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COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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Corrupting a Process Designed to Save Taxpayer Dollars: A Case of New York Bid Rigging

Recent articles featured in “Competition Matters” have provided public purchasers with practical guidelines for avoiding common pitfalls that can harm the competitive bidding process. These guidelines have focused on detecting suspicious behavior that may indicate vendor collusion such as market allocation, bid rigging, or price fixing. However, even processes intended to help governmental entities obtain more competitive prices can have the opposite effect if unethical vendors take control. A recent case from New York provides an example of how collusive vendors can subvert a process originally intended to save taxpayer funds. It should serve as a warning to Ohio’s public purchasers.

Recently, many states and municipalities have tried maximizing taxpayer funds through the use of local development corporations or similar (typically nonprofit) entities. In connection with their work on public projects, local development corporations receive tax incentives and have less stringent public bidding requirements in order to minimize costs. Despite the cost-savings potential, vendors can take advantage of these entities if public purchasers do not exercise proper oversight.

In May 2016, a New York court sentenced several defendants on bid-rigging and public corruption charges for misusing local development corporations. The “ringleader” of the bid rigging scheme, Daniel Lynch, was sentenced to prison and ordered to pay \$600,083 in restitution to Monroe County, New York. Lynch had been instrumental in helping the county establish local development corporations to manage two county projects: the overhaul of its emergency communications systems and the replacement of maintenance copiers and telephones. However, instead of using the process to minimize costs, Lynch colluded with several other defendants to steer projects to local development corporations that he created and to *inflate* the county’s costs.

These local development corporations had borrowed millions of dollars to finance the county’s infrastructure projects. While several independent board members were appointed to oversee the two local development corporations, Lynch admitted in his plea bargain that he was able to manipulate the process by illegally diverting work to a company he created and to his former

employer. He also confessed that he inflated contracts and used the proceeds to purchase personal televisions, a home computer, and a home alarm system.

Prosecutors in the New York case acknowledged that a lack of oversight of local development corporations and similar entities has the potential to harm the competitive bidding process.

Ohio public purchasers should conduct due diligence to ensure that vendors are not hijacking otherwise pro-competitive processes by inflating bid prices, submitting sham bids, or creating vendor entities for the purpose of diverting public funds. Public purchasers should review bids closely to determine if vendors are engaging in suspicious activity and to watch for potential red flags of collusion. (See the [“Red Flags of Collusion”](#) series of articles in other editions of “Competition Matters.”)

If you would like to speak with someone from the Antitrust Section of the Ohio Attorney General’s Office about potential anticompetitive activity, please call 614-466-4328.

The Informed Purchaser – “Collusive Bidding”

The above article illustrates how several parties acted together to achieve an unlawful act. This is known as “collusive bidding”, which is a secret agreement among suppliers to control prices when submitting bids in an attempt to win contracts by illegal means or methods.

Collusion is a conspiracy between two or more parties to inhibit fair competition or to defraud competitors. A conspiracy exists when parties have “...a conscious commitment to a common scheme designed to achieve an unlawful objective” *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). Some examples of collusion are sham or complementary bidding (bid rigging), price fixing, and market allocation.

Collusion may be encountered in many different markets in many different ways. And, one type of collusion does not preclude another; in fact, they can often occur together. For example, some conspirators collude to fix prices and allocate markets simultaneously. Collusive behavior is especially possible in markets with few competitors and/or standardized (homogeneous) products.

Envelope Please: Checking Packaging for Signs of Collusion

A best practice that ensures fair and open competition as well as discourages collusion is the use of sealed bids in your purchasing process. It is important to note that the envelopes that house the bid documents are, in many cases, just as important as the bid documents themselves in the detection of collusion among competitors.

It is common for unscrupulous vendors to put a large amount of focus and attention into covering up signs of their collusive agreement within the bid materials that they are submitting; however, even the craftiest colluders often leave clues behind at some point that can aid in the detection of collusive behavior. In many instances, this clue will be left on the envelope or packaging because it is overlooked while focusing on the bid materials.

Some of the first clues that you may encounter are similarities in the appearance of the bid envelopes. These similarities may be found in the style of handwriting, typeface or font, identical spelling errors, white-outs, unusual postage or stamps, or identical postmarks on separately submitted bids. These similarities on two separate envelopes could be a clue that the same individual or company is submitting a sham bid on behalf of another “competitor.”

Other clues that can be found while looking at the envelope are whether or not the envelope has been torn, taped, glued, or stapled in an effort to reseal it. This could be an indication that the envelope or its contents were tampered with before its submission.

None of these clues alone are clear indicators that there is a collusive agreement between competitors, but they do serve as a starting point for paying closer attention to the contents. If something seems odd, make sure you note it in the bid files; keeping an updated and accurate log helps to identify patterns of these types of behaviors or clues.

As a procurement agent, please “handle with care” when receiving, examining, and safeguarding bid envelopes and contents to ensure a fair and legal competitive bid process. If you suspect sham bids are being submitted, contact the Ohio Attorney General’s Office by submitting a tip on the [Antitrust Bid-Rigging Web Tip Form](#), or call us at 614-466-4328.

We’re Looking for Partners to Keep Competition Healthy!

Ohio Attorney General Mike DeWine’s Partnership for Competitive Purchasing takes a proactive approach to bid-rigging detection. Our attorneys and investigators regularly work on issues related to anti-competitive activities, giving them the expertise to help you spot bid-rigging and price-fixing. The partnership offers reviews to analyze bid files for anti-competitive activities and answers your questions or concerns. This is not an audit, but a helpful on-site review to keep competition fair and healthy.

The partnership is a voluntary program open to all Ohio public entities — from cities to villages, from universities to state agencies, from public libraries to school districts. 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](#),” or call us at 614-466-4328.

Need a Speaker?

We have attorneys and investigators available to present your group with a lively presentation that educates participants on the basics of antitrust law, giving real-life examples of vendor misconduct impacting Ohio public purchasers. If you have an upcoming event 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.

We Welcome Your Questions

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.

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