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GOVERNMENT CONTRACTS

New Justice Department Initiative Raises Risk Of Prosecution for Government Contractors



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Under President Obama, federal spending has increased to historically unprecedented levels. Newly enacted legislation, most notably the American Recovery and Reinvestment Act of 2009 (Recovery Act),¹ also known as the 2009 “stimulus” bill, promises dramatic growth in government grant and program sponsorship funding. The resulting array of stimulus projects heralds a wide range of new opportu-

¹ Pub. L. No. 111-5, 50 Stat. 664 (codified in scattered sections of the U.S. Code).

nities for suppliers of goods and services to governmental entities at all levels.²

Cognizant that expanded government funding may also create opportunities for collusion and fraud, the Antitrust Division of the Department of Justice announced last May a training and enforcement initiative to protect the integrity of procurement processes and to prosecute collusion and other wrongful conduct.³ DOJ's Antitrust Division has devoted substantial resources to what it calls the Recovery Initiative, both in training procurement personnel at the federal, state, and local level, and in providing investigation and prosecution capability to pursue antitrust and other criminal violations.

The training and enforcement components of the Recovery Initiative complement the Antitrust Division's existing enforcement activities. As a result, while government contractors may enjoy expanded opportunities under the Recovery Act, they also face increased risks of investigation and prosecution, which can result in significant criminal fines, incarceration of executives and employees, and debarment from government contracts with the concomitant loss of a key (and in some cases only) customer.

This article reviews the antitrust "risk environment" for government contractors brought about as ongoing enforcement practices are combined with the enhanced scrutiny of federally funded projects under the relatively new Recovery Initiative. The pertinent statutes and sanctions are summarized, along with the Antitrust Division's enforcement practices and leniency programs, focusing on potential vulnerabilities of government contractors. Finally, specific steps firms should consider in order to reduce legal exposure and improve preparedness in the event of an investigation are recommended.

Recovery Initiative Basics

The Recovery Initiative was announced by Assistant Attorney General Christine A. Varney in May 2009. At the time, a Department of Justice press release described the initiative as intended "to help government agencies insulate procurement, grant and program funding processes from collusion and fraud, as well as to ensure that those who abuse those processes are prosecuted to the fullest extent of the law." The initiative will focus on training procurement officials and investigators to identify bidding patterns and contractor conduct indicative of collusion and fraud, as well as industry characteristics suggesting susceptibility to collusion. As part of the initiative, the Division will also increase its own enforcement against bid rigging and make its personnel available to assist other agencies in investigating and prosecuting bid rigging and related conduct.⁴

² The Recovery Act itself provides \$4 billion in Department of Justice grant funding for a variety of law enforcement projects. See <http://www.justice.gov/recovery>.

³ DOJ press release, *Antitrust Division Announces Initiative to Help Protect Recovery Funds From Fraud, Waste, and Abuse* (May 12, 2009), http://www.justice.gov/atr/public/press_releases/2009/245776.htm.

⁴ *Id.*; Antitrust Division Recovery Initiative, http://www.justice.gov/atr/public/criminal/recovery_initiative.htm; Statement of Scott D. Hammond before the Senate Committee

While it is too early to quantify its effects, the initiative certainly appears to have increased enforcement efforts; its interplay with greater government spending is likely to lead to more investigations and prosecutions of government contractors. The head of Antitrust Division criminal enforcement recently noted that the Division has trained about 20,000 procurement and grant officials and nearly 4,000 agents and auditors as part of the initiative and, while declining to provide much detail, made clear that this training has already paid dividends in the form of increased detection of questionable conduct.⁵

Overview of Relevant Antitrust Statutes

The Antitrust Division is charged with criminal enforcement of the federal antitrust laws. Those laws address a range of topics, but the core statute for criminal enforcement purposes is Section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade.⁶ The investigation of possible "hard core" or "per se" violations of the statute, such as price-fixing, bid rigging, and division of markets, is the Division's principal criminal enforcement mission.⁷

Judicial interpretations of the statute make it clear that any agreement or understanding among competitors that has the purpose or effect of fixing prices, dividing markets, or the like, is *per se* illegal. Agreements to rig bids are a classic example and are frequently the focus of investigations involving government procurement processes, which typically rely on competitive bidding. Moreover, the crucial element of agreement, or understanding, does not require a written contract, a handshake, or even explicit language. Rather, communications among competitors, accompanied or followed by uniform pricing, or a suspect pattern of project awards, can give rise to an inference of agreement. Evidence of this sort is relied on frequently in antitrust cases.

Both companies and individuals can be prosecuted for violating Section 1 of the Sherman Act. Violations are felonies.⁸ As discussed in more detail below, penal-

on Homeland Security and Government Affairs, *Follow the Money: An Update on Stimulus Spending, Transparency and Fraud Prevention* (Sept. 10, 2009), <http://www.justice.gov/atr/public/testimony/250274.htm>. The initiative builds on the National Procurement Fraud Task Force, which was formed in 2006 and includes attorneys and staff from DOJ Criminal, Antitrust, and other divisions, U.S. attorneys, