

How Contractors Can Reduce Antitrust Risk Amid COVID-19

By **Nicole Wells, Jeffrey Martino and Regis Arnone**

The arrival of COVID-19 brings with it a sudden need for specific goods and services provided by the various levels of government to protect against the spread of the virus.

Many federal, state and local agencies have been forced to move quickly, which increases the risk of antitrust crimes such as bid-rigging conspiracies and related fraudulent schemes that undermine competition in government procurement, grant and program funding.

One way the government is addressing this risk is with the continued development and expansion of the procurement collusion strike force, which is on high alert for bid rigging and fraudulent practices.

On June 16, Assistant Attorney General Makan Delrahim presented at the Organization for Economic Cooperation and Development competition committee's virtual meeting, citing more than 50 federal, state and local government agencies that have contacted the strike force seeking training, assistance in safeguarding the procurement process and opportunities to partner with the strike force.[1]

The U.S. Department of Justice announced that strike force members have trained more than 2,000 criminal investigators, data scientists and procurement officials over the past few months.[2]

Additionally, the Justice Department noted that over a third of the Antitrust Division's open investigations relate to conduct affecting public procurement and indicated that several grand jury investigations across the country have already been opened as a result of the work of the strike force.[3]

Purpose of the Procurement Collusion Strike Force

Even before the outbreak of the pandemic, the annual growth in the number of contractors and dollars spent on government contracting was rising steadily. At the beginning of the year, it was projected that contract spending would be between \$624 billion and \$644 billion this year,[4] keeping pace with the growth rate of about 7.6% annually from 2015 through 2019.[5]

To protect taxpayer-funded projects at the federal, state and local level from antitrust violations and related crimes, the DOJ announced the creation of the strike force in November 2019.

Since its launch, the strike force, whose mission is to "deter, detect and prosecute antitrust crimes and related schemes in government procurements," has generated an overwhelmingly positive response from key stakeholders in the procurement space as well as international interest.

Given the government's increased scrutiny of contracts involving government funding and



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the need to exercise prudence, coupled with the fact that the DOJ will now consider and allow crediting of corporate compliance programs at the charging stage, companies involved in government contracts should take a closer look at their compliance and internal controls processes.

How to Reduce Antitrust Risk: Compliance Programs and Internal Controls

The DOJ recently announced it continues to focus on holding accountable anyone who violates the antitrust laws in connection with public health products such as face masks, respirators and diagnostics. The department reiterated that any individual or company caught bid-rigging or violating fair and reasonable pricing rules could face criminal prosecution.

Fair and reasonable pricing is a guiding principle in government contracting. The Defense Federal Acquisition Regulation Supplement, or DFARS, is a resource available to government contractors that provides guidelines, based upon industry best practices, for effective estimating and procurement systems.

DFARS 252.244-7001(a) provides specific criteria for an effective purchasing system to ensure fair and reasonable pricing,[6] which includes, but is not limited to:

- Requiring competitive bidding and vetting subcontractors, including by conducting effective cost and price analysis of competing vendors;
- Enforcing policies on personal and organizational conflicts of interest, gifts and gratuities, including Anti-Kickback Act requirements;
- Including flow-down provisions in subcontracts and monitoring subcontractor compliance;
- Ensuring that only authorized personnel make purchases;
- Identifying and appropriately addressing performance problems; and
- Formally justifying changes impacting cost or price.

Given supply chain strains caused by COVID-19 and the entry of first-time government contractors supporting response efforts, it is not unreasonable to expect an increase in inquiries arising from the strike force's investigations or independent whistleblower claims.

As a result, companies may find themselves defending the reasonableness of cost and pricing data to refute the claims. Effective compliance programs and internal controls are instrumental in reducing antitrust risk.

Compliance Programs

The DOJ views effective corporate compliance programs as the first line of defense^[7] in preventing and detecting price-fixing, bid-rigging and other criminal antitrust violations.

In July 2019, the Justice Department's Antitrust Division announced that it would consider and allow for crediting corporate compliance at the charging stage in criminal antitrust investigations.^[8] In conjunction with this announcement, the division also published a guidance document that focuses on evaluating compliance programs at both the charging and sentencing stages of criminal antitrust investigations.^[9]

As emphasized in the division's recent guidance, the effectiveness of an antitrust compliance program includes the following:

- The design and comprehensiveness of the program;
- The culture of compliance within the company;
- Responsibility for, and resources dedicated to, antitrust compliance;
- Antitrust risk assessment techniques;
- Compliance training and communications to employees;
- Monitoring and auditing techniques, including continued review, evaluation and revision of the program;
- Reporting mechanisms;
- Compliance incentives and disciplines; and

- Remediation methods.[10]

Internal Controls

In addition to compliance programs, internal controls related to the preparation of pricing proposals as well as the overall procurement bid process will be subject to strike force scrutiny.

