*CPI's Cartel Column Presents:*

# U.S. Cartel Investigations: The Next Big Thing?

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By any measure, U.S. criminal antitrust enforcement has been in significant decline over the past three years. Corporate criminal fines have dropped from $3.6 billion in 2015 to $172 million in 2018. The number of criminal antitrust cases also fell substantially – from 66 in 2015 to 28 in 2018.[2] The once-powerful U.S. Corporate Leniency Policy – the greatest tool for the detection and prosecution of cartel behavior in antitrust enforcement history – has resulted in fewer significant cases than in decades past. The reasons for this decline are the significantly increased cost – in time, money, and corporate resources – of obtaining leniency in multiple jurisdictions around the world and the proliferation of damage actions in many countries, as well as concerns with perceived changes in the treatment of executives and other criminal offenses under the U.S. Leniency Policy.[3] The "conspiracy trees" that grew from "Leniency Plus" applications in the auto parts and computer parts cases of the last fifteen years have not yet flowered into new investigations.[4] The "No Poaching" criminal initiative is also in its earliest stages, and the recent deferred prosecution agreement initiative is in its incipiency.

At the same time, the Antitrust Division recently took a dramatic step in reversing its long-held position on the value of antitrust compliance programs. On July 11, 2019, Assistant Attorney General Makan Delrahim announced "A New Model for Incentivizing Antitrust Compliance Programs."[5] This major policy shift opens the way for companies that maintain a robust antitrust compliance program to obtain credit at the charging stage (including the possibility of a deferred prosecution agreement) and at the penalty stage (including sentencing reductions and limits on probation and corporate monitoring). These benefits will be available only if the company complies with the very strict requirements laid out in the Antitrust Division's advisory statement, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations."[6]

In facing the limited output of major criminal antitrust prosecutions and blending in the new compliance incentives, what type of enforcement initiative is likely to be the next big thing? The massive, multi-jurisdictional cartel cases that dominated the headlines for twenty years have fallen off considerably, leaving small local bid rigging cases for opportunistic investigation and prosecution. There is, however, one group of cases on which the spotlight shines brightly. These are the recent international bid rigging cases against South Korean fuel suppliers. Five South Korean oil refiners and logistics companies – SK Energy Co., Inc., GS Caltex Corp., Hanjin Transportation Co. Ltd., Hyundai Oilbank Co., Ltd., and S-Oil Corporation – and seven individuals – engaged in a bid rigging conspiracy from 2005 to 2016 that targeted U.S. Army, Navy, Marine Corps, and Air Force operations in South Korea.[7] The Division's prosecution of South Korean suppliers in November 2018 and March 2019 for bid rigging of fuel to the U.S. military – as well as the related damage actions – Clayton Act Section 4A and False Claims Act – was announced with great enthusiasm in a major policy address by AAG Delrahim.[8] We do not know for certain whether there will be more cases arising out of the *South Korean Fuel* bid rigging – either other corporate defendants or prosecutions of executives – or whether there are more investigations of bid rigging against U.S. government procurement around the world.

U.S. cartel practitioners – and counsel who advise U.S. government contractors around the world – should take notice of these cases and advise their clients of the serious risks of investigation and prosecution. In this regard, the Division's compliance initiative is timely and highly significant. Many of the clients probably have no idea that the United States has jurisdiction over them, nor are they aware that their bidding practices are likely under serious

scrutiny. If violations occurred, these companies face substantial criminal fines, jail sentences for their executives, treble damages for overcharges, False Claims Act damages for attesting to competitive bids, and debarment under the federal procurement regulations.

This article will examine the advantages and incentives to the Antitrust Division devoting time and resources to bid rigging cases against U.S. procurement agencies around the world. Combined with the Division's new compliance initiative, this may well be the next big investigative initiative. This article does not suggest that bid rigging on U.S. government contracts is rampant around the globe; it simply recommends that the investment of resources for a systematic look at these contracts is a prudent and efficient use of corporate resources. The Antitrust Division's announcements on international bid rigging and the new compliance initiative were neither subtle nor muted. Its next announcement is likely to be bigger and louder.

