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Joint Bidding Arrangements With Competitors: Evaluating and Minimizing Antitrust Risks

Avoiding Bid Rigging Allegations and Violations Arising From Negotiations, Communications, and Information Exchanges With Competitors

TUESDAY, JUNE 28, 2016

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Joint Bidding Arrangements with Competitors: *Evaluating and Minimizing Legal Risks*

Strafford Webinar

Tuesday, June 28, 2016 1:00 p.m.

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I. Bid Rigging

A. Bid rigging is a “hard core” offense, subject to criminal sanctions in the U.S.

1. In the auto parts investigation, 44 companies have been charged and have agreed to pay more than $2.7 billion in criminal fines; many of those companies pled guilty to bid rigging.
2. Most of the 64 individuals that have been charged in the auto parts cases were charged with bid rigging.
3. Real estate auctions, tax lien auctions, and the construction industry have also been targets of numerous bid rigging prosecutions.

I. Bid Rigging (*continued*)

B. The majority of DOJ's bid rigging prosecutions begin with a leniency applicant. The first company to report illegal conduct to the Antitrust Division and cooperate receives:

   1. Complete amnesty from criminal prosecution for the company and its employees, and
   2. Single instead of treble damages and no joint and several liability in civil damage actions.

I. Bid Rigging (*continued*)

C. Variations on bid rigging

1. Complementary or cover bids
2. Bid suppression
3. Bid rotation
4. Geographic or customer allocation

I. Bid Rigging (*continued*)

D. EU law on bid rigging

1. US and EU law penalize essentially the same conduct.
2. A company that does not participate in the relevant market, such as a consultant, violates EU competition law if it organizes and participates in bid rigging meetings. Cf. Case C.194/14 P, AC-TreuhandAG v. Comm'n, 2015.

I. Bid Rigging (*continued*)

D. EU law on bid rigging

3. The biggest difference between US and EU law is with respect to information exchanges.

4. In the U.S., information exchanges are evaluated under the rule of reason, which means that an anticompetitive effect must be proved.

5. In the EU, an exchange of information between competitors that "reduces or removes…uncertainty" about their strategy or conduct is regarded as a restriction of competition "by object", that is, it is illegal without any showing of a direct effect on prices. Case C-286/13 P, Dole Food Co. v. Comm'n, 2015.

I. Bid Rigging (*continued*)

E. Things antitrust authorities look for in deciding to open investigations—also the things lawyers should look for in antitrust audits

1. A company bids high on some RFQs and low on others with no cost differences to account for the disparity.
2. Fewer than the normal number of companies submit bids.
3. Companies seem to take turns being the winning bidder.
4. A company withdraws its bid or changes the terms and conditions of the bid without a good reason for doing so.

I. Bid Rigging (*continued*)

E. Things antitrust authorities look for … (*continued*)

5. Bids are much higher than the customer's pre-bid estimates.
6. Bids drop significantly when a new or infrequent bidder submits a bid.
7. The winning bidder subcontracts work to one or more competitors that submitted bids for the same project.
8. There are secret agreements with competitors and/or potential competitors.

I. Bid Rigging (*continued*)

F. Best practices for avoiding bid rigging violations

1. All employees involved in submitting bids should receive regular antitrust training.
2. Employees involved in submitting bids ideally should not have any contact with competitors; if they do have contacts, contacts should be kept to a minimum and sensitive business information (prices, costs, margins, strategies, etc.) should never be discussed.

I. Bid Rigging (*continued*)

F. Best practices … (*continued*)

3. Do not knowingly submit non-competitive bids.
4. Do not award subcontracts to losing bidders.
5. Do not enter into any secret agreements with actual or potential competitors.

I. Bid Rigging (*continued*)

G. Practical counseling question

Company A has unilaterally decided not to bid on an RFQ. An employee of Company B contacts an employee of Company A and asks Company A not to bid on the RFQ. What should Company A do?

II. Joint Bidding

A. Joint bids can violate the antitrust laws, but they are prosecuted civilly, not criminally.

B. The standards the agencies use to determine whether a joint bid violates the antitrust laws are set out in the 2000 Department of Justice and Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors.

C. The ultimate question is whether cognizable efficiencies created by a joint bidding arrangement are sufficient to offset any anticompetitive harms. Guidelines § 3.37.

II. Joint Bidding (*continued*)

D. Application of the Collaboration Guidelines to Joint Bidding

1. Joint bidding arrangements that create a new competitor

a. Where neither party to a joint bid could perform the contract on its own and some combination of their capital, technology, and other complementary assets is used in an efficiency-enhancing integration, the joint bid is presumptively legal.

- Cf. Guidelines Example 6 (Two firms contribute significant assets to a joint effort that produces a better product than either could produce on its own; the Agencies would conclude that the project is an efficiency enhancing integration.)

II. Joint Bidding (*continued*)

D. Application of the Collaboration Guidelines … (*continued*)

2. Arrangements that are per se illegal

a. Where two parties, each of which could perform the contract, submit a joint bid without any integration, the agencies will challenge it as per se illegal. Guidelines §3.2.

