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Critical Antitrust Issues Facing the Construction Industry

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What Are the U.S. Antitrust Laws?

Federal Laws

- The U.S. federal antitrust statutes of principal concern to construction companies are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act (“FTC Act”).
- Section 1 of the Sherman Act and Section 5 of the FTC Act prohibit all contracts, combinations and conspiracies that unreasonably restrain trade.
- Section 2 of the Sherman Act prohibits monopolization and attempted monopolization.

State Laws

- The states usually interpret and apply their respective laws in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.

What Are the U.S. Antitrust Laws? (cont.)

Per Se illegal conduct:

- Agreements to fix prices.
- Agreements to rig bids.
- Agreements to boycott competitors, suppliers, or customers.
- Agreements to allocate markets or limit production.

Conduct that does not unambiguously injure competition is analyzed under the “rule of reason”:

- Under the “rule of reason,” courts will analyze agreements or conduct by examining all of the facts and circumstances that surround the conduct in question to determine whether the actions unreasonably restrain trade.

What Are the U.S. Antitrust Laws? (cont.)

What is an agreement?

- An “agreement” does not need to be written and signed by all of the “parties.” More often than not, agreements are inferred, by judges or juries, from facts and circumstances that suggest the existence of an understanding.
- Agreements may be direct or indirect, explicit or tacit.
- Plaintiffs may prove an agreement with all sorts of evidence, including, most typically, circumstantial evidence.

Why Is Compliance with the Antitrust Laws Important?

For Companies:

- Companies may be fined up to \$100 million per antitrust violation. Courts also may impose an “alternate fine” of up to twice the gain to the perpetrator or twice the loss to the victim as a result of illegal behavior.
- Courts or government antitrust agencies may impose permanent restrictions limiting business and trade association activity.
- Private actions – by customers or competitors who show they were harmed by the perpetrator’s actions – may result in damages many times the size of a government-imposed fine.

For Individuals:

- Violations of the Sherman Antitrust Act are felonies.
- Individuals may be imprisoned for up to ten years, fined up to \$1 million, or both, for each violation.

Antitrust Issues at the Forefront of the Construction Industry

Bid Rigging: An agreement among competitors to determine in advance who will submit the winning bid on a contract that requires competitive bidding. Bid rigging may take a variety of forms:

- ***Bid suppression:*** One or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- ***Complementary bidding ("cover" or "courtesy" bidding):*** Some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. These bids are not intended to secure the contract, but are merely designed to give the appearance of genuine competitive bidding. This is the most frequently occurring form of bid rigging.
- ***Bid Rotation:*** All competitors submit bids, but take turns being the low bidder.
- ***Subcontracting:*** Competitors who agree not to bid or to submit a losing bid receive subcontracts or supply contracts from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder, in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

Price Fixing : An agreement among competitors to raise, fix, or otherwise maintain the price at which goods or services are sold.

Market Division: An agreement among competitors to divide markets among themselves. Competing firms may allocate specific customers or types of customers, products, or territories.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

How do the enforcers detect bid rigging, price fixing, and other types of collusion?

- Bid or price patterns that seem at odds with a competitive market.
 - Same company always wins a particular bid;
 - Same suppliers submit bids and each company seems to take turns being the low bidder;
 - Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates;
 - Fewer than the normal number of competitors submit bids;
 - Company appears to be bidding substantially higher on some bids than others, with no apparent cost difference to account for the difference;
 - Bid prices drop whenever a new or infrequent bidder submits a bid;
 - Successful bidder subcontracts work to competitors that bid unsuccessfully on same project; or
 - Company withdraws its successful bid and subsequently is subcontracted work by the new winning bidder.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

How do enforcers detect bid rigging, price fixing, and other types of collusion?

- Identical prices may indicate a price fixing conspiracy, especially when:
 - Prices stay identical for a long time;
 - Prices previously differed; or
 - Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts were typical.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

How do enforcers detect bid rigging, price fixing, and other types of collusion?