## I. A Short History of Antitrust Division Bid Rigging Prosecutions

The Antitrust Division has an impressive history of detecting and prosecuting bid rigging – targeted at federal, state, and corporate contracts. While the vast majority of Antitrust Division criminal prosecutions are for price fixing and market allocation, the Division has a distinguished record of prosecuting all forms of bid rigging. The *Electrical Equipment Conspiracy* cases of the 1960s began as a series of criminal indictments against the largest electrical equipment manufacturers in the country and their senior executives. Although these actions attacked bid rigging schemes against private companies and electric utilities, the breadth and scope of those cases spawned the private treble damage action movement that is so incredibly important to cartel enforcement today.[9]

A substantial portion of the Antitrust Division's experience with bid rigging prosecutions came in the 1970s and 1980s with well over 100 road building cases in numerous states.[10] In the era before email and computer analysis of bids and bidding practices, Antitrust Division attorneys used grand jury questioning to find patterns of bid rigging, when the bid agreements were finalized during in person meetings the night before the bids. As the bidders' tactics became more sophisticated, the Antitrust Division brought in experienced investigators from the U.S. Department of Transportation, who meticulously reviewed documents relating to the targeted bids, as well as documents about other companies. Their work was very tedious, but the agents developed very creative methods of matching up documents that proved very effective in securing prosecutions and convictions.[11] These cases primarily involved state contracts, not federal, so any follow-on damage actions or settlements were brought by the states.

Bid rigging prosecutions on federal procurement actions are far more limited. Most cases occurred at least twenty years ago. They include a 54-count indictment against major Mississippi River bank stabilization firms for bid rigging to the U.S. Army Corps of Engineers in 1978,[12] a prosecution of bid rigging on Food for Peace orders to the developing world in 1978, and the major prosecution of bid rigging and subcontract splitting on USAID wastewater construction projects in Egypt in 2000 and 2001, which included a major False Claims Act complaint by a whistleblower and a significant settlement.

The *USAID Egypt Wastewater Construction Projects* cases[13] are of particular note because the investigation was conducted at a time when the Antitrust Division was heavily involved in

international cartel investigations, as were the European Commission, its Member States and Asian and Latin American jurisdictions. The investigation targeted several of the major German construction companies that had relationships with U.S. companies. The U.S. companies were the prequalified bidders, but much of the discussion of bidding took place among the German construction companies that would complete the work.[14]

Eighteen years later, the *South Korean Fuel* cases are the logical next step – and perhaps the beginning of the next big Antitrust Division initiative.

## II. The Antitrust Division Has Formidable Resources and Legal Remedies That Provide a Comparative Advantage in Detecting, Prosecuting, and Obtaining Substantial Damages in International Bid Rigging Cases

In the era of international cartel enforcement, it has always been a mystery that the Antitrust Division did not devote more resources to investigate major U.S. government procurement contracting in non-U.S. jurisdictions. Immediately after the first group of *South Korean Fuel* cases were filed, AAG Makan Delrahim delivered a major speech to the ABA Section of Antitrust Law where he described the prosecutions and the civil damage components of the cases. His discussion focused on the opportunity to prosecute criminally and obtain damages under the False Claims Act and Section 4A of the Clayton Act – noting that the United States obtained significantly higher civil damages than criminal fines in these cases.[15] AAG Delrahim's brief is compelling and strongly suggests that the Division plans to allocate significant resources to these international procurement investigations.

This strategy by the Division is based on six areas of comparative advantage for the Division as it embarks on this initiative. Counsel and their clients should carefully consider these six areas of potential impact to the companies and their executives.

### *A. Law Enforcement and Contracting Agencies Have the Technology and the Expertise to Detect Sophisticated Antitrust Violations*

From its earliest bid rigging prosecutions – large and small – the Division has enjoyed the expertise of the contracting agencies to develop compelling evidence. Even before a litigation world dominated by emails and electronic records, agency experts were able to find bidding irregularities and patterns that were the key to many prosecutions, federal and state. In the current world of sophisticated electronic data and artificial intelligence, the detection of bid rigging and market allocation schemes is much better defined. The combined expertise of the Division, the investigative prowess of the Federal Bureau of Investigation, and the industry-specific experience of the procurement agencies is formidable.

At the same time, the alleged bid riggers have become far more sophisticated and often use the same technologies to prevent detection of their bidding schemes. The contracting agencies have sometimes been less than enthusiastic about uncovering illegal activity on their watch. When that happens, other techniques, such as conspiracy screens and whistleblowers, are often available to uncover collusion. These techniques can also be used by the companies as part of an effective compliance program, as recommended expressly in the Division's July 2019 compliance advisory.