- Cf. Guidelines Example 4 (Two companies set up a joint venture with no economic integration and the companies agree on the price at which the joint venture will sell.)
- *FTC v. B&J School Bus Services, Inc.,* 116 F.T.C. 308 (1993) (Four companies that operate school buses submitted joint bids and then allocated portions of the school district each company would serve. They did not integrate their operations.)

II. Joint Bidding (*continued*)

D. Application of the Collaboration Guidelines … (*continued*)

3. Arrangements analyzed under the rule of reason

a. If a joint bid creates efficiencies and therefore permits the submission of a lower bid price than either party could submit alone, it is judged under the rule of reason. As long as there are a sufficient number of other bidders, the arrangement is likely permissible. Guidelines §3.3.

- Caveat: If the participants could achieve equivalent efficiencies through practical, less restrictive means, the agencies will conclude the joint bidding arrangement isn't reasonably necessary. Guidelines §3.36(b).

II. Joint Bidding (*continued*)

D. Application of the Collaboration Guidelines … (*continued*)

4. The competitive landscape matters.

   a. The Guidelines create a safety zone where the collaboration is not per se illegal and does not account for more than 20% of the market. Guidelines §4.2.

   b. This suggests that where there are four or more bidders in addition to the joint bidding group, the joint bid is probably permissible provided that it is not per se illegal.

   c. In contrast, a joint bidding arrangement that combines the two leading bidders for a contract or two of the three leading bidders is likely to be problematic.

II. Joint Bidding (*continued*)

D. Application of the Collaboration Guidelines … (*continued*)

5. Spillover effects

   a. It is important to limit the joint activity to the bid or bids in question; the agencies will examine whether the parties to a joint bidding agreement continue to compete against each other. Guidelines §3.34(a).

   b. Another factor is whether key assets are contributed to the joint bidding arrangement such that the participants' ability to compete independently is reduced. Guidelines §3.34(b).

   c. The most important spillover effect is often anticompetitive information sharing. Guidelines §3.34(c).

II. Joint Bidding (*continued*)

E. Teaming Agreements

1. "Teaming Agreement" is a term used in government contracts.
2. In most teaming agreements, a potential prime contractor agrees with one or more other companies prior to the submission of a bid for them to act as subcontractors. A teaming agreement can also occur where two or more companies form a partnership or joint venture to act as a potential prime contractor. Federal Acquisition Regulation (FAR) 9.601.

II. Joint Bidding (*continued*)

E. Teaming Agreements (*continued*)

3. The same antitrust principles that apply to joint bidding arrangements apply to teaming agreements.
   a. *Northrup Grumman v. McDonnell Douglas*, 705 F.2d 1030, 1050-54 (9th Cir. 1983)
      i. Teaming agreements were judged under rule of reason
      ii. No ruling on the merits
      iii. Court strongly suggested the teaming agreements were valid because "there would be no competition but for the agreements" and the two companies should be viewed as "teammates" constituting a single economic unit for purposes of the F-18 market.

II. Joint Bidding (*continued*)

E. Teaming Agreements (*continued*)

b. *U.S. v. Alliant Tech Systems*, 1994-1 Trade Cas. (CCH) ¶ 70,595 (C.D. Ill. 1994)

i. From 1985-1991 Alliant and Aerojet competed for contracts to supply cluster bombs.

ii. In 1992, the parties entered into a teaming agreement and submitted a single bid—the only bid—for the RFQ.

iii. The United States filed a civil complaint and the parties entered into a consent decree requiring cash payments to the U.S., a price reduction in the 1992 contract, and an injunction prohibiting teaming agreements unless first approved by the DOJ or the Court.

II. Joint Bidding (*continued*)

E. Teaming Agreements (*continued*)

c. Additional antitrust issues raised by teaming agreements

i. Teaming agreements can violate the antitrust laws if an agreement locks up a critical component or technology other bidders need in order to compete.

ii. Government officials sometimes urge companies to enter into teaming agreements. This does not insulate a teaming agreement from antitrust scrutiny.

II. Joint Bidding (*continued*)

F. Best Practices for Joint Bidding and Teaming Agreements

1. The business people should be able to clearly articulate how the proposed arrangement combines complementary skills/assets to the benefit of the customer, and should be able to document this.
2. All joint bidding and teaming agreements should be in writing and reviewed by antitrust lawyers.

II. Joint Bidding (*continued*)

F. Best Practices … (*continued*)

3. The agreements should be carefully limited to the scope of the project(s), and access to competitively sensitive information should be limited to certain individuals and protected by a confidentiality agreement.
4. Any joint bidding arrangement should be disclosed to the customer. (Teaming agreements are required to be disclosed to government contracting authorities.)

II. Joint Bidding (*continued*)

G. Practical Counseling Question

Company A and Company B are considering a joint bid on a private construction project. They cannot be sure how many companies will bid on the project, but they think it is likely there will be three other bidders. The parties can demonstrate cost savings through a joint bidding arrangement, and there is no other practical way to achieve the cost savings. Is there anything the parties can do to reduce their antitrust risk if they proceed with a joint bid?