

The Procurement Collusion Strike Force Takes Flight

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Introduction

Rooting out collusion in the government procurement space has long been a priority of the U.S. Department of Justice (DOJ) and, specifically, its Antitrust Division, whose mission is to promote economic competition.¹ That approach makes sense, as government procurement is big business. In 2019, the federal government made in excess of \$586 billion in procurement purchases.² Thus, the driving force behind the Antitrust Division's launch of the Procurement Collusion Strike Force (PCSF) in the fall of 2019 was to protect that procurement spending—our tax dollars—from those looking to take advantage of, and divert—resources from, the important public works projects that money is dedicated to fund. The elimination of bid-rigging from public procurement spending could result in a savings of 20% on procurement projects.³ The possibility of achieving such savings in public spending projects and the PCSF's early successes are powerful incentives to ensure that fighting corruption in public procurement remains at the forefront of the Antitrust Division's mission for years to come.

Launched during the Trump Administration, the PCSF received a significant boost from the transition to the Biden Administration. Antitrust enforcement is a centerpiece of President Biden's law enforcement agenda; last July, he signed a sweeping Executive Order designed to promote competition and encourage enforcement of the country's antitrust laws.⁴ Among other provisions, the Executive Order established the White House Competition Council, which the President empowered to “work across agencies to provide a coordinated response

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to overconcentration, monopolization, and unfair competition in or directly affecting the American economy.”⁵ Enabling the PCSF's continued growth fits squarely within that agenda.

I. Brief Overview of the Procurement Collusion Strike Force

The PCSF is tasked with leading a coordinated national response to antitrust crimes aimed at defrauding federal, state, and local government procurement spending. The PCSF is made up of a number of different DOJ resources, including members of the DOJ's Antitrust Division, 22 U.S. Attorneys' Offices throughout the country, the FBI, and the Inspectors General of a number of different federal agencies.

The PCSF is not limited solely to procurement spending domestically. A number of PCSF partners exercise oversight responsibility for the United States' spending abroad. As a result, a key focus for the PCSF is deepening relationships with international partners to assist the PCSF in its enforcement efforts and priorities on public procurement purchases outside of the United States. Senior Antitrust Division personnel have presented to groups within the international law enforcement community, such as the Organization for Economic Cooperation and Development and the International Competition Network, in order to raise awareness, deepen international partnerships, and offer the PCSF as a template for other countries interested in battling this type of corruption.

The PCSF is also focused heavily on training government procurement personnel to spot suspicious bidding patterns and other forms of collusion before they happen. The training teaches personnel how to spot various “red flags of collusion”⁶ by analyzing the specific markets where procurement spending is targeted, the details of applications for procurement dollars, patterns in bidding and awards over time, and suspicious behavior among bidders.⁷ As of November 2020, the PCSF has trained more than 8,000 individuals in 500 federal, state, and local government agencies in its first year of existence.⁸

II. The View from the Director's Chair

Daniel Glad is the director of the PCSF. In October 2020, Glad addressed the American Bar Association's Section of Public Contract Law's Public Procurement Symposium to outline the PCSF's accomplishments to date, and what the Antitrust Division views as its enforcement priorities in the coming months for the task force.

The title of Glad's remarks is telling and demonstrates the intended breadth of the PCSF's reach: “A Whole-of-Government Approach to Combating a

Whole-of-Government Problem.”⁹ In his address, Glad outlined how the PCSF was designed with a twofold mission. First, the PCSF is set on deterring antitrust criminal activity at the outset of the procurement process—a goal it is accomplishing through outreach to, and training of, procurement personnel at all levels of government. Second, the PCSF is facilitating an improved process for detecting, investigating, and, when warranted, bringing criminal charges for conduct that undermines the intended competitive nature of the public procurement process. Glad also described how the PCSF is an added resource to local governments that were facing a personnel crunch before the pandemic, which has only placed further constraints on their available resources to root out procurement collusion and fraud.¹⁰

After describing the breadth of the PCSF’s reach—geographically and substantively—Glad laid out two enforcement areas that, in his words, are where the PCSF has currently “trained its spotlight.”¹¹

The first spotlight is “set-aside fraud.” As the Small Business Administration (SBA) notes, “The federal government prefers to contract with small businesses wherever possible,” especially those owned by members of historically disadvantaged communities.¹² Thus, the federal government runs a number of programs—through the SBA—to ensure that small businesses owned by members of historically disadvantaged communities have equal access to the procurement process by setting aside certain qualifying contracts worth \$150,000 or more.¹³ Glad described the PCSF’s efforts to preserve the integrity of these socioeconomic set-aside programs, by preventing members of those underserved communities from being placed in an illusory ownership or management position by others seeking access to funds that would not be available to them, as “some of the most important work the PCSF is doing.”¹⁴

