

COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



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

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[Online Government Auction Bidder Involved in Bid-Rigging Scheme](#)

In April of 2019, Marshall Holland, the owner of a Texas-based company that buys and sells used computers and computer parts, pleaded guilty in federal court for participating in a scheme to fix bids in online auctions set up and run by the Government Services Administration (“GSA”), the federal agency that manages federal properties and provides support services to federal government agencies.

According to court documents, from about February of 2017 to about May of 2018, Holland and his co-conspirators communicated with each other by phone, text message, and email before and during the online auctions to determine who would compete, refrain from competing, or win certain bids. They divided the winnings amongst themselves afterwards. As a result, Holland and his co-conspirators were able to subvert the competitive bid process and win bids that totaled at least \$67,250.00 without much meaningful competition. This unscrupulous behavior has a negative effect on taxpayers and federal government agencies, depriving them of the benefits of competition such as getting the best possible value for the goods sold at the online auctions.

The circumstances surrounding this case serve as a reminder for public purchasers to review bids and watch out for any signs that vendors may be working together to subvert the competitive bidding process. While online bidding processes can help lower the risk of collusion by keeping bidders from encountering each other (and thus being tempted to collude) when dropping off physical bids, this case shows that bidders who are determined to collude can always find a way. (See previous editions of “Competition Matters” for [10 signs of possible vendor collusion](#), [patterns that can form if vendors collude](#), [physical clues of possible collusion](#), and [other red flags](#)).

If you would like to speak with the Antitrust Section of the Ohio Attorney General’s Office about anticompetitive activity, please call 614-466-4328.

The Intelligence is Artificial, but the Conspiracy is Real

Price-fixing occurs when competing businesses conspire to raise, lower, or maintain the prices of goods or services at certain price points. This practice violates state and federal antitrust laws when the conspirators agree to impede the free market by restricting competition, which reduces the incentive for businesses to lower their prices or improve quality to attract customers. Thus, what often results under the circumstances is that consumers pay higher prices or receive deficient goods or inadequate services.

Antitrust enforcers play an important role in promoting competition so that businesses are motivated to compete for customers by lowering their prices or improving quality. Indeed, antitrust enforcers investigate and litigate anticompetitive practices such as price-fixing on various fronts. That task becomes even more challenging when conspiring businesses use advanced technology to operate and conceal their scheme. One example involves the use of computer algorithms to fix the prices of wall posters sold online.

In January of 2019, Daniel William Aston, a former part owner and director of Trod Limited (doing business as “Buy 4 Less,” “Buy For Less,” and “Buy-For-Less-Online”), pleaded guilty in federal court for fixing the prices of wall posters sold on an online marketplace and was sentenced to serve six months in prison. According to court documents, Aston secretly met with co-conspirators to fix the prices of certain wall posters at agreed-upon price points and used computer algorithms to coordinate any changes in pricing to avoid price competition. This anticompetitive scheme occurred from about September of 2013 to about January of 2014.

Additionally, other co-conspirators were charged, pleaded guilty, and sentenced in federal court for their participation in the above-referenced price-fixing scheme. In 2015, David Topkins, who wrote the computer algorithms used to avoid price competition, pleaded guilty and was sentenced to pay a \$20,000.00 fine. In 2016, Trod Limited pleaded guilty and was sentenced to pay a \$50,000.00 fine.

The use of artificial intelligence in this case reduced the amount of direct communication (i.e., phone calls, emails, etc.) that had to take place among the conspirators. Reduced communication makes detection more difficult, but not impossible. If you suspect unscrupulous behavior like this, or have questions about how to recognize anticompetitive activity, please call the Antitrust Section of the Ohio Attorney General’s Office at 614-466-4328.

Top Ten Things You Might Not be Keeping in Your Bid Files ... But Should

Everyone loves a good Letterman-style “Top 10” list. And while a list focused on what documents you should be retaining in your procurement files after the contract is awarded certainly won’t score high enough on the comedic scale to find its way onto late-night television, it is nevertheless an important tool in achieving one of every public entity’s most important goals – making tax dollars go as far as possible.

The vast majority of public entities retain a core set of materials from each of their competitive selection processes after the contract is awarded – the winning bid, the advertisement, the

engineer's estimate, and the bid tab. But there are additional materials that in a normal, truly competitive, successful solicitation, may seem unnecessary to retain post-award. As such, they are discarded after the solicitation concludes and as soon as the applicable records retention schedule allows in order to conserve physical or digital storage space.

But what if that seemingly normal, competitive solicitation turns out to be just the opposite? The practice of retaining only the bare minimum number of documents in the bid file could significantly hamper the detection and prosecution of vendor collusion.

So, what are the most common (and problematic) omissions from post-award bid files (from the perspective of an antitrust enforcer)? Here's our Top 10:

#10: The planholder list (the list of everyone who picked up a bid packet). Knowing who expressed interest in the project at the outset can not only help establish who might have dropped out for collusive reasons, but can also help you maintain a robust invitation list for the next time the project is up for bid.

#9: A list of all vendors who were invited to bid. Just like the planholders list, the list of firms who were invited to bid on a job – and declined – can be an important starting point for investigators when collusion is suspected.

#8: The sign-in sheet for any pre-bid meeting(s). Again, proof of a prospective bidder's initial interest in a project combined with a failure to bid, while not conclusive, is certainly informative.

#7: The sign-in sheet for any post-award meeting(s). This can be a key piece of evidence in putting together the story of competitors who suddenly switched roles to become prime and sub as a result of an anticompetitive agreement to share the business rather than compete.

#6: All non-collusion affidavits submitted by winning and non-winning bidders. Sworn statements that no collusion has occurred can be valuable evidence that the alleged conspirators in a bid-rigging scheme purposefully and fraudulently concealed their wrongdoing.

#5: The envelopes or other packaging in which physical bids are delivered. Oddly enough, some vendors are careful to cover their collusive tracks in generating the bids themselves, only to make a colossal mistake on the packaging, such as using the same return address or handwriting on envelopes that are supposed to be coming from independent sources.

#4: Supporting memos and other documentation related to awards to non-low bidders. There are often completely valid reasons for awarding contracts to someone other than the low bidder. Such situations, however, are fodder for disgruntled and disappointed bidders to challenge the fairness of the process. Documenting the decision-making process in these cases – and retaining that documentation after the fact – can be a vital weapon with which

to defend your purchasing process from unwarranted (and resource-draining) attacks.

#3: All electronic submissions in their original format – not pdf'd or printed in hard copy. The metadata (the computer-assigned digital attributes) of any electronic document often hold vital clues about who created or modified it, and thus about the bidder's independence.

#2: All bid submissions – not just the winner's. While the winning bid is certainly the single most important piece of documentation in every contract, the losing bids become vital evidence whenever there are allegations that the bid results arose out of collusion rather than competition.

And the number one item you should be sure to keep in your post-award bid files ...

#1: Your notes! Whether these are notes of phone conversations with bidders explaining why they won't be bidding this year, notes of conversations with neighboring municipalities or fellow agencies who have noticed the same odd bidder behavior, or notes of seeing bidders chatting in the parking lot just before dropping off their bids, these post-its or electronic notes to the file can capture pivotal information that might be lost otherwise. The memories of busy people fade quickly, so document and retain all of these details!

[Send Us Your Questions and Ideas](#)

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 by email to Beth Hubbard.