PRICE FIXING & BID RIGGING – IT CAN HAPPEN IN CONNECTICUT

What Are These Violations and What to Look For

AN ANTITRUST PRIMER FOR PROCUREMENT PROFESSIONALS

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I. INTRODUCTION

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. Public and private procurement professionals often rely on a competitive bidding process to achieve that end. The competitive process properly functions, however, only when competitors set prices honestly and independently. When competitors collude, prices are inflated and the customer is cheated. Price fixing, bid rigging, and other forms of collusion are illegal and subject to criminal prosecution by the U.S. Department of Justice, as well as civil enforcement actions by the Office of the Connecticut Attorney General.

In recent years, the Office of the Connecticut Attorney General has successfully enforced the federal and state antitrust laws against conspiracies affecting several industries including: pharmaceutical, waste hauling, financial services, insurance, retail merchandising, high technology information systems, healthcare, and transportation services. Many of these enforcement actions resulted from information reported to our office by members of the public, including information provided by alert and dedicated purchasing professionals. With such assistance, the protection of everyone's right to free and open competition will continue to be a top priority of the Office of the Connecticut Attorney General.

This Antitrust Primer is designed primarily for public or private purchasing professionals. It contains an overview of the federal and state antitrust laws and the penalties that may be imposed for their violation. It briefly describes the most common antitrust violations and outlines those conditions and events that indicate anticompetitive activity, so that purchasing professionals might better detect and report suspicious activity.

II. ANTITRUST ENFORCEMENT

A. Federal Law

Enacted in 1890, the Sherman Act is among our country's most important and enduring pieces of economic legislation. The Sherman Act prohibits any agreement among competitors to fix prices, rig bids, or engage in other anticompetitve activity. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the U.S. Department of Justice.

A 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 receiving a criminal sentence, a corporation or individual convicted of a Sherman Act violation may be ordered to make restitution to the victims, including state agencies, for all overcharges. Both public and private victims of bid-rigging and price-fixing conspiracies also may seek civil recovery of up to three times the amount of damages suffered. The Office of the Connecticut Attorney General has authority to bring actions for damages on behalf of individuals, corporations and state agencies injured by antitrust violations.

B. Connecticut Law

The Connecticut Antitrust Act, Conn. Gen. Stat. §§ 35-24 et seq. (the "Act"), which is patterned largely after the Sherman Act, essentially 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 deal with another person. The Act also makes it unlawful for a person to monopolize or attempt to monopolize any part of trade or commerce.

Civil enforcement of the Act is the responsibility of the Attorney General's Antitrust Department, which is authorized to investigate suspected violations of the Act and bring suit on behalf of individuals, companies, the state and its agencies, municipalities, and school districts to recover damages and/or to temporarily or permanently enjoin the anticompetitive conduct. To facilitate its responsibility for investigating suspected violations, the Office of the Connecticut Attorney General has the power to subpoena witnesses and documents, take testimony under oath and issue written interrogatories.

Violations of the Act subject the person committing the violation to treble damages plus attorney's fees and costs. In addition, the Act subjects an individual held to have violated its provisions to a civil penalty of up to $100,000, and subjects a business or corporate entity held to have violated its provisions to a civil penalty of up to $1,000,000.

III. FORMS OF COLLUSION

Most antitrust enforcement actions involve price fixing, bid rigging, or market division or allocation schemes. Each of these forms of collusion may be prosecuted criminally or civilly. The conspirators need not have entered into a formal (i.e., written) or express agreement to have violated the law; an informal agreement among competitors can support a finding of liability. Although it is necessary to prove an agreement between competitors, there is no requirement that any overt act be alleged or proven to sustain a violation of the Act. The agreement itself is the violation. Price fixing, bid rigging, and other collusive agreements can be established by direct evidence, such as the testimony of a participant, or by circumstantial evidence, such as suspicious bid patterns, travel and expense reports, telephone records, and business diary entries.

