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New DOJ Task Force to Increase Detection of Collusion in Government Contracting

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The U.S. Department of Justice Antitrust Division recently announced a new Procurement Collusion Strike Force, combining resources from several federal agencies to target collusion and similar schemes among companies that contract with federal, state, and local government entities or receive government grants. The Strike Force will provide training to procurement officers to improve detection of bid rigging, procurement fraud, and other schemes related to government awards.

Assistant Attorney General for Antitrust, Makan Delrahim, described the Strike Force as an interagency partnership consisting of prosecutors from the Antitrust Division, prosecutors from 13 U.S. Attorneys' Offices, and investigators from the FBI, the Department of Defense Office of Inspector General, the U.S. Postal Service Office of Inspector General, and other partner federal Offices of Inspector General.

Contracting with private companies continues to fill an important need for government agencies, supporting efforts by government entities to achieve their mission through efficient delivery of goods or services. In return, contracting with the government can provide companies a sizeable customer and significant business. In the last decade, the U.S. government has spent, on average, about \$500 billion per year on federal contracts.¹

While the opportunities for contracting with government entities continue to be attractive for many, increasing scrutiny underscores the value of compliance. The Antitrust Division has prioritized recovering when the government was the victim of bid rigging and price fixing.

Once a criminal antitrust violation is detected, companies involved face significant fines and the potential for debarment. Individual employees involved in criminal antitrust violations face the risk of indictment and prison, as well as fines. Additionally, government entities may recover trebled damages under the Clayton Act, § 4A.

The U.S. government may also recover overcharges through actions under the False Claims Act. The False Claims Act prohibits fraudulent billing to the federal government, providing for civil penalties and damages when the party submitting the claim knows, or should know, the claim is false. Such claims include billing for services not rendered, goods not delivered, or overcharges billed to a federal government agency resulting from price fixing.

Penalties for False Claims Act violations range from (an inflation-adjusted) \$11,181 to \$22,363 per violation, plus trebled damages caused to the government.² While the damages in a civil antitrust



claim to recover a government agency's losses would be the same—the overcharges trebled—there are not corresponding civil penalties for antitrust violations. As such, damages analysis will likely depend on the form and frequency of billing, and can prove to be significant.

Government procurement also can expand the jurisdictional boundaries to include typically foreign conduct. For example, a company bidding to provide goods and services to the U.S. military or other U.S. government agencies overseas will be engaged in U.S. commerce. Even though the conduct occurred overseas and involved foreign companies, the delivery of goods and services to the U.S. military subjects the conduct to investigation and potential enforcement actions by the Antitrust Division.

The Strike Force's initial focus on training will increase scrutiny of conduct in procurement opportunities. Companies contracting with the U.S. government should be aware of the increased risks posed by the Antitrust Division's increasing scrutiny of contracting behavior. DOJ investigations bring with them costs and distraction to a company and, of course, can carry significant risk.

For companies contracting with government agencies, whether at the federal, state, or local level, being vigilant in their compliance remains the first line of defense against such risk. In July 2019, the Antitrust Division published its guidelines for Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations in connection with prosecutorial charging and sentencing decisions. While many of the guidelines are repetitive of prior pronouncements, a few deserve attention. First, there is a focus on a chief compliance officer or someone with sufficient seniority, independence, and resources to oversee an effective compliance program tailored to antitrust risks, who reports directly to the Board of Directors or some governing body with the power to oversee the program. Second, they stress the necessity of periodic risk assessments designed to identify antitrust risks and revise or tailor the antitrust compliance program to address those risks. "For example, if the company bids on contracts, is bid information subject to evaluation to detect possible bid rigging? Does the company evaluate pricing changes for possible price-fixing?" (DOJ Guidelines at 8). Third, there should be testing of the compliance program through periodic reviews, monitoring, or auditing. Many compliance programs fall short because they do not adequately test the effectiveness of the program to ensure compliance. "For example, are there routine and unannounced audits. . . . Does the Company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?" (DOJ Guidelines at 10.) Finally, the guidelines underscore the importance of whistleblowers and providing mechanisms for employees to report potential antitrust violations confidentially and without fear of retaliation. In other words, the handling and protection of whistleblowers will be expressly considered in evaluating the effectiveness of the compliance program.

Given the government's clear intention to increase enforcement activity for the protection of government agencies, contractors are well advised to adjust existing compliance protocols to align with the agency guidelines above.





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¹ <https://datalab.usaspending.gov/contracts-over-time.html>

² See 31 U.S.C. § 3729(g); 28 C.F.R. § 85.5.

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