

COMPETITION MATTERS

Fostering Fair Play in the Marketplace



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Identify the Purchases Most At Risk for Bid-Rigging

Detecting bid-rigging schemes is no easy feat. It becomes a little bit easier, however, if you know which purchases are the most likely to be the subject of anti-competitive schemes by vendors.

Three factors make a product or service especially vulnerable to bid-rigging:

- **Products that have no readily available substitutes.** When buyers cannot feasibly switch to another product if the price of the current product goes too high, they have no choice but to accept the rigged bid and are far less likely to question the high price.
- **Products that are either homogenous or at least simple or standardized.** If the product offered by every bidder is identical in terms of quality, safety, appearance, effectiveness, and all factors other than price, then the bid-rigging conspirators can steer the contract to the pre-determined winner just by controlling who bids what dollar amount.
- **Products that are offered by a small and stable group of bidders year after year.** If the same few bidders are the only ones submitting a bid each time the purchaser advertises an opportunity, a bid-rigging conspiracy is easy to maintain. A few conspirators can communicate and keep an eye on each other easier than when there are many competitors. Having new sellers appear on the scene on a regular basis is a nightmare for conspirators, since they have to recruit the new players into their scheme each time to keep the conspiracy going.

Two products — school milk and computer software — provide good examples.

On the one hand, school milk has every one of the factors described above. There are no real substitutes for milk in meeting the nutritional needs of the students. Milk is homogenous (pun intended). In other words, every container of 2 percent milk is identical to every other, regardless of the vendor. And finally, the number of dairies large enough to bid on public school milk contracts is relatively finite and changes very little from year to year.

On the other hand, computer software is widely varied, ranging from simple to complex. A vast number of sellers offer it, and many frequently come and go from the market. Purchasers judge the products on far more than price alone. They look at how user-friendly it is, whether additional hardware is needed, how well it interfaces with existing programs, how much technical support is provided, and much more.

While no method of predicting bid-rigging is ever absolute, it is easy to see why it would be easier to conspire on school milk contracts than computer software purchases.

The takeaway? Look at the list of products and services you purchase through competitive bidding and apply this test. You will be able to determine which purchases are most at risk for bid-rigging and keep an extra-watchful eye on those contracts, reducing the likelihood of being harmed by a bid-rigging scheme.

Attorney General's Office Adopts Self-Disclosure Policy

The Ohio Attorney General's Self-Disclosure Policy encourages vendors and others to self-report anticompetitive activities and offers lenient treatment to businesses that come forward to report wrongdoing that may violate antitrust laws.

Under the policy, the Attorney General's Office will not criminally prosecute a business that reports its own antitrust violation, nor will it refer the matter for prosecution by another agency. The Attorney General's Office also will not file a civil lawsuit for damages, penalties, or other remedies unless the business breaches the terms of the policy. In addition, the Attorney General's Office will refrain from seeking to debar or otherwise prevent the company from doing business in Ohio.

To qualify for leniency under the Self-Disclosure Policy, a business must meet several important criteria:

- It must either disclose wrongdoing that the Attorney General's Office did not know about or, if the Attorney General was already aware of the wrongdoing, the entity must be the first violator to come forward and provide information that supports a sustainable conviction or finding of liability that the Attorney General's Office did not have before.
- The self-reporting business must have taken prompt action to stop its own illegal behavior and must fully and candidly disclose all relevant facts to the Attorney General's Office.
- It must agree to cooperate with any further investigation of the matter, especially if the Attorney General's Office is pursuing the company's co-conspirators.
- It must not have been the ring leader of the conspiracy and must not have coerced any other business or individual to participate.
- Importantly, whenever possible the business must make restitution to injured parties, such as public entities that were victims of a bid-rigging or price-fixing conspiracy.

While several federal agencies have similar policies providing lenient treatment for businesses that self-report illegal activity, the Ohio Attorney General's Office Self-Disclosure Policy appears to be the first of its kind among the nation's state attorneys general. The policy also includes provisions covering consumer protection and charitable law violations.

The full text of the [Self-Disclosure Policy](#) appears on the Ohio Attorney General's website.

The Informed Purchaser

From time to time, you may encounter terms or concepts unique to antitrust issues, competition, and schemes to exploit purchasers. Here are a few relevant terms and definitions:

- **Inelastic demand:** This occurs when the need for a good or service does not vary with a change in price. Examples of products with inelastic demand are gasoline, prescription medications, or other necessities.
- **Homogeneous/homogeneity:** These are goods, products, and services that are indistinguishable from the same items offered by a different supplier. Examples include agricultural, energy, and raw materials such as rock salt and metal ores.
- **Market allocation:** This occurs when competitors agree to divide markets between themselves. These markets may be delineated by geographic regions, allocated in ratios, or differentiated by types.
- **Sham bid/complementary bidding:** This is a bid submitted by a competitor in which the amounts are clearly too high for consideration or are riddled with unrealistic special conditions, forcing purchasers to select another bid. Sham bids allow competitors to provide the appearance of a legitimate competitive bid process.

Have You Registered to Become One of our Partners?

Ohio Attorney General Mike DeWine's Partnership for Competitive Purchasing takes a proactive approach to bid-rigging detection. The partnership is a free, voluntary program open to all Ohio public entities — from cities to villages, from universities to state agencies, from public libraries to school districts. Through the program, staff with the Ohio Attorney General's Office search for evidence of bid-rigging and other anti-competitive practices. If such practices are uncovered, they can conduct an investigation of the contractor that may result in the recovery of funds. Registration for the partnership is free and easy. Just visit the [Partnership for Competitive Purchasing](#) page and select "[Enroll in the Partnership for Competitive Purchasing.](#)"

We Welcome Your Questions, Speaker Requests

We encourage you to suggest a topic or ask a question of the legal staff of the Ohio Attorney General's Antitrust Section. Questions will be addressed in future issues of *Competition Matters*. (No individuals' or organizations' names will be published.) Please submit your questions or suggested topics to Karen Pierson at Karen.Pierson@OhioAttorneyGeneral.gov.

If you have an upcoming conference or association meeting and would like a speaker from our office to talk about the Partnership for Competitive Purchasing, bid-rigging detection, or other antitrust issues, contact Karen Pierson at 614-728-2493 or Karen.Pierson@OhioAttorneyGeneral.gov.

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