THE ATTORNEY GENERAL OF TEXAS

KEN PAXTON



Antitrust Basics for Government Purchasers

Background

 What is antitrust law and what does it prohibit?

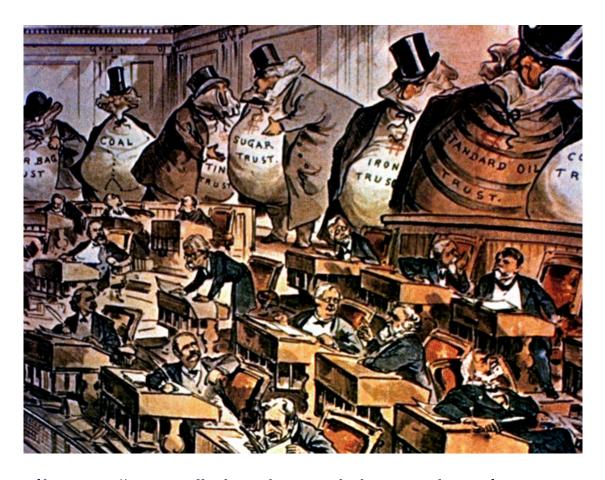
Bid-rigging

 What is it and how can you guard against it?



Trust certificates were used to consolidate ownership of groups of businesses operating as a highly disciplined monopoly

Origins



Monopolies or "trusts" dominated the national economy and wielded enormous political power in the late 1800s

Effects in the Marketplace

- Without Competition:
 - Higher Prices
 - Less Choice

- Poorer Quality
- Less Innovation

Antitrust statutes are premised on a congressional determination that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress...." N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 4 (1958)

Effects in the Marketplace

With Competition:

Opportunities for a business to grow market share



Opportunities for another business to take market share



Consequences of Collusion

Potential Consequences for Antitrust Violators:

- Government prosecution
 - State &/or federal
 - Civil &/or criminal
 - Criminal consequences can include jail time & large fines
- Private litigation (including massive class actions)
- Treble damages, penalties, attorneys' fees and investigative costs
- Debarment or suspension



What we don't do:

- Direct officials to choose one procurement method over another.
- Investigate procurement or bidding violations that don't raise antitrust concerns.
- Make sure public entities get the best price or value for goods and services.

Three Primary Types of Antitrust Violations

Monopolization

Unlawfully acquiring or maintaining the power to fix prices and exclude competitors.

Collusion and Conspiracy

 Competitors making agreements to remove or reduce competition in the marketplace.

Illegal Mergers

Where the effect of the merger may substantially lessen competition.

What Can You Do About Monopolies/Mergers?

- Let us know if you suspect a dominant vendor is trying to drive its competitors out of business.
- Let us know if you are unable to buy product due to restrictions imposed by manufacturers, suppliers, or vendors.
- Let us know if you hear of a merger that could reduce your buying options or lead to higher prices.
- Assist us when contacted for interviews.

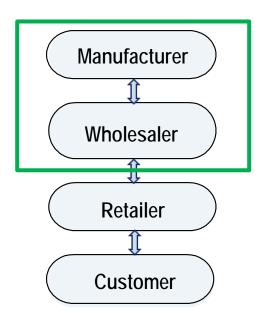
Collusion: What's Prohibited

- "Contracts, combinations or conspiracies in restraint of trade"
 - There must be an agreement, but agreements may be hard to detect.
 - Independently matching prices is not a violation.
 - Conspirators try to hide agreements.



