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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from the United States

-- Session V --

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COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

-- United States --

Outreach and Training Programmes

1. In the United States, attorneys at the U.S. Department of Justice Antitrust Division (DOJ) have for many years spent considerable time conducting outreach and training programmes for public procurement officials and government investigators, including investigators who work for other government agencies that solicit bids for various projects. These outreach programmes help develop an effective working relationship between the DOJ officials who have the expertise concerning investigating and prosecuting bid rigging, and public procurement officials and government investigators who are in the best position to detect and prevent bid rigging on public procurement contracts. DOJ officials advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and on what bidding patterns and types of behaviour they and their investigators should look for to detect bid rigging. In turn, procurement officials and investigators often provide the key evidence that results in a successful bid-rigging prosecution. Our experience has been that this team effort among public procurement officials, government investigators, and DOJ attorneys has contributed to a significant decrease in bid rigging on public procurement in the United States over the last twenty to thirty years.

2. This paper provides an overview of the Antitrust Division's public procurement outreach and training programmes. Part 1 sets forth the purposes of these programmes. Part 2 describes the use of publications – brochures, newsletters – as tools of outreach programmes. The key features of an effective outreach presentation are laid out in Part 3. Part 4 describes the Certificate of Independent Price Determination, a critical tool in preserving competition in public procurement, and Part 5 notes the relationship between corruption and bid-rigging violations. Part 6 describes a recent DOJ training initiative aimed at safeguarding the ongoing economic stimulus programme, and Part 7 concludes.

1. Purposes of Public Procurement Outreach and Training Programmes

3. Public procurement outreach and training programmes serve a number of purposes. First, these programmes help educate public procurement officials and government investigators about the costs of bid rigging. Because bid-rigging conspiracies often last for many years, government purchasers, and therefore taxpayers, pay much more for goods and services than they should because they were deprived of the full benefits of competition. Furthermore, if companies are successful in rigging bids on one type of product or service, they may be tempted to rig bids on other products and services, causing additional harm to government purchasers.

4. Second, outreach programmes help educate public procurement officials and government investigators about what they should look for in order to detect bid rigging and various types of fraud with respect to government procurement. This enables procurement officials and investigators to detect illegal conduct earlier and more frequently, resulting in more successful prosecutions and greater deterrence. In the United States, procurement officials have frequently provided the initial

evidence of bid rigging or other procurement violations based on indications of illegal conduct that they observed. Some of these cases are discussed in more detail in paragraph 15 below.

5. Third, outreach programmes educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Antitrust agency officials provide advice about techniques that procurement officials can use to make it less likely that their programme will become the victim of a bid-rigging scheme. For example, in certain circumstances DOJ attorneys have advised procurement officials to combine work into larger contracts so that competitors outside the local geographic area will decide that it is profitable to bid on the contracts, resulting in more competition for each contract. DOJ attorneys also advocate that all government purchasers require bidders to submit and sign a Certificate of Independent Price Determination. The details of this certificate and why it should be used are discussed in more detail in paragraphs 17-18 below.

6. Fourth, outreach programmes help develop a close working relationship between public procurement officials, government investigators, and antitrust agency officials. This is a critical goal of an outreach programme. Procurement officials are sometimes reluctant to report illegal activity partly because they think they will be blamed for its occurrence on their watch. During outreach programmes, antitrust agencies should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy that was carried out in secret without their knowledge; procurement offices and antitrust agencies have the same interest in trying to prevent and prosecute bid rigging. The statistics indicate that the joint efforts of public procurement officials, government investigators, and DOJ attorneys have reduced the amount of bid rigging on public procurement in the U.S. In the 1970s and 1980s, a majority of overall criminal antitrust prosecutions in the U.S. were for bid rigging, primarily involving public procurement. Most notable in terms of the number of cases was bid rigging on the construction of roads and on the sale of milk to schools. During this time period, the Antitrust Division filed hundreds of cases involving bid rigging on road building and the sale of milk. More recently, the proportion and total number of bid-rigging prosecutions has declined.

7. Finally, as will be discussed more fully below in paragraphs 19-20, sometimes public procurement officials are in fact involved in bid rigging and other illegal conduct that undermines competition, in the form of kickbacks or other remuneration received from companies that submit bids. Outreach programmes serve to warn any procurement officials who are tempted to participate in this type of conduct that the government will vigorously prosecute such violations and to encourage honest procurement officials to report violations by corrupt co-workers.

