

Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 18

**A Deep Dive Into Antitrust Violations and the
Procurement Collusion Strike Force**

Featuring Ryan Becker and Kristen Broz of Fox Rothschild LLP

Adams: Hello everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the [White-Collar Criminal Defense and Regulatory Compliance Practice](#) at Fox Rothschild. I'm [Matt Adams](#). I'm one of the co-chairs of the Practice Group, and I am delighted to introduce, a guest host [Ryan Becker](#), who's gonna take the reins of the Presumption of Innocence for today, talking about the Department of Justice's Procurement Collusion Strike Force with his guest, [Kristen Ward Broz](#). A preeminent partner of our firm in our Washington DC office. And just by way of background, in November of 2019, the Department of Justice announced the creation of the Procurement Collusion Strikeforce or P C S F, as an inter-agency partnership composed of prosecutors from the anti-trust division and the United States Attorney's offices throughout the country as well as the FBI, the Department of Defenses and various offices of the Inspector General. The PCSF's stated goal is to deter, detect, investigate, and prosecute antitrust crimes that relate to government procurement grant, and other public funding programs. The DOJ has devoted significant, significant resources to the PCSF.

Which is a clear indication that investigations of procurement crimes will remain a top priority for the Biden Department of Justice in the years to come, Kristin and Ryan are gonna take over from here. But, this is a really, really interesting topic and dovetails into the work that our firm does in the procurement space with our government contracts practice predominantly out of our Washington, DC office.

And I am delighted to turn over the reins at this point and have Ryan take it away.

Becker: I spend a significant amount of my practice on antitrust issues, which is what we are here to talk about today. In particular, we're going to talk about the Procurement Collusion Strike Force. And I'm thrilled to be joined today by my fellow partner, Kristen Ward Broz.

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Kristen, thanks for joining us on the podcast today. It's great to have you. And would you please just introduce yourself to the audience and tell us a little about what you do.

Broz: Thanks for that introduction, Ryan. I work as a litigator in the Washington, D.C. office. My litigation practice focuses on complex issues, especially class actions, antitrust and government contracts. So, it's very exciting to be talking with you today, Ryan, about a topic that merges so much of what my practice has been historically, and that's antitrust and government contracts and particularly with how active the taskforce has been.

Becker: It is, it's great and you're the perfect person to join us. And when we were talking about having this topic, you were the first person that came to mind because of that awesome intersection of what you do on both sides and how it's a perfect fit for what we're about to talk about today.

So, let me just start and give a little history of the Procurement Collusion Strike Force, what it does. Essentially, it's a unit within the U.S. Department of Justice's Antitrust Division. It was started back in November 2019 during the Trump administration and has certainly gained steam during the Biden administration, when antitrust enforcement efforts have very much picked up, as we have seen. And essentially what the Strike Force is designed to do is to lead a coordinated national response in order to combat antitrust crimes and related schemes when it comes to government procurement, government grants, government funding at all levels of government. So federal, state and local all is within the Strike Force's purview. And I think, Kristen, part of the reason that this started was... Government procurement, as you know, is big business, right? One of the latest figures I saw on government spending for fiscal year 2021, and I think it was in excess of \$600 billion. And --

Broz: Wow.

Becker: You know, it's a massive number. Right? And I mean, I'm sure that's what you mean --

Broz: mm-hmm.

Becker: --on your side. And one estimate I saw from the Organization for Economic Co-operation and Development was that if they could eliminate bid rigging, just bid rigging, from public procurement spending, it could result in the savings of 20% on procurement projects. So it's a massive, massive number, and it's a massive problem that the government was trying to fix.

In the Procurement Collusion Strike Force, there are U.S. Attorneys' Offices throughout the country, there's FBI members, there's Inspectors General of a number of federal agencies. Every year it seems they're adding more, right? I think, Kris, and you and I were talking before we came on, they just added a few new folks a couple weeks ago, right?

Broz: Yes, they did. They've added folks from all different departments and one of their focuses now seems to be on Department of Transportation. But they're really trying to add folks, both at a federal and state level, to make sure that the approach to addressing bid rigging and other antitrust violations is comprehensive.