- Suspicious statements or behavior:
 - Irregularities or similar handwriting, typeface, or stationery in the proposals or bid forms submitted by different bidders;
 - Bid or price documents contain white out or other physical alteration indicating last-minute price changes;
 - Bidder requests a bid package for itself and a competitor or submits its bid as well as competitor's bid;
 - Company brings multiple bids to a bid opening, but submits its bid only after determining who else is bidding;
 - Bidder or salesperson makes suspicious statement such as:
 - Reference to industry-wide price schedules;
 - Indication of advance notice of non-public pricing for competitor;
 - Acknowledgement that a particular bid "belongs" to a certain competitor;
 - Indication that competitors discussed pricing or have an understanding about prices.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

Examples of Recent Enforcement Actions in the Construction Industry:

- ***U.S. v. Woodson & Assoc.*** (9/05): Woodson, a Florida electrical contractor, was indicted with conspiring to rig bids for contracts for a program supported by the United States Air Force. Specifically, DOJ alleged that Woodson discussed bids with competitors and agreed not to compete on bids. Woodson agreed to plead guilty to the one-count felony charge and pay a criminal fine of \$175,000.
- ***U.S. v. APAC-Missouri, Inc.*** (8/04): APAC (a subsidiary of Ashland, Inc.) and its vice president were indicted for conspiring to rig a \$7.1 million bid submitted for a Missouri state highway construction project. According to the indictment, APAC agreed not to compete by designating that APAC would submit the low bid and the competitor would submit a higher complementary bid, with APAC subcontracting a portion of the project to the competitor after APAC won the contract. Following DOJ's indictment, the State of Missouri Department of Transportation prohibited APAC from bidding on any new work. A jury ultimately acquitted APAC of the charges.

Antitrust Issues at the Forefront of the Construction Industry (cont.)

Examples of Enforcement Actions in the Construction Industry:

- ***U.S. v. Streu Construction Co., et al.*** (3/04): Streu, Vinton Construction, and James Cope & Sons, as well as several company executives, were indicted for conspiring to rig bids for highway construction projects from pre-1999 until January 13, 2004. According to the indictment, the defendants allocated highway construction projects among themselves, then designated which one would submit the low bid, and which one would submit higher, complementary bids or no bid at all. The projects were worth more than \$100 million. The government based its case in part on testimony and recorded conversations supplied by a cooperating witness. Streu, Vinton, and their executives were sentenced to pay a total of \$3.1 in fines and restitution. The executives also were sentenced to prison and fines.

Can Subsidiaries Collude with Each Other under the Antitrust Laws?

The *Copperweld* Exception:

- Although the antitrust laws prohibit agreements that restrain trade, in 1984 the Supreme Court carved out an exception to this rule.
- In *Copperweld Corp. v. Independence Tube Corp.*, the Court held that a parent corporation is incapable of conspiring with its wholly-owned subsidiary, affiliated corporations, or unincorporated divisions.
- The Supreme Court based its reasoning on the fact that the parent and its subsidiary have a unity of economic interest.
- Most states have adopted *Copperweld's* reasoning in applying state antitrust laws (California is a notable exception).

The *Copperweld* Exception

Copperweld has been applied to numerous situations in which the courts have declined to find a conspiracy:

- Agreement among two wholly-owned subsidiaries (“sister” corporations);
- Agreement among two corporations with common ownership;
- Agreement among a parent and its partially-owned subsidiary; and
- Agreement among a wholly-owned subsidiary and a partially-owned subsidiary of the same parent.

The *Copperweld* Exception (cont.)

How much ownership is necessary to benefit from the *Copperweld* exception?

- The courts are split. Most courts ultimately look at whether the parent has a **controlling interest** over the subsidiary.

What about “sister” corporations?

- In most cases, the courts have found that “sister” corporations controlled by the same parent are protected under *Copperweld* from Section 1 liability.
- At least one court, however, has ruled that *Copperweld* protection did not extend to commonly-controlled subsidiaries. (*Geneva Pharm. Tech. Corp. v. Barr Labs, Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002).
 - In that case, the court relied on the fact that the parent attempted to conceal the ownership of one subsidiary and was a passive investor (even though it held the majority of shares) of the other subsidiary.

What Does *Copperweld* Mean?

- Wholly-owned subsidiaries of the same holding company are incapable of conspiring in violation of the antitrust laws.
 - Thus, coordination of prices and/or bids will not raise Section 1 antitrust concerns.
- Where ownership is less than 100 percent, additional antitrust counseling and/or analysis may be necessary before coordinating among parents and/or subsidiaries.
- However, coordination of prices and/or bids with unrelated competitors is **absolutely prohibited**.

What Actions Should Be Taken to Avoid or Minimize Coordinated Bid Antitrust Risk?

