
Antitrust Compliance Training

(company name)

(date)

Company Policy and Guidelines

- STATEMENT SHOULD GO HERE FROM AN OFFICER OF THE COMPANY

Enforcement Of Violations Of Company Policy

- Any employee found in violation of rules or guidelines of the Company shall be subject to strict disciplinary action, up to and including discharge, even for a first offense in appropriate circumstances.
- Sanctions by the Company may include:
 - [INSERT EXAMPLES OF SANCTIONS]

The Competitive Process

- Connecticut consumers have the right to expect the benefits of free and open competition, i.e., the best goods and services at the lowest prices.
- The competitive process only works when competitors set prices honestly and independently.
- Consumers are cheated when competitors collude and inflate prices.

Basic Company Principles

- Act responsibly
- Always be honest... no cover-ups
- Be fair... and compete fairly
- Act in the company and customer's best interest
- Don't do anything you don't want others to find out about
- Nothing is More Important Than Our Commitment To Integrity

What do Antitrust Laws Do For the Consumer?

- Antitrust laws protect competition.
- Consumers benefit from competition through lower prices, better products and services.
- When competitors agree to fix prices, rig bids or allocate customers or sales territories, consumers lose the benefits of competition.
- The result is artificially higher prices.

Antitrust Laws and Enforcement

Sherman Act

- The Sherman Act is a federal law that prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitive activity.
- Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the U.S. Department of Justice.
- Violation of the Sherman Act is a felony punishable by a fine of up to \$100 million for corporations, and a fine of up to \$1 million or 10 years imprisonment (or both) for individuals.
- In addition to fines, parties engaging in anticompetitive activity may be ordered to pay restitution to the victims.

Antitrust Laws and Enforcement

Connecticut Antitrust Act

- Conn. Gen. Stat. Section 35-24, et seq makes it unlawful to restrain trade or commerce by fixing, controlling or maintaining prices, allocating or dividing customers or markets or refusing to deal or inducing third parties to refuse to deal with another person.
- Violations of the Act subjects an individual to a civil penalty of up to \$100,000, and subjects a business or corporate entity held to have violated the Act to a civil penalty of up to \$1,000,000.
- In addition to civil penalties, those found liable for violating the Act may be subject to paying restitution and damages.

Antitrust Laws and Enforcement (cont'd.)

■ Penalties are Severe.

- ❑ Companies have been fined hundreds of millions of dollars and individuals can receive prison sentences.
- ❑ The Company can lose its right to do business in the State.
- ❑ The Company may lose its opportunity to bid for federal or state contracts.

■ Careless conduct can violate the law.

- ❑ What appears to be ordinary business contacts, such as lunch with a competitor's sales rep or discussions at an industry trade association can raise "red flags" and expose us to a government investigation.
- ❑ Because of the risks, **never** discuss competitive matters with competitors.

Other Potential Sanctions

- Treble damages
- Attorneys fees
- Injunctive relief – which may mandate the way the company must conduct its business.

Federal and State Antitrust laws prohibit:

- Agreements that unreasonably restrain trade, including:
 - Price fixing and market or customer allocation
 - Concerted refusals to deal (group boycotts)
 - Tying arrangements (I'll sell you this only if you agree to buy this as well)
- Monopolization

Agreements in Restraint of Trade

- Section 1 of the Sherman Act:

“Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce...is declared to be illegal.”

- Section 35-26 of the Connecticut Antitrust Act:

“Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful.”

What constitutes an “agreement”

- Agreements between competitors need not be in writing.
- Can be implied from one’s conduct or a conversation.
- Most antitrust cases involve an agreement between the parties that has been inferred from circumstantial evidence supporting a conspiracy.
- If the plaintiff can produce evidence supporting a conspiracy, the defendant may be required to prove their conduct was the result of independent (not coordinated) conduct.

What is Price Fixing?

- Price fixing can take many forms, and any agreement among competitors that restricts price competition violates the antitrust law. Examples of price-fixing agreements include those where competitors agree to:
 - ❑ Establish or adhere to price discounts;
 - ❑ Hold prices firm;
 - ❑ Eliminate or reduce discounts;
 - ❑ Adopt a standard formula for computing prices;
 - ❑ Maintain certain price differentials between different types, sizes, or quantities of products;
 - ❑ Adhere to a minimum fee or price schedule;
 - ❑ Fix credit terms; or
 - ❑ Not advertise prices.

Bid Rigging

- Bid rigging is the way that competitors conspire to raise prices when purchasers, including state or local government seek to acquire goods or services by soliciting competing bids.

Bid-rigging

- Practices that raise “red flags” (and avoid):
 - Last minute changes to bid documents at time of submission
 - Discussions with competitors immediately prior to submitting bids
 - Statements that a given contract “belongs” to a particular bidder
- Any of the above may support an inference of an agreement to rig bids.

