Bid-Rigging Remains Focus of DOJ Antitrust Criminal Enforcement: Businesses Need to Ensure Their Compliance

Sunday, December 30, 2012

A number of recent U.S. Department of Justice Antitrust Division ("Antitrust Division") press releases highlight the agency's ongoing criminal enforcement initiatives regarding hard-core antitrust violations such as bid-rigging. Businesspersons often seem to forget that the nation's antitrust laws carry both civil and criminal penalties. Provisions of both the Sherman Antitrust Act (15 U.S.C. §§ 1-7) and Clayton Act (15 U.S.C. §§ 12-27), the primary federal antitrust statutes, include significant criminal penalties that can be imposed against violators. The statutes do not state what specific violations should result in criminal penalties or the factors to be used in determining when such penalties apply. However, historically, the Antitrust Division (which has exclusive responsibility for criminal enforcement of the federal antitrust laws) has focused its criminal enforcement efforts on so-called hard-core per se violations of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1). The recent Antitrust Division press releases announcing guilty pleas, convictions and sentencings of individuals involved in hard-core antitrust violations suggest that the Antitrust Division is, and will be, aggressively pursuing such criminal enforcement, especially regarding the financial industry, for at least the next several years.

Criminal Penalties For Hard-Core Antitrust Violations Are Substantial

Section 1 of the Sherman Antitrust Act prohibits contracts, combinations and conspiracies in restraint of interstate trade or commerce. The maximum criminal penalties for corporations and individuals under this statute are substantial:

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. Although the maximum $100 million fine for corporations and $1 million fine for individuals may seem stiff enough, the Antitrust Division has also obtained larger maximum fines by arguing that 18 U.S.C. § 3571(d) allows the maximum fine to be increased to twice the gain derived from the violation or twice the loss suffered by the victims if either amount is greater than the statutory maximum.

The Antitrust Division’s 2012 fiscal year (which ended on September 30, 2012) proved to be a record-breaking year regarding criminal fines. The Antitrust Division obtained criminal fines of $1.1 billion in FY2012, the second time it had topped the $1 billion mark since 2003 (the other time was FY2009 when the Antitrust Division obtained criminal fines of $1 billion). The figure for the recently ended fiscal year rises to approximately $1.35 billion when other monetary remedies that the Antitrust Division has obtained, such as disgorgement, restitution and other penalties, are included. In the past two years, the Antitrust Division has been pursuing these other so-called “equitable monetary remedies,” more aggressively. In FY2009, the Antitrust Division filed 72 criminal cases. In FY2012, it filed 67 criminal cases, down from 90 in FY2011. Thus, it is clear that the Antitrust Division is aggressively pursuing, and obtaining, larger fines and monetary remedies against antitrust violators.
In addition, the Antitrust Division has announced that the average prison sentence it has obtained for criminal antitrust violations has been increasing. For fiscal years 2010-2012, the average prison sentence obtained has been 25 months, up from 20 months for fiscal years 2000-2009 and 8 months for fiscal years 1990-1999. In terms of total prison days sentenced, the increase is from an average of 3,313 days for fiscal years 1990-1999, to 12,722 for fiscal years 2000-2009, to 23,398 for fiscal years 2010-2012. Thus, the Antitrust Division has also been successful in obtaining longer prison sentences for individuals who have engaged in per se antitrust violations.

In light of the increasing magnitude of the criminal penalties for hard-core antitrust violations, both corporations and businesspersons must be zealous in their efforts to avoid practices that run afoul of the antitrust laws, especially hard-core per se violations of Section 1 of the Sherman Antitrust Act that prohibits contracts, combinations and conspiracies in restraint of trade.

**Bid-Rigging Is A Per Se Antitrust Violation Often Leading To Criminal Enforcement**

So-called per se antitrust violations are practices that historically have been shown to result in harm to competition. They are practices that require little or no economic analysis to determine their negative impact on consumers and/or the competitive process. These violations normally include price-fixing, bid-rigging, and customer or market allocations – i.e., agreements among two or more competitors to eliminate the competition among them so that the participants often obtain higher prices for their products or services.

Bid-rigging is the very antithesis of what should be a competitive bidding process. The entity holding the bidding process – often federal, state, or local governments – is attempting to obtain the best bid (in terms of prices, services, quality, etc.) by soliciting bids from competing providers. It would seem to be common sense that such competitors should not collude or agree to subvert the bidding process by coordinating their bids in some fashion so that the outcome is skewed toward the conspirators’ desired result. However, as the Antitrust Division's recent press releases show, bid-rigging is still a common practice in some industries. Bid-rigging conspiracies can take many forms, including (i) certain competitors agreeing not to bid so that the conspirators’ chosen competitor will win the bid; (ii) certain competitors submitting purposely inflated bids to give the appearance of a competitive bidding process; and (iii) the conspirators rotating which competitor will be the low bidder. No matter the form, the goal of almost all bid-rigging schemes is that the participants hope to ensure the winning bidder is their chosen participant and the elimination of competition among the conspirators regarding the bidding process.

