

# COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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OHIO ATTORNEY GENERAL

To submit a tip about bid-rigging or other collusion, call 614-466-4328 or visit [www.OhioAttorneyGeneral.gov/Antitrust](http://www.OhioAttorneyGeneral.gov/Antitrust) for the Antitrust Bid-Rigging Web Tip Form.

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## [When Disaster Strikes – Vendor Misconduct in Times of Crisis](#)

Just a few weeks ago, on a terrifying late May evening, southwest and west central Ohio was ravaged by powerful tornadoes, leaving a path of destruction reminiscent of the devastation suffered by the City of Xenia in 1974. The National Weather Service has classified at least one of the tornadoes that struck that night as an EF-4, the second-highest category on the scale that measures the strength of such storms.

Homes in Dayton, Celina, Trotwood, and other communities were leveled, power lines were downed, and roads were made impassible by debris. Tragically, at least one person was killed and several more were injured by the fierce storms. As the tornadoes left the area, public officials and first responders set to work doing search and rescue, restoring power to city water plants and pump stations, and even using Ohio Department of Transportation snow plows to remove downed trees from Interstate 75.

But disaster recovery takes far longer than just a few hours or days. In the weeks and months following a natural disaster, public officials must address damage to school and university buildings, city offices, and county courthouses. They must replace equipment and vehicles destroyed by the storm. In some cases, very strong tornadoes can even damage sidewalks, parking lots, and other pavement.

It is an unfortunate fact that the public officials facing such a daunting task need to be on heightened alert for anti-competitive behavior by vendors who are intent on taking advantage of the crisis situation. In 2006, for example, a contractor and subcontractor colluded to rig the competitive process in connection with the reconstruction of New Orleans levees that were severely damaged by Hurricane Katrina. The owners of those firms each received prison sentences of five years or more for engaging in the conspiracy.

So, what is there about post-disaster recovery efforts that makes vendor misconduct more likely? There are three main factors.

1. Publicity

The tornadoes that cut a swath through Dayton and surrounding communities last month made news around the world. That kind of publicity can be beneficial, as it often brings with it an outpouring of charitable donations. But it also serves to notify unscrupulous businesses that many federal, state, and local dollars will be flowing into the numerous projects needed in order to make the affected communities whole again. Big dollars mean big incentives to rig bids, allocate markets, and fix prices.

## 2. Vulnerable Products and Services

Some goods and services are more susceptible to anticompetitive vendor activity than others. When an item or a service is relatively homogeneous – *i.e.*, one vendor's product/service is essentially the same as any other's – the deciding factor when awarding the contract is usually price. Unscrupulous vendors can be confident that they can "rig" the bidding process by agreeing among themselves who will submit the "low" price. (The price is not, in reality, low at all in these situations because the lack of competition inflates it.) Services like paving, roofing, and tree removal are examples of purchases that generally fall into this category and call for extra vigilance.

## 3. Public Officials Stretched to Their Limits

A vendor that is unethical enough to game the competitive bidding system is probably also unethical enough to take advantage of the chaos that ensues after a disaster strikes. Knowing that the workloads of school officials, county administrators, and township trustees are now double or triple what they were before the disaster, such vendors are more likely to enact an anticompetitive scheme in the hopes that the public official will simply be far too busy to question unusual bid results.

These words of warning are not meant to send the message that all vendors are dishonest. On the contrary, most are ethical firms that can be valuable partners with community leaders as they work to rebuild what nature destroyed. But when public purchasers are alert to anticompetitive schemes, they can greatly increase the chances that their projects will be awarded to ethical companies and that their taxpayers' dollars will go as far as possible.

## **Contractors Use Advanced Technology to Rig Bids on Contracts**

When it works as it should, competitive bidding is a process where purchasers issue bids to vendors who proceed to assemble the best proposals possible to compete for the opportunity to provide specific products or services. This process is meant to foster a fair and transparent environment for vendors to compete for business, and for purchasers to get the best products or services at the lowest prices. Nevertheless, the competitive bidding process is undermined whenever vendors coordinate with each other to engage in anti-competitive practices such as bid-rigging. Conspirators often use the latest technology to enact and conceal their schemes.

In April, Gary DeVoe, a Connecticut-based branch manager for an insulation contractor, pleaded guilty in federal court for his role in a scheme to rig bids on insulation installation contracts in Connecticut, Massachusetts, and New York. According to court documents, DeVoe and his co-conspirators used disappearing messaging technology to inflate bids on \$45 million worth of projects to install insulation around pipes and ducts in hospitals, universities, and other public facilities and private businesses in those states. DeVoe and his co-conspirators engaged in this anti-competitive scheme at various times from 2011 to 2018. Despite their clever use of

the latest technology, the scheme was uncovered.

The charge DeVoe faces for violating federal antitrust laws carries a maximum penalty of 10 years in prison and a \$1 million fine for individuals.

If you suspect that your purchasing process has been impacted by unscrupulous vendor behavior like this, or have questions about how to recognize anti-competitive activity, please call the Antitrust Section of the Ohio Attorney General's Office at 614-466-4328.