Price-fixing, market division and/or allocation, and bid-rigging schemes are Per Se violations of federal and state antitrust laws. This means that where such a collusive scheme has been established, it cannot be justified under the law. Arguments or evidence that the agreed-upon prices were reasonable, that the agreement was necessary to prevent or eliminate price cutting or ruinous competition, that the conspirators were merely trying to make sure that each got a fair share of the market or that the conduct otherwise allegedly enhanced competition are not viable defenses.

A. Price Fixing

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement among competitors that restricts price competition violates the law. Examples of price-fixing agreements include those to:

1. Establish or adhere to price discounts;

2. Hold prices firm;

3. Eliminate or reduce discounts;

4. Adopt a standard formula for computing prices;

5. Maintain certain price differentials between different types, sizes, or quantities of products;

6. Adhere to a minimum fee or price schedule;

7. Fix credit terms;

8. Not advertise prices; or

9. Exchange current price information.

In many cases, participants in a price-fixing conspiracy also establish some type of policing mechanism to make sure that everyone adheres to the agreement. Purchasing officials should be on the lookout for such a mechanism.

B. Bid Rigging

Bid rigging is the way that conspiring competitors effectively raise prices when purchasers -- including state or local governments – seek to acquire goods or services by soliciting competing bids. Bid rigging robs the purchaser requesting bids – and often ultimately the taxpayer – of the ability to receive the lowest price possible.

Although there are several types of bid rigging schemes, at the heart of all bid rigging schemes lies an agreement in advance among competitors as to whom will submit the winning bid on a contract being let through a competitive bidding process. As with price fixing, it is not necessary that all bidders participate in the conspiracy. Bid rigging occurs in many forms, but bid-rigging conspiracies usually fall into one or more of the following categories:

1. Bid Suppression

In bid suppression schemes, one or more competitors who otherwise would be expected to bid, agree to refrain from bidding or withdraw a previously submitted bid, so that the designated winning competitor's bid will be accepted.

2. Complementary Bidding

Complementary bidding (also called "cover" or "courtesy" bidding) occurs when one or more competitors agree(s) to submit bids that are either too high to be accepted or contain special conditions that will not be acceptable to the purchaser. Such bids are not intended to secure the purchaser's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

3. Bid Rotation

Bid rotation schemes are similar to complementary bidding schemes. In bid rotation schemes, all conspirators submit bids, but take turns on being the low bidder. The terms of the rotation may vary; for example competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company. A strict bid rotation pattern defies the law of chance and suggests collusion is taking place.

4. Subcontracting

Subcontracting arrangements are often part of a bid-rigging scheme. Competitors agree not to bid or to submit a losing bid in exchange for subcontracts or supply contracts from the successful low bidder. In some schemes the collusion may take place in the bidding process; for example, a low bidder may agree to withdraw its winning bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

C. Market Division

Market division or allocation schemes, sometimes known as "property rights" systems, are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate among themselves specific customers or types of customers, products, or geographic territories. For example, one competitor will be allowed to sell to or bid on contracts let by certain customers or types of customers. In return, he or she agrees not to sell to, or bid on contracts let by, customers allocated to other competitors. In other schemes, competitors agree to sell only to customers in certain geographic areas and refuse to sell to, or quote intentionally high prices to, customers in geographic areas allocated to conspirator companies.

IV. DETECTING BID RIGGING, PRICE FIXING, MARKET DIVISION AND OTHER TYPES OF COLLUSION

Bid rigging, price fixing, market division and other collusion can be very difficult to detect. Collusive agreements are usually reached in secret, with only the participants having knowledge of the scheme. Very rarely will illegal collusive conduct be shared with a non-conspirator, making detection of collusive behavior difficult. However, there are certain suspicious bidding or pricing patterns that may indicate illegal collusion. In addition, in certain instances a vendor may say or do something that arouses suspicion. The following scenarios are examples of signs that illegal collusion may have occurred.

