COMPETITION MATTERS

Fostering Fair Competition in the Marketplace

DAVE YOST

OHIO ATTORNEY GENERAL

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# Buy, Sell, Bid Rig, or Price-Fix: Anticompetitive Conduct in the Foreign Exchange Trade

State and federal antitrust enforcers investigate various kinds of anticompetitive conduct that impede free and fair competition, and disadvantage consumers. For instance, one type of anticompetitive conduct is bid rigging, which occurs when bidders undermine the competitive bidding process by colluding to determine who will win the bid. Another type of anticompetitive conduct is price-fixing, which occurs when two or more competing businesses conspire to set the prices of goods or services at certain price points. Bid rigging and price-fixing often result in market inefficiencies, causing consumers to pay higher prices or tolerate deficient goods or inadequate services.

It is important to note that bid rigging or price-fixing can occur in a variety of contexts. From real estate to consumer goods and services, no facet of society is immune from the potential harms that rigging bids or fixing prices can inflict. As described below, bid rigging or price-fixing can even cause trouble on a global scale.

In September 2020, Askshay Aiyer, a former currency trader at a multinational bank, was sentenced in federal court to serve eight months in prison and ordered to pay a $150,000 criminal fine for participating in an antitrust conspiracy whereby he colluded with other currency traders to fix the prices of and rigs bids on Central and Eastern European, Middle Eastern, and African currencies, which are generally traded against the United States Dollar and the Euro.

According to evidence presented at trial, Aiyer communicated constantly with his co-conspirators from at least October 2010 through at least January 2013 by phone, text, or electronic chat room to manipulate bids or offers to avoid adverse effects from the exchange rate, share customer information, and coordinate trading to increase their profits at customers' expense. Additionally, the jury heard evidence that Aiyer and his co-conspirators deliberately concealed their actions by using code words, communicating on their personal mobile devices during work hours, and meeting in person.

The anticompetitive conduct that Aiyer and his co-conspirators perpetrated is reminiscent of the acts that unscrupulous vendors commit against public purchasers. As such, to help discourage anticompetitive activity and increase detection, one should:

- Keep an up-to-date list of potential bidders; solicit bids from as many competitors as possible.
- Require bidders to identify partners, subcontractors, and joint ventures in their bids.
- Require non-collusion affidavits with every bid.
- If something looks strange, ask bidders to explain.
- Retain bid and purchase records for at least five years, allowing for review.
- Not reveal the names of prospective bidders or cost estimates before the contract is awarded.

If you suspect unscrupulous behavior, or have questions about how to recognize anticompetitive activity, please call the Antitrust Section of the Ohio Attorney General's Office at 614-466-4328.

## The Effects of Monopolies are No Laughing Matter

Recently, a nationally syndicated comic strip (think computer programmer with an iconic tie) poked fun at monopolistic behavior. While a comic strip is meant to bring a chuckle to the reader, in reality, monopolistic behavior is no laughing matter.

While in some circumstances having only one large supplier of a good or service (think utilities, such as water) has benefits (such as keeping infrastructure simple), monopolies most often do more harm than good. Besides increasing prices, the monopolist can use its power and position to coerce suppliers and customers not to do business with any company that dares to try to compete with it, or to extract major price concessions from a supplier, impacting the supplier's bottom-line. It may choose not to service geographic areas that are less profitable – areas that might be served if there were multiple sellers in the market.

Because they face little or no competitive pressure, monopolists often produce inferior products because they know that customers cannot find an alternative product or service. Monopolists are free to limit production, driving prices even higher. Higher prices are always harmful to purchasers, but they have an especially serious impact on the poor, or on public entities struggling to get the most out of limited taxpayer dollars.

Additionally, with a monopoly, there can be little incentive for innovation or improvement on a product/service. Monopolies can also make it difficult for new and innovative companies to enter the market. Even companies with legal patent-based monopolies at times try to extend those patents beyond their legitimate time periods through improper means such as sham patent litigation.

While in some respects larger firms can be more efficient than smaller ones, economists generally agree that monopolies don't operate as efficiently as firms in competitive markets.

While it is fun playing a board game that encourages one to obtain a monopoly and drive up prices (and there are now many versions of that game), that is the only place where monopolistic behavior is proper and encouraged.

# The Ethics of Reporting Vendor Behavior

Imagine this scenario: it is time once again for your organization to award the contract for the coming year's supply of widgets. Every year for the last decade, you've gotten bids from the same three widget vendors – A, B, and C. There appears to be a healthy rivalry among the companies with the contract changing hands periodically. You have a good relationship with the representatives of all three companies, making your day-to-day dealings with the winning vendor – regardless of which one wins – smooth and efficient throughout the year.

This year, however, when the bids are opened, you have an uneasy feeling. Something seems off. Vendor C failed to bid at all, and Vendors A and B submitted noticeably higher bids than last year – both around 15% higher. All three vendors provide you with explanations, all of which are plausible, but that nagging feeling persists.

So, you find yourself on the horns of an ethical dilemma. Do you report the situation and your uneasy feeling to the Attorney General's office, or do you keep your suspicions to yourself? After all, you think, they are just suspicions. How do you balance your interest in treating your vendors fairly and maintaining a good relationship with them against your obligation to your organization and the public you serve? It is not an easy question, for certain. But consider the following points, which might help you as you weigh your options:

1. Reporting does not always spell trouble for the vendors. The Investigative Unit of the Ohio Attorney General's Antitrust Section approaches initial inquiries on the leads it receives with care and discretion, using a variety of techniques to gather information about market conditions and the vendors in a confidential and non-public way to determine whether there is good cause to launch a formal investigation under Ohio's antitrust law (R.C. Chapter 1331). If there is no cause for concern, the matter may not go beyond this stage.
2. Failing to report your suspicions may end up punishing honest vendors. A market in which conspirators are allowed to get away with their wrongdoing is inherently unfair to those who refuse to collude, as it gives a competitive advantage to those who do. Some anticompetitive schemes result in a group of colluding vendors underbidding an honest bidder, for example, then working together in a pre-arranged principal/subcontractor relationship to cut corners in quality on the job or to submit pre-planned change orders to inflate the ultimate price. The deserving bidder – and the taxpayers – lose out.
3. Your "gut" feelings are not simply wild speculation. They are borne out of your skill and experience as a public purchaser. Trust your instincts, as they may be the only line of defense against harmful vendor activity.
4. You can preserve your relationship with the vendors by reporting anonymously. Take a look at the Ohio Attorney General's website. You can report a tip – anything from solid evidence of collusion to simple observations of an unexplained price hike or a sudden inability to get multiple bids – either with or without providing your name and contact information. If you do report anonymously, however, please provide as much detail as possible, since our investigators will be unable to follow up with questions.

Hopefully, these points will provide food for thought that will help you weigh the ethical pros and cons of reporting suspicious vendor behavior. The bottom line is that the risk to honest vendors of a mistaken report is relatively low. But the cost of failing to report a collusive scheme can be very, very high.