2. The Use of Publications to Make an Outreach Programme More Effective

8. Brochures – In the United States, DOJ attorneys provide brochures to public procurement officials and government investigators to make outreach programmes more effective. These documents explain the antitrust laws and what procurement officials and investigators should look for to determine if bid rigging or other procurement violations are occurring. Copies of these brochures can be obtained using the Internet: 1) “Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What To Look For” (“Bid Rigging Brochure”) can be found at <http://www.justice.gov/atr/public/guidelines/211578.pdf>; and “An Antitrust Primer For Federal Law Enforcement Personnel” can be found at <http://www.justice.gov/atr/public/guidelines/209114.pdf>.

9. Newsletters – Offices within the Antitrust Division publish newsletters that discuss certain cases that have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. For example, a four-page, colour newsletter published by the Chicago Field Office in the fall of 2008 was distributed to about 1,700

recipients, including federal, state, and local public procurement officials and government investigators.

3. Key Features of an Effective Outreach Presentation

10. Explain the legal standard for a violation – In the United States, this means an emphasis on the fact that under U.S. law the *agreement* to rig bids is the crime. In other countries, the legal standard may be different, but it is important for antitrust agency officials to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand this, they will not know what to look for and report to the authorities. In U.S. outreach programmes, DOJ attorneys also explain the differences between bid rigging, price fixing, and market allocation, and what procurement officials and investigators should look for with respect to each violation.

11. Explain how antitrust investigations are conducted – During outreach programmes, antitrust agency attorneys explain the procedures used to conduct an investigation. In the United States, these procedures include taping conversations with the assistance of co-operating witnesses, using search warrants and wiretaps, conducting unannounced “drop-in” interviews, and using grand jury subpoenas for documents and testimony. Also, DOJ attorneys discuss the Corporate Leniency Policy which may enable a co-operating company to avoid prosecution.

12. Discuss Penalties for Bid Rigging and Other Antitrust Violations – Outreach programmes provide an opportunity to explain the maximum penalties which companies and individuals can receive for bid rigging and other procurement violations. It is useful to cite specific examples of successful prosecutions: instances in which companies have received substantial fines and individuals have been sentenced to lengthy jail terms.

13. Discuss Indicators of Bid Rigging – A key part of U.S. outreach programmes is a discussion of factors suggesting that bid rigging may be taking place. For example, a pattern where company A wins a contract one year, and company B wins the next year, with each taking turns in subsequent years, may reveal that the companies are engaged in a bid-rotation scheme. Another indicator of bid rigging occurs when the same errors (misspelled words and typographic or arithmetic errors) are evident in bids submitted by allegedly competing companies. This, of course, suggests the companies prepared the bids in concert. Yet another indicator involves the situation where a new company enters the bidding unexpectedly, and at a much lower price than the bids of the other companies that traditionally submit bids on a contract. This pattern may indicate that the new entrant was bidding competitively and that the traditional companies had been rigging their bids and winning contracts at high, non-competitive prices.

14. Encourage procurement officials to report anything suspicious – As previously discussed, public procurement officials may be reluctant to report their suspicions that illegal conduct is occurring. Antitrust agency officials should encourage procurement officials and investigators to contact them if procurement officials or investigators have *any* concerns that bid rigging or other procurement violations may be occurring. Antitrust agency officials should also assure procurement officials that they are always willing to talk about procurement concerns. Sometimes antitrust agency officials will decide that there is insufficient evidence to open an investigation based on what the procurement official or investigator has observed, but other times they will investigate and develop a case.

15. Give examples of matters in which procurement officials have played a key role – It is very useful to provide specific examples of actual cases that have been developed with the assistance of

public procurement officials. This will demonstrate to procurement officials that action will be taken when they report their suspicions. Each country will have its own examples to use, but in the United States, DOJ attorneys have used the following examples in outreach programmes:

- Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were ninety contracts over seven years. The two companies co-ordinated their bidding such that each company won fifty percent of the contract each year. This pattern was identified by two procurement auditors when they happened to discuss these contracts over lunch. They reported their concerns, and after an investigation by the DOJ, the companies and their executives were successfully prosecuted for bid rigging;
- Two companies submitted bids for the repair of certain government equipment damaged by a storm. Each company submitted a cover letter with its bid expressing its interest in performing the work. A procurement official noticed that each cover letter contained the same typographical error (an unnecessary word), which was as follows: “Please give us a call **us** if you have any question.” The procurement official was concerned that the companies had colluded on their bids and he reported his concerns to the Antitrust Division. Following a full investigation, the companies and individuals involved were prosecuted and convicted for bid rigging and other violations;
- The government sought to buy four types of gloves: 1) women’s dress gloves; 2) women’s outdoor gloves; 3) men’s dress gloves, and 4) men’s outdoor gloves. The government intended to award four contracts, one for each type of glove. Four companies submitted bids on these contracts. A government procurement official noticed that the bids submitted resulted in each company winning one of the contracts. The official believed that the contracts had been allocated among the companies submitting bids and reported his concerns. Following a DOJ investigation, the companies and culpable individuals were successfully prosecuted for bid rigging.