Coordinated bids from subsidiaries of the same holding company are likely to be protected from liability from Section 1 under the *Copperweld* exception.

- Ensure that the holding company has a controlling interest in the subsidiaries, and/or the right to control the subsidiaries through the governance structure so that the companies have a “unity of economic interest.” This will afford antitrust immunity and thereby allow for coordination among the companies for bidding, pricing and other competitive strategies.

Nevertheless, given the split among the courts, to minimize Section 1 risk:

- If the ownership interest in the subsidiary is less than 100 percent, the safest approach is to disclose the control relationship to the bid seeker.
- Conduct of affiliated entities should not create the impression in the minds of the bid seeker that the affiliated entities are acting independently and competitively in their bid submissions.

What Actions Should Be Taken to Avoid or Minimize Coordinated Bid Antitrust Risk? (cont.)

Even if the company is not in violation of Section 1, an attempt, either express or implied, to misrepresent the relationship among the wholly owned subsidiaries may implicate Section 2 of the Sherman Act, which prohibits monopolization or attempted monopolization.

- A monopolization claim under Section 2 requires proof of monopoly power in the relevant market and the willful acquisition or maintenance of that power. Thus, generally the company must have at minimum a 50 percent share in a properly defined relevant market.
- An attempted monopolization claim requires proof that the defendant engaged in predatory or anticompetitive conduct with the specific intent to monopolize and a dangerous probability of achieving monopoly power.

In order to avoid a Section 2 violation, carefully consider the combined share of the holding company and the subsidiaries in the relevant market before engaging in coordinated bidding activities.

- If the combined market share exceeds 50 percent and the subsidiaries are not 100 percent owned or controlled by the same holding company, consult with antitrust counsel to determine whether coordinated actions could be construed as monopolization or attempted monopolization.

What Actions Should Be Taken to Avoid or Minimize Coordinated Bid Antitrust Risk? (cont.)

Ensure that, if the ownership interest in the subsidiary is less than 100 percent, the control relationship is made clear to the public, customers, and the marketplace through disclosures, marketing materials, *etc.*

Evaluate market share in the relevant bid market to determine whether the company has a monopoly position or dominant share. If so, carefully consider the purpose and intent of the coordinated bid activities.

- If the purpose of coordinating bids is to drive up the price in order to reap additional monopoly profits, exclude competitors, or otherwise grow a monopoly position, it could implicate Section 2.

What Actions Should Be Taken to Avoid or Minimize Coordinated Bid Antitrust Risk? (cont.)

Even if you do not believe you have antitrust exposure, consider other legal implications of coordinated bid activities.

- What is the purpose and intent of coordinating bids?
- What is the effect of the bid coordination on the bid seeker likely to be? For example, is the bid seeker likely to solicit fewer bids than he or she would otherwise because the bids of the related companies offer “sufficient competition” to ensure a competitive price?
- Does the conduct raise other common law business torts such as misrepresentation, fraud, tortious interference, *etc.*?

Practical Antitrust Guidelines

- Competitors should not discuss prices or features that can impact prices such as discounts, costs of common inputs, inventory and output levels, salaries, terms and conditions of sale, warranties, or profit margins.
 - Note that a price-fixing violation may be inferred from price-related discussions followed by parallel decisions on pricing by association members — even in the absence of an oral or written agreement on prices.
- Competitors should not agree to divide customers, markets, or territories.
- Competitors should not agree to uniform terms of sale, warranties, or contract provisions.

Practical Antitrust Guidelines (cont.)

- Competitors should not share data concerning fees, prices, production, sales, bids, costs, salaries, customer credit, or other business practices with industry organizations unless the exchange is made pursuant to a well-considered plan that has been approved by legal counsel.
- Competitors should not discuss their customers.
- Competitors should not agree to any industry-related association membership restrictions, standard-setting, certification, accreditation, or self-regulation programs without consultation and approval by legal counsel.
- Competitors should not agree to refuse to deal with certain suppliers, customers, or others.

Practical Antitrust Guidelines (cont.)

- Companies should ask for an agenda for any meeting, including trade association meetings, where other competitors will be present.
- Companies should request that counsel be present at any discussion that involves potentially competitively sensitive information.
- Companies should attend only those meetings that serve their legitimate business interest.
- These guidelines apply to both formal and informal meetings or discussions with competitors.