A. Bid or Price Patterns

1. Bids

a) The same company always wins a particular procurement. This may be more suspicious if one or more companies continually submit unsuccessful bids;

b) The same suppliers submit bids and each company seems to take a turn being the successful bidder;

c) Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates;

d) fewer than normal number of competitors submit bids;

e) A company appears to be bidding substantially higher on some bids than on other bids, with no apparent cost differences to account for the disparity;

f) Bid prices drop whenever a new or infrequent bidder submits a bid;

g) A successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project; or

i) A company withdraws its successful bid and subsequently is awarded subcontracting work by the new winning contractor.

2. Prices

a) Identical prices may indicate a price-fixing conspiracy, especially when:

(i) prices stay identical for long periods of time;

(ii) prices previously were lower;

(iii) price increases do not appear to be supported by increased costs or normal rates of inflation; or

(iv) prices that would be expected to vary with the cost of underlying raw materials or commodities do not vary.

b) Discounts are eliminated, especially in a market where discounts historically were given; or

c) Vendors are charging higher prices to local customers than to distant customers. This may also indicate local prices are fixed.

B. Suspicious Statements or Behavior

While vendors who collude try to keep their arrangements secret, occasional slips or carelessness may be a tip-off to collusion. Additionally, certain patterns of conduct or statements by bidders or their employees suggest the possibility of collusion. You should be alert for the following situations, each of which has triggered a successful antitrust prosecution:

1. There are irregularities (e.g., identical calculations or spelling errors) or similar handwriting, typeface, or stationery in the proposals or bid forms submitted by different vendors (indicating that the designated low bidder may have prepared some or all of the losing vendor's bid);

2. Bid or price documents contain white-outs or other physical alterations indicating last-minute changes;

3. A bidder requests a bid package for himself and a competitor or submits both his and another's bids;

4. A company submits a bid when it is incapable of successfully performing the contract (possibly a complementary bid);

5. A company brings multiple bids to a bid opening and submits its bid only after determining (or trying to determine) who else is bidding; and

6. A bidder or salesperson makes a suspicious statement such as:

a) Any reference to industry-wide or association price schedules;

b) Any statement indicating advance (non-public) knowledge of a competitor's pricing;

c) Statements to the effect that a particular customer, contract, or sale territory "belongs" to a certain vendor or the vendor will not do business in a particular area or product; or

d) Statements that a bid was a "courtesy," "complementary," "token," or "cover" bid;

e) Any statements indicating that vendors have discussed prices among themselves, that they know of a competitor's bid or have reached an understanding about prices.

C. A Caution About Indicators of Collusion

While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may appear to be the product of collusion when they are in fact merely an incorrect estimate. Also, a bidder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list. Only when a competitor submits an intentionally high bid *because of an agreement with a competitor* does an antitrust violation occur. Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question. If you have a suspicion that collusion has occurred, please contact our office immediately.

V. CONDITIONS FAVORABLE TO COLLUSION

While collusion can occur in almost any industry, it is more likely to occur in some industries. An indicator of collusion may be more meaningful when industry conditions are already favorable to collusion.

A. Indicators of Collusion

1. Few Sellers

Collusion is more likely to occur if there are few competitors. The fewer the competitors, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur even when the number of firms is fairly large, if there is a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.

2. Unique Products/Restrictive Specifications

The probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured.

3. Standardized Products

The more standardized a product is, (i.e., a commodity), the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality or service.

4. Familiarity With Bidding Practices

Repetitive purchases may increase the chance of collusion, as the vendors become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.

5. Familiarity With Bidders

Collusion is more likely if the competitors know each other well, through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another. Similarly, bidders who congregate in the same building or town to submit their bids, have an easy opportunity for last-minute communications.

