

# COMPETITION MATTERS

## Fostering Fair Play in the Marketplace



**August 2013**

### **From the Attorney General: Why Competition Matters**

As public servants, we are called upon every day to do more with less and to get the most value possible for taxpayers' dollars. Competition is one of our most effective tools in achieving these goals.

When a vendor knows its competitors are vying to take on the same project or sell the same product or service to a public entity, it knows it has to bring its best bid to the table or go home empty-handed. The pressure of competition pushes prices down and encourages vendors to keep quality, service, selection, and safety high.

But what happens when a few unscrupulous vendors decide to work together instead of competing? Deals can result, such as a vendor agreeing to give up one region in return for another vendor's pledge not to compete somewhere else. With the pressure of competition gone, both vendors can raise their prices and know they will not be underbid.

This is an example of collusion — a conspiracy or other agreement among vendors that establishes the amounts they will bid, whether they will bid, which vendor will win, or any other aspect of doing business. In a competitive market, vendors should make these decisions independently, without conferring or agreeing with one another.

To help Ohio public officials better recognize collusion and get the best value for the public funds they oversee, we have developed this Competition Matters newsletter, to be published three times a year. It contains information about competitive purchasing and the schemes that threaten to undermine it and provides tips for safeguarding your purchasing process. It also will acquaint you with the tools my office provides to deter, detect, and address anti-competitive practices of which your public entity might be a victim.

Those tools include our new bid-rigging hotline and webpage, through which you can share information — anonymously or not — to make my office aware of suspected collusion. We also offer the Partnership for Competitive Purchasing, a free, voluntary program through which members of my staff trained in bid-rigging detection select a registered entity twice a year for an on-site review of bid records for pre-selected products or services. If we detect evidence that vendors may have colluded, we may open an investigation and possibly recover funds that can be returned to your coffers.

I hope you find this newsletter helpful and pass it along to others in your office. Also, please consider registering for the Partnership for Competitive Purchasing and reporting suspicious activity through our bid-rigging hotline or webpage.

Because, quite simply, competition matters.

Very respectfully yours,



Mike DeWine  
Ohio Attorney General

## **Non-Collusion Affidavits: More Than Just Filler for Your Bid Files**

Non-collusion affidavits serve some very valuable purposes, and as such, should be an integral part of every bid project file.

Non-collusion affidavits are sworn statements executed by vendors along with their bid submissions attesting that the vendor has not colluded with any other vendors in preparing the bid. Conventional wisdom says every vendor responding to a competitive solicitation should complete these documents.

But the natural question is: What unscrupulous vendor would rig bids and then honestly disclose that fact on a non-collusion affidavit? The answer, of course, is none. Still, non-collusion affidavits do have benefits, and they fall into three categories:

### **Education**

Large, sophisticated corporate bidders are usually well-advised and aware of antitrust laws and their impact on the bidding process. Many medium-sized and small businesses are similarly aware that collusion with competitors in the preparation or submission of a bid is illegal. Yet that is not necessarily true for all business enterprises.

The Attorney General's Office regularly encounters small companies and sole proprietors that are genuinely unaware that agreeing with one's competitors on price or any other terms of sale is a violation of state and federal antitrust laws. If reading and signing a non-collusion affidavit informs even one potential bidder that all bids must be made strictly independently, the document has served a valuable purpose. The result will be a better-informed pool of bidders and more successful competitive solicitations.

### **Deterrence**

Some would-be conspirators are more concerned about perjury laws than they are about antitrust laws. Falsification, the making of an intentionally false statement sworn to before a notary public, is a first-degree misdemeanor under Ohio Revised Code Section 2921.13(A)(6). In the final analysis, it makes no difference what deters a potential bid-rigger. The main thing is that he is deterred!

### **Remediation**

Let's say that the non-collusion affidavit failed to educate or deter a particular vendor. A fully executed non-collusion affidavit can be a valuable tool in holding wrongdoers accountable and securing a remedy for the harm they cause. It can be used in criminal prosecution or civil litigation against such a party.

First, a charge of falsification can be effectively combined with charges for violation of antitrust laws to strengthen a criminal case. Second, in the event the just-discovered illegal activity has been occurring for a significant period of time, the Attorney General or other counsel bringing civil antitrust claims may face statute of limitations problems. (Under Ohio law, the statute of limitations for recovery of damages on antitrust claims

is four years.) However, courts often grant relief from the running of a statute of limitations when a party has engaged in fraudulent concealment of its unlawful acts. An intentionally false non-collusion affidavit can be an extremely valuable piece of evidence in establishing fraudulent concealment.

The bottom line is that while requiring non-collusion affidavits may seem like a meaningless act that does nothing more than add to the paperwork or bytes a public entity has to store, nothing could be further from the truth. They serve a variety of functions, all with the end result of making the market more competitive for the benefit of Ohio taxpayers. As such, you should ensure they are a part of every bid package.