The PCSF’s second spotlight involves infrastructure fraud. Infrastructure touches every phase of American society, from bridges and public buildings to roads, schools, and even bike lanes. Through an increased focus on public projects and infrastructure spending, the PCSF is dedicated to ensuring that individuals do not abuse the underlying procurement process through bid rigging and other anticompetitive conduct.¹⁵

III. Summary of Recent PCSF Enforcement Actions

Now that the PCSF has a two-plus year track record to analyze, the best way to gain an understanding of the types of conduct the group will focus on in the future is to review the conduct at issue in the cases it has already brought. Below are four examples of recent PCSF-enforcement actions that shed some light into how the PCSF is operating.

A. San Antonio Veterans Set-Aside Construction Project

The PCSF opened an investigation into the awards of certain set-aside contracts intended to benefit

service-disabled veterans in the San Antonio, Texas, area. The investigation resulted in charges being brought against three co-conspirators. One co-conspirator pled guilty to one count of conspiracy to commit wire fraud and defraud the United States, while another co-conspirator pled guilty to one count of conspiracy to defraud the United States.¹⁶ The third co-conspirator was indicted in March 2021 on one count of conspiracy and seven counts of wire fraud. That case is still pending.¹⁷

A set-aside program administered by the SBA supports small businesses owned and operated by veterans. To qualify for a government contract under this program, a company must be owned and controlled by a veteran disabled in the line of duty.¹⁸ The Antitrust Division alleged in the indictment that two business partners (neither of whom was a disabled veteran, allegedly) conspired with a disabled veteran to install him as the ostensible owner and operator of a construction company that would qualify for government contracts under the SBA program. But the two nonveteran business partners were actually the ones exercising control over that company, essentially making the disabled veteran a figurehead. As part of this alleged scheme, the co-conspirators secured \$250 million in government contracts over a 13-year period that the Antitrust Division alleges they were not entitled to receive.

B. Connecticut Insulation Contractors’ Bid-Rigging Scheme

An ongoing investigation by the PCSF into New England construction projects, which already resulted in three prior convictions, bore additional fruit in February 2020 when a Connecticut-based insulation company and one of its owners each pled guilty to Sherman Act violations and wire fraud.¹⁹ Court documents show the insulation company and owner participated in a six-and-a-half-year conspiracy to rig bids solicited by Connecticut universities, hospitals, and other public and private entities on contracts to install pipe and duct insulation at renovation and new construction projects.²⁰ Through prepaid cellular phones and an encrypted messaging application that deletes messages immediately after reading, the defendants (and co-conspirators) discussed prices, shared bids, and agreed to allocate contracts among themselves through the submission of “losing” bids for the same contracts at intentionally inflated prices.²¹ The insulation company and owner also submitted materially false certifications of noncollusion and independent pricing with their noncompetitive bids.²²

As part of their plea deal, the insulation company and owner agreed to forfeit assets, pay civil penalties, and make restitution.

C. Bid Rigging Scheme to Defraud the North Carolina Department of Transportation

In October 2020, a PCSF investigation into the procurement of certain transportation contracts solicited by the North Carolina Department of Transportation led to the

indictment of an Ohio-based engineering firm and one of its employees.²³ The six-count charging document alleged the engineering firm and employee violated the Sherman Act, committed mail and wire fraud, and engaged in a conspiracy to commit fraud by participating in a scheme to rig bids for contracts to build or improve aluminum structures used to control the flow of water around roads, bridges, and overpasses.²⁴

According to the indictment, over a nine-year period, the employee, himself or through others at his direction, would allegedly obtain a co-conspirator's pricing information prior to its submission and then intentionally submit a higher bid for the engineering firm on the same contracts to create a false appearance of competition.²⁵ The indictment alleges that the engineering firm also submitted materially false certifications of noncollusion and competitive pricing with its "losing" bids.²⁶

In May 2021, the engineering firm pled guilty to one count of violating the Sherman Act and one count of conspiracy to commit fraud. As part of the plea agreement, the engineering firm agreed to pay a \$7 million criminal fine and over \$1.5 million in restitution.²⁷

