



Bulletin

Compliance with Antitrust Laws

All businesses, including ours, should take great care that they maintain strict compliance with all antitrust laws and avoid the perception of violating the antitrust laws. This bulletin provides a brief summary that is intended as a general guide only. Your association cannot and does not render individual legal advice, and suggests that specific questions of law be referred to an individual's or company's legal counsel.

PROVISIONS OF THE ANTITRUST LAWS

The most important federal antitrust statutes relating to the business activities of your company and that of your association are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits a "contract, combination...or conspiracy...in restraint of trade or commerce." This means that agreements between two or more persons or firms that "restrain trade" are illegal. A restraint of trade generally refers to a practice which inhibits free and open competition. The intent of the law is to protect competition as opposed to individual competitors.

The most critical element of competition is price and, accordingly, the antitrust laws are applied most vigorously to

protect price competition. The Sherman Act prohibits any agreement affecting

the price of a product regardless of the purpose of the agreement. For example, if businessmen reach any form of understanding or agreement that affects prices (that is, enter into a price fixing agreement), they cannot attempt to justify the actions by attempting to show some legitimate objective or beneficial result from the agreement. Such agreements are known as per se violations of the Sherman Act. Bid rigging, of course, is a form of price fixing. Other per se violations include group boycotts to pressure suppliers or customers not to deal with the group's competitor and the division of markets or territories among competitors.

Mere attendance at a meeting where businessmen engage in price fixing discussions may imply acquiescence and participation and make a businessman and his company criminally liable, even though he did not actively participate in a resulting price fixing scheme. Only by an affirmative act of withdrawing himself from such a meeting can a non-participant who was present at the conception of a conspiracy avoid liability.

The antitrust laws also prohibit agreements among competitors as to

other terms of sale, such as credit and warranties. In short, each company, in order to comply with the antitrust laws, must make its own decisions regarding prices and other terms of sale; this unilateral decision-making process is at the heart of the competitive process, which the antitrust laws are designed to protect.

Section 5 of the Federal Trade Commission Act prohibits “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” Unlike the Sherman Act, the Federal Trade Commission Act reaches anticompetitive acts committed by individual persons or companies, whether or not there is any agreement or “combination;” but, like the Sherman Act, it also covers joint actions. The FTC is also vested with rule-making powers applicable to entire industries.

In addition to federal laws, most states have adopted antitrust statutes. Therefore, no local business can expect to avoid the antitrust laws by claiming that they do not apply to them.

TOPICS TO AVOID IN DISCUSSION WITH OTHER INDUSTRY MEMBERS

There are topics that a businessman should avoid discussing with another industry member or members to avoid the perception or in fact an actual violation, of the antitrust laws. This applies no matter where the discussions take place (e.g., in an office, at a convention, in correspondence or on the telephone). These topics include but are not limited to:

Prices

- Current or future prices including bids. (The safest policy is to avoid any mention whatever of prices, even of past prices, and

one should tread lightly in this area.)

- What constitutes a “fair” profit level in one’s view.
- Possible increases or decreases in prices on future bids.
- Standardization or stabilization of prices in the region or across the board.
- Pricing procedures, including margins, markups, cost percentages, discounts, or formulas or policies for arriving at prices.
- Avoidance of ruinous competition.
- Credit and warranty terms.

Production, Capacity, and Marketing Plans

- Plans to reduce, increase, or maintain production capabilities.
- Plans to reduce or increase capacity.
- Plans to market products, expand, or contract product lines or enter new markets.

Allocation of Markets

- Dividing up winning bids.
- Dividing up territories.
- Dividing up products or product lines.

Joint Boycott of a Supplier, Subcontractor, or Customer to Pressure a Competitor to Change Prices or Other Policies

- Boycott to pressure discounter into raising prices.
- Boycott to pressure competitor to raise future prices.
- Boycott to pressure competitor to change certain competitive behavior.

PENALTIES FOR VIOLATION OF THE ANTITRUST LAWS

Federal antitrust laws may be enforced against individuals and corporations both by government officials and by private parties through treble damage actions. In both cases, penalties can be severe.

An individual convicted of a criminal violation of the Sherman Act may be fined as much as \$350,000 and imprisoned for up to three years **for each violation**. A corporation convicted of such a criminal offense may be fined up to \$10 million or more in some cases. Both may be subjected to court injunctions severely restricting their activities and to further penalties for violating such injunctions.

Violation of the Federal Trade Commission Act can result in issuance of a cease-and-desist order, which can impose extensive restrictions on the activities of a corporation. Failure to comply with such an order can result in penalties of as much as \$10,000 **per day**.

In addition to governmental prosecution for a criminal or civil violation, the business can face private actions for treble damages by injured competitors, customers or suppliers.

YOUR ASSOCIATION AND THE ANTITRUST LAWS

The provisions of the antitrust laws and the penalties for violation also apply to associations and their members and staffs. A trade association is a group of competitors and thus a “combination” within the meaning of Section 1 of the Sherman Act. Therefore, any antitrust violation that occurs through the association or with the participation of its officers or staff or is somehow facilitated by association activities can also create liability for the association, as well as the participating members.

Strict compliance with the anti-trust laws is, and always has been, the policy of your association. This association exercises extreme care, with the assistance of its legal counsel, to avoid not only a violation but anything that might create a perception of a possible violation. That policy is essential for the protection of its members and for the continuance of its activities for the improvement and promotion of the industry.

This bulletin is not intended to be legal advice. Contractors should seek local counsel for specific information regarding the information found in this bulletin.