### *B. Screens Have Successfully Been Employed to Detect Bid Rigging – In the United States and Around the World*

The use of empirical screens, an econometric tool to flag patterns of conspiratorial behavior in defined markets, has become a reliable means to detect price fixing and bid rigging. Screens are not the complete answer, but they can point the investigator to specific patterns of behavior that then become the focus of the investigation. Screens have been used successfully by enforcement agencies in Chile and Mexico, among others. Canada's new Competition Commissioner has announced that Canada is using screens in its Criminal Intelligence Unit to determine what a competitive bidding market would look like.[16] In the U.S., screens have been successful in flagging collusion in the LIBOR, Foreign Exchange, and other bank rate markets in civil damage cases.[17] While screens can be time and data intensive, costs have come down dramatically in recent years because of the greater availability of data and the use of sophisticated algorithms. It is worth noting that the Division's compliance advisory expressly identified screens as a useful tool in gauging the effectiveness of the company's compliance program.

The Division would not likely use screens in every case, but it is a valuable tool to flag irregularities in particularly tough cases. It is the combination of the strategic use of screens and the investigative techniques described above that will provide the framework for an international bid rigging initiative.

### *C. The False Claims Act Is a Valuable Tool that Provides Incentives to Whistleblowers to Cooperate and Disclose Compelling Information to the United States*

The South Korean fuel sellers were also charged with violating the False Claims Act, a potent civil damage statute that, until these cases, was seldom used in antitrust matters. The False Claims Act provides that any person who knowingly submitted false claims is liable for treble damages plus a penalty of $5,500 to $11,000 for each false claim.[18] In an antitrust case, the false claim is virtually always the certification of independent bidding that the United States requires on every bid. The statute requires that the defendant knowingly submits, or causes another to submit, the false claim. False Claims Act actions are brought by the Civil Division of the Department of Justice, not the Antitrust Division.

The False Claims Act also provides for private persons to file suit for violations of the False Claims Act on behalf of the United States. This suit is known as a *qui tam* action. It is the classic whistleblower action, where the person who brings the suit is known as a "relator." These are cases where the United States will provide incentives and reward whistleblowers with significant payments – the relator can recover between 15 to 25 percent if the government intervenes in the case, and 25 to 35 percent if the United States does not intervene in the action. The False Claims Act settlement in the *South Korean Fuel* cases establishes that there was a whistleblower involved.

The *USAID Egyptian Wastewater Contracts* cases in 2000-2001 also involved a whistleblower – or relator – in a very significant False Claims Act proceeding, including a significant payment to the relator.[19]

### *D. Section 4A of the Clayton Act, a Little-Used Weapon Until Now, May Become the Centerpiece of the Division's Bid Rigging Initiative*

Section 4A of the Clayton Act is a surprisingly underutilized statute. Enacted in 1955 to allow the United States to seek *single* damages when it is injured "by reason of anything forbidden in the antitrust laws,"[20] it was used to recover damages for the United States. Over time, its use became very limited. In 1990, the law was amended to provide a *treble* action remedy for

the United States. While the United States has only invoked the Section 4A treble damage remedy three times since 1990, AAG Delrahim authorized it in the *South Korean Fuel* cases.[21] Noting that the taxpayer deserves a revitalization of Section 4A, he asserted that the Division will aggressively exercise 4A authority to seek compensation for taxpayers when the United States has been the victim of an antitrust violation.[22]

The power of utilizing both Clayton Act and False Claims Act actions is amply demonstrated by the simple fact that the civil settlements in the *South Korean Fuel* cases were considerably higher than the fines in the criminal actions.

***E.*** *Corporate Leniency will be much more Streamlined and Straightforward in Government Procurement Investigations than in International Cartel Investigations*

Much of the concern voiced about the U.S. Corporate Leniency Policy today relates to the high cost of seeking leniency and facing damage actions in multiple jurisdictions around the world. The high cost of reporting conduct to multiple enforcement agencies alone has clearly kept companies from cooperating in the United States. In government procurement cases where the firm allegedly rigged bids to the U.S. federal government (no matter where in the world the bidding took place), the only enforcement and damage actions can be brought by the United States.

That situation changes the dynamic substantially. Defense counsel can give the client a degree of certainty about the scope and cost of the leniency process – it is limited to the U.S. investigation. Applying for leniency does not mean engaging with enforcers or private plaintiffs in Europe or Asia or Latin America.

A further advantage to seeking and obtaining leniency in a government procurement case is that the leniency recipient can likely take advantage of the detrebling provisions of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA").[23] Under ACPERA, if the leniency recipient cooperates with the civil damage plaintiffs, it will be liable for single damages and not be subject to joint and several liability. AAG Delrahim confirmed that the detrebling incentive will apply to any Section 4A claims brought by the United States.[24] As long as the company cooperates with the "civil team" as well as the "criminal team" at DOJ, the company will qualify for ACPERA treatment. This can be a considerable benefit to any leniency recipient.

***F.*** *The Suspension and Debarment Provisions of Federal Procurement Law Are Formidable – and Clearly Encourage Cooperation*

The Federal Procurement Regulations provide that the affected federal agency may suspend and debar government contractors if it is "in the public interest for the Government's protection."[25] Suspension temporarily disqualifies a contractor, often during the investigation and criminal proceedings. It often begins when a criminal case is brought by the Antitrust Division. Debarment disqualifies a company from contracting with the United States for a period of up to three years. Conviction of a criminal violation of the antitrust laws, conspiracy to defraud the United States, mail fraud, wire fraud, or false certifications are all sufficient reasons for debarment.

Suspension and debarment decisions are made by the contracting agencies, not the Antitrust Division. While the Division will often advise the contracting agency of the scope of the contractor's cooperation, the contracting agencies will make the decision on debarment, and they have debarred contractors even where they were not the subject of criminal prosecution.

This suggests that even if a contractor is an Antitrust Division leniency recipient, it could be subject to debarment.[26]

The combined impact of criminal fines, Clayton Act and False Claims Act damages, and debarment should be a formidable deterrent to federal bid rigging. In many respects, debarment is the worst result because of its impact on future revenue and the concern that the contracting agency would not credit cooperation in criminal and civil proceedings in the same way the Division would. The long-term impact of debarment, therefore, should be a significant feature that is explained in each contractor's antitrust compliance program.

## III. How Can U.S. Government Contractors Keep Out of Criminal and Civil Trouble?

The Division's call to action in shaping this bid rigging initiative on government contracting is clear and unambiguous. AAG Delrahim left little doubt that the Division would pursue criminal, civil treble damage, and False Claims actions. When the *South Korean Fuel* actions were announced in November, there was a moderate amount of discussion, and more was added in the March announcements with a clear sense of more to come. Procurement firms and their lawyers should not be lulled into a false sense of security that the curtain has fallen on this initiative. It is just beginning. There will be much more to come.

U.S. government contractors around the world are on notice that the Antitrust Division is looking at them and will bring criminal and civil actions, as well as giving the procurement agencies the opportunity to debar the contractors. Because these bid rigging cases are streamlined and self-contained, the Division has every incentive to pursue them. Because many of these contractors are located around the world, they, in all likelihood, do not believe that the United States can prosecute them. They are wrong, just as the European and Asian companies prosecuted in international cartel cases were wrong in believing that they could not be subject to U.S. criminal jurisdiction during the past twenty years.

Government contractors, especially those outside the U.S., should take the opportunity to establish or renew an effective antitrust compliance program to keep them out of harm's way – or at least to minimize their exposure. The timing could not be better. The Antitrust Division announced its new compliance policy on July 11, 2019 and set out a detailed roadmap for effective compliance programs. With an effective compliance program, a contractor can safeguard itself and its employees from dangerous criminal and civil liability. If, on the other hand, the compliance program detects anticompetitive behavior, the company can take advantage of the incentives available to the first company to report the conduct, or, at least, the benefits of an effective compliance program presented in the Division's new advisory.

Over the past nine months, the Antitrust Division has put the international contracting community on notice that bid rigging will be prosecuted aggressively. At the same time, the Division has explained in detail how to remove – or at least limit – illegal conduct through an effective compliance program. Contractors should take advantage of this opportunity. There may never be a moment like this again.

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[2] U.S. Department of Justice Antitrust Division, Criminal Enforcement Trends Chart, 2019.

[3] Robert B. Bell & Kristin Millay, "The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Egg," *Antitrust Magazine,* Vol.33, No. 1 (Fall, 2018); see also Donald C. Klawiter, "The U.S. Corporate Leniency Policy: It is Time for a Renaissance," *CPI Antitrust Chronicle*, January-Winter 2019, 24.

[4] Tara L. Reinhart, "'Leniency Plus' and its Potential Minuses," *CPI Antitrust Chronicle*, January – Winter 2019, 8.

[5] Assistant Attorney General Makan Delrahim, "Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs," available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0 (July 11,2019).

[6] U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 2019.