**Jennifer L. Pratt, Chief**  
**Ohio Attorney General's Antitrust Section**

## **Attorney General Partners with Public Entities to Catch Unscrupulous Vendors**

Even the most diligent and astute public purchasing official has little chance of detecting bid-rigging and other forms of collusive agreements because perpetrators can be so adept at concealing them. One weapon to make public purchasers less susceptible is Ohio Attorney General Mike DeWine's Partnership for Competitive Purchasing, a voluntary program for which any public entity in Ohio can register.

Under the program, the Attorney General's Office selects two registered entities per year for an on-site analysis of bid records by a team experienced in antitrust law and bid-rigging detection. They generally review five years of bid records for one or more products or services, selected in advance in consultation with the registered entity. If they find indications of collusion on the bids they review, they may take copies of the pertinent bid records for further analysis. If vendor misconduct is indicated, the Attorney General may launch an investigation and possibly litigation against the vendor(s) involved. Such a lawsuit could result in the public entity's recovery of overcharges.

The Attorney General and his staff are keenly aware that your staff's time and resources are stretched thin. Several features of the program are designed to minimize disruption to your operations:

- No registered public entity may be selected for an on-site visit more than once every five years.
- When selected, any registered public entity may defer its selection if an on-site visit would be inconvenient or problematic in any way.
- Both registration and withdrawal from the program are simple and quick via the Attorney General's website.
- The Attorney General's staff will make any photocopies needed, either at your offices or offsite.
- The program is free to participating public entities.

For more information, [view a brochure about the Partnership for Competitive Purchasing](#) or call Robert Morgan at 614-466-4328. Visit [www.OhioAttorneyGeneral.gov/CompetitivePurchasing](http://www.OhioAttorneyGeneral.gov/CompetitivePurchasing) for more details or to register.

## **Legal Corner**

### **Bid-Rigging Scheme Affects Mobile Radio Purchases**

Gatt Communications Inc., a vendor of commercial land mobile radios, has admitted to participating in a bid-rigging scheme that affected New York state and city agencies from 2005 to 2007. Gatt submitted artificially inflated "dummy quotations" to help steer contracts to its co-conspirators when directed to do so by rival and conspirator PMC Associates Inc. When Gatt decided to end its participation in the scheme, its dealer agreement with the manufacturer of the radios (Vertex Standard USA Inc.) was terminated. Gatt sued PMC for

the losses it suffered as a result, but its complaint was thrown out earlier this year on the grounds that, as a competitor, it was not the kind of injured party allowed to recover damages under antitrust laws.

Visit the [U.S. Court of Appeals for the Second Circuit website](#) to view the opinion in Gatt Communications Inc. v. PMC Associates LLC.

### **Insulation Contractor Sentenced for Role in Rigging Bids to Hospitals**

In April, the owner of a Long Island, N.Y., insulation services company was fined \$20,000 and given probation after pleading guilty to conspiring to rig bids and allocate contracts for services provided to New York Presbyterian Hospital and Mount Sinai Medical Center. In cooperating with prosecutors, the contractor provided detailed information about how his co-conspirators conferred to decide who would win particular bids and, in some cases, submitted deliberately high bids on each other's letterhead to create the illusion of competition.

Visit the [U.S. Department of Justice website](#) to view the opinion in U.S. v. Monosis Inc.

### **Cooperative Purchasing Program Benefits Public Entities**

The Ohio Department of Administrative Services' Cooperative Purchasing Program offers Ohio counties, townships, municipalities, school districts, public libraries, regional park districts, and other political subdivisions the benefits and cost-savings of buying goods and services through state contracts. For more information, visit the [Ohio DAS Cooperative Purchasing](#) website, where you can search for [Cooperative Purchasing Program members](#) on county and Ohio Department of Transportation maps.

### **Tips for Preventing Anti-Competitive Activity**

Bid-rigging, price-fixing, and other antitrust violations by unscrupulous vendors can result in significant overcharges to public entities. With a few simple steps, however, you can help discourage anticompetitive activity and increase your chances of detecting it if it occurs:

- 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.
- Do not reveal the names of prospective bidders or cost estimates before the contract is awarded unless required to do so by law.
- Join the Ohio Attorney General's Partnership for Competitive Purchasing and let us know about suspicious activity. Visit the [Attorney General's website](#) to register.

### **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](mailto: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](mailto:Karen.Pierson@OhioAttorneyGeneral.gov).

## **Tailor the Topics and Timing of Our Communications**

You can tailor the topics and timing of email communications from the Ohio Attorney General's Office by visiting [www.OhioAttorneyGeneral.gov/EmailUpdates](http://www.OhioAttorneyGeneral.gov/EmailUpdates). In addition to receiving Competition Matters, you can sign up for other newsletters, learn about careers with the Attorney General's Office, and more. You also can choose the timeframe for delivery — when available, daily, or weekly.