16. Discuss Other Crimes Which May Be Prosecuted – In U.S. outreach programmes, DOJ attorneys explain to public procurement officials and government investigators that the DOJ prosecutes various types of fraud and other violations in addition to violations of the antitrust laws. This is important for a couple of reasons. First, some violations that severely undermine the procurement process, such as kickback schemes, may not be violations of U.S. antitrust laws; such conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when the DOJ investigates these schemes it may determine that bid rigging is occurring and that procurement officials are being paid a kickback or bribe to facilitate the collusion. The prosecution of kickback schemes with respect to government procurement is discussed in more detail below in paragraphs 19-20.

4. Certificate of Independent Price Determination – What It Is and Why It Is Important?

17. A Certificate of Independent Price Determination has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Basically, this document requires each company that submits a bid to sign a statement under oath that it has neither agreed with its competitors about the bids which it will submit nor disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids. The key part of the certificate states:

- The offeror certifies that –

- The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered,
- The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed solicitation) or contract award (in the case of a negotiated solicitation), unless otherwise required by law, and
- No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

18. Under U.S. law, evidence that a company lied in its Certificate of Independent Price Determination is a criminal violation. This is very important because it means that the company can be prosecuted if the only evidence is that it disclosed bid prices to its competitors or attempted to convince its competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on who would win the project for which bids were submitted.

5. Investigations Involving Kickbacks and Other Improper Conduct by Procurement Officials

19. In some cases, there may be evidence that kickbacks or bribes are being paid to procurement officials who are responsible for awarding contracts. In the initial stages of the investigation, it may not be clear whether the companies involved are also engaged in bid rigging. However, in a number of cases DOJ attorneys have developed evidence that corrupt procurement officials were paid off to facilitate a bid-rigging scheme.

20. It is important to determine whether corrupt procurement officials are assisting collusion among bidders. Kickbacks and bribes typically leave a paper trail showing money passing from the person paying the kickback or bribe to the corrupt procurement official. These types of cases are important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is legitimate.

6. Proactive Initiative to Safeguard Large Government Expenditures: Antitrust Division Programme to Protect Economic Recovery Stimulus Programmes from Fraud, Waste, and Abuse

21. In May 2009, the Antitrust Division announced the details of an initiative aimed at preparing government officials and contractors to recognise and report efforts by parties to unlawfully profit from stimulus projects that are being awarded as part of The American Recovery and Reinvestment Act of 2009. The Recovery Act, a multi-billion dollar economic stimulus programme, was signed into law by President Obama on Feb. 17, 2009 as an effort to jumpstart the economy and to create or save jobs. The Antitrust Division's Recovery Initiative involves training procurement and grant officials, government contractors, and agency auditors and investigators, on techniques for identifying the "red flags of collusion" before stimulus awards are made and taxpayer money is unnecessarily wasted. The initiative makes available to agencies Antitrust Division competition experts who can evaluate procurement and programme funding processes. These Division experts make recommendations on "best practices" that may be adopted by the agencies to further protect processes from fraud, waste and abuse and maximise open and fair competition. Finally, the initiative commits the Antitrust

Division to playing a significant role in assisting agencies to investigate and prosecute those who seek to or succeed in defrauding the government's efforts to maximise competition for stimulus funds.

22. The Antitrust Division's Recovery Initiative has had a significant impact. Since March 2009, in partnership with agency Inspector Generals handling stimulus funds, the Antitrust Division has already assisted in training thousands of federal and state procurement, grant and programme officials nationwide, with thousands more scheduled to be trained in the coming months. The Antitrust Division has also launched a Recovery Initiative Web site through which consumers, contractors and federal, state and local agencies, can review information about the antitrust laws and the Division's training programmes, request training, and report suspicious activity. The Web site is located at http://www.justice.gov/atr/public/criminal/economic_recovery.htm. This Web site is linked to www.recovery.gov, the official website of the Recovery Accountability and Transparency Board. The board is responsible for overseeing federal agencies to ensure that there is transparency and accountability for the expenditure of Recovery Act funds.

7. Summary and Conclusion

23. A comprehensive outreach and training programme for public procurement officials and government investigators can significantly increase the effectiveness of efforts to prevent and punish bid rigging on public procurement. Public procurement officials and government investigators can greatly assist antitrust agencies in investigating and prosecuting bid rigging. In order for that to happen, antitrust agency attorneys need to educate procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Antitrust agency officials also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

24. The ultimate goal of an outreach and training programme is to encourage public procurement officials, government investigators, and antitrust agency attorneys to work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programmes.