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**PUBLIC PROCUREMENT – THE ROLE OF COMPETITION AUTHORITIES IN PROMOTING
COMPETITION**

-- United States --

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The attached document is submitted by the United States delegation to Working party No. 3 of the Competition Committee FOR DISCUSSION under item VI of the agenda at its forthcoming meeting on 5 June 2007.

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Public Procurement Outreach and Training Programs
(Contributed by the Antitrust Division of the U.S. Department of Justice)

1. Introduction

1. In the United States, government attorneys at the Antitrust Division of the U.S. Department of Justice have for many years spent considerable time conducting outreach and training programs for public procurement officials and government investigators, including investigators who work for government agencies which solicit bids for various projects. These outreach programs help develop an effective working relationship between the government attorneys 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. Government attorneys advise procurement officials on how their procedures can be changed to decrease the likelihood that bid rigging will occur and what bidding patterns and types of behavior 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 government 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. Purposes of Public Procurement Outreach and Training Programs

2. Public procurement outreach and training programs serve a number of purposes. First, these programs 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.

3. Second, outreach programs 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, which results 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 14 below.

4. Third, outreach programs educate public procurement officials about what they can do to protect themselves from bid rigging or other procurement violations. Government attorneys provide advice about techniques that procurement officials can use to make it less likely that their program will be victimized. For example, in certain circumstances government attorneys have advised procurement officials to combine work into larger contracts so that competitors outside of a local geographic area will decide that it is profitable for them to bid on the contracts, resulting in more competition for each contract. Government 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 16-18 below.

5. Fourth, outreach programs help develop a close working relationship between public procurement officials, government investigators, and government attorneys. This is the ultimate goal of an outreach program. Procurement officials are sometimes reluctant to report illegal activity partly because

they think they will be blamed for not preventing the illegal activity from occurring. During outreach programs, government attorneys should assure procurement officials that if bid rigging occurs they will be the victims of a conspiracy which was carried out in secret without their knowledge, and that they and government attorneys have the same interests in trying to prevent and prosecute bid rigging. The statistics concerning the number of prosecutions in the United States which are bid-rigging prosecutions rather than price-fixing prosecutions indicates that the joint efforts of public procurement officials, government investigators, and government attorneys have significantly 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 number of bid-rigging prosecutions has dropped dramatically. For example, during the past three years less than five percent of the criminal antitrust prosecutions in the United States were for bid rigging.

6. Finally, as will be discussed more fully below in paragraphs 19-21, sometimes public procurement officials are involved in bid rigging and other illegal conduct which undermines competition as a result of receiving kickbacks or other remuneration from companies which submit bids. Outreach programs 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.

3. The Use of Publications To Make an Outreach Program More Effective

7. **Brochures** – In the United States, government attorneys provide brochures to public procurement officials and government investigators to make outreach programs 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 www.atrnet.gov/subdocs/211578.pdf; and “An Antitrust Primer For Federal Law Enforcement Personnel” can be found at www.atrnet.gov/policies/guidance/209114.pdf. Copies of these brochures have also been provided as handouts.

8. **Newsletters** – Offices within the Antitrust Division publish newsletters which discuss certain cases which have been prosecuted during the previous year and various issues of importance to public procurement officials, government investigators, and others. An example of a newsletter published by the Chicago Field Office has been provided as a handout. In the fall of 2006, this newsletter was distributed to about 1,700 recipients, including federal, state, and local public procurement officials and government investigators.

4. Key Features of An Effective Outreach Presentation

9. **Explains 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 government attorneys to educate public procurement officials and government investigators about what conduct constitutes the violation. If the procurement officials and investigators do not clearly understand what constitutes the violation, they will not know what to look for and report to the authorities. In U.S. outreach programs, government 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.

10. **Explains how antitrust investigations are conducted** – During outreach programs, government attorneys should explain the procedures used to conduct the investigation, which, of course, will vary from country to country. In the United States, these procedures would include taping conversations with the assistance of cooperating witnesses, using search warrants and wiretaps, conducting unannounced “drop-in” interviews, and serving grand jury subpoenas for documents and testimony. Also, government attorneys discuss the Corporate Leniency Policy which may enable a cooperating company to avoid prosecution.

11. **Discusses Penalties for Bid Rigging and Other Antitrust Violations** – Outreach programs 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.