Becker: The geographic scope is interesting, too. And if you look at who their partners are, it's really offices and departments nationwide. Their reach is the entire country. And it's not just focused on the U.S. But there's also an international component as well. Because if you can imagine, and I'm sure, Kristen, and you've dealt with this in your practice, you know, there's a lot of government spending that happens abroad. Think of, you know, military bases. I know there was one case recently where, I think it was the South Korean military base. There were South Korean nationals that were indicted because of irregularities in procurement-related spending on a military base there.

They have a broad remit, and they are very much exploring the studio space with that remit as they are bringing case after case. It seems like there's not a week that goes by that we don't see new cases being brought.

For those of you who may not know as much about antitrust law, let me just give a very brief overview of what we're dealing with. When you think of antitrust, the first thing you think of is really an agreement, right? An illegal agreement. And the kind of prototypical antitrust case is, two

competitors get together and they decide that they're gonna fix the prices for a particular product. Or they're gonna allocate a market in some way. There's gonna be an agreement that says, "I'm gonna stay away from your customers here. You stay away from my customers there." And that's what the Sherman Antitrust Act, which is the primary federal legislation that is working to root out anti-competitive activity, is designed to protect against. So those are the prototypical cases.

But essentially any type of actor that is a monopoly that has dominant market power. And using that power in a way to freeze out competitors or leading to anti-competitive conduct. That's the type of behavior that the Strike Force is focused on. I know, Kristen, there's a very intense training component to this. Do you wanna maybe tell us a little bit about that?

Broz: Yeah, sure. And Ryan, I think it was smart to go through a little bit of an overview of what antitrust is and what it can look like. Because I think some of the reason this has been a new focus for the government is that a lot of contractors, especially federal contractors, they've been in the business for a long time. There's a lot of the same players, especially in industries like construction. And so things like bid rigging come about as part of the relationships that exist in this space. And so I think that's how the emphasis turned to these practices and a recognition of how much they're costing the government.

So, one of the things that the DOJ is trying to do to make sure that they effectively address things like bid rigging and other types of antitrust violations is to make sure that government contractors-- and anybody who's gonna be submitting a bid to the government-- understand what they're doing and whether that is anti-competitive.

So, the Strike Force has been boosting training within government off agencies to better equip government personnel as to how to spot red flags. And there's also trainings that private companies can sign up for within the government to recognize antitrust conspiracies, safeguard the procurement process from collusion and recognize anti-competitive bid patterns for auditors and data analytics professionals.

So, even just in the first year of the Strike Force, there were more than 8,000 individuals trained. There were more than 500 federal, state and local offices trained. They conducted dozens of sessions, and there were a number of participants in even data analytics webinars. So, in general, the DOJ has not just prioritized enforcement, but they've done a lot to try to train both people within the government and people outside of the government who might be submitting competitive bids to recognize what the risk factors are, to recognize if what they're doing is anti-competitive and to try to avoid any potential misconduct.

Becker: I'm glad you brought up the data analytics point. I'm fascinated by that. I'm a baseball nerd. I love baseball. I coach my son's baseball team. And so when I think of analytics, I think about sports, right? You know, the different ways they're looking at, "Oh we love this hitter because of his exit velocity and his hard hit rate," and all this kind of stuff. But, it's not just sports, right? The Justice Department is also on the data analytics train. And it seems like that's really a primary way that they are teaching procurement professionals to seek out anti-competitive conduct, right? They're showing them how to look for patterns in the data and in the bids that are coming in on government projects to recognize if they see any type of irregularity that could peak their interest and start an investigation.

Broz: Yeah, no, that's absolutely right, and it shouldn't come as a surprise. And just like every other arm of the government, the Procurement Offices tend to be overloaded and not necessarily always have sufficient resources toward analyzing bids and auditing them. So, data analytics is a huge way

for the government to reduce personnel costs but still get a handle on whether companies are engaging in these activities.

Becker: You mentioned, too, the spike in enforcement that we've seen over the last couple years as they continued to ramp up. Daniel Glad is the current director of the Procurement Collusion Strike Force, and he gave a speech where he talked about, sort of, some of the enforcement priorities for the Strike Force. And what they're really focusing on are two main areas: One is set-aside fraud, and the other is infrastructure fraud, for lack of a better word.

