COMPETITION MATTERS

Fostering Fair Competition in the Marketplace

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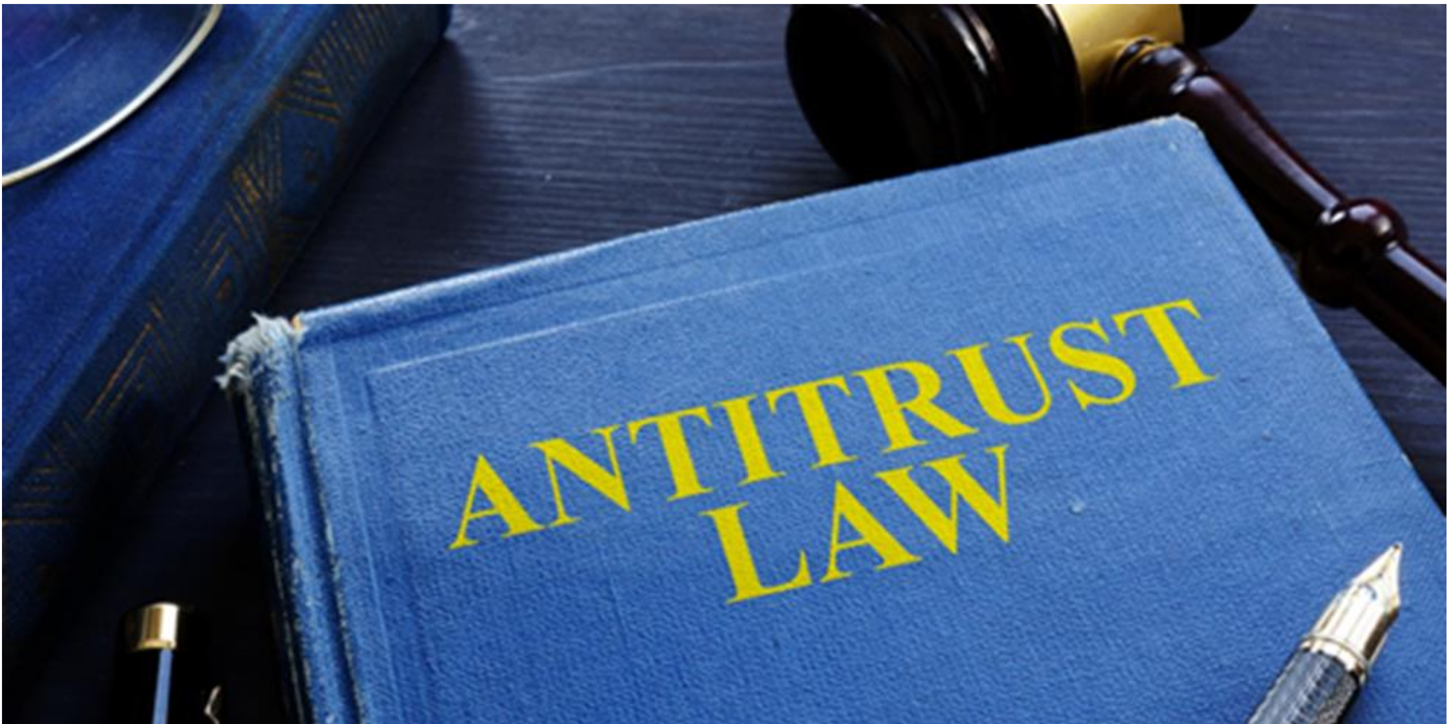

Complementary Bids Not So “Complimentary” For Commercial Flooring Contractor

Complementary bidding (also known as “cover,” “courtesy” or “shadow” bidding) occurs when competitors agree to submit a series of higher-priced bids or deliberately defective bids that give the appearance of genuine competition, but in actuality ensure the selection of a designated winner at inflated prices. In exchange for manipulating the bid process, the designated winner may share profits with the losing bidders, hire them as subcontractors or coordinate with them so that they can win other contracts.

