

Creation of the Procurement Collusion Strike Force

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Antitrust/Competition, Government Contracts, and White Collar Defense and Investigations

On November 5, 2019 the Department of Justice (DOJ) announced the launch of the “Procurement Collusion Strike Force” (PCSF). The creation of the PCSF marks a significant development in the government procurement enforcement landscape. Creation of the PCSF prioritizes the DOJ’s focus on government procurement offenses. As part of that effort, DOJ has launched a virtually accessible hotline to report offenses, and it is developing a more detailed complaint form for the general public to report suspected fraud, thereby increasing the risk of costly investigations, as well as criminal and civil penalties. It is more important than ever for parties to remain diligent and ensure compliance with proper bidding practices. This alert introduces the PCSF and its origins; describes the PCSF’s new features and likely impact on enforcement; highlights repercussions for noncompliance; and ends with recommendations for navigating government procurements going forward.

What is the Procurement Collusion Strike Force?

The PCSF is a DOJ entity devoted to “deterring, detecting, investigating, and prosecuting antitrust crimes,” including price fixing, bid rigging, market allocation, and labor market allocation/wage fixing.¹ The PCSF is an interagency partnership consisting of prosecutors from DOJ’s Antitrust Division, prosecutors from 13 U.S. Attorneys’ Offices, FBI investigators, Department of Defense OIG investigators, and U.S. Postal Service OIG investigators. The PCSF is a byproduct of DOJ’s concern over fraudulent procurement practices. The PCSF’s creation is consistent with DOJ’s practice of forming special task forces to address high concern areas. For example, in 2006, DOJ created a National Procurement Fraud Task Force whose successful probing of high-dollar government contracts for contingency operations abroad led to numerous criminal convictions. Perhaps DOJ’s most prolific strike force, the Medicare Fraud Strike Force (MFSF), established in 2007, has resulted in charges against over 4,200 defendants responsible for over \$19 billion in fraudulent Medicare billing.

Renewed DOJ concern over procurement is likely the result of recent high-profile enforcement actions. Notably, in November 2018 and March 2019, DOJ announced settlements with five

¹ DOJ, Press Release, *Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding*, (Nov. 5, 2019), <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>.

South Korean energy companies accused of a decade-long bid-rigging scheme that targeted fuel supply contracts to U.S. military bases in South Korea.² The civil and criminal settlements totaled over \$350 million, and seven individuals faced additional criminal charges for their role in the scheme.

What's New?

Although PCSF's rollout is ongoing, DOJ has offered some insights into its new features. The newly launched PCSF website asks tipsters to identify the companies and/or individuals involved in the suspected antitrust violations; the government contract, grant, or program that is affected by the alleged conduct; and a description of the conduct that the tipster believes violates antitrust law. To "facilitate reporting by the public of complaints, concerns, and tips regarding potential antitrust crimes affecting government procurement, grants, and program funding," DOJ also intends to post a "Procurement Collusion Strike Force" complaint form to streamline the whistleblowing process.³ At a minimum, this streamlined process will encourage more whistleblowers, qui tam lawsuits, and accompanying investigations.

Additionally, the Antitrust Division has recently posted slides to the DOJ website that define various procurement offenses and provide red flags that can be used to identify fraudulent practices. For instance, DOJ identifies indicia of bid rigging as: (1) rotating winning bids among competitors, (2) losing firms receiving sub-contracts, (3) sudden unexplained bid price increases, (4) similarities in actual bid forms suggesting all were prepared by the bid winner, and (5) statements that a bid was a courtesy or cover bid.⁴ The slides appear to be part of a larger initiative—detailed on the PCSF website—to train federal, state, and local procurement officials and auditors to better detect fraudulent practices. The increased training will focus attention on potentially improper practices, and inevitably will result in increased allegations of fraudulent awards and government investigations.

The DOJ's successful prosecution of the South Korean energy companies signals DOJ's newfound willingness to target vendors to U.S. government purchasers abroad. Historically, DOJ's government-procurement cartel cases have been limited to domestic purchasers. Companies that may have previously felt insulated from DOJ scrutiny due to their foreign procurements are no longer safe. Any entity that sells to the U.S. government, whether that sale occurs in the United States or abroad, must now anticipate DOJ action.

Costs of Noncompliance

Although the PCSF does not introduce new penalties, it will increase the resources devoted to preventing antitrust violations in federal procurement, driving up the number of investigations, the stakes of which have always been high. Penalties for bid rigging can be both criminal and

² *Safeguarding Taxpayer Dollars: The Antitrust Division Announces Criminal Charges and Civil Settlements for Bid Rigging and Fraud Targeting U.S. Military Bases in South Korea*, DOJ (updated Mar. 28, 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/safeguarding-taxpayer-dollars>.

³ 84 Fed. Reg. 57,055.

⁴ DOJ, Antitrust Division, *Recognizing Antitrust Conspiracies and Working with the Antitrust Division*, <https://www.justice.gov/atr/page/file/1214191/download>.

civil. Criminal repercussions include: (1) corporate fines up to \$100 million or twice the gain/loss caused by the fraud and (2) incarceration of individuals for up to ten years. In addition to criminal penalties, the Antitrust Division also has made it a policy to seek treble damages through civil antitrust actions to recover damages to the government, which greatly increases a company's overall exposure. Such conduct also can result in violations of the False Claims Act, which also provides for treble damages and fines, and may trigger scrutiny of relationships with contracting officers and other government personnel for violations of federal anti-corruption laws, which have their own penalties and consequences. And a violation of any of these laws, criminal or civil, is a basis for suspension or debarment from eligibility for federal contracts and grants, which also can have wide-ranging consequences on a company's ability to secure state, local, or even private contracts.

Recommendations

The best way for companies to avoid the costs of investigations and accompanying penalties is to prevent them altogether. Ensuring your company's corporate compliance program performs favorably under DOJ scrutiny should provide a solid foundation for preventing fraud. Should a violation still occur, DOJ has shown a willingness to mitigate penalties and damages—including the use of possible deferred prosecution agreements—for companies with effective compliance programs. When evaluating such programs, DOJ looks to “(1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation methods.”⁵ An investment in compliance is a worthwhile step to avoiding and mitigating possible investigations.

An important focus for compliance efforts also includes bidding and teaming practices. Although the Federal Acquisition Regulation and antitrust enforcement guidelines recognize the procompetitive benefits of and indeed encourage teaming agreements, communications with potential partners, information sharing, attention to processes, and accurate documentation of the procompetitive justifications for teaming arrangements can help to prevent and address problems.

Finally, the importance of mechanisms for addressing and responding to whistleblower issues cannot be overstated. Complete prevention is not always obtainable, so establishing an effective protocol for promptly addressing problems is integral to mitigating otherwise extensive damages that can stem from company fraud. Under the Antitrust Division's Leniency Program, corporations and individuals who report their cartel activity and cooperate in the Division's investigation may be able to avoid criminal convictions, fines, and prison sentences altogether, and self-disclosure is an important mitigating factor in suspension and debarment considerations.

⁵ DOJ, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations*, (July 2019) <https://www.justice.gov/atr/page/file/1182001/download>.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Antitrust/Competition, Government Contracts, and White Collar Defense and Investigations practices:

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