So, just to give folks a sense of what types of conduct they're really focused on -- set-aside fraud, I'll start with that. And the idea there is, there's certain groups where the government and the Small Business Administration, for example, works really hard at this, right? To try to make sure that traditionally disadvantaged groups get their fair share and get access to being able to win government contracts.

Think of women-owned business, minority-owned businesses, disabled veterans or veteran -owned businesses. There's government programs that encourage folks in those groups to apply for, and hopefully win, government grants and help aid the development of their businesses.

And there's been a number of investigations and a number of criminal actions brought in this area. I know disabled veterans is one specifically where there was a case down in San Antonio where this happened. But essentially, you have individuals getting together and getting in a losery CEO or a losery president that happens to be a disabled veteran but is not actually engaged in the day-to-day operations of the business. And you know, trying to use that disabled veteran status to get government contracts. And those types of schemes are things that the Procurement Collusion Strike Force is particularly looking to root out and stop, and they've brought cases in that regard.

And then the second piece on the infrastructure. Infrastructure is also a big business, right? And there's a ton of infrastructure spending. Certainly under the Biden administration, there's been great efforts to pass comprehensive infrastructure legislation. And when you have a lot of government spending on infrastructure, there's also the possibility for people taking advantage of that and trying to fraudulently obtain some of those infrastructure dollars.

Another area where we've seen a lot of enforcement is after there's natural disasters: A hurricane comes, wildfires, COVID, too, right? In the aftermath of these natural disasters, there's an influx of government spending and they're very focused on making sure that you don't have any type of bid rigging or market allocation price fixing in those types of areas.

Broz: Yeah, Ryan, and the one thing I would add to that, just going back for a moment to your note about set-aside fraud. Even outside of the context of the procurement Strike Force, set-aside fraud is a huge issue and it often ends up being a False Claims Act issue. A lot of these requirements for particular projects will say you have to have 10% of your subs from a minority-owned contractor. Prime contractors and even lower tier subcontractors often try to find clever ways around that. And it's interesting to note that not only can that be a False Claims Act violation, but if it's done in a particular sort of way, especially in a collusive way, it can also be an antitrust violation.

Becker: No, that's a great point. It's funny, and we see this in antitrust a lot, right? That if you're engaging in some kind of anti-competitive, antitrust scheme, you typically are not only at risk of being prosecuted for an antitrust violation. Typically you're also going to be engaging in other federal crimes like mail and wire fraud or False Claims Act, as you suggest. So, it's something that companies have to be really careful with because even if the conduct that they're engaging in may

not rise to the level of a violation of the Sherman Act from the Justice Department's perspective in the Antitrust Division, there could be criminal referrals to other units in the Justice Department to investigate that conduct.

Broz: Yeah, that's right.

Becker: You gotta be really careful there. Can you talk us through some enforcement cases that you've seen that you know are out there that might be interesting to people to give a little bit of a flavor of what it is that the Justice Department is actually going after?

Broz: Yeah, sure. And honestly, the timing of this podcast is great because there've been just an onslaught, as you mentioned earlier, of enforcement actions just in the last three to six months. So for instance, the most recent one was a bid rigging plea agreement that was actually filed by a construction company owner who pled guilty for his role in bid rigging and bribery scheme involving the California Department of Transportation Improvement and Repair Contracts.

And in that case, to our point about multiple criminal violations, it wasn't just bid rigging --which included a conspiracy to thwart competitive bidding process for contracts on numerous occasions, to make sure that companies controlled by co-conspirators or himself submitted the winning bid and would be awarded the contract. But on top of that and, part of the bid rigging scheme, were these illegal bribes. I thought that was a pretty interesting one.

Becker: Mm-hmm.

Broz: And it also shows the federal and state coordination. That this was a scheme involving the California Department of Transportation. So it wasn't even a federal procurement, it was a state procurement. But the federal government got very much involved as did the U.S. District Court for the Eastern District of California in bringing that scheme to light.

Becker: Sure. Yep.