In November 2020, Donald E. Church Jr., the president and co-owner of Vortex Commercial Flooring Inc., pleaded guilty in federal court to participating in a scheme to rig bids and fix prices for commercial flooring services and products. According to court documents, for years Church attended meetings and communicated with co-conspirators to manipulate bidding processes related to flooring services. One of the approaches involved exchanging pricing information so that the vendors could submit complementary bids, setting up their choice to win the contract and reap ill-gotten gains.

Church and his co-conspirators engaged in this anti-competitive scheme at various times from 2009 to 2017.

To date, Church and five other co-conspirators have pleaded guilty to violating federal antitrust laws by subverting the competitive bidding process. Church himself faces a maximum penalty of 10 years in prison and a $1 million fine.

Such anticompetitive conduct is often embraced by unscrupulous vendors who want to cheat public purchasers. As a result, public purchasers should carefully review bids and watch out for any signs that vendors may be working together to undermine the competitive bidding process.

Red flags of possible bid-rigging among vendors include:

- Unexpected similarities in the bids of different vendors, such as documents all having the same unusual font, postage stamps, math errors, spelling errors, postmarks, fax number or contact person.
- Geographical patterns, where the same vendors consistently win the same geographical areas.
- Bid rotation patterns, where different vendors win contracts in succeeding years in a predictable order.
- For electronic bid submissions, similarities in documents' metadata, such as the author's name.
- Evidence of haphazard, last-minute changes to bids, such as white-outs, erasures or other physical alterations that might indicate the changes happened during a conversation among bidders (perhaps just moments earlier in a parking lot).
- References to "industry-wide" or "association-set" price schedules and blanket statements such as "all the businesses in this industry charge the same" or "there's no difference in product, and that's why prices are the same."
- Statements that a bid was a "courtesy," "token" or "cover" bid or statements that indicate advance, nonpublic knowledge of a competitor's pricing or the specifics of a competitor's bid.
- A suggestion that the bidder has discussed prices with competitors or that it is the bidder's "turn" to win a bid or contract.
- A reference to "my customer," "my contract" or "my territory" (except when referring to territories established by a distributor).
- Any statements that a company has been meeting with its competitors (whether at a social outing, trade association conference or business meeting) where pricing and contract specifics were discussed.

If you suspect anticompetitive activity, contact the Antitrust Section of the Ohio Attorney General's Office at 614-466-4328 or submit a bid-rigging tip here.

Bid-Rigging the United States' Strategic Petroleum Reserve

In September 2020, Cajan Welding & Rentals LTD., a Louisiana-based company that provides equipment rental and maintenance services, pleaded guilty in federal court to participating in a scheme to undermine the U.S. Department of Energy's procurement process for servicing the Strategic Petroleum Reserve, the nation's emergency supply of crude oil.

According to court documents, from 2002 through 2016, Cajan Welding colluded with co-conspirators to obtain nonpublic pricing and cost information for equipment and services needed to operate the Reserve. Specifically, the co-conspirators provided paper copies or emails containing the nonpublic information to Cajan Welding to use before and during the procurement process. In so doing, Cajan Welding clearly gained an unfair advantage over other vendors.

Cajan Welding was able to reap significant ill-gotten gains from its anticompetitive conduct, namely, over 50 subcontracts and payments of over $15 million from the U.S. Department of Energy. This unscrupulous behavior hurt taxpayers and federal government agencies, depriving them of one of the most important benefits of competition: getting the best possible value for services needed to operate the nation's resources.

Additionally, a co-conspirator, Johnny Guillory Sr., was charged in February for his part in the scheme.

The circumstances surrounding this case serve as a reminder for public purchasers to review bids and watch out for any signs that vendors may be subverting the competitive bidding process.

Moreover, this case is a good illustration of the fact that sometimes one or more participants in a conspiracy are not competitors, but rather third parties who lend a hand to wrongdoers, often in exchange for a cut of the proceeds. Be sure to put safeguards in place so that you have oversight of third parties with access to information that could skew the bid process.

With a few simple steps, you can discourage anticompetitive activity and increase your chances of detecting it if it occurs:

- Keep an up-to-date list of potential bidders and 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.
- Do not reveal the names of prospective bidders or cost estimates before the contract is awarded, unless required to do so by law.

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High Prices – Price-Fixing, Price-Gouging or None of the Above?