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On February 1, 2022, a federal jury in North Carolina convicted the employee of all six counts on which he (and the engineering firm) were indicted.²⁸ The employee, who is scheduled to be sentenced on April 12, 2022, faces a maximum penalty of 10 years in prison for the bid-rigging conspiracy count and 20 years in prison for each of the other counts.²⁹

D. Contractor Defrauds Local Governments and School Districts in Minnesota

In September 2021, a PCSF investigation led to the guilty plea of a contractor for violations of the Sherman Act.³⁰ For almost five years, the contractor participated in a bid-rigging scheme on concrete repair and construction contracts solicited by local Minnesota

municipalities and schools.³¹ The contracts were governed by a Minnesota law that required at least two bids for an amount above a certain threshold before the contract could be awarded.³² As part of the scheme, the contractor shared pricing information with the principal of a competitor and agreed on multiple occasions to submit intentionally losing bids at higher prices for the same contracts.³³


As part of his guilty plea, the contractor agreed to cooperate with the United States and law enforcement authorities "in any matter as to which the United States requests such cooperation."³⁴

IV. How to Protect Your Company from the PCSF

The PCSF is getting stronger, more determined, and more emboldened with each passing month and successful prosecution. The PCSF is not going away, and the Biden Administration's DOJ has put a greater focus on antitrust enforcement. Companies involved in the government procurement space need to be thinking proactively about how to protect themselves from being in the investigative crosshairs of this upstart task force. Some things to consider:

- An ounce of prevention is better than a pound of cure. It is an old saying, but one that sticks around because it works. If you are involved in the government procurement space, now, more than ever, is the time to evaluate and update your compliance program to ensure it is capable of identifying problematic conduct and provides a mechanism for employees to report potential misconduct without fear of retribution or reprisals. An effective compliance program is essential to stop problems before they become problems, but also has the added benefit of assisting the company in potentially arguing for leniency from the DOJ if there is an investigation.³⁵
- Training procurement employees on the antitrust laws generally, and the specific conduct and patterns sought by the PCSF, is critical. Contractor employees need to be able to spot the red flags of potential procurement collusion so that they (and the company) do not find themselves in a position where they are the targets of a PCSF investigation.
- Many antitrust cases start with seemingly innocent communications among friends or colleagues, and then slowly escalate from there. In many industries, people at competitors know each other. They are friendly. They attend the same industry events. They may have the same customers. An employee from one company may leave that company and go to work for a competitor in a similar position, but the relationships from the prior company continue. Casual discussions or meetings among friends or colleagues have started many an antitrust investigation. Employees need to know and understand

this, and they need to be careful in their oral and written communications with competitors.

- A report of potential misconduct should be taken seriously and investigated immediately, usually with outside counsel engaged to conduct an independent internal investigation. A company that identifies misconduct has options, including self-reporting to the DOJ and applying for the extraordinary benefits offered by the Antitrust Division's Leniency Program, but only the first applicant will get those benefits, so time is of the essence. 

Endnotes

1. U.S. DEP'T OF JUST., JUSTICE MANUAL, § 7-1.100 – Antitrust Policy, <https://www.justice.gov/jm/jm-7-1000-policy> (updated Feb. 2020).

2. See Press Release, U.S. Dep't of Just., Director of the Procurement Collusion Strike Force Daniel Glad Delivers Remarks at ABA Section of Public Contract Law's Public Procurement Symposium (Oct. 13, 2021), <http://www.justice.gov/opa/speech/director-procurement-collusion-strike-force-daniel-glad-delivers-remarks-aba-section>.

3. *Fighting Bid Rigging in Public Procurement*, Org. for Econ. Coop. & Dev., <https://www.oecd.org/competition/cartels/fighting-bidrigginginpublicprocurement.htm> (last visited Jan. 6, 2022).

4. White House Briefing Room, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

5. *Id.* sec. 4(c).

6. U.S. Dep't of Just., *Red Flags of Collusion*, <https://www.justice.gov/atr/red-flags-collusion> (last visited Mar. 7, 2022).

7. Federal agencies are *required* to report “[p]ractices or events that may evidence violations of antitrust laws.” FAR 3.303 (emphasis added)).

8. Press Release, U.S. Dep't of Just., Assistant Attorney General Makan Delrahim Delivers Remarks on the Future of Antitrust (Nov. 12, 2020), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-future-antitrust> (Remarks as Prepared for Delivery at the American Bar Association Antitrust Law Section Fall Forum: “Here I Go Again”: New Developments for the Future of the Antitrust Division).

