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ATTORNEYS

Purdue Road School:

Antitrust Issues in Road Construction

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Introduction

- Overview of antitrust laws
- Price fixing and other per se violations
- Joint ventures and other collaborations
- Mergers

Sherman Antitrust Act

- Prohibits price fixing and monopolization
- Section 1 prohibits agreements among competitors in restraint of trade or commerce.
- Agreement does not have to be in writing or even expressed.

Acts Forbidden by Sherman Act

Per se illegal conduct

- Price fixing
- Agreements on output
- Bid rigging
- Market division
- Boycotts

Other conduct may be prohibited under the “rule of reason” (e.g., tying arrangements, exclusive dealing arrangements).

Other Antitrust Statutes

- Clayton Act
 - Prohibits certain forms of exclusive dealing, tying arrangements, and price discrimination
 - Regulates mergers and acquisitions
 - Creates a private right of action
- FTC Act
 - Created the Federal Trade Commission
 - Prohibits various forms of unfair competition
- Indiana Antitrust Act

Penalties

- Fines up to \$100 million for corporations and \$1 million for individuals
- Up to 10 years in prison
- Civil damages include treble damages and attorneys' fees

Price Fixing Examples

- Agreement to raise or fix prices
 - Not necessary that conspirators charge same price
- Eliminate or reduce discounts
- Adopt standard formula for computing prices
- Maintain price differentials
- Fix credit terms
- Refuse to advertise prices

Agreements on Output

- Agreements to reduce or to restrict output
- Treated like price fixing

Bid Rigging Examples

- Bid suppression
- Complementary bidding
- Bid rotation
- Bid rigging is often accompanied by subcontracting arrangements.

Market Division Examples

- Customer allocation
- Territory allocation
- Product allocation
- Supplier allocation

Detection and Enforcement

How do government agencies detect price fixing, bid rigging, and other types of collusion?

- Identical prices may indicate a price-fixing conspiracy, especially when:
 - Prices stay identical for a long time;
 - Prices previously differed; or
 - Price increases do not appear to be supported by increased costs.
- Discounts are eliminated, especially in a market where discounts were typical.

Detection and Enforcement

- Bid or price patterns at odds with a competitive market
 - Same company always wins a particular bid.
 - Same suppliers submit bids and each company takes turns being the low bidder.
 - Some bids are much higher than published price lists, previous bids by the same firm, or engineering cost estimates.
 - Fewer companies submit bids.
 - Company bids significantly higher on some bids than others, with no apparent cost difference.

Detection and Enforcement

- Bid or price patterns at odds with a competitive market (continued)
 - Bid prices drop when a new or infrequent bidder submits a bid.
 - Successful bidder subcontracts work to competitors that bid unsuccessfully on the same project.
 - Company withdraws its successful bid and later receives a subcontract from the new winning bidder.

Detection and Enforcement

- Suspicious statements
 - References to industry-wide price schedules
 - References to a competitor's non-public pricing information
 - Statements that a particular bid “belongs” to a certain company
 - Acknowledgments that competitors discussed pricing or have an understanding about prices

Detection and Enforcement

- Suspicious behavior
 - Irregularities or similar handwriting, typeface, or stationery in the proposals or bid forms submitted by different companies
 - Bid or price documents contain white out or other physical alteration indicating last-minute price changes.
 - Bidder requests a bid packet for itself and a competitor or submits its bid as well as competitor's bid.
 - Company brings multiple bids to a bid opening but submits its bid only after determining who else is bidding.

Ready-mix Concrete Case Study

- Price-fixing discussions at trade association meetings
- Criminal investigation, fines, and prison sentences
- Civil lawsuits

Ready-mix Concrete Case Study (cont.)

- Investigation of six ready-mix concrete suppliers in central Indiana
- Investigation began with tip from informant.
- Department of Justice and FBI raided homes and offices on one morning.
- Amnesty program for first cooperator
- Reduced penalties for second cooperator
- Significant penalties for others

Ready-mix Concrete Case Study (cont.)

- Penalties included prison sentences and fines
- Sentences ranged from 5 months to 27 months
- Fines totaled \$35 million, including a single fine of \$29.2 million, a record for domestic antitrust cases
- Class action suit against six suppliers; more than \$50 million paid in settlements

Pro-competitive Collaborations

- Some competitor collaborations benefit competition.
- Collaboration may help companies to:
 - Expand into new markets;
 - Fund research and innovation;
 - Improve quality; and
 - Lower production and other costs.

Areas for Collaboration

- Research and Development
- Production
- Marketing
- Distribution
- Sales
- Purchasing

Rule of Reason

- What is the business purpose of the agreement?
- Has the agreement caused competitive harm?
- Will the agreement create or increase market power?
- If potential for competitive harm exists, is agreement reasonably necessary to achieve pro-competitive benefits?

DOJ Business Review Program

- Department of Justice will give opinion on proposed joint venture or information sharing program.
- Provided guidance to Colorado Asphalt Producers Association concerning R&D joint venture
- Provided guidance to construction associations concerning certification programs

Mergers

- Two or more companies become one company.
- Horizontal merger – the merger of two competitors
- Clayton Act regulates mergers that create or enhance market power.
- Premerger notification required for some transactions.

Mergers

- Market Power – The ability to reduce output and raise prices above the competitive level for a sustained period without losing business
- Product Market – What are the available substitutes?
- Geographic Market – Where do consumers make purchases?

Mergers

- Are there pro-competitive benefits to the merger?
- Is one of the merging companies likely to fail?
- What power do the merging companies' customers possess?

Mergers – Special Issues in Road Construction

- Mergers of aggregate, asphalt concrete, and ready-mix concrete get close scrutiny.
- Lack of functional substitutes for products
- Small geographic markets
- High barriers to entry

Mergers – Special Issues in Road Construction

- *United States v. Martin Marietta Materials*
- Proposed acquisition of American Aggregates Corporation by Martin Marietta Materials
- DOJ challenged the merger, contending it would lessen competition in the sale of aggregate in Marion County, Indiana.
- Settlement agreement permitted merger but required Martin Marietta Materials to sell an aggregate facility.

Mergers – Special Issues in Road Construction

- A Merger Screening System to Monitor Acquisitions Occurring in the Aggregate, Asphalt Concrete, and Concrete Industries
- Template spreadsheets and maps provided by DOJ to state departments of transportation to collect information concerning acquisitions
- INDOT provides this information to the Indiana Attorney General and the DOJ.

Conclusion

- Increased scrutiny – high stakes
- Some activities are per se illegal.
- Some competitor collaborations are pro-competitive, but carefully consider purpose and effect of collaboration.
- Some mergers may be prohibited or limited.

Discussion / Questions

CONTACT INFORMATION

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