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# Hughes Hubbard & Reed

## DOJ Antitrust Division Focuses on Bid-Rigging by Government Contractors

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**November 8, 2019** – On November 5, 2019, the U.S. Department of Justice, Antitrust Division, announced a new criminal enforcement initiative focused on bid-rigging in government contracts. The Procurement Collusion Strike Force (PCSF) is a joint initiative among the Antitrust Division, the FBI, inspectors general for several Federal agencies—including the Department of Defense, and thirteen U.S. Attorneys’ Offices in major metropolitan areas across the country. In its initial stage, the initiative consists of outreach to PCSF partners and government procurement officials to educate the community on detecting bid-rigging. The intent is to enhance the government’s discovery and criminal prosecution of coordinated procurement fraud, but the initiative may also reveal other civil and criminal violations.

In announcing this initiative, Assistant Attorney General Makan Delrahim noted that over a third of the Antitrust Division’s 100-plus criminal investigations currently open are cases that relate to public procurement or otherwise involve the government being victimized by criminal conduct. Bid-rigging has been the key success story in the government’s recent cartel prosecutions, with the Antitrust Division trumpeting guilty pleas from South Korean oil companies supplying fuel to U.S. military bases in that country. The Antitrust Division’s focus on such cases does not appear to be relenting.

Any government contractor, or bidder for government contracts, whether federal, state, or local, should carefully review its contacts with competitors for any improprieties. The spectrum of potential criminal and civil exposure is broad. The Antitrust Division prosecutes entities that rig bids on government contracts for criminal violations of the antitrust laws, as well as for wire and mail fraud. Under Mr. Delrahim’s leadership, the Antitrust Division has also reinvigorated the use of its authority to obtain treble damages on behalf of the United States; in the South Korean oil supply case, it obtained both criminal fines and record-setting civil recoveries that exceeded the criminal fines. The Antitrust Division has also brought charges under the False Claims Act (“FCA”) against companies—for instance, generic drug suppliers—whose sales to the U.S. government are allegedly tainted by a collusively-set price. Conduct that falls short of the criminal threshold may still expose a contractor to civil

penalties, including treble damages under both the FCA and the antitrust laws. The involvement of the government partners alongside the Antitrust Division will likely broaden the spectrum of charges considered for bid-rigging of government contracts.

Any internal review conducted by a government contractor should be conducted swiftly. The Antitrust Division operates a first-through-the-door [leniency program](#). The first successful whistleblower and its cooperating employees are spared criminal prosecution, but the other cartel members with whom the whistleblower conspired should expect to face a likely prospect of a guilty plea, and in civil litigation, joint and several liability for treble the damages caused by the cartel. Thus time is of the essence in avoiding harsh consequences. Furthermore, the PCSF initiative may also encourage individual whistleblowers to step forward as qui tam relators under the False Claims Act may receive a share of the government's monetary recovery.

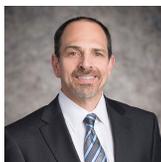
However, the need for effective antitrust corporate [compliance programs](#) is nothing new. And intra-governmental outreach initiatives have been a tool in the Antitrust Division's cartel discovery toolbox for decades. But the Antitrust Division's intent to apply data analytics programs to identify red flags across procurement programs may increase the government's capability to uncover forms of bid-rigging, including bid rotation or bid allocation, that previously may have been less visible. In addition, the PCSF's designation of antitrust attorneys to serve as liaisons to U.S. Attorneys' Offices across the country may help reinvigorate prosecution of regional cartels, whether or not linked to government procurement, which has lagged following the 2012 closure of the Antitrust Division's field offices in Atlanta, Cleveland, Dallas, and Philadelphia.

If you have any questions concerning this advisory, Hughes Hubbard has extensive experience in counseling clients on antitrust compliance issues, internal investigations and leniency applications, as well as in representing clients in False Claims Act matters. We would welcome the opportunity to advise you further.

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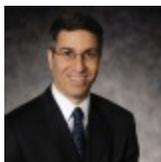
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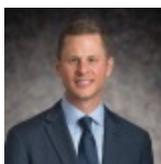
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