



**MIKE DEWINE**

★ OHIO ATTORNEY GENERAL ★

# COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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## New Feature: *Competition Matters* Red Flag Series

Procurement professionals purchase goods and services based on many factors, including quality, service, and price. Part of the process can involve competitive bidding between vendors for contracts to supply necessary goods or services to the purchasing entity.

Both the vendor and the purchaser should want the competitive process for these contracts to be fair, legal, and honest. While the majority of vendors are fair competitors, price-fixing and bid-rigging schemes can and do happen.

*Competition Matters* will feature a “Red Flag” series of articles in this and future editions of our newsletter with tips for purchasing professionals on spotting possible vendor collusion. We hope this series will help you spot some warning signs, or “red flags,” that might indicate illegal activity.

### Communication or Collusion?

Effective communication between purchasers and bidders during the procurement process is critical to enhancing competition. Moreover, while it is not uncommon for competing bidders to communicate with each other, when their conversations turn into agreements to allocate specific customers, products, or territories among themselves, they can violate antitrust laws.

Words can be key indicators that collusion might be occurring between the competitors. How does one tell when a bidder’s words and statements might be more than a sales pitch? Collusion is a secretive business, and certain statements by bidders for your service or contract may alert you that the words are more than business chitchat.

Here are some red flags:

- References to “industry-wide” or “association set” price schedules
- Statements that indicate advance (non-public) knowledge of a competitor’s pricing or the specifics of a competitor’s bid
- Statements that a bid was a “courtesy,” “token,” or “cover” bid
- A suggestion that the bidder has discussed prices with competitors

- Statements by a bidder that it is their “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)
- 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”
- Any statements that a company has been meeting with its competitors – whether at a social outing, a trade association conference or a business meeting – where pricing and contract specifics were discussed

Common sense and intuition can be your best weapons in detecting collusive activity. Bid rigging occurs when competitors agree on who will submit the winning bid, how much they will bid, or any other terms of the contract.

If you suspect something is not quite right, or there is evidence of bid rigging, please contact the Ohio Attorney General’s Antitrust Section at 614-466-4328, or submit an [Antitrust Bid-Rigging Web Tip](#), which you may provide anonymously.

## The Informed Purchaser: Defining Collusion

Occasionally, you may encounter terms or concepts unique to antitrust issues, competition, and schemes to exploit purchasers. In this installment of “The Informed Purchaser,” we address *collusion*.

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 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.

## Rock Salt Case Settlement Update

Ohio Attorney General Mike DeWine announced that his office is sending checks to 850 Ohio public entities as part of the Attorney General’s \$11.5 million settlement to resolve an antitrust lawsuit against Cargill Inc. and Morton Salt Inc. over past rock salt prices.

Entities in 87 Ohio counties are receiving settlement funds.

“When I announced this settlement in June, I indicated my intention to return a significant portion of the money to local agencies and governments that buy rock salt,” Attorney General DeWine said. “We know these agencies stretch public funds and taxpayer dollars as far as possible, and we hope this money will help them make roads safer for the citizens who depend on them.”

Attorney General DeWine's settlement with Cargill and Morton Salt resolved a 2012 lawsuit accusing the companies of dividing up the Ohio rock salt market and agreeing not to compete with each other for public bids during a period ending in 2010.

Although Morton and Cargill admitted no wrongdoing, they agreed to pay \$11.5 million to resolve the state's case, just before a jury trial was set to begin.

Of the total settlement, about \$6.8 million was available to local governments. Additional payments were allotted to the state's largest single rock salt purchaser — the Ohio Department of Transportation (\$1.7 million), the Ohio Turnpike Commission (\$174,435), and, as required by law, the state's antitrust fund.

Over the summer, the Attorney General's Office encouraged Ohio public entities to submit a claim for a share of the settlement based on the total amount of rock salt they purchased from Cargill and/or Morton between 2008 and 2010, the timeframe for which the state could seek recovery in the case.

The office received eligible claims from 848 Ohio public entities, each of which is receiving a check. Distribution amounts were calculated at a percentage of an entity's total eligible rock salt purchase. To ensure that no entity received a check for just a few dollars, entities were guaranteed at least a minimum distribution of \$500, except for one entity whose total purchase was just \$319.

A list of entities receiving claim checks from the rock salt settlement is available [here](#) (listed by county) and [here](#) (listed by amount).

All public entities in Ohio can receive free help from the Ohio Attorney General's Antitrust Section to detect possible anti-competitive activity. For more information, entities can contact the Ohio Attorney General's Office at [www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov) or 800-282-0515.

## Get Free Help Identifying Collusion

Attorney General 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 for Competitive Purchasing offers reviews to analyze bid files for anti-competitive activities and answers to 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, universities to state agencies, public libraries to school districts.

Registering 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 the Attorney General's Antitrust Section at 614-466-4328.

## Have a Question or Suggestion? Let Us Know!

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).

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