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DOJ “Strike Force” Targets Antitrust Violations in Government Contracting

On November 5, 2019, the Justice Department announced the creation of a nationwide “strike force” to address criminal antitrust violations impacting government contracting, such as price fixing and bid rigging. The strike force was formed by the DOJ’s Antitrust Division along with the Federal Bureau of Investigation, 13 US attorneys’ offices and four federal inspector general offices.

“The investigation and prosecution of individuals and organizations that cheat, collude and seek to undermine the integrity of government procurement are priorities for this administration,” Makan Delrahim, the chief of the DOJ’s antitrust division, said during a press conference announcing the strike force.

The new Procurement Collusion Strike Force will educate federal, state, and local government officials that handle government contracts — as well as the contractors submitting bids to the government — on the antitrust risks involved in the process.

According to the Department, the strike force will use data — such as selective bidding that suggests companies are splitting a market — to seek out and prosecute government contractors who collude. The strike force will also jointly conduct criminal investigations and prosecutions should they find any antitrust violations related to government contracts. Companies caught rigging bids or fixing prices can face significant criminal fines of up to \$100 million or twice the collective gain or loss from the conspiracy (which often can far exceed \$100 million). Penalties for individuals are also severe, including prison time of up to 10 years and fines up to \$1 million. Delrahim also noted that, in addition to criminal penalties, if the strike force uncovers collusion that harmed taxpayers, the DOJ will seek trebled damages on behalf of taxpayers against those involved under Section 4a of the Clayton Act.

The announcement comes a year after the DOJ first announced a series of criminal fines against several South Korean fuel supply companies that



rigged bids for fuel contracts with the U.S. military, and it is a follow-up to the DOJ's announcement last year that it would be more aggressive in pursuing antitrust charges against companies that rig bids for government contracts.

According to Delrahim, the federal government in 2018 spent more than \$550 billion on contracts for goods and services, and he cited a study by the Organization for Economic Cooperation and Development that estimated taxpayers were overcharged 20 percent or more due to procurement bid rigging. Delrahim said that, "today, more than one third of the Antitrust Division's 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct."

The DOJ will assign a trial attorney to each of the 13 partner federal districts, Delrahim said. In addition, the US Attorney's Office will assign an assistant US attorney to each district. The FBI will also assign a liaison for each field office.

The 13 federal districts participating are: the Central District of California, the Eastern District of California, the District of Colorado, the District of Columbia, the Southern District of Florida, the Northern District of Georgia, the Northern District of Illinois, the Eastern District of Michigan, the Southern District of New York, the Southern District of Ohio, the Eastern District of Pennsylvania, the Northern District of Texas, and the Eastern District of Virginia.

The four federal inspector general offices participating are those of the DOJ, the Department of Defense — including the Defense Criminal Investigative Service — the General Services Administration, and the US Postal Service.

The November 5th DOJ announcement comes shortly after a speech by Richard Powers, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, at the ABA's Public Procurement Symposium on October 25, 2019. At that event, Powers emphasized that part of the Antitrust Division's core mission is to protect taxpayer money by preventing and prosecuting anticompetitive conduct in public procurements. Powers also warned that violations of criminal antitrust laws in public procurements can result not only in prison time and significant fines, but also in debarment of government contractors. In particular, Powers noted that government procurements are vulnerable to collusion given the size and volume of federal contracts and the small pool of qualified bidders.

The full text of the DOJ announcement can be found [here](#), and Assistant Attorney General Delrahim's speech is available [here](#).

Takeaways:

Any company doing business with the federal government must be mindful of the following:

- Bid rigging agreements in which competitors allocate bids or agree on pricing will a top priority of the DOJ and will be prosecuted criminally.
- Given the DOJ's new initiative, companies that contract with the government should be proactive and consider conducting audits of key sales and pricing individuals to determine if there has been any collusive communications with competitors. The Antitrust Division has a well-established amnesty program which provides protections for companies and individuals who self-report antitrust violations.
- Companies that provide goods and services to government agencies also should take steps to protect themselves and their employees, including a detailed review of corporate compliance policies and programs to ensure that they are consistent with Antitrust Division standards. Such a review is particularly important in light of the Division's recent July 2019 announcement of a significant change to its policy on criminal antitrust compliance. Going forward, companies that demonstrate that they had in place a robust and effective antitrust compliance program at the time that an antitrust violation occurred will be eligible to be considered for a deferred prosecution agreement (DPA) if they self-report the conduct to the Division and cooperate with



its investigation. In connection with this policy change, the DOJ issued detailed guidance regarding the criteria that it will use to evaluate corporate antitrust compliance programs. Given this detailed guidance, companies that do business with the federal government should keep in mind that prosecutors will not likely tolerate the lack of a strong corporate antitrust compliance policy and employee training programs.

- The DOJ will likely examine closely any joint bidding arrangements or teaming agreements between competitors where the only two (or few) technologically capable bidders for a government contract join forces, rather than compete for a procurement opportunity.

King & Spalding has deep experience representing government contractors and other companies in criminal and civil antitrust matters, as well as advising companies doing business with government agencies on many issues related to procurement and contracting activities. We are available and well-positioned to assist with counseling and training on potential antitrust violations in the government procurement process.

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