Broz: I'd say most of what I've seen out there recently has been rigging related. But I want to point out, there was also one in October of this year concerning monopolization. I don't typically see too many monopolization cases in this space. You see a lot of bid rigging, you see a lot of collusion, set-aside fraud, as Ryan mentioned, and that makes sense in the context of government contracts. But I was interested to see that the Task Force is also going after monopolization. So the case that I was mentioning: In October, the president of a paving and asphalt contractor in Billings, Montana, pled guilty to attempting to monopolize market for highway crack sealing services in Montana and Wyoming. So, I thought that was interesting. And what he did is, he would propose that his company and its competitor allocate regional markets. I guess the scheme started sometime around early 2020. The person who pleaded guilty actually approached a competitor about a strategic partnership and proposed that the competitor stop competing with their work for crack sealing projects in Montana and Wyoming and the competitor would have exclusive ability to compete for projects in South Dakota and Nebraska. That's a monopolization and a market allocation scheme that the Task Force also prosecuted.

Becker: If I could just hop in on that one, cause that's a great case that you brought up, and it was one that really rocked the antitrust world, honestly. I mean, we're pretty fun cats in the antitrust world, let me tell you. So, if we go back to where we started, your typical Section 1 Sherman Act case, right? Two competitors get together and they agree to fix prices on a product. That's illegal

under the Sherman Act. Can't do that. And most, all of really, the Justice Department's criminal prosecutions for the last half century focused on that type of conduct, right?

Two competitors--

Broz: Right.

Becker: --Getting together, having an agreement and either agreeing to fix prices or allocate markets, customers, things of that nature. But this one, this is the first Section II case that they brought in 50 years. And it's really a huge pivot for the Justice Department and greatly broadens the scope for companies to be thinking about where there could be potential criminal prosecution.

I mean, this was an attempted monopolization case, not an actual agreement. You know, and it's one of those situations companies need to be aware of where there's no attempt that you can be criminally prosecuted for under Section One of the Sherman Act, but you can under Section Two. And now the idea that a lot of times the defense in Section One case is, "Well, but there never was an agreement." Maybe there was competitor communications that make you uncomfortable or that get close to line, but they never agreed to violate the Sherman Act, and therefore there's no case. I mean, you know, I've made that pitch to the Justice Department before, but now you've got this Section Two. If you're a company that has monopoly power, dominant market power, and you have an individual that goes out and even just attempts this, now your head's on the chopping block too, in a way it wasn't before.

Broz: No, that's a great observation. And it dovetails into what I was saying earlier about training. And obviously I don't know the underlying mentality of the individuals involved in this case, but reading it, I was thinking of some clients that I've dealt with, some who might not be as sophisticated in the construction space, who, you know, this is what they do every day. Maybe it doesn't even raise a flag for them that engaging in this type of activity would be considered an antitrust violation.

I think, given the facts, I think they probably knew they were doing something that wasn't on the up and up, but I'm not sure that they recognized that it would be considered an antitrust violation.

Becker: Yeah. And that's truly a scary broadening of scope from the Justice Department if your answer of what conduct is potentially within their sphere of enforcement universe.

Now the training point, I think, Kristen, is an important one to focus on. So, as we're sitting here and we're attorneys, we're advising our clients on these types of issues. And the client says "Well, I know this Procurement Collusion Strike Force is out there. I know there is this uptick in antitrust enforcement. We play in the procurement space, right? We're submitting government contracts all the time. What can we do? What steps can we take to protect ourselves from finding ourselves as a target of a criminal probe by the Antitrust Division?"

Broz: I think the training that the Task Force itself is offering is something that I would consider if you're frequently engaged in submitting bids. And especially when you're submitting them in conjunction with lower tier subcontractors with a prime, or if you're just a subcontractor and you're submitting them with a prime, it might just be worth getting a little bit of a refresher course. Or, if not a refresher course, a first course. What sorts of activities in the process of bidding, especially when you're working with competitors, are prohibited by the antitrust laws? So I think it's twofold. One is, talk to your attorneys who you have on retainer about these issues. Make sure you understand what they are. And then also, maybe take advantage of public resources that are available to help better educate your company.