9. Press Release, U.S. Dep't of Just., Director of the Procurement Collusion Strike Force Daniel Glad Delivers Remarks at ABA Section of Public Contract Law's Public Procurement Symposium (Oct. 13, 2021), <http://www.justice.gov/opa/speech/director-procurement-collusion-strike-force-daniel-glad-delivers-remarks-aba-section> (Remarks as Prepared for Delivery: The Procurement Collusion Strike Force: A Whole-of-Government Approach to Combating a Whole-of-Government Problem).

10. *Id.*

11. *Id.*

12. *Set-Aside Procurement*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/partners/contracting-officials/small-business-procurement/set-aside-procurement> (last visited Jan. 6, 2022).

13. *Id.*

14. Daniel Glad Remarks, *supra* note 9.

15. *Id.*

16. Press Release, U.S. Dep't of Just., Former Construction

Company Owner Indicted for Defrauding Federal Program Intended for Service-Disabled Veteran-Owned Small Business (Mar. 17, 2021), <https://www.justice.gov/opa/pr/former-construction-company-owner-indicted-defrauding-federal-program-intended-service>.

17. United States v. Michael Angelo Padron, 5:21-cr-00124-OLG (W.D. Tex.), Dkt. No. 1 (Indictment).

18. *Id.*

19. Press Release, U.S. Dep't of Just., Insulation Contracting Firm and Co-Owner Plead Guilty to Antitrust and Fraud Charges (Feb. 3, 2020), <https://www.justice.gov/opa/pr/insulation-contracting-firm-and-co-owner-plead-guilty-antitrust-and-fraud-charges>.

20. United States v. Thomas F Langan, 3:20-cr-00014-KAD (D. Conn), Dkt. Nos. 1 (Criminal Information), 5 (Plea Agreement); United States v. Langan Insulation LLC, 3:20-cr-00015-KAD (D. Conn), Dkt. Nos. 1 (Criminal Information), 4 (Plea Agreement).

21. *Id.*

22. *Id.*

23. Press Release, U.S. Dep't of Just., Engineering Firm Pleads Guilty to Decade-Long Bid Rigging and Fraud Scheme (June 7, 2021), <https://www.justice.gov/opa/pr/engineering-firm-pleads-guilty-decade-long-bid-rigging-and-fraud-scheme>.

24. United States v. Brent Brewbaker; Contech Engineered Solutions LLC, 5:20-cr-00481-FL (E.D.N.C.), Dkt. 1 (Indictment).

25. *Id.*

26. *Id.*

27. *Id.* at Dkt. No. 92 (Memorandum of Plea Agreement); Press Release, *supra* note 19.

28. Press Release, U.S. Dep't of Just., Former Engineering Executive Convicted of Rigging Bids and Defrauding North Carolina Department of Transportation (Feb. 1, 2022), <https://www.justice.gov/opa/pr/former-engineering-executive-convicted-rigging-bids-and-defrauding-north-carolina-department>.

29. *Id.*

30. Press Release, U.S. Dep't of Just., Engineering Firm Pleads Guilty to Decade-Long Bid Rigging and Fraud Scheme (June 7, 2021), <https://www.justice.gov/opa/pr/engineering-firm-pleads-guilty-decade-long-bid-rigging-and-fraud-scheme>.

31. *Id.*

32. United States v. Clarence Olson, 0:21-cr-000172-ECT (D. Minn), Dkt. 1 (Criminal Information).

33. *Id.*

34. *Id.* at Dkt. No. 13 (Plea Agreement and Sentencing Stipulations).

35. For decades, the DOJ's Corporate Leniency Program has incentivized corporations and individuals to self-report illegal antitrust activity by offering leniency—or amnesty—to the *first* to confess to participation in a criminal cartel. U.S. Dep't of Just., *Leniency Program*, <https://www.justice.gov/atr/leniency-program>. In exchange for fully cooperating with the DOJ and complying with other specified conditions, depending on when the self-reporting occurs (before or after an investigation has begun), corporations, as well as their directors, officers, and employees, can avoid potential criminal prosecution, fines, and imprisonment for their illegal activity. U.S. Dep't of Just., *Corporate Leniency Policy*, <https://www.justice.gov/atr/file/810281/download>. Leniency is also available to individuals who self-report on their own behalf (not as part of a corporate proffer or confession) and *before* an investigation has begun. U.S. Dep't of Just., *Individual Leniency Policy*, <https://www.justice.gov/atr/individual-lenieny-policy> (last visited Mar. 7, 2022).