

## DOJ Announces Expanded Procurement Collusion Strike Force to Stop Antitrust Violations in Government Contracting

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Companies that engage in competitive bidding for government contracts should take note: the U.S. Department of Justice has announced the addition of 11 new partner offices to its “Procurement Collusion Strike Force,” bringing the total number of national agencies and offices participating in the interagency partnership to 29.

The DOJ launched the Strike Force one year ago with considerable fanfare. Despite the images that a Strike Force might evoke, the effort does not involve fighter planes and Navy SEALs. But it does involve FBI agents and lots of lawyers. The Strike Force focuses on deterring, detecting, investigating, and prosecuting bid-rigging and other antitrust crimes and related schemes in government procurement. In addition to its enforcement mission, the Strike Force also prioritizes outreach and education both to buyers, including federal, state, and local procurement officials, and to sellers, including government contractors and the trade associations and lawyers that support them.

The Strike Force initially launched with liaisons between the DOJ Antitrust Division and the U.S. Attorneys’ Offices and FBI field offices in 13 federal districts, covering major commercial and governmental centers. Also involved in the Strike Force are Inspectors General from the U.S. Department of Defense, the U.S. Postal Service Office, the General Services Administration, and other federal offices.

The expansion of the Strike Force demonstrates that the DOJ Antitrust Division will continue to prioritize enforcement in government procurement, bringing both criminal charges and civil claims against companies that rig bids for government purchasers. On November 12, 2020, Assistant Attorney General for the Antitrust Division, Makan Delrahim, in a speech given at the ABA Antitrust Section’s Fall Forum, reemphasized this commitment to the enforcement and growth of the Strike Force. Delrahim noted that although the Strike Force was only formed last year, it has already opened more than two dozen grand jury investigations into procurement-related collusion and fraud, ranging from matters of defense and national security to public works projects. Moreover, these investigations are not limited to the districts where the Strike Force has established partnerships with government agencies, but rather are taking place throughout the country. Delrahim also highlighted the establishment of a permanent Director position for the Strike Force, further cementing its position as a key facet of the DOJ’s Antitrust Division going forward.

The DOJ’s focus on antitrust crimes and schemes related to government procurement has likewise been reflected in enforcement actions, going back even prior to the formation of the Strike Force. In recent matters, the DOJ has

used the False Claims Act and Section 4A of the Clayton Act, both of which allow the government to obtain treble damages for certain anticompetitive conduct, to bring parallel civil cases related to criminal antitrust offenses. A notable example of this is the DOJ's recent investigation of five South Korean oil companies, which were charged with bid rigging in the supply of fuel to the U.S. military. Seven individuals were also indicted in connection with the scheme. Rather than submit competitive bids for U.S. military contracts, the DOJ alleged that these oil companies secretly communicated with other large oil refiners to pre-determine the winner for each military contract. They then submitted false and coordinated bids, thereby obtaining higher profit margins on the fuel they supplied to the U.S. military than on the fuel they supplied to South Korean military and private parties. Three of the companies pleaded guilty in November 2018, and two additional companies pleaded guilty in March 2019.

Collectively, the defendant companies had to pay over \$150 million in criminal fines, and they also agreed to civil settlements totaling another \$200 million because the DOJ utilized the enforcement power of section 4A of the Clayton Act. As Delrahim stated, Section 4A is a "powerful yet historically underused enforcement tool that empowers the United States to obtain treble damages for anticompetitive conduct when the government is itself the victim." He added that when "a firm cheats the United States by rigging bids, the Division will insist on robust civil settlements."

On the heels of the successful fuel supply bid-rigging prosecution, the DOJ has continued to investigate and prosecute criminal antitrust violations in federal procurement. Specifically, the Antitrust Division recently secured two plea agreements in an ongoing criminal investigation into bid rigging in online public auctions for surplus government equipment. In a separate ongoing investigation, multiple installation contractors have pleaded guilty to rigging bids for construction projects at government facilities, including public universities, hospitals, and schools.

In sum, bid rigging is a *per se* antitrust violation that carries severe penalties, including criminal fines up to \$100 million for companies, while individuals face up to 10 years in prison and a criminal fine of up to \$1 million. And government contractors engaged in bid rigging could also face debarment from bidding on future contracts. In light of the DOJ's continued focus on enforcement in this arena and its eagerness to seek civil remedies, as well as criminal charges, it is critically important for companies involved in government procurement to evaluate their compliance programs and to ensure proper safeguards are in place to avoid potential bid-rigging claims.

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