In the June 10, 1921, edition of the Holt County (Missouri) Sentinel, a case of price fixing was printed in black and white: At the grain threshers association's annual meeting, participants fixed wheat at 8

cents per bushel and oats at 6 cents per bushel.[1] Evidence like the 100-year-old news article containing this surprising admission is rarely found today as business people are more aware of what behavior is allowed, and not allowed, under antitrust laws.

Price fixing, which is mostly barred by our antitrust laws, is the raising, lowering or stabilizing of prices or competitive terms (such as shipping fees, warranties, discount programs or financing rates) by agreement (written, verbal or inferred from conduct) between competitors. The competitors agree to buy or sell a product, service or commodity at a fixed price or maintain market conditions so that the price persists at a given level by controlling supply or demand.

When the term "laissez faire" is used in reference to the U.S. free-market economy, it usually refers to restricting government intervention in the economy. "Laissez faire" is French for "let do" or "leave us alone." In other words, let the market do its own thing. But government intervention is not the only thing that can derail the workings of a market. Businesses can also do so, such as when competitors agree among themselves to limit supply, manipulate demand or set prices, instead of letting the market "do its own thing."

Price-fixing schemes are usually plotted out in secret and are hard to uncover, but "circumstantial" evidence can point to such agreements. Any pact among competitors to fix prices is almost always illegal, whether prices are fixed at a minimum or within some range. Arguing that the prices were reasonable to consumers or were necessary to avoid cut-throat competition or to stimulate competition is no defense against charges of price fixing.

However, not all similar prices or simultaneous price changes are price fixing. There are situations that are part of normal market workings in which prices may be similar or move similarly. A prime example is gasoline prices.

All sellers' gasoline is essentially the same product with a few formulary variants, meaning consumers can easily substitute one seller's product for another seller's product. The price per gallon is posted by the seller for easy viewing by all, including competitors. Often, when one seller raises or lowers its price and displays that change on its sign, competitors in the area will follow. This does not mean that the sellers have an agreement. If a price is the result of an independent business decision, as opposed to being the product of an agreement, such pricing behavior does not violate antitrust laws.

Furthermore, changes in consumer demand may drive market prices up or down en masse. Sticking with gasoline as an example, as drivers travel for a holiday or in the summer, demand for gas increases and stations can raise prices without negatively affecting how much gas they sell. Even though this price increase happens about the same time among stations, this does not trigger liability under antitrust laws. Remember, however, that if price changes come as the result of an agreement with other gas stations, as opposed to independent business decisions, they violate the law!

Simultaneous supply-and-demand-related changes in the price of necessities — such as gasoline but also food, bottled water and building supplies — also can result from a natural disaster or another disruption in supply chains. But does the fact that economic factors, rather than collusion, sparked price changes mean that no law has been violated? Not necessarily. While it is understandable that prices rise during a time of crisis, under some circumstances, increases can constitute unlawful price gouging.

Price gouging occurs when a seller increases the prices of goods, services or commodities to a level much higher than is considered reasonable or fair. Such sellers take advantage of consumers. While Ohio does not have a statute that deals directly with price gouging, state law bans "unfair,"

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[1] "County Threshers Meet.", *Holt County (MO) Sentinel,* June 10, 1921, page 8, Column 1. Available at https://chroniclingamerica.loc.gov/lccn/sn90061417/1921-06-10/ed-1/seq-8/.

“deceptive” or “unconscionable” sales practices under O.R.C. 1345.02 and 1345.03, both part of Ohio’s Consumer Sales Practices Act.

A sale could be considered “unconscionable” if the business knew at the time that the price was excessively higher than normal or if the business dramatically increased the price of in-stock products solely in response to current events. Examples include the spike in gasoline prices on 9/11 and the exorbitant prices for N95 masks at the start of the COVID-19 pandemic.

Price fixing and price gouging are covered by two different sets of laws and handled by two different sections of the Attorney General’s Office, but they both likely constitute illegal business conduct, whether undertaken by an individual or a company. Ohioans who suspect either of these business practices should contact Ohio Attorney General Dave Yost or call 1-800-282-0515.