Types of Anticompetitive Agreements

Vertical Agreements Typically less suspect

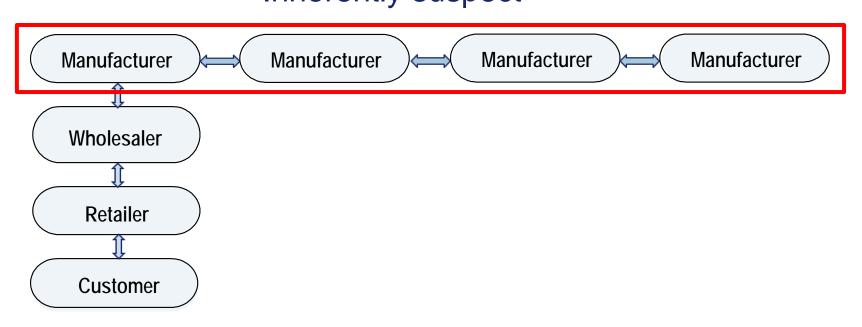


Examples:

- Resale Price Maintenance
- Tying
- Exclusive Dealing

Types of Anticompetitive Agreements

Horizontal Agreements Inherently suspect





Types of Anticompetitive Agreements

- Horizontal Agreements
 - Price Fixing
 - Market Allocation / Customer Allocation
 - Group Boycott (Concerted Refusal to Deal)
 - Bid Rigging
 - Basic types:
 - Complementary Bidding
 - Bid Suppression
 - Incentives:
 - Bid Rotations
 - Subcontracting

Conspirators often mix and match



Communicating Agreements

A Classic Example:



"The Result Was the Usual One"

Modern Examples:

- In-Person Meetings
 - whether or not in a smoke-filled room
- Phone Calls
- Text Messages
- Emails
- Business Documents
- Instant Messaging
- Chat Rooms
- Video Chat
- Social Networking
- New/creative methods



Examples of Collusion

Horizontal Agreements: Bid Rigging/Customer Allocation

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- Recognize Conditions Favorable to Collusion.
 - Few vendors in the market.
 - No easy substitutions.
 - Long-established firms continually dominate.
 - Frequent interactions or information sharing between competitors; a high probability the vendors will interact in the future.

- Recognize Suspicious Statements or Behavior.
 - Irregularities in appearance or submission of bids, e.g., suspicious joint bid.
 - Refusals to bid alluding to agreement or understanding with competitor.
 - Refusal to bid or offer quote due to "ethical concerns" about poaching customers.
 - No bid from a firm you otherwise expect to make a bid.

Red Flags Part 2: Suspicious Statements & Behavior (Con't)

- The absence of bids or responses when more are expected.
- Certain vendors bid frequently but never or almost never win.
- A vendor requests confidential information to gain an advantage for itself and others.
- High bids from a vendor you suspect wouldn't be able to successfully perform the contract.
- Line items are close, except one or two crucial ones from losing bidders are much higher.
- Suspicious explanations for price increases

- Existing vendors drop prices when a new or infrequent vendor bids.
- Suspicious subcontracting
- Some bids are much higher than previous bids or estimated costs.
- Consistent \$ or % margins between winning and losing bids.
- A vendor always wins a bid in a certain area for a particular product or in a fixed rotation with other bidders.
- Two bids are tied and the odds of two bidders submitting the same number independently are low.

Guarding Against Collusion

- Be aware of the red flags; contact us if you suspect collusion.
- Draft RFPs to encourage maximum participation.
 - Minimize use of tight specs:
 - Don't tailor bids to one particular product or supplier.
 - Don't use specs written by or copied from a manufacturer.
 - Don't use brand names in specs.
 - Make sure a vendor is an actual sole source before proceeding with a sole source procurement.
- Evaluate your process with an eye towards ensuring competition.

- Advertise in a variety of ways.
- Insist on compliance with procedures.
- Maintain and review procurement records.
- Don't disclose cost estimates before awarding a contract (unless required).
- Don't disclose the identity or bids of proposal holders or other bidders (unless required).

- ▶ Antitrust Certification Statement--Gov. Code § 2155.005
- Antitrust Assignment Clause--Part B.5.6, Comptroller's RFP Template

To Sum Up:

- Use us as a resource
 - All questions, ideas, tips are welcome
- Be alert and proactive in making sure you have competitive options
- Assist us with our investigations

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