

# COMPETITION MATTERS

## Fostering Fair Play in the Marketplace



**Spring 2014**

### **Bidders and Their Subcontractors: The Importance of Full Disclosure**

Public entities routinely ask bidders to identify their subcontractors. Bidders usually comply. But what is the reason for the requirement? Is the question merely boilerplate or something more? While the identification of subcontractors may serve a variety of purposes, one of the most important relates to the detection of bid-rigging.

Subcontracting is an essential part of many projects that are put out for competitive bid by public entity purchasers. Unscrupulous vendors, however, can utilize otherwise valid subcontracting arrangements as an effective means to short-circuit the competitive process. Take, for example, one common form of bid-rigging that involves some competitors submitting intentionally losing bids, or agreeing not to bid at all, in order to ensure success for a predetermined winner. At first glance, it seems illogical that a company would agree to surrender its chance to win a job so that its rival can prevail. It makes sense, however, when it occurs in conjunction with a bid-rigging agreement.

Winning contractors on rigged bids often reward rival vendors that back off and let them have the business by naming the rivals as subcontractors on the job. With competition suppressed, the successful bidder can extract a higher price from the public entity, and the resulting excess profits can be divided between the winning bidder and its complicit subcontractors. Thus, a subcontract can be a very desirable reward for a cooperative competitor who goes along with the scheme.

So how does the identification of subcontractors in a bid submission aid in the detection of bid-rigging conspiracies? It can provide the procurement official with information that is invaluable for identifying suspicious subcontracting arrangements. For example, a contractor that wins a job every time it is put out for bid and then awards the subcontract to the same losing bidder each time could signify an illegal arrangement between the two. Further, two or more firms that appear to take turns acting as prime contractor versus subcontractor could be doing so as part of an orchestrated bid-rigging scheme.

When subcontractors are identified during the course of the bid process, patterns such as these can much more easily come to light. Having detected such a pattern, the public purchaser can report its suspicions to antitrust enforcers such as the Ohio Attorney General's Office and possibly put a stop to the illegal anticompetitive activity.

Requiring bidders to identify their planned subcontractors and to supplement that information as it changes is an important means of protecting public purchasing dollars from being diverted by illegal bid-rigging schemes. Check to make sure all bidders complete the subcontractor portion of their bid submissions, and insist that the winner update that information as the project progresses. These relatively simple steps can yield big benefits in the future.

To submit a tip or ask a question about bid-rigging or other forms of collusion, call 800-282-0515 or visit the [Antitrust page](#).

## Legal Corner: Ohio Attorney General's Rock Salt Litigation

A brutal winter like the one that has gripped Ohio and much of the nation this year makes cities, counties, townships, and other governmental entities rely even more heavily than usual on their purchases of one particular product: rock salt. Because rock salt is widely accepted as the most cost-effective means of treating icy roads, public purchasers have very little choice when the price goes up but to take money from other parts of their budgets for salt purchases. The fact that it is impractical for buyers to purchase less of a product when the price goes up is one factor that can make the product especially susceptible to bid-rigging and other forms of anticompetitive vendor behavior.

It is that kind of scenario that Ohio Attorney General Mike DeWine described in his complaint against rock salt sellers Morton Salt Inc. and Cargill Inc., filed March 21, 2012, in Tuscarawas County Common Pleas Court. The complaint alleges that Morton and Cargill, operators of the only two Ohio salt mines, conspired to divide up Ohio public entity customers between themselves for more than a decade beginning about 2000. It also alleges the two companies provided sham (purposefully losing) bids on public entity accounts in order to give the appearance they were competing against each other when in reality they had predetermined which company would win which accounts. According to the Attorney General's filing, public entities were overcharged because they had no alternative but to pay the increased prices charged for rock salt as a result of these companies' scheme to refrain from competing against each other.

Defendants Morton and Cargill asked the court in May 2012 to dismiss the Attorney General's conspiracy case against them, but the judge refused. The case is currently set for trial in November.

## News in Brief

### 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 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](#)."

### Prevent Vendor Collusion

Beware of bid-rigging. Know the warning signs. Download a [free poster](#) with information about the Attorney General's bid-rigging hotline and tips on preventing vendor collusion.

### 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).

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