

COMPETITION MATTERS

Fostering Fair Competition in the Marketplace



Summer 2020

[Keeping Bidders Honest at Online Government Auctions](#)

The competitive bidding process is designed to facilitate transparency and accountability in procurement, provide bidders with a fair and equal chance to compete for and potentially be awarded a bid, and allow purchasers to receive the best value and quality for the goods and services that they seek. As such, public purchasers rely on the competitive bidding process to best provide for the communities that they serve and safeguard the taxpayers' money from bad actors or unscrupulous deals.

Recently, more and more public purchasers use e-procurement as the principal means to get goods and services. E-procurement brings the entire procurement process onto a digital platform — allowing for increased transparency, accessibility, efficiency, and cost savings. Another significant benefit that e-procurement programs yield over traditional face-to-face competitive bidding processes is the elimination of the opportunity to collude that bidders receive by being in physical proximity to each other. But are e-procurement programs fool-proof when it comes to stifling collusion? Sadly no. As one recent incident shows, bidders that are intent on engaging in anticompetitive practices such as bid-rigging can find ways to collude even when the bid process is solely electronic.

In February, Alan Gaines, a Missouri-resident, was indicted by a federal grand jury for engaging in a scheme to rig bids issued online by the Government Services Administration (GSA) for surplus government equipment. According to court documents, Gaines and his co-conspirators rigged GSA-issued bids for surplus government equipment from about July 2012 to about May 2018 in an effort to eliminate competition in the market for such items. Specifically, Gaines and his co-conspirators communicated with each other by phone, text message, and email before and during the GSA's online auctions to determine who would compete, refrain from competing, or win certain bids. They divided the winnings amongst themselves afterwards.

Gaines' co-conspirators, Marshall Holland and Igor Yurkovetsky, have pled guilty for their part in the anticompetitive scheme.

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

The Antitrust Section of the Ohio Attorney General's Office will soon begin offering a presentation on the risks and benefits of e-procurement programs from a competition perspective. If your organization is interested in learning more about this presentation or scheduling it for an upcoming meeting or conference, please call Beth Hubbard at 614-466-4328.

The Jungle: COVID-19 Edition

When Upton Sinclair wrote *The Jungle*, he addressed much of the corruption which took place in the meatpacking industry. This then led to federal food safety laws, which were generally effective, but failed to eradicate corruption from the industry. Many say that, thanks to COVID-19, anti-competitive behavior within the meatpacking industry has only been exacerbated. In one particular case, plaintiffs continue struggling to stake a claim against Minnesota cattle ranchers and pork purchasers for violations amidst the economic uncertainty of COVID.

Prior to the pandemic, the defendants were accused of conspiring to decrease production using an industry reporting service, Agri Stats, to exchange non-public information about prices, sales, and demand. However, U.S. District Court Judge John R. Tunheim initially dismissed the case in August 2019 because there was "no smoking gun." The plaintiff failed to provide sufficient evidence that suggested an illegal agreement to restrain trade. While their "plus factors" (potentially collusive use of Agri Stats, inelasticity of pork demand, and common trade associations among defendants) were "undoubtedly strong," the court still ruled that the plaintiff had not implied any anticompetitive conduct.

After amending their complaints, the plaintiff came back with an increased emphasis on Agri Stats as a core conspirator. Not only did defendants use the Agri Stats platform for "increasing profitability – not always increasing the level of production," new evidence also proves the defendants used Agri Stats' benchmark reports to "monitor each other's production and control supply and price in furtherance of their anticompetitive scheme." Normally, this would sufficiently imply collusion; however, the uncertainty of COVID-19 pokes holes into the plaintiff's argument.

Plant closures as a result of COVID have forced many of the defendants to reduce operational capacity, bloating the supply of unsold animals for slaughter and so affecting price levels. Additionally, judicial notice of President Donald Trump's April 28 executive order provides evidence of how susceptible the pork market is to any kind of supply constraints. The order deemed meatpacking plants as essential businesses, because even a single plant closure can disrupt the supply to an entire chain of grocery stores. Thus, it is

harder to distinguish whether movements in supply are an effect of the pandemic or collusion. Furthermore, when it comes to crisis situations like the present one, many argue that coordinated responses may be the only way to maintain the health of an industry. For example, the Justice Department allowed coordinated euthanasia of over 700,000 hogs per week by the National Pork Producers Council, the largest hog farmers association in America. This could be seen as collusion to reduce the supply of live hogs, and yet it was deemed necessary to keep the pork industry afloat. Thus, it becomes clear the difficulty plaintiffs will have using coinciding actions to assert claims of collusion during crises.

The Jungle was authored by guest columnist, Sahithi Thumuluri, a senior at Dublin Jerome High School and a participant in the Ohio Attorney General's Teen Advisory Board.

Knowledge is Power

Knowledge is power. Growing up in a family where education was the “family business”, this has been a guiding principle for me. As a former high school social studies teacher, I tried to instill this idea in all my students.

Since coming to work in the Antitrust Section of the Ohio Attorney General's Office, I have added a corollary to this principle - a knowledgeable consumer is a smart purchaser, both personally and professionally. I do not mean just doing comparison shopping, looking for the best price or doing research to determine the best item to purchase. I would include that understanding more about product markets can help inform your behavior, especially when making a choice which can have long-term impacts. Asking questions about what services are provided for, included in the cost, can help one make an informed choice.

The Christmas before I began working as a paralegal in the Antitrust Section, a family member wanted the “it” item that season. I looked around for the item, checking numerous advertisements. The item was the same price at each store I visited. I purchased the gift and did not think much about it for over a year. Then, we were asked to participate in a multi-state investigation into a possible antitrust violation through an illegal resale price maintenance, exclusive dealing and monopolization scheme orchestrated by the manufacturer and implemented, in whole or in part, through combinations or agreements with others. These allegations had me shaking my head as it explained why I was unable to find the item at an even slightly lower price. The manufacturer eventually settled. I will always wonder if I had been a more informed consumer and reported my experiences to this office, would an investigation have begun and the behavior ended sooner.

I had considered myself an educated consumer. I realized that there were many things I had yet to learn. In my decades of work in the Antitrust Section, I have learned a few things; such as the fees that are imposed on retailers when a consumer uses a credit or debit

card. As such, I try not to use credit cards at “mom and pop” shops. One business I frequent provides a cash discount for their services. I am learning more about purchasing pharmaceutical products and I have found that it is not always cheapest to purchase my medication through my health insurance’s pharmacy benefit management program.

Just as identity thieves no longer go “dumpster diving” to steal information and now use new techniques, such as telephone scams, “phishing” and “clickbait” to capture one’s personal information, so too have business people who try to thwart competition changed their tactics. They no longer meet in smoke-filled boardrooms. Instead, they may have a “friendly” drink after meeting a competitor at a conference or trade show. They may use transient message applications to communicate with their competitors.

Those entrusted by the public to conduct work on their behalf have an important arrow to fight back against unscrupulous businesses’ attempts to stifle competition and obtain work and money to which they are not entitled – knowledge. Specifically, the best shield against unlawful vendor behavior such as predatory pricing, bid-rigging, market allocation, or price fixing is the awareness and understanding of what those tactics are and how to recognize them. The public, whether a private citizen or a public employee, are the “eyes and ears” that help the Antitrust Section of the Ohio Attorney General’s Office do its work because competition matters.

This article was written by Patrice Fatig, a paralegal in the Antitrust Section of the Ohio Attorney General’s Office.