12. **Discusses Indicators of Bid Rigging** – A key part of U.S. outreach programs is a discussion of certain patterns indicating bid rigging which procurement officials and investigators should look for. For example, if company A wins a contract one year, then company B wins the next year, then A, then B, this pattern may mean that the companies have agreed to allocate the contracts by taking turns winning it – a bid rotation scheme. Another example is that sometimes the same errors (misspelled words and typographical or arithmetic errors) are evident in bids submitted by competing companies, indicating that the companies prepared the bids in concert. A third example is when a new company enters the bidding unexpectedly, and at a much lower price, than the bids of the other companies which 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 the bids and winning the contract at a high, non-competitive price. Additional examples of indicators of bid rigging can be found on pages 3 - 5 of the Bid Rigging Brochure.

13. **Encourages procurement officials to report anything suspicious** – As previously discussed, public procurement officials may be reluctant to report suspicions which they have that illegal conduct is occurring. Government attorneys should encourage procurement officials and investigators to contact them if the procurement officials or investigators have any concerns that bid rigging or other procurement violations may be occurring and assure them that they are always willing to talk to them about their concerns. Sometimes government attorneys 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.

14. **Gives 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 encourage procurement officials to believe that action will be taken if they report their suspicions. Each country will have its own examples to use, but in the United States government attorneys have used the following examples in outreach programs:

1. Two companies supplied nylon filament for paintbrushes made by prisoners at a federal prison. There were a series of ninety contracts over seven years. The two companies coordinated their bidding so 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 the companies and their executives were successfully prosecuted for bid rigging.
2. 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 had the same typographical error

(an unnecessary word): “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 reported his concerns to the Antitrust Division of the U.S. Department of Justice. The companies and individuals involved were subsequently prosecuted and convicted for bid rigging and other violations.

3. The government sought to buy four type 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 contract 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. The companies and culpable individuals were subsequently successfully prosecuted for bid rigging.

15. **Discusses Other Crimes Which May Be Prosecuted** – In U.S. outreach programs, government attorneys explain to public procurement officials and government investigators that the government 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 competitive process, such as kickback schemes, may not be violations of U.S. antitrust laws – this conduct can only be prosecuted as fraud or other non-antitrust violations. Second, when we investigate these schemes we 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 will be discussed in more detail below in paragraphs 19-21.

5. **Certificate of Independent Price Determination – What It Is and Why It Is Important**

16. An example of a Certificate of Independent Price Determination used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985 has been provided as a handout. The key part of this certificate states:

The offeror certifies that –

1. 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.
2. 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
3. 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.

17. Basically, this document requires each company which submits a bid to sign a statement under oath that it has not only not agreed with its competitors about the bids which it will submit, but has also not even disclosed bid prices to any of its competitors or attempted to convince a competitor to rig bids.

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 though there is insufficient evidence to prove that the competitors actually agreed on prices or who would win the project for which bids were submitted.

19. Because the evidence needed to prove a violation of the Certificate of Independent Price Determination is significantly less than the evidence needed to prove an illegal agreement, the violation of the terms of the certificate gives government attorneys leverage which they can use to convince companies to cooperate with the government's investigation in return for not charging them with lying on the certificate or for a favorable sentencing recommendation.

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

20. 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 be not be clear whether or not the companies involved are also engaged in bid rigging. However, in a number of cases in the United States government attorneys have developed evidence that corrupt procurement officials are being paid off to facilitate a bid-rigging scheme.

21. It is important to determine whether corrupt procurement officials are also 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.

22. Consequently, evidence of kickbacks or bribes provides very good leverage to enable government attorneys to obtain cooperation from culpable individuals and determine whether bid rigging is also occurring.

23. These types of cases are also important because of the need to remove corrupt public procurement officials and to assure the public and suppliers that the bidding process is fair and competitive.

7. Summary and Conclusion

24. A comprehensive outreach and training program 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 government attorneys in investigating and prosecuting bid rigging, but in order for that to happen government attorneys need to educate these procurement officials and investigators about the harm caused by bid rigging and how to detect and prevent it. Government attorneys also need to encourage procurement officials and investigators to work with them to investigate and prosecute those who rig bids.

25. The ultimate goal of an outreach and training program is that the public procurement officials, government investigators, and government attorneys will work together as a team to deter bid rigging through successful prosecutions, increased vigilance, and better-designed public procurement programs.