despite the government's generally permissive attitude towards collaborative contractor agreements, distinct and potentially disadvantageous anticompetitive consequences exist as a result of the sharing and subsequent use of proprietary information shared in such relationships (Polk, 1999).

WHAT CAN THE GOVERNMENT DO TO DECREASE ITS VULNERABILITIES?

Recognizing the government's antitrust vulnerabilities, the government should take greater care to ensure that its procurement practices and procedures do not violate or facilitate the violation of the antitrust rules. A more proactive approach is necessary to ensure that government contractors do not collude in anti-competitive ways. Further, steps need to be taken to deter contractors from artificially manipulating the price of government contracts.

The Government's Current Mechanisms for Preventing Antitrust Violations in Federal Procurement

With so many glaring weaknesses in the federal procurement process' antitrust enforcement, it would seem as if the government has taken little initiative to coordinate its procurement with antitrust laws. The government has, however, taken some steps attempting to "prevent collective or unilateral rivalry-suppressing behavior" (Kovacic, 1997, p. 1066). The government requires: 1) that contractors certify they have not participated in a price-fixing scheme; and 2) that COs report suspicious behavior directly to the Attorney General (Haberbush, 2000). The government also specifically addresses certain behaviors and activities that might be indicative of collusion, and promotes the identification of such actions and the resulting penalties (Haberbush, 2000).

The most significant antitrust safeguard is the requirement that contractors certify that they have not participated in an anticompetitive collusive arrangement (FAR § 3.103-1). This requirement is manifested by the "Certificate of Independent Price Determination" (CIPD) as outlined in the FAR (FAR §52.203-2). The CIPD requires that the contractor set its prices "independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to 1) those prices, 2) the intention to submit an offer, or 3) the methods or factors used to calculate the prices offered" (FAR §52.203-2). The CIPD is intended as a means of holding contractors accountable for their bids and ensuring that they have been calculated autonomously. Since the CIPD is a requirement for bid submittal in many contracts, its success therefore relies on the honesty and integrity of the contractors.

The next antitrust safeguard pertains to the reporting requirements of the Internal Revenue Code and the FAR (Haberbush, 2000). These reporting requirements mandate that the contracting governmental agency notify the Attorney General regarding any bids or proposals that indicate the possibility of collusive activity [10 U.S.C. § 2305(b)(9); 41 U.S.C. § 253(b)(i)]. As mentioned above, the government vests the CO with the responsibility of recognizing potentially anticompetitive activity. Consequently, the FAR requires the CO to notify not only their respective governmental agency, but also the Attorney General of any suspiciously anticompetitive activities [FAR § 3.301(b)].

Another attempted safeguard is the FAR's recognition that certain contractor behavior is potentially indicative of anticompetitive activity [FAR § 3.301(c)]. The FAR recognizes several activities as being "sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures" [FAR §3.303(b); FAR §3.303(c)]. Along with the recognition that certain activities are potentially anticompetitive, the FAR identifies penalties for antitrust violations regarding federal procurement (FAR § 3.104-8). A corporate government contractor, for instance, can be fined a maximum of $10 million or twice its gain, or twice the victims' losses as a result of being involved in an antitrust violation [18 U.S.C. § 3571 (d) (2000); 15 U.S.C. § 1 (2000)].

Suggestions for Decreasing the Government's Vulnerability.

Despite the fact that the government has safeguards in place to prevent antitrust abuses in federal procurement, the government undoubtedly needs to more proactively enforce its current safeguards and implement new practices and procedures which decrease the facilitation of anticompetitive activities. While a complete overhaul of the procurement process might be the most effective way to coordinate procurement and antitrust rules, it would be extremely inefficient and seemingly impractical. Instead of macro-analyzing the procurement process for large-scale flaws, a micro-analysis of specific, manageable aspects of the procurement process would be a more efficient and feasible method of coordinating antitrust rules and the procurement process.

Altering the bidding process, for instance, would be a realistic and manageable way to change the procurement process. As mentioned above, the sealed bidding process helps facilitate bid-rigging schemes. Since the sealed bidding process is currently the preferred method of requesting bids [FAR §§ 6.401(a), 6.401(b)(1)]. Altering the format to include an active negotiation phase would ideally undermine bid-rigging schemes. While conducting negotiations would be slightly more expensive and time consuming than the sealed bidding process, the increased competition and the potential alleviation of price fixing schemes would more than merit the expenditures.

The implementation of a “hybrid” bidding system would also prove to make price-fixing schemes more difficult to operate. A hybrid system would combine the sealed bidding procedure with a preliminary negotiation phase, designed to give COs more variables to consider when awarding contracts (Haberbush, 2000). This hybrid system would be quite similar to the two-step sealed bidding procedure currently outlined in the FAR (FAR § 14.5). Involving the COs earlier and more frequently in the procurement process and maintaining active lines of communication between the CO and the contractors would increase the likelihood that price-fixing schemes or cartels would be discovered (Haberbush, 2000). Further, when all parties involved are open to negotiation, it is less likely that anticompetitive collusion could be sustained (Haberbush, 2000).

Another micro-protection that the government could implement to promote contractor competition would be to establish a practice of requesting unbiased cost estimations prior to requesting bids (Haberbush, 2000). By having independent experts in the respective fields give accurate estimations as to what each specific government contract should cost, the government will have a better expectation of what the contractors should bid. Knowing the market value for their contracts will allow the government to identify extraordinarily high bids and help the COs identify potential price-fixing schemes.

Micro-analyzing the government’s permittance of certain horizontally collusive arrangements is more challenging due to the fact that the government actually benefits from many of these arrangements. From an efficiency and frequently from a cost-saving perspective, the government, as mentioned above, allows and encourages certain collaborations. From an antitrust perspective, however, these collusive arrangements facilitate the perfect opportunity for contractors to anticompetitively interact.

The best opportunity the government has in regulating these collaborative arrangements is to work on identifying and enforcing the antitrust regulations. From an antitrust analysis, ideally the government would prevent any and all collaborative arrangements. Realistically however, if the government allows these certain arrangements, they should at least be prepared to identify potentially anticompetitive behavior and limit the vulnerability for antitrust regulations. In regards to enforcing the antitrust regulations, penalties such as the suspension of the contractor's right to bid on government contracts should be explored, as opposed to mere fines. Large government contractors can and will absorb fines and monetary penalties because the potential gain from winning government contracts far outweighs the potential fines. Consequently, the current fine structure is less likely to dissuade a contractor from acting unscrupulously than the potential to be excluded from future government contracting opportunities.

CONCLUSION

As evidenced above, the federal procurement process is specifically vulnerable to antitrust violations. These vulnerabilities, however, do not necessarily have to result in antitrust violations. Acknowledging the specific vulnerabilities and analyzing each one on an individualized basis will allow the government to adjust its practices and procedures so that the federal procurement process and antitrust rules and regulations operate harmoniously to promote American commerce.

ACKNOWLEDGEMENTS

The author wishes to thank David and Pamela Brunk for their continued support, as well as Professor Mark D. Bauer of Stetson University College of Law for his encouragement, insight, and advice in the preparation of this material.

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