Becker: You know, it's the old, the ounce of prevention's better than a pound of cure, right? Like you're far better off training people and engaging in costs-- or even if you have to go out and hire a, me or you, Kristen, a Fox Rothschild --to come in and do a robust antitrust training for your employees, I mean, the cost of that pales in comparison to what you could be facing if you find yourself caught in the antitrust investigation. Violating the Sherman Act, it's not only a felony punishable by up to 10 years in prison, but also a million dollar fine for individuals and up to a hundred million for corporations. But in certain cases, those fines can also be increased to twice the gain derived from the crime or twice the loss suffered by the victim. So, you're talking about potential enormous liability here.

And so I think you're spot on that training is absolutely critical to make sure folks understand the PCSF is going to be looking for what type of conduct the Antitrust Division is going to focus on. I think part of that too, Kristen, and I've found, when I've done these types of trainings or talked to clients, advising them on what they need to be aware of, competitor communications is always a key element of any antitrust case. In a lot of industries, your competitors, you know them, right? You see them at trade associations, you see them at the bar at different events where you're all, maybe mingling among clients that you could even have in common, potentially, with competitors, right? And so you become friendly.

And also there's a lot of movement in a lot of industries. You're at one company and then maybe you move over to another company that's a competitor and you still have really good friends at the other company. Many antitrust investigations have started over seemingly innocent conversations that take place at the bar at a trade association, and people don't understand.

Broz: Yeah, I think that's right. And what I would just add to that, Ryan, is in most industries, competitor communications happen in the exact context that you're saying: At conferences, things like that. And that is equally true in the procurement space. But additionally in the procurement space, a lot of government contractors who are competitors often have to work together on government contracts, both in the submitting bids part of the process, and if they're potentially assigned multiple parts on a project by the government, the potential for antitrust conduct is all the higher because competitors do as part of their work in the seats, have conversations about what prices to submit, about what costs to submit in a way that you would only see incidentally in a typical industry.

Becker: And I wonder if that's why the PCSF is so busy.

Broz: I think that's exactly why,

Becker: Right? For them, unfortunately, for companies. It's a target-rich environment in that space. And they have a lot of--

Broz: Right.

Becker: --of companies to choose from.

One other thing, and then we're running out time, but I wanted to at least raise and chat with you about is, if you're at a company and you discover that there is maybe a question about some conduct that went on, whether or not it violates the antitrust laws.

I wanna just put a note in here about the Antitrust Division's Leniency Program, which has also over the last, especially three to five years, exploded as far as the amount of companies and individuals

that are going in and applying for leniency. Because the Justice Department, the Antitrust Division, has worked really hard to make it a very attractive program. But they've set up a race to the Justice Department if there's misconduct going on in this space, because they'll give leniency benefits, but only to the first person in, the first company in. And if you're in an illegal antitrust agreement, typically putting that Section Two case aside, you typically have an illegal agreement with somebody else, right? There's another company involved. And if that company goes to the Antitrust Division first, they're gonna get the benefits of leniency and not you, even if they beat you into the Justice Department by a day.

And the benefits of leniency are massive. You're talking about no criminal charges against a company, no criminal charges filed against cooperating employees, promises on confidentiality. And then you get additional benefits in any follow on civil litigation. Because trust me, when there's a criminal DOJ prosecution or even an investigation, there's going to be civil litigation that is commenced almost immediately. You can get single damages in the civil case instead of treble damages, right? And no joint several liability. So, it is a massive incentive if you discover anti-competitive conduct to act promptly, get Fox Rothschild involved, do an internal investigation, find out what happens, and then get into the Justice Department before somebody beats you to it. And it could have significant, both criminal and financial consequences for your company.

Broz: Couldn't agree more.

Becker: It's something to just keep in mind. So Kristen, thank you so much for joining us today. I really appreciate your time and your insight. You're a tremendous lawyer and a huge, huge credit to Fox Rothschild. So, we're really happy to have you here and I greatly appreciate it.

Thank you all for joining us today to discuss the Procurement Collusion Task Force. My name is Ryan Becker, and we'll see you next time on "The Presumption of Innocence."