Types of Bid Rigging Schemes

- Bid suppression – an agreement between competitors to either refrain from bidding or withdrawing a submitted bid so that a designated competitor’s bid will be accepted.
- Complementary Bidding – also called “cover” or “courtesy” bidding occurs when one or more competitors agree to submit bids that are either too high to be accepted or contain special conditions that will not be acceptable to the purchaser. This includes those situations where you did not intend on bidding but agree to do so to “help out” a competitor.
- Bid rotation – In this scheme all conspirators submit bids, but take turns on being the low or winning bidder.
- Subcontracting – Competitors agree not to bid or to submit a losing bid in exchange for subcontracts from the successful low bidder.

Bid-rigging: Subcontractors

- Contractor-subcontractor relationships can present special problems.
- Agreements between a specialized subcontractor and a general contractor to work together to submit a bid is OK.
- Agreements between entities that could bid independently where one submits the prime bid and the second agrees to be a subcontractor may give the appearance of an agreement not to compete for the prime contract.
- Is the arrangement to make your bid more competitive or is to remove a competitor from the process and raise the ultimate price?

Customer or Territorial Allocations

- An agreement in which competitors divide markets among themselves:
 - Competitors agree to allocate customers amongst themselves; or
 - Competitors agree to allocate sales territories or geographic markets
 - In the trash hauling industry, this has been referred to as the “property rights” system (i.e., the customer is the “property” of a given company)

All of these agreements affect “price”

- Extends beyond agreements to charge a specific price to include:
 - Floor prices, price ceilings or credit terms
 - Agreement not to bid or to bid non-competitively
 - Dividing or trading customers
 - An agreement not to advertise
 - Exchanging price information in order to increase or stabilize prices

Vertical Restraints

- Agreements with suppliers, customers or resellers to:
 - Set minimum prices
 - Set maximum prices
 - Suggest or promote resale prices
 - Restrict or allocate sales territories
- In some respects, the current law is unsettled, although generally now judged under the “rule of reason” (weighing the competitive harm against the procompetitive justification for the practice).

Vertical Agreements that Might Give Rise to Liability

- Fixing specific or minimum resale prices.
- Cutting off a reseller that prices below a prescribed level.
- Cutting off a reseller at the request of a competing reseller.
- Unlawful tying agreements (I'll only sell you my pencils if you also purchase my eraser).

Vertical Agreements that Usually Do Not Pose Problems

- Exclusive territories for resellers
- Bundling or tying where (company name) has no market power or where the products are offered separately.
- Suggesting or promoting reseller-advertised resale prices.

Tying Agreements

- It is unlawful to require the purchase of one product in order to purchase a second product *where*:
 - (company name) has market power (usually a very large market share and the ability to raise prices) in the first (i.e. tying) product.
 - The products can be and are sold separately.
 - There is no legitimate business justification for requiring that they be purchased together.

Monopolization

- The intentional acquisition or maintenance of the power to control prices or exclude competition.

Elements:

1. Market Power
2. Abuse of monopoly position

Abuse of Monopoly Position

- The existence of monopoly power is not illegal, it's the illegal use of that power that runs afoul of the law.
- “Abuse” could include any type of “predatory” or “exclusionary” conduct.
- Exclusionary conduct may include conduct that has no apparent rational business purpose other than their adverse effect on competitors such as (i) a refusal to deal with competitors, customers or suppliers, (ii) exclusionary boycotts, or (iii) exclusive deals that foreclose competitors from a substantial portion of the market.
- Predatory conduct is defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.
- “Abuse” does **not** include simply charging a monopoly price or refusing to sell to a customer for legitimate business reason, even if that customer is a competitor.

Ways the Company Can Get into Trouble with Antitrust Enforcers

- Discussing prices, terms, or product offerings with competitors or at industry meetings.
- Calling up a competitor complaining that she/he stole a customer.
- Discuss bids or bidding strategy with a competitor at bidder conferences.
- Urging, Inciting or Signaling competitors not to deal with a buyer or seller (a “boycott”).

Dos and Don'ts

- Do what is best for the customer.
- Use and communicate information honestly.
- Play hard, as long as you play fair.
- Don't submit a bid on work you don't want to help out a competitor who does.
- Be very careful in how you entertain or give gifts to customers (e.g., purchasing agents); there is a very gray line as to what is appropriate and what constitutes an illegal inducement.

Dos and Don'ts (cont'd)

- Don't make references to industry-wide or association price schedules;
- Don't submit a bid for work that your company is incapable of performing to cover a competitor's bid.
- Don't pick up bid packages or drop off bids for competitors.
- Don't discuss advance pricing with your competitors

List of Dos and Don'ts

- Don't make statements that a particular customer, contract or sale territory “belongs” to a certain vendor.
- Don't target or gang up on specific competitors.
- Don't speak with competitors about prices, promotions, terms of sale, future business plans, boycotts, refusals to deal, market share or specific customers.

Hypothetical Situations You may Encounter.

Hypothetical Situation #1

- A contractor that is preparing a bid asks a sheet metal sub-contractor for his “rock-bottom” price for this bid with a promise that “I’ll steer some future work your way.”
- Any problems?