Pursuant to DFARS 252.215-7002(d), a contractor's "estimating system shall provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures." [11]

Otherwise stated, companies are expected to have, and adhere to, formal policies and procedures that provide guidance regarding:

- Segregation of duties in the preparation, review, and approval of pricing proposals; and
- Consistent application of estimating and budgeting techniques, including:
 - Systems of record or other resources for gathering appropriate source data;
 - Standards for adequately documenting underlying assumptions supporting the basis of estimates; and
 - Involvement of appropriate subject matter experts in the estimating process to gather requisite support, review and validate the reasonableness of pricing proposals.

Government contracts provide companies with both considerable opportunities and potentially significant risks, which require effective compliance programs and internal controls. The government expects its contractors to employ good business practices. Doing so not only mitigates risks of noncompliance, but also improves process efficiencies and yields other company benefits.

Assessing Potential Exposure and Improving Efficiencies

Consistent with the DOJ's 2019 antitrust compliance guidance, companies should continuously monitor their processes associated with government contracts in order to detect and assess potential violations and to root out inconsistent approaches. There are several ways companies can take action to assess their risk and improve efficiencies through use of data.

Make the most of data.

Companies can leverage data quality, advanced analytics and artificial intelligence cost-effectively to help reduce manual processes and false positives while increasing the capability to detect relevant outliers and anomalies for further investigation. Financial,

customer relationship, production and communication data can enable a company to reduce time and cost of identifying potential risk areas for further evaluation.

Use company enterprise resource-planning and customer relationship management systems, consolidate data, and consider outside information.

A company's own data from its enterprise resource-planning system can be used to proactively identify pricing patterns that may indicate collusive behavior or assess potential exposure. Using transaction data as the source, a company can assess pricing trends in numerous ways including across similar products, customers, markets, time periods and regions.

Some companies may also maintain relevant data points in their customer relationship management systems, which can be used to analyze historical bids, competitors involved and awarded projects, and the bid progression from initial to final bid.

The first step a company should take in utilizing data analytics for compliance monitoring is to consider readily available internal and external data sources that would be meaningful to the assessment of potential exposure or violation.

For example, depending on the industry, publicly available data may exist to support the cost structure of the product or service provided. At a minimum, it is important to ensure that transaction-level data can be easily accessed which separately tracks prices, material, labor and overhead costs for products and/or services associated with procurement bids.

Create key risk indicators.

Once relevant transaction data is identified and consolidated, a company can set up a series of screens using financial data points, also referred to as key risk indicators, to monitor potential collusive activity against known unimpaired or clean transactions referred to as benchmarks. The proper key risk indicators for evaluation will vary depending on the company and industry, but may include price variance and sensitivity; price-volume relationship; price-to-profitability impacts on material, shipment or distribution costs; production capacity and output levels; or exchange rate impacts.

It is important that the screens implemented are risk-based and capture any differences between government and nongovernment business.

Visualize data and analyze key risk indicators.

Periodic review of variances between risk indicators and benchmarks through a dashboard or data visualization tool can allow a company to summarize and trend each key risk indicator, as well as identify legitimate reasons for the risk indicators.

When appropriate, a company should conduct a more extensive review of key risk indicators by looking at the specifics of variances and reviewing additional documentation associated with bidding. This can provide customer intelligence while also acting as a means for actively monitoring compliance.

Monitor communications.

In addition using financial and operational data to monitor for potential violations associated with procurement bids, companies can screen employee communications.

First, protocols governing communications channels should be implemented — i.e., email only and no text for other apps for communications regarding government contracts. Next, employee emails can be screened to identify potential collusive activity.

Computer software can systematically review outgoing and incoming emails for key phrases, such as competitor email addresses, contract or bid information.

Monitoring and analysis can also be done retrospectively on a large volume of historical email messages, and can be processed in near real time using distributing computing techniques. If an issue is detected, emerging software solutions can be utilized to collect and monitor text and other disappearing messaging applications.

Conclusion

COVID-19 has created an atmosphere of increased risk of antitrust crimes. With the formation and recent affirmation of the strike force, the DOJ has put companies on notice that enforcers are proactively monitoring for antitrust violations and procurement fraud. Company leadership should promote a culture of compliance and companies should take action to reduce their antitrust risk and improve efficiencies.

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[1] <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-presents-procurement-collusion-strike-force>.

[2] Ibid.

[3] Ibid.

[4] <https://about.bgov.com/news/bgov-forecasts-at-least-600b-in-contract-spending-in-fy-2021/>.

[5] <https://about.bgov.com/news/federal-contract-spending-five-trends-in-five-charts/#:~:text=Federal%20contract%20spending%20in%20fiscal,spending%20obligations%20in%20fiscal%202015>.

[6] https://www.ecfr.gov/cgi-bin/text-idx?SID=14c07ab1518119f07006b11f3119f047&mc=true&node=sp48.3.252.252_11&rgn=div6.

[7] <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international>.

[8] <https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance>.

[9] <https://www.justice.gov/atr/page/file/1182001/download>.

[10] Ibid.

[11] https://www.ecfr.gov/cgi-bin/text-idx?SID=516e5007412b157421210dc6342a24dc&mc=true&tpl=/ecfrbrowse/Title48/48cfr252_main_02.tpl.