Obviously, given the nation’s economic woes in recent years, the pressure to maximize profits and secure business can lead businesspersons to make poor decisions regarding their business practices, but certain of the recent enforcement actions have related to bid-rigging conspiracies that took place over numerous years, including prior to the current economic downturn. Whether it is the familiarity with their competitors that businesspersons often gain after years of pursuing the same customers and contracts, or the importance of each long-term or financially sizable contract that is being pursued, businesspersons still engage in bid-rigging practices at a level that it would seem they should not, given the substantial criminal penalties (and prison time) they, and their companies, face for such practices.

**Recent Bid-Rigging Enforcement By The Antitrust Division**

Just since August 2012, the Antitrust Division has announced convictions, guilty pleas and sentencings regarding bid-rigging practices in several industries, including bidding for contracts for the proceeds of municipal bonds, public foreclosure auctions, municipal tax lien auctions, and the automobile anti-vibration rubber parts industry. The investigation and prosecution of bid-rigging conspiracies often involve joint efforts by the Antitrust Division, the FBI and the U.S. Attorneys’ Office. Indeed, regarding the first three industries – municipal bonds, public foreclosure auctions, and municipal tax lien auctions – the enforcement actions were the result of President Obama’s Financial Fraud Enforcement Task Force “created in November 2009 to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes.”

*http://www.justice.gov/atr/public/press_releases/2012/290188.htm*. The Task Force includes “more than 20 federal agencies, 94 U.S. attorneys’ offices and state and local partners, ...[o]ver the past three fiscal years, the Justice Department has filed more than 10,000 financial fraud cases against nearly 15,000 defendants including more than 2,700 mortgage fraud defendants.” *Id.* Such inter-agency coordination at the federal, state and local level highlights the aggressive nature of the efforts to identify and prosecute financial crimes, including criminal antitrust violations such as bid-rigging schemes.

**Foreclosure Auctions**

The Antitrust Division has obtained guilty pleas from numerous real estate investors who participated in separate bid-rigging conspiracies (taking place at various times from 2001 to 2010) at public foreclosure auctions, including agreeing not to bid against one another and selecting a designated winning bidder or agreeing to bid at
suppressed prices, in Alabama, North Carolina and Northern California. The Antitrust Division has stated that such conspiracies “cause financial institutions, homeowners and others with a legal interest in rigged foreclosure properties to receive less than the competitive price for the properties.” [http://www.justice.gov/atr/public/press_releases/2012/290188.htm](http://www.justice.gov/atr/public/press_releases/2012/290188.htm).

**Municipal Bonds**

The Antitrust Division obtained the conviction of at least six former financial services executives for their participation in conspiracies related to bidding for contracts for the investment of municipal bond proceeds and other municipal finance contracts. The conspiracies took place from 1999 through 2006 and involved collusion by financial institutions regarding investment agreements offered to state, county and local governments and agencies that the government entities used to raise money for public projects. The Antitrust Division alleged that the conspiracies resulted in the government entities’ obtaining non-competitive interest rates for the investment agreements that cost them millions of dollars.

**Municipal Tax Lien Auctions**

The Antitrust Division obtained the guilty plea of a Pennsylvania corporation that participated in a conspiracy to rig bids for the sale of tax liens auctioned by municipalities throughout New Jersey. From at least 1998 through 2006, the conspirators allocated bids such that the winning bidder obtained a higher interest rate for the tax lien, to the detriment of the homeowner who had failed to pay property taxes. The Antitrust Division has obtained 10 guilty pleas from the ongoing investigation.

**Automobile Anti-Vibration Rubber Parts**

The Antitrust Division has obtained guilty pleas, or agreements to plead guilty, from nine companies and 12 executives as a result of an ongoing investigation regarding price-fixing and bid-rigging in the automobile anti-vibration rubber parts industry. As part of a conspiracy that took place from at least 2005 through 2011, the conspirators agreed, in part, to submit noncompetitive bids for parts contracts.

**Regular Antitrust Training And Rigorous Oversight Are the Key To Avoiding Violations**

These recent enforcement actions and ongoing investigations highlight the need for companies and businesspersons to be knowledgeable about the antitrust laws and vigilant in their compliance with these laws. In light of the significant criminal penalties for corporations and individuals stemming from bid-rigging violations of the antitrust laws, companies should increase their training and oversight of their employees with responsibility for competitive bidding processes. Regularly scheduled training sessions should emphasize the types of unlawful bid-rigging practices that violate the antitrust laws. In addition, companies should perform regular audits of their bidding efforts and the bidding-related activities of the businesspersons responsible for such bids. Such audits should include a rigorous review of entertainment and expense reports that might indicate meetings with businesspersons from competitors that may lead to, or be in furtherance of, anticompetitive bid-rigging conspiracies. The cost of lax oversight may be significant for the company and its employees.

This article appeared in the January 2013 issue of The Metropolitan Corporate Counsel.

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