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The Procurement Collusion Strike Force: Will DOJ Intrude on the Procurement Process?

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The Department of Justice (DOJ) announced last week that it had established a multi-agency Procurement Collusion Strike Force (PCSF) that would be focused on “detering, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant and program funding.” This new “Strike Force” appears to reflect a shift in the DOJ Antitrust Division’s (Division) enforcement priorities toward companies that collude and conspire in connection with government procurement (and other federally funded) opportunities.

The Strike Force

The PCSF is an interagency partnership consisting of prosecutors from the Division and 13 US Attorneys’ Offices and investigators from the FBI and various Inspector Generals’ (IG) offices. The PCSF has been tasked with detecting, deterring and prosecuting collusion and bid rigging as it relates to government procurements at the federal, state and local levels that involve federal funds (including grants).

In addition to investigating possible antitrust crimes, the PCSF also will conduct training and outreach for procurement officials and government contractors on antitrust risks in the procurement process. Based on the PCSF’s newly launched website, training procurement officials to identify and investigate the “red flags of collusion” would appear to be one of the Strike Force’s key missions. Such training could not only help protect government agencies from collusive bidding but also could serve as a pipeline of new cases for the Division.

In its press release announcing the Strike Force, the DOJ stressed that the Division had a “history of prosecuting criminal antitrust conspiracies” that targeted government contractors, citing its prosecution of several South Korean companies that rigged bids for fuel contracts with the Defense Department that resulted in civil

and criminal penalties in excess of \$350 million. The Division's success in prosecuting these cases would appear to have been one of the drivers behind the PCSF's creation, but other factors would appear to be at work as well, including the absence of significant cartel investigations and prosecutions in recent years. In fact, since the Division completed its sprawling auto parts investigation, its criminal docket has slowed dramatically.

Implications for Government Contractors

The high-profile rollout of the PCSF suggests that the Division intends to refocus its enforcement efforts on government contractors. In light of this scrutiny, firms that do business with federal, state or local agencies should consider a reexamination of their compliance policies and their business practices and rethink their training, as well as scrutinize the process they use in selecting contracting opportunities, whether as a prime contractor, a subcontractor or a supplier. The Division's new policy giving firms with effective compliance programs the opportunity to avoid prosecution for antitrust offenses should incentivize internal review.

Beyond this common-sense proposition, however, many questions remain unanswered. For example, despite the PCFS's high-profile rollout, it appears that the government intends to invest only about \$1 million in new money to support its initiatives. Some might suggest that the lack of new funds evidences a lack of real support for the initiative, but the more likely reality is that the Division has already begun shifting prosecutors away from its traditional (but, of late, quiet) cartel-enforcement initiatives to focus on investigations of government contractors.

Perhaps the most fundamental question, however, is whether the creation of the PCSF signals a substantive change in cartel enforcement. Traditionally, the Division's criminal docket has revolved around "hard-core" cartel conduct, such as bid rigging and collusion. In contrast, the process for obtaining contracts from government agencies, which already is highly regulated, raises more nuanced antitrust questions. While the PCSF's website suggests that its focus will be on hard-core cartel conduct, it is too soon to know whether a heightened focus on government contracting will lead to new or expanded enforcement theories.

For example, the DOJ's announcement is unclear with respect to how the initiative defines "competition" or how it will relate to or be coordinated with the procurement statutes and regulations. Regulations already specifically address anticompetitive processes such as collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems and sharing of the business.

The DOJ announcement is similarly unclear with respect to the relationship between the Strike Force and government buying agencies. Existing procurement laws contain multiple provisions aimed at protecting the competitive procurement process. The Competition in Contracting Act requires “full and open” competition but also spells out permissible exceptions that enable buying agencies to exercise discretion in selecting an appropriate procurement approach, including non-competitive awards.

Despite the competition mandate:

- Congress has permitted various departures from competitive processes, such as limited competition for Indefinite Quantity Indefinite Delivery (IDIQ) contracts (as has been highly visible in the controversy surrounding DoD’s JEDI cloud procurement). Even in the case of a multiple-award IDIQ procurement, competition for orders is limited to contract holders and subject to certain fair opportunity rules;
- The federal government also acquires over \$30 billion in commercial goods and services under the GSA Schedules which, while deemed by statute to be competitive, may limit actual competition for larger orders to three companies already holding Schedule contracts or permit the government to enter into long-term blanket purchase agreements with a limited number of companies;
- Congress also has authorized acquisition of purchases valued under certain thresholds with no competition (and there is a proposal to increase that threshold);
- Recently, Congress authorized the use of “Other Transaction Agreements” (OTAs), which are exempt from the Competition statute and permit collaboration among competitors in consortium-type arrangements; and
- Recent proposals would permit the government to acquire commercial items through an e marketplace in the same manner as private sector individuals.

In sum, Congress has accorded government buyers substantial discretion in determining how to use these various authorities. Presumably, the PCSF will be required to understand the applicable competition requirements and the multiple exceptions.

In addition to these (and more) authorities, current procurement laws contain requirements to protect the integrity of the procurement process. Both the Government Accountability Office and the Court of Federal Claims review procurements actions for compliance with the competition statutes and regulations under proceedings known as bid protests. Statutes and regulations already contain specific procurement integrity requirements, protection against both personal and organizational conflicts of interest, prohibitions on revolving door activities and requirements for ethics programs, as well as mandatory disclosures. Of course, the government maintains the right to suspend or debar any company viewed as lacking integrity.

Companies doing business with government agencies expend substantial resources understanding and complying with the procurement laws and regulations. The DOJ's announcement introduces substantial uncertainty as to the potential reach of the "Strike Force." For example, agencies routinely issue draft solicitations and invite comment and discussion. To what extent will activities such as working with an agency to "shape" an agency's requirements with respect to a technical solution, or the extent to which IP rights must be relinquished in a procurement, be subject to scrutiny? How will the Strike Force view efforts by companies to encourage an agency to use an OTA versus a traditional competitive procurement be viewed? Furthermore, on a daily basis, companies that receive federal funds in the form of contracts and grants negotiate with and collaborate with other entities to complete contracts and other projects. For example, contractors collaborate with other companies in exploring or forming teaming agreements and subcontracting, supplier and other alliances.

The scope of the PCSF's mandate suggests that the government's antitrust enforcement may take a new and more discerning approach to such activities. Do companies need to revise their business processes and compliance programs to address specifically how decisions regarding procurement opportunities and options are made—recognizing the discretion that the government possesses to structure its procurements in ways that, to some, may appear non-competitive?

Conclusion

The creation of the PCSF suggests that the Division and its partners suspect that government contracting may be more rife with abuse than is currently known. It also suggests that the Division (and the IGs) may more directly oversee the procurement processes of agencies in assessing how agencies (and contractors) employ existing competition authorities. Companies that do business with federal, state and local governments would be wise to prepare for more scrutiny, in a greater variety of contexts, than ever before.