Hypothetical Situation #1-Analysis

- Parties are free to negotiate deals that involve multiple interactions and future commitments, so long as the agreement does not foreclose the market for a particular service.
- Thus, so long as there are other prime contractors and sub-contractors out there, no antitrust violation from seeking a “package” deal from a given sub-contractor.
- This is a vertical relationship. *Similar statement to a competitor could be per se illegal!*

Hypothetical Situation #2

- Over time, a pattern develops where sheet metal contractors generally decline to bid outside of their local markets, in each of which a single contractor gets the lion's share of jobs.
- A buyer frustrated with the lack of competing bids on his projects threatens an antitrust suit.

Hypothetical Situation #2- (cont'd)

- If the developer specifically requests a bid from [Company], what is the proper response?
 - a) Thanks, but we generally don't look for work over there.
 - b) We would lose money in the long run if we competed for your project.
 - c) We're happy to evaluate your RFP and will get back to you if we decide to bid.

Hypothetical Situation #2-Analysis

- Assuming that every contractor is making an independent business decision that its best interest is served by not entering adjoining markets, then no antitrust violation exists.
- BUT, even the hint of an agreement could give rise to a lengthy dispute over whether an illegal conspiracy existed.
- In this situation, extreme caution is warranted to avoid compromising interactions with competitors in adjacent markets.

Hypothetical Situation #2-Analysis

- The proper response is to offer to review the request for a bid and then to act independently and for good business reasons.
- Avoid implying that there may be an agreement with a competitor by flatly refusing to bid on jobs that appear profitable.

Hypothetical Situation #3-Analysis

- Members of a trade association are upset with the reimbursement amount a state agency will pay their company for a particular good or service.
- The members discuss the perceived unfairness with the level of reimbursement, voice their displeasure amongst themselves and some make the statement they will not participate in the program.
- Subsequent to the meeting, many of the members decline to provide services/good or otherwise participate in the program.
- Have they engaged in an illegal boycott?

Hypothetical Situation #3 – (cont'd)

- Decisions whether to participate that are made independently do not violate the antitrust laws. On the other hand, a joint decision not to participate in order to pressure the agency into raising the price will run afoul of the antitrust laws.
- The “gray area” revolves around when conduct is independent and when it crosses the line to a coordinated agreement. Factors that might lead to the inference that conduct amounts to a boycott include:
 - keeping membership apprised of who has declined to participate;

Hypothetical Situation #3-Analysis

(cont'd)

- communications to membership along the lines of “good luck if you can make money on this”, or “if enough of us refuse to participate, they’ll have to raise the price”, may be seen as communications amounting to a call for a boycott.
- While those trade association members that did not agree to the boycott would not be liable, sorting out who participated in the agreement would be a factual dispute.

Hypothetical Situation #4

- Two substantial building projects are currently open for bids, with the final bids due one week apart. During a subcontractor meeting held by one of the two contractors that are the prime candidates for each job, a discussion ensues that contractors A and B are each going to get one of the jobs, and that if B was smart he would “take it easy” on the first one.
- After A wins the first project with an unexpectedly high bid, there are rumblings of an investigation. B knows it will likely win the second project, on which bids are due soon, because A’s “plate is full”.
- Can B bid higher than it normally would, knowing that A is “out of the game”.

Hypothetical Situation #4 -Analysis

- B is in a difficult situation. So long as there was not an agreement between it and A that B would not compete vigorously for the first project, there is no antitrust violation.
- But, agreements can be proven through circumstantial evidence and it would be extremely difficult to rebut claims that the discussion at the subcontractor's meeting made its way back to B and lead to an understanding that affected its bidding behavior.

Hypothetical Situation #4-Analysis

- What could B do to lessen the antitrust sensitivity?
 - At the time the initial conversation occurred, make the record clear that B would not entertain further such discussions. For example state, “I don’t think that’s an appropriate topic for us to discuss” and notify (company name) legal after the meeting.
 - Compete vigorously on every project.

Confidential or Proprietary Information

- Never use a competitor's confidential or proprietary information.
- Never use a competitor's bid if you are involved in bidding, especially on Government contracts.
- Never use information on a competitor that someone offers to sell.

Legitimate sources of competitive information

- Newspaper and press accounts.
- Other public information, such as annual reports or published sales materials.
- Customers giving you a competitor's proposal, but only if it is not confidential.
- Trade shows.
- Information publicly available on the Internet.

Conduct that might indicate a Bid Rigging Scheme

- Competitors submitting identical bids;
- Bidders seem to win bids on a fixed rotation;
- Fewer competitors than normal bids on a project;
- Large dollar differential between the winning bid and other bids;
- One bidder submits substantially higher bids on some bids than others, with no logical reason to explain the difference in cost.

What is my role in Antitrust Enforcement?

- If you encounter business behavior that appears to violate the company policy, you **must** notify:
[company insert one or more executives who are responsible for compliance]
 - Information provided will be kept confidential
 - You **will not** be subject to retaliation for alerting company officials to possible illegal, improper conduct or breaches of the company's policies.
- If you suspect that someone within our company has committed a violation of the antitrust laws and you say nothing, you could be held criminally responsible or lose your job.

How do I report a violation?

- If you suspect that someone within our Company has violated our Company compliance policies and you do not report it to appropriate company officials, **you** could be subject to disciplinary action.
- If you suspect an antitrust violation among competitors inquiries can be made to:

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