VI. WHAT YOU AND YOUR EMPLOYER CAN DO

If companies are conspiring to collude on prices, the purchasing agent is the last person in the world that they want to know about the scheme. For this reason, even the most conscientious buyer can be unknowingly victimized. If you believe your agency, municipality or employer is the victim – or possibly involved – in collusive behavior, please contact this office immediately.

A. Procedures to Discourage Anticompetitive Activity

1. Expand the List of Bidders

Expanding the list of bidders will make it more difficult for bidders to collude. Buyers should solicit bids from as many suppliers as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. While there is no magic number of bidders above which collusion cannot occur, past experience suggests that collusion is more likely to arise where there are five or fewer competitors.

2. Educate Purchasing Professionals

Ensure that all purchasing department employees are familiar with the indicators of bid rigging, price fixing, and other types of collusion, and that those employees are instructed to inform this office or an agency "contact person" in the case of suspicious behavior.

3. Maintain Procurement Records

Maintain procurement records, e.g., bid lists, abstracts, and awards. Rarely is collusion found to exist via a "smoking gun." Therefore, when collusion is suspected, it is necessary for

the investigators to review the procurement history of a product to determine if a pattern of bid allocation or rotation is present.

4. Ask Questions of Bidders

Ask questions. If the prices or bids submitted do not make sense, press your vendors to explain and justify their prices. You may be provided with a reasonable explanation or your suspicions may be heightened by a questionable answer. Either way, you learn more about your markets and demonstrate your interest in competitive prices.

5. Know the Products You Purchase and Your Markets

Know and understand the dynamics of the markets in which you make major purchases. A knowledgeable buyer may correctly suspect collusion from market behavior that may not arouse suspicions in an uninformed buyer.

6. Bidder Certification

Require all bidders to read and sign a statement indicating awareness of illicit bidding behavior and affirming that they have participated in an open and fair bidding process. Sample forms are available with the Office of the Connecticut Attorney General. Once completed, they should be kept on file for a minimum of five years.

VII. REPORT YOUR SUSPICIONS

The Office of the Attorney General encourages all purchasing personnel and/or consumers to report suspicions of collusion through appropriate channels in your agency or organization. The Antitrust Department of the Office of the Attorney General cannot promise that every reported suspicion will warrant investigation, but we will carefully consider all information provided to us. Your observations may add to information we already have about an industry or, together with other reports, indicate a more widespread problem. The Act provides that information furnished to the Office of the Attorney General related to a suspected violation of the antitrust laws shall not be available to the public. Thus, your call will always be appreciated and treated in accordance with our confidentiality policy, and, we will conduct an investigation when warranted.

VIII. COMMON QUESTIONS AND CONCERNS

We understand that there are some concerns about reporting a suspected antitrust violation. First, we realize that in most instances purchasing officials have only a suspicion that there may be a problem. Even the most knowledgeable and conscientious purchasing official probably could not prove price fixing or bid rigging. Reported suspicions, however, sometimes on their own or more often coupled with information the Antitrust Department may have from similar complainants, other sources, or previous investigations, may be sufficient to warrant an

investigation. Of course, many reported suspicions are not sufficient on their own to start an investigation, but they provide the antitrust unit with important market and industry intelligence.

Second, we understand that many purchasing professionals may fear that a vendor will be debarred, publicly accused, or even sued based solely on their suspicions. Be assured, however, that reported information and suspicions are merely the first step in an incremental and very thorough process that occurs before a lawsuit is initiated. Only if sufficient evidence develops will the Antitrust Department begin a full fledged investigation, and a lawsuit will not be brought unless that investigation uncovers compelling evidence of bid rigging, price fixing or other collusion.

Finally, we are sensitive to the fact that purchasing professionals value their relationships with vendors and do not want to be identified, especially because suspicious conduct may prove to have an innocent explanation. The Office of the Attorney General acknowledges this concern and your complaint will be handled in accordance with our confidentiality policy.

INQUIRIES TO THE ANTITRUST DEPARTMENT SHOULD BE MADE TO:

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