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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PUBLIC PROCUREMENT/BID RIGGING ISSUES

-- United States --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 15 June 2010.

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1. This paper briefly discusses the three procurement topics mentioned in the Chair's letter of March 29, 2010: experience with Certificates of Independent Price Determination, the relationship between leniency and procuring agency debarment rules, and techniques for incentivizing procurement officials to be vigilant for possible bid-rigging violations.

1. Certificates of Independent Price Determination

2. A Certificate of Independent Price Determination (CIPD) has been used in the United States for government procurement by federal (but not necessarily state or local) agencies since 1985. Companies submitting most federal bids are required to sign a CIPD – a statement that the bidder has not agreed with its competitors about the bids which it will submit, disclosed bid prices to any of its competitors, or attempted to convince a competitor to rig bids. The key part of the certificate states:

3. The offeror certifies that –

- 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,
- 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
- 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.

4. Under U.S. law, evidence that a company falsely certified its CIPD is a criminal violation; the company that submits a false CIPD, as well as the individual who signs the CIPD for the company, may be subject to a fine and, in the case of the individual, imprisonment of up to 5 years. This provision is very important because it means that a subject company and/or individual can be prosecuted for discussing or disclosing an intention to bid, bid terms or bid prices with competitors, or attempting to convince competitors to rig bids, even if there is insufficient evidence to prove that the competitors actually agreed on prices or on which of them would win the project.

5. CIPD violations are charged under 18 U.S.C. § 1001, the section of the U.S. Code that criminalizes false statements, and not under sections of Title 15 of the Code that cover antitrust violations. A recent CIPD case in which the defendant pled guilty and paid a fine of over \$140,000, was *United States v. Air Van Lines International, Inc.*¹ In that case, the Department of Defense had a program that sought rate offers from household goods moving companies. It then issued bills of lading, as needed, for household goods moving services related to the transfer of civilian and military employees. Service providers submitted rates every six months. The rates they submitted were required to be good for six months: for either the “summer” (high demand) season (April to September) or the “winter” (low demand) season (October to March). In the first round of bidding, companies filed bids containing rates to supply service on specific routes, or “channels,” e.g., Germany to North Carolina. The five lowest rates were then announced publicly and the government held a second round of bidding. Each company that filed a rate for a particular channel in the initial round could file a new rate for that same channel in the second round,

¹ *United States v. Air Van Lines International, Inc. dba AVLC*, Criminal No. 1:07CR304 (E.D. Va.)(CCH) ¶45,107 (July 31, 2007).

including, if it wished, a new rate that matched the lowest rate filed by any competing bidder (a “me too” rate). Matching the lowest rate filed for a particular channel entitled a bidder to a *pro rata* share of the awards in that channel during the summer or winter season, as applicable, except that the bidder who filed the lowest rate for the particular channel in the first round would get a larger than *pro rata* share of the awards, as “incentive tonnage.” As a result of this process, more than 40 companies would often submit “me too” filings at the low rate in a heavy traffic channel and would be placed on the “traffic distribution roster” and be entitled to a shipment when their names came up. This system also created the perverse incentive for companies to qualify more than one subsidiary to compete for awards in a channel.

6. In the *Air Van* case, Air Van agreed to “rent” its name to another company and to take direction from that company on the rates it would file in particular channels, with the understanding that the other company would service the shipments awarded to Air Van and pay Air Van a “commission” of \$1 for each hundred pounds on the shipments it was awarded. On these facts, Air Van clearly violated the terms of the CIPD it was required to file with its bid, in which it certified that that it had independently determined its rates. Thus, while DOJ ultimately decided not to pursue a Sherman Act charge against Air Van, Air Van was nonetheless prosecuted for having made a false statement in its CIPD.

7. The Federal Acquisition Regulations (FAR)² now require use of CIPDs in federal procurement, and the DOJ strongly advocates that sub-federal procuring entities use them as well. Requiring a CIPD has the benefit of putting vendors on notice of the importance of competition to the procurement process. CIPDs also assist the DOJ in the prosecution of bid-rigging conduct. As an initial matter, CIPDs are helpful evidence of a defendant’s consciousness of guilt while conspiring to rig bids. Further, in situations where a procurement has been corrupted by bid rigging, but there is insufficient evidence to prove the agreement necessary to pursue an antitrust charge against the conspirators, DOJ may still be able to pursue the individual conspirators for falsifying their CIPDs. Importantly, the potential for false statement charges may also serve to motivate otherwise recalcitrant defendants to cooperate in the prosecution of their co-conspirators for a bid-rigging charge.

2. Leniency and bidder disqualification

8. The DOJ’s leniency program does not provide any protection to leniency applicants with respect to bidder disqualification or debarment rules. Procuring agencies have their own rules that are separate and distinct from the leniency program. Thus, if a procuring body’s debarment rules are triggered by a supplier’s conviction for an antitrust crime, a leniency applicant – immune from DOJ prosecution – will escape debarment consequences.

9. The DOJ has assisted leniency applicants facing possible debarment by advising, at the applicant’s request, the procuring agency of the cooperation rendered by the applicant. The DOJ does not specifically request relief from the debarment rules, and the DOJ can never guarantee a particular outcome from its intervention.

10. Note that under recent amendments to the FAR,³ bidders on federal contracts have an on-going obligation to self-report any Title 18 (federal crimes, including fraud and false statements) violations. Thus, a leniency applicant that has committed, in addition to Title 15 antitrust violations, violations of federal fraud provisions is required to report that activity to the affected government agency.

² Federal Acquisition Regulation, 48 C.F.R. § 52.203-2.

³ FAR 52.203-13(b)(3).

3. Incentives for public procurement officials

11. The DOJ has a very active training program for federal and state government procurement officials. Following the passage of the economic stimulus bill in 2008, the Antitrust Division initiated a Recovery Initiative to train federal and state procurement officials on detecting and avoiding bid-rigging. Since March 2009, the Division has trained over 20,000 federal and state procurement, grant and program officials nationwide, with thousands more scheduled to be trained in the coming months. The Initiative was described in the February 2010 Global Forum, when copies of DOJ's *Red Flags of Collusion* pamphlet were distributed.

12. DOJ trainers emphasize to procurement officials that careful attention to the Red Flags of Collusion, and due diligence in monitoring the procurement process for signs of possible bid-rigging, are beneficial not only to government and taxpayer interests, but also are in the best interests of those individual officials. Procurement officials understand that their files will be critically reviewed in the course of any bid-rigging investigation. Thus, it is easy for them to appreciate that their potential exposure from any such review – administrative or otherwise – will be significantly reduced if they have been diligent in following the sound procedures advocated by the DOJ. Procurement officials are also incentivized to follow the DOJ training when they learn that the DOJ often sends commendatory letters to senior supervisors of those procurement officials who do a particularly good job of uncovering collusion and/or assisting in prosecutions.

13. DOJ trainers present the Red Flags program not as an additional regulatory burden that procurement officials must carry, but rather as an enhancement of the due diligence they already perform on a regular basis in evaluating procurement programs. The factors that are evaluated as part of the collusion inquiry are the same ones that must be considered in the award of any government contract; the red flags evaluation merely examines them from the lens of an antitrust prosecutor. Procurement officials easily grasp these concepts, many of which are intuitive and combine readily with their ordinary experience and practice. One indication of the success of the program is that a number of Fortune 500 companies have recently adopted internal procurement training programs directly modeled after the DOJ's program.