

DOJ TASK FORCE TO INVESTIGATE ANTITRUST CRIMES IN GOVERNMENT PROCUREMENT

On November 5, 2019, the US Department of Justice ("DOJ"), Antitrust Division announced the launch of an inter-agency Procurement Collusion Strike Force ("Strike Force") tasked with identifying and prosecuting collusion in connection with government procurement. This announcement is the latest reflecting the priority that the present leadership of the Antitrust Division has placed on targeting allegedly anticompetitive conduct by companies that bid for contracts to sell goods and services to the US government. Companies who contract for US government procurement—anywhere in the world—should revisit their antitrust compliance policies to guard against the threat of a similar enforcement action, which can lead to corporate penalties, prison time for executives, and civil damages.

Background

The DOJ Antitrust Division is the component within the DOJ charged with enforcing criminal violations of Section 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies in restraint of trade. Antitrust Division policy is to pursue criminal charges only for *per se* violations, a narrow class of restraints between horizontal competitors that have no redeeming competitive justification. These include agreements to fix prices, to rig bids, or to divide customers or markets. These agreements are categorically illegal, meaning that a defendant has no opportunity to argue that an agreement has procompetitive benefits. And because the US antitrust laws apply extraterritorially, the Antitrust Division can target conduct anywhere in the world with the requisite effect on US commerce.

Structure of the Strike Force

The Strike Force will act under the DOJ's enforcement authority and will focus on criminal antitrust violations. The interagency partnership also includes prosecutors from thirteen US Attorneys' Offices, as well as investigators from the FBI and

several federal agencies' Inspectors General, including the Department of Defense, the General Services Administration, the Department of Justice, and the US Postal Service.

Assistant Attorney General Makan Delrahim explained that the Strike Force "will use a district-based task organization model, beginning in the 13 partner federal districts."¹ Under this approach, the Strike Force will initially only have established liaisons with the US Attorneys' Offices and FBI Special Agents in those districts. It is not clear how this gradual rollout will affect the prosecution of violations that are discovered in other federal districts. Eventually, however, the Antitrust Division envisions expanding the scope, and many key initiatives are not limited to those geographies.

Note that, while the structure of the Strike Force is new, its launch fits into a preexisting effort under this administration to address anticompetitive conduct in government procurement in the name of protecting taxpayer dollars. On September 17, 2019, before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Delrahim highlighted protecting the interests of taxpayers as a central priority in the DOJ's criminal enforcement agenda.²

As Delrahim explained in the announcement of the Strike Force:

When competitors in any given industry collude and conspire to rig bids, fix prices, or allocate markets—that is, commit criminal antitrust violations—they distort the free market and harm customers with high prices and lower quality goods and services. This is no less true in the area of public procurement, where the customer is the government and the American taxpayer foots the bill for artificially high prices.³

He went on to highlight that over one-third of the Antitrust Division's open investigations are related to public procurement or other government victimization. The DOJ has already secured guilty pleas in relation to several bid-rigging arrangements, and the Strike Force is also pursuing price fixing agreements and agreements to allocate customers or markets in government procurement.

Training and Outreach to Identify and Prevent Antitrust Violations

Beyond investigating and prosecuting cases, the Strike Force will conduct outreach training programs on both the buy- and sell-side of the procurement process. This outreach will include training procurement officials at the federal, state, and local levels to recognize and report suspicious conduct. On the sell-side, the Strike Force plans to conduct outreach to government contractors, their trade associations, and public contract lawyers to "educate them about criminal antitrust violations and associated penalties."⁴

¹ Prepared Remarks by Assistant Attorney General Makan Delrahim at the Procurement Collusion Strike Force Press Conference, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike>.

² Statement of Assistant Attorney General Makan Delrahim Before the US. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, <https://www.justice.gov/opa/speech/statement-assistant-attorney-general-makan-delrahim-us-senate-subcommittee-antitrust>.

³ Prepared Remarks by Assistant Attorney General Makan Delrahim at the Procurement Collusion Strike Force Press Conference, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike>.

⁴ *Id.*

DOJ published training materials on its website in conjunction with its announcement of the Strike Force. Those materials identify a number of "red flags of collusion" that procurement officials are to look out for.⁵ In his remarks, Delrahim indicated that the Strike Force will be developing a data analytics strategy focused on identifying suspect behavior, and it is possible that these red flags may also be indicative of the types of information that could be involved in future data analysis.

The red flags fall into several categories. The first relates to market conditions. The materials direct procurement officials to determine the number of vendors that compete in the market for the good or service at issue. Markets for standardized goods or services where a small number of vendors control large market shares are likely to be viewed skeptically.

The second category of red flags relates to the applications themselves. Officials are supposed to look out for similarities in applications, such as consistent handwriting, typeface, or stationery. A slide deck used for trainings also includes examples where the same typos or mathematical errors have showed up in multiple bids. The materials also direct officials to look for white-outs or other physical alterations to prices that reflect last-minute changes.

Finally, officials may be on the lookout for patterns or irregularities in bidding over a series of awards. These might include companies that appear to take turns submitting the winning bid, regular suppliers failing to bid for work they typically perform, or large spreads between the winning bid and other bids.

Potential for Civil Damages In Addition to Criminal Penalties

Another notable aspect of the Strike Force is the prospect that it could lead to additional civil suits by the Antitrust Division to recover treble damages from wrongdoers. Clayton Act Section 4A authorizes the federal government to pursue a civil treble damages claim for harm it has itself suffered as a result of an antitrust violation.

For decades, the DOJ has largely declined to pursue civil damages claims under Section 4A. But in the set of criminal and civil suits related to a bid-rigging conspiracy between five South Korean-based companies for fuel supply contracts to the US Department of Defense, the Antitrust Division—under Delrahim's leadership—invoked the provision to pursue civil damages in addition to criminal penalties.⁶ This set of cases represent the largest penalties related to government procurement that the Antitrust Division has secured under Delrahim, and the civil damages were the highest ever secured under Section 4A. In sum, the cases were settled for a total of \$206 million in criminal penalties and \$157 million in civil damages.

Given this experience, even though the Strike Force is focused on criminal prosecution, increased prosecution may be accompanied by a rise in follow-on damages actions against companies involved in this conduct. Of course, the potential for civil claims in addition to criminal penalties exists anytime a company participates in an antitrust violation, whether conduct affects private parties or the

⁵ See, e.g., Red Flags of Collusion, <https://www.justice.gov/atr/red-flags-collusion>.

⁶ Complaint, *United States v. Hyundai Oilbank Co., Ltd.*, No. 2:19-cv-1037 (S.D. Ohio, Mar. 20, 2019); Complaint, *United States v. GS Caltex et al.*, No. 2:18-cv-1456 (S.D. Ohio, Nov. 14, 2018).

federal government. The difference in these types of cases is that it is the federal government who pursues both criminal prosecution and the civil claim.

Conclusion

Many of the practical implications of this initiative remain to be seen. However, given the increased scrutiny that the Strike Force represents, companies involved in government procurement should assess whether there are steps to take in managing the heightened risk. In particular, government contractors should become familiar with the "red flags" the Antitrust Division has identified here, as well as with guidance that the Antitrust Division published in July 2019 regarding the practices that the DOJ believes constitute an effective antitrust compliance and training regime.⁷ With this level of detail available, and in light of the Antitrust Division's recent focus on procurement, prosecutors will expect government contractors around the world to be on notice of the need to take steps to avoid cartel activity in government procurement.

⁷ Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, <https://www.justice.gov/atr/page/file/1182001/download>.

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