## **Deterring Vendor Schemes Through Antitrust Enforcement**

The Ohio Attorney General's Office works hard to detect bid-rigging, price-fixing, and other anticompetitive acts by vendors. Equally important are our efforts to recover the overcharges that public entities have incurred because of those misdeeds. But there is a third, vitally important motivation behind our enforcement efforts – to discourage vendors from engaging in these illegal acts in the first place.

But how effective is antitrust enforcement at deterring collusive schemes? In the world of academia, "deterrence theory" says that a person's decision to obey or violate the law will be influenced by his or her perception of punishment. Specifically, how severe it will be; how certain it is to happen; and how soon the punishment will come. Criminal justice experts say the system needs to balance all three factors. Put in simple terms: the severity of punishment should match the nature of the crime, the punishment must take place every time a criminal act is committed, and should occur quickly.

Unfortunately, the very nature of antitrust violations and enforcement makes it difficult to balance these factors. The public often struggles to view antitrust violations as serious violations of the law. Further, antitrust violations are inherently difficult to detect, and thus there are no guarantees that every violator will be punished. More often than not, violators have been engaging in this behavior for extended periods of time before they get caught (assuming they ever get caught). Lastly, antitrust violations require tremendous amounts of resources and time to litigate and often end up in multi-year court battles before they are adjudicated.

Nevertheless, recent trends suggest that countries around the world are taking a stricter approach in addressing antitrust violations. Many have in recent years increased the level of fines imposed on companies engaging in antitrust violations. While the U.S. is often seen as the leader in the movement to criminalize antitrust behaviors, it was not until 1974 that Congress upgraded cartel activity to a felony level and increased prison sentences. In its original enactment, cartel activity under the Sherman Act was considered a misdemeanor offense. Additionally, more jurisdictions are criminalizing cartel behavior at the individual level. When faced with the real threat of prison and personal fines, potential perpetrators might think twice before engaging in criminal behavior.

Ohio recently took steps to increase the effectiveness of antitrust enforcement at deterring vendor collusion. Before April 6, 2017, antitrust violations had been treated as first degree misdemeanors under Ohio's antitrust law, the Valentine Act. But on that date, an amendment became effective that broadened the scope of the Act and made its penalties more severe. ORC 1331.99 now classifies a violation of the Act as a fifth degree felony. The penalty is further enhanced to a fourth-degree felony if: (1) the amount of the contract, or sale of goods or services, is \$7,500 or more, (2) the conspiracy relates to the sale of goods or services to or from

a local, state, or federal governmental entity, or (3) the contract or sale of goods or services involves funding to or from a local, state, or federal governmental entity. A fifth degree felony is punishable by a fine of up to \$2,500 and incarceration for a maximum of twelve months. A fourth degree felony is punishable by a fine of up to \$5,000 and incarceration for a maximum of eighteen months.

Hopefully, these revisions will deter anticompetitive behavior that harms Ohio's consumers, especially in taxpayer-funded purchases. And for those vendors that are not deterred, the Attorney General stands ready to pursue the wrongdoers and to return public funds to their rightful place.

## **Spotlight: Meet Robert Yaptangco**

Robert Yaptangco recently joined the Antitrust Section of the Ohio Attorney General's Office as an Assistant Attorney General and began working as a speaker for the Partnership for Competitive Purchasing.

### **Q: How long have you participated in the Partnership for Competitive Purchasing?**

A: I have been a part of the Partnership for Competitive Purchasing since I started with the Antitrust Section of the Ohio Attorney General's Office in September of 2018.

### **Q: How important do you feel the program is and why?**

A: The program is very important. The presentations that my colleagues and I give help our audience understand who we are and what we do; increase awareness of issues related to vendor collusion; and highlight ways to detect anti-competitive practices. More awareness about the red flags of collusion and the role of the Ohio Attorney General's Office in protecting the public from anti-competitive practices may lead to referrals and that can help us save taxpayers money.

### **Q: What is your favorite part of your job?**

A: With the Partnership for Competitive Purchasing, I enjoy giving presentations to purchasers and others throughout Ohio. Moreover, I enjoy working with my colleagues in the Antitrust Section of the Ohio Attorney General's Office. We work hard every day to help taxpayers save money by investigating anti-competitive practices.

### **Q: How can you assist Ohio public purchasers?**

A: I help Ohio public purchasers by participating in the Partnership for Competitive Purchasing where I increase awareness of issues related to vendor collusion and other anti-competitive practices. In addition, I am a contributor to the "Competition Matters" newsletter. If you have any ideas for stories, please let us know! Beth Hubbard, who coordinates the newsletter, can be reached at [Beth.Hubbard@OhioAttorneyGeneral.gov](mailto:Beth.Hubbard@OhioAttorneyGeneral.gov). I can be reached at [Robert.Yaptangco@OhioAttorneyGeneral.gov](mailto:Robert.Yaptangco@OhioAttorneyGeneral.gov).