



BID RIGGING IN THE CROSSHAIRS

Firms should avoid the appearance of collusion. BY JONATHAN M. GROSSMAN AND ROBERT K. MAGOVERN



The construction industry has seen its share of ups and downs recently. For instance, demand for private projects is down, and the prices for key construction materials are up. Profit margins are down, while the industry's unemployment rate is staggeringly up. And as many states continue to face budget crises, the public works projects are down, meaning the competition among firms for these projects is naturally up.

As your company competes during these times, there is an important point to keep in mind. When President Barack Obama took office, he criticized the previous administration for having the "weakest record of antitrust enforcement" in the last half century. In addition, his deputy attorney general said the antitrust enforcement would play a significant role in responding to the economic crisis because "there is no substitute for a competitive market."

The result has been more than \$1.5 billion in criminal antitrust penalties levied on companies and individuals by the Department of Justice (DOJ) in the last two years. As antitrust experts expect more of the same in 2011, the message is clear: even though times are still tough, antitrust regulators won't cut you any slack.

Because the contracts in the construction industry are often determined by a call for bids by federal, state and local governments, bid rigging is one of the most common antitrust violations in this industry. This article will outline some practical steps for

understanding, identifying and preventing even the appearance of bid rigging.

Bid Rigging Defined

“Bid Rigging” refers to an unlawful agreement among competitors to influence the outcome of a contract that requires competitive bidding. The purchaser, who depends on competition between bidders to generate the lowest competitive price, instead receives a “lowest bid” that is higher than the competitive market would otherwise have produced. Bid rigging conspiracies usually fall into one of the following four categories:

- **Bid suppression** – One company who would otherwise bid, or has previously bid, agrees to not submit a bid or withdraw a previously submitted bid so that the designated winner’s bid will be accepted.
- **Complementary bidding** – One or more competitors agree to submit bids that are either too high to be the winning bid or contain certain special terms that will not be acceptable to the buyer.
- **Bid rotation** – All conspirators submit bids but take turns being the low bidder.
- **Subcontracting** – Competitors agree not to bid or to submit a losing bid in exchange for lucrative subcontracts or supply contracts from the successful bidder.

Avoiding Bid Rigging

Antitrust violations carry fines of up to \$100 million for corporations, and \$1 million for individuals along with jail terms up to 10 years. Private parties also can recover three times the damages they suffer from the violation. Dodging legal missteps early can save your company considerable resources and unwanted negative publicity. Here are a few tips:

- Don’t discuss commercially sensitive information with competitors, such as bid terms, prices, costs, customer lists, discounts, profits, credit terms or production levels, and ensure that company employees at all levels understand and comply with this prohibition.
- Limit the number of people in your firm who are familiar with bid terms. The fewer people that have this information, the less likely it will be disclosed to a competitor.
- Where your firm is incapable of performing a contract, or there is no practical rea-

son to submit the bid (e.g., geographic restraints or resource limitations), it is preferable to decline to bid rather than to make a high bid that will likely be rejected. Unrealistically high bids could appear to be collusive even when they are not.

- Avoid using language about bids that could suggest collusion, such as prices or terms “following industry standards,” or indications that you knew the terms of a competitor’s bid.
- Avoid public discussions about what is the “right,” “fair” or “reasonable” price for particular contracts.
- Minimize sudden withdrawals of bids, price increases or changes in terms/conditions.
- Establish effective code of conduct and compliance programs for your employees. Provide practical advice for specific situations that employees may encounter.
- Listen to your employees. Where construction firms have been found guilty of rigging bids, whistle-blowers often claimed their warnings or suggestions to management were ignored.
- During trade association meetings, avoid agreeing to industry-related standard-setting or self regulation programs without first contacting legal counsel. These agreements could suggest competitors used the association to standardize bids or to facilitate subtle exchanges of pricing information.

Watching for Red Flags

Executives can and should regularly audit their company’s bidding practices to minimize the risks of bid rigging. Routinely check your company’s accounting records. Are there questionable invoices or payments for unknown services? After a bid is selected by the purchaser, is there evidence that a winning bidder has rewarded co-conspirators or purchasing agents with payoffs?

Also, keep an eye out for patterns of behavior that suggest the possibility of anti-competitive activities and may raise red flags to antitrust enforcers, such as:

- **Suspicious Bidding Patterns** – Has your company or its close competitors declined to bid on projects for which it is capable of competing? Are fewer-than-normal companies placing bids for particular types of projects?
- **Suspicious Pricing Patterns** – Has your company placed bids for certain contracts that seem much too high? Does your company appear to bid substantially higher for some contracts than others, with no apparent justification for the difference?
- **Suspicious Statements or Behavior** – Do your bid documents contain white-outs or other physical alterations suggesting last minute pricing changes? Does anything indicate that someone at your company had advance notice of the competitors’ pricing or business strategies?

While these indicators should be investigated, it is important to remember that they are not proof of collusion. Instead, an unusually



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high bid for a certain project may just be the result of unforeseen high vendor or supply costs and communications with competitors may be unrelated to bid rigging.

Team and Subcontractor Agreements

Antitrust officials have acknowledged that competitor collaborations are often pro-competitive. This allows companies to combine their resources and expertise to make better use of their assets.

Where contractors lack the resources or geographic scope to handle projects on their own, teaming arrangements or joint bids can increase competition by allowing small and regional contractors to complement each other's unique capabilities and compete with larger companies.

But the line between a pro-competitive arrangement and an illegal conspiracy is highly dependent on the details of the agreements and market conditions. The same agreement may be viewed as pro-competitive in one context and illegal in another. Contractors should carefully consider the purpose and intent of joint bids by asking if part of the motivation is to drive up prices or eliminate a competitor.

Contractors also should fully disclose all teaming agreements or subcontractor arrangements in their bids. If the customer knows about and fails to object to the collaboration, it is harder for an antitrust enforcer to claim that it was anti-competitive. Finally, always consult with an antitrust counsel before teaming with another firm that might otherwise bid on the project by itself.

In February, the DOJ's Antitrust Division reaffirmed its commitment to crack down on bid rigging by announcing it has trained more than 1,000 federal procurement officers to identify and report potential bid rigging schemes. So as your company prepares its next public bid, or considers a new teaming arrangement with a competitor, remember to keep your guard up — antitrust regulators are watching. ♦