

# COMPETITION MATTERS

## Fostering Fair Play in the Marketplace



## Winter 2013

### Assignment Clauses: A Few Words That Can Pay Big Dividends

Many of the steps that public purchasers can take to deter vendor collusion, such as making sure bidders submit all required documentation with their bids, can also increase their chances of recovering compensation if bidder collusion does occur and a lawsuit results.

Antitrust litigation against conspiring vendors is often challenging because of the difficulties of proving cleverly concealed acts. But when the antitrust violation is committed by a supplier of the vendor rather than by the vendor itself, the challenge becomes even greater. A simple contractual provision — an assignment clause — may help meet that challenge.

Consider this example. The City of Anytown has new playground equipment installed at its parks by Contractor A. Anytown later finds out that Contractor A's supplier, Supplier X, conspired with its competitor, Supplier Y, to fix and inflate the price of the equipment. Although Contractor A did not engage in any illegal activity, it passed the overcharge on to Anytown when it submitted its bill for the playground equipment. Can Anytown sue the wrongdoers, X and Y, to recover the overcharge? No, not in Ohio.

In 1977, the U.S. Supreme Court ruled in *Illinois Brick Co. v. Illinois* that purchasers cannot sue violators of federal antitrust laws unless they bought the product or service *directly* from the violator. While more than half of the states have expressly rejected *Illinois Brick* through legislation or court decisions, Ohio has not done so. So, are Ohio public purchasers simply out of luck when they are victims of bid-rigging conspiracies involving companies they did not buy from directly? Not necessarily.

An Ohio public purchaser's best chance of recovering compensation when it did not do business directly with the wrongdoer is to step into the shoes of the middleman who has the right to sue. Although not foolproof, one of the purchaser's best tools for obtaining the middleman's right to sue for damages in such situations is the use of assignment clauses in its contracts. Assignment clauses transfer to the purchaser any rights the vendor may have to pursue an antitrust case against the vendor's supplier.

Assignment clauses do not need to be lengthy or complex. For example, one might read: "Contractor assigns to Purchaser any and all of Contractor's state and federal antitrust claims and causes of action that relate to all goods and services provided for in this Agreement."

Vendors are often not as reluctant to give up the right to sue their suppliers as one might expect. Vendors usually value their good relationships with suppliers, and therefore may be just as happy to allow the public purchaser to bring an antitrust lawsuit against the supplier if one is necessary.

The bottom line is that not every vendor will agree to add an assignment clause to its contracts. But making that request as a part of every contract negotiation is a sound contracting practice that can yield substantial benefits for a public purchaser if an antitrust lawsuit becomes necessary in the future.

**Jennifer L. Pratt, Chief  
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## **Public Notice Websites Offer Valuable Services**

Did you know that two websites compile and publish public notices about competitive bidding opportunities and other proceedings in Ohio?

In 2012, the Ohio Department of Administrative Services, Office of Information Technology, in compliance with [Ohio Revised Code Section 7.16](#), created an online system to publish local government public notices and make them searchable by the public at no charge. Ohio Public Notice ([publicnoticeohio.gov](http://publicnoticeohio.gov)) allows state and local government entities in Ohio to post abbreviated versions of public notices at no cost via the Ohio Business Gateway. Since some notices are required to be published multiple times, public entities may realize significant cost savings by using PublicNoticeOhio.gov.

The Ohio Supreme Court has identified about a dozen instances of [statutes that require multiple notices](#). The search function for PublicNoticeOhio.gov allows the user to select notice type, entity type, counties, key words and date ranges. Cities, colleges and universities, county agencies, county elected officials, courts, municipalities, school districts, state agencies, state elected officials, townships, and villages may use the site to post their notices. For information on registering to use the site, visit [www.PublicNoticeOhio.gov](http://www.PublicNoticeOhio.gov).

The Ohio Newspaper Association also has a website — Public Notices Ohio ([publicnoticesohio.com](http://publicnoticesohio.com)) — that offers access not only to competitive bidding-related notices, but to public notices about foreclosures, hearings, financial reports, ordinances, and other government activities. The site collects and displays notices originally published in Ohio newspapers.

Both websites display notices required by law to be published in Ohio and provide an efficient means for members of the public to find notices that may affect them, their community or business, or their local government. In addition, the state site offers public entities a method of posting notices for free, which may reduce costs to government entities when notices are required to be published multiple times.

These websites are valuable resources that provide a wealth of information.

## **Legal Corner**

### **Connecticut AG Files Antitrust Suit Against Snowplow Operators**

In October 2011, a Nor'easter deposited an enormous and crippling snowfall across much of the East Coast. Now, two years later, the Connecticut Attorney General has filed an antitrust lawsuit alleging three snow removal companies engaged in an illegal boycott and bid-rigging conspiracy that caused Southbury, Conn., and its taxpayers to pay too much to make the town's roads safe and passable during that extreme weather event.

The complaint states the three competing snow removal companies —H.I. Stone & Son Inc., S&S Asphalt Paving Inc., and Stone Construction Co. Inc. — had done the town's plowing for a number of years without a

competitive bid process. Shortly before the monster storm hit, the town decided to put the job out for competitive bids. The complaint asserts that the companies reacted to the news by consulting each other and, as the Nor'easter approached, jointly refusing to plow the roads of Southbury unless they got a guaranteed minimum contract that would pay them extra for plowing during the impending storm. In light of public safety concerns, the town acquiesced to their demands.

According to the complaint, when the town later put its 2011–12 plowing contract out for bid, the conspirators continued their pact and refused to compete against each other. The result? The town paid higher prices for essential snow-removal services.

More information appears in [the complaint](#) and a [Connecticut Attorney General news release](#).

## **Attorney General Offers Bid-Rigging Detection Program at No Cost to Ohio Public Entities**

Our first issue of *Competition Matters* in August described Ohio Attorney General Mike DeWine's Partnership for Competitive Purchasing, a program designed to take a proactive approach to bid-rigging detection. The partnership is a voluntary program open to all Ohio public entities — from township governments to state agencies and small school districts to public universities. The Attorney General's Antitrust Section staff periodically select one registered public entity and provide an on-site review of the bid records for one or more products or services purchased by that entity.

The goal is to identify any signs that the entity's vendors may have conspired. If signs of conspiracy are detected, the Attorney General's Office may open an investigation and could recover funds for the public entity to compensate it for paying too much for the goods or services it bought from the conspirators. At the conclusion of the review, the Attorney General's staff also offers helpful tips on ways to safeguard the competitive bidding process even more from unscrupulous vendors.

Many public entities ask how much participating in the program would cost them. The answer is nothing! 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](#).

There is also no charge if your entity is selected for review. The Attorney General's staff makes every effort to make these reviews as unobtrusive as possible. Most reviews last two days or less, and very little of your staff's time will be required throughout the process.

Attorney General DeWine believes the Partnership for Competitive Purchasing is a win-win proposition. By registering, you can help the Attorney General in his mission to seek out and stop vendors who break the law and overcharge the taxpayers of this state. Plus, you learn how to get the most out of your purchasing process with no drain on your budget. Why not sign up today?

## **We Welcome Your Questions, Speaker Requests**

We encourage you to suggest a topic for 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 Pierson at 614-728-2493 or [Karen.Pierson@OhioAttorneyGeneral.gov](mailto:Karen.Pierson@OhioAttorneyGeneral.gov).