[7] Press Release, "More Charges Announced in Ongoing Investigation into Bid Rigging and Fraud Targeting Defense Department Fuel Supply Contracts for U.S. Military Bases in South Korea," available at https://www.justice.gov/opa/pr/more-charges-announced-ongoing-investigation-bid-rigging-and-fraud-targeting-defense (March 20, 2019); Press Release, "Three South Korean Companies Agree to Plead Guilty and Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts," available at https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids (November 14, 2018).

[8] Assistant Attorney General Makan Delrahim, "Remarks at the American Bar Association Antitrust Section Fall Forum," available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust (November 15, 2018).

[9] Charles A. Bane, *The Electrical Equipment Conspiracies,* Federal Legal Publications, 1973. The Antitrust Division brought multiple indictments in over a dozen product areas (e.g., turbine generators, power switchgear assemblies) where the victims ranged from the Tennessee Valley Authority to electric utilities to private companies. The bid rigging scheme was based on a formula based on the "phases of the moon" or the "light of the moon." These cases were the legendary beginnings of the modern class action antitrust treble damage cases, establishing the standard for antitrust damage cases over 60 years.

[10] The Division's roadbuilding investigations started in Illinois in the late 1970s and spread to other states, beginning with Tennessee, Virginia, and most of the South. The spread was caused by contractors doing business in bordering states and cooperating in the second state when they were charged in the first. Bids were usually delivered in person at the state capitols, and the normal procedure was for the bidders to meet the night before and make their deals. For full disclosure, the author was Chief of the Antitrust Division's Dallas Office and supervised major roadbuilding investigations in Texas, Oklahoma, Arkansas, and Louisiana. The information discussed herein is limited to publicly available information.

[11] In the early 1980s, DOT auditors would painstakingly review contractor documents, creating handwritten charts of the contractors' equipment placement and bid movements. This detailed work demonstrated that contractors often knew in advance what jobs they would win by moving their equipment to the job site before the job was bid. Today, econometric screens and sophisticated AI techniques can make these market calculations quickly and efficiently with virtually no data errors.

[12] *U.S. v. Anthony J. Bertucci Co.*, (E.D.La 1978). This was a very aggressive indictment of contractors and their executives involving bidding on U.S. Army Corps of Engineers projects on the Mississippi River. This was a 54-count indictment charging conspiracy to rig bids, mail fraud, wire fraud, and making false statements on bid certifications (18 U.S.C. 1001). The United States brought single damage actions against the company defendants.

[13] *U.S. v. Philipp Holzmann Aktiengesellschaft*, CR-00-N-0285S (N.D.AL August 18, 2000); *U.S. v. Bill Harbert International Construction, Inc.*, CR-01-PT-0302-S (N.D.AL July 25, 2001).

[14] For full disclosure, the author was counsel for Philipp Holzmann AG in the criminal investigation and prosecution and the civil litigation. The information discussed herein is limited to publicly available information.

[15] The potency of the Section 4A and False Claims Act is clearly illustrated in the *South Korean Fuel* cases, where the civil damage settlements ($200 million) were larger than the criminal fines ($150 million). See U.S. Department of Justice Antitrust Division, "Safeguarding Taxpayer Dollars: The Antitrust Division Announces

Criminal Charges and Civil Settlements for Bid Rigging and Fraud Targeting U.S. Military Bases in South Korea, available at https://www.justice.gov/atr/division-operations/division-update-spring-2019/safeguarding-taxpayer-dollars.

[16] Matthew Boswell, Canadian Competition Commissioner, at ABA Section of Antitrust Law Teleseminar, July 10, 2019.

[17] An early example of the pioneering work of Dr. Rosa Abrantes-Metz is found at Rosa Abrantes-Metz & Patrick Bajari, "Screens for Conspiracies and their Multiple Applications," *Antitrust Magazine,* Volume 24, No.1 (Fall 2009). The LIBOR, foreign exchange and other bank rate cases developed from her empirical screen work.

[18] 31 U.S.C. 3729-3733.

[19] *Miller v. Holzmann*, 563 F.Supp. 54 (D.D.C. 2008); *Miller v. Bill Harbert Int'l Constr.,* 608 F.3d 871 (D.C.Cir.2010).

[20] *Supra* note 8.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 48 C.F.R. 9.402(b), et seq. Suspension and debarment procedures are governed by the Federal Acquisition Regulations.

[26] There is one reported Court of Claims case where a contractor was not prosecuted criminally, and argued unsuccessfully that it should not be debarred. *Am. Floor Consultants & Installations, Inc. v. United States,* 70 Fed. Cl. 235 (2006).