

PUBLICATION

DOJ Announces Strikeforce Targeting Antitrust Violations in Government Contracting

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On November 5, 2019, Antitrust Division Assistant Attorney General Makan Delrahim announced the creation of a joint law enforcement task force to combat antitrust crimes and other fraudulent schemes impacting government contracting, grants and other programmatic funding. The formal announcement was presaged by Delrahim in statements to leaders of the ABA Antitrust Law Section in August and recent activity by the division.

The new task force, the Procurement Collusion Strike Force (PCSF), is an interagency partnership comprised of prosecutors from the Antitrust Division, prosecutors from 13 U.S. Attorneys' Offices, and investigators from the FBI and four Offices of Inspector General. Delrahim stated that the goal of the PCSF is "to deter, detect, investigate and prosecute antitrust crimes, and related criminal schemes that undermine the integrity of the government procurement process."

The DOJ announcement explained the need for the task force by citing the scope and scale of government contracting and grant programs and associated Antitrust Division investigations and prosecutions. Last year, approximately 40 percent of all federal discretionary spending – around \$550 billion – was on contracts for goods and services. In addition, the Antitrust Division's current caseload includes a significant number of cases involving government procurement. Delrahim indicated that "more than one third of the Antitrust Division's 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct."

The PCSF has two primary goals: (1) to "deter and prevent antitrust and related crimes on the front end of the procurement process through outreach and training" and (2) "to effectively detect, investigate, and prosecute crimes ... through better coordination and partnership in the law enforcement and inspector general communities." The "related crimes" focus reinforces recent Antitrust Division investigations, prosecutions and settlements of Title 18 and related criminal allegations (e.g., Israeli executive defrauding Foreign Military Financing Program); False Claims Act violations (e.g., SK Energy Co. Ltd. defrauding DOD fuel supply contracts for U.S. military bases in South Korea; Heritage Pharmaceuticals price fixing, bid rigging, customer allocation with generic competitors); and civil recovery of treble damages under Section 4A of the Clayton Act where the government is the victim of collusion.

With regard to deterrence and prevention, the PCSF will conduct outreach and training to those involved in public procurement in order to "prevent criminal activity and to identify crimes when they do occur." The PCSF will offer training to those involved on both sides of the equation: government personnel involved in the procurement process and private sector companies, individuals and organizations involved in selling to the government. With regard to the "buying," or government side, Delrahim indicated that the training and outreach will focus on educating government procurement personnel "on how to identify potential indicators," or red flags, of collusion, and to assist with structuring their acquisition processes to remove vulnerabilities in the first place. On the private sector side, the outreach will focus on government contractors, their trade associations and public contract lawyers with the goal of further educating them "about criminal antitrust violations and associated penalties."

It is the goal of the PCSF that increased awareness will increase competition and prevent illegal behavior. In addition, increased awareness should "facilitate the detection and reporting of suspicious behavior." This is consistent with the current obligation of government procurement personnel under FAR Subpart 3.301(b):

Contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offerors and contractors. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral to-

1. The Attorney General under 3.303; and
2. The agency office responsible for contractor debarment and suspension under subpart 9.4.

One interesting aspect of the announcement is the emphasis placed on the use of data analytics to identify potential red flags. The PCSF is planning to convene data scientists "from across the law enforcement and Inspector General community" in early 2020. This raises an additional challenge for the private sector: How can private organizations use data analytics as part of their compliance programs to identify red flags? The ability to identify and evaluate problems early is a positive feature of any compliance program.

Finally, as one might expect, the DOJ announcement includes a commitment to the investigation and prosecution of potential antitrust related crimes as they are identified.

On the private sector side, strong compliance programs and timely voluntary disclosures remain of utmost importance. For years, the Antitrust Division, in contrast to the Criminal Division, resisted considering and rewarding credit for "robust" compliance programs. On July 11, 2019, Delrahim announced a new credit incentive for corporate compliance programs, thus affecting charging decisions and sentencing recommendations. In particular, companies should focus on antitrust compliance training provided to employees, particularly senior leadership and those involved in business development and contracting. Companies would also be well served to assess:

- the design and implementation of their compliance program;
- the "culture of compliance" within the company (tone at the top and downward);
- the sufficiency of responsibility and resources for antitrust compliance;
- the use of antitrust risk assessment procedures (product line and geographic differences);
- the antitrust compliance training provided to employees (frequency, documentation, testing);
- the use of appropriate monitoring and auditing procedures;
- the sufficiency of processes for reporting antitrust noncompliance up to management and the board, as well as to agency programs and enforcers;
- the compliance incentives and discipline used by the company; and
- the remediation process for antitrust noncompliance.

For more information, please contact any member of Baker Donelson's [Government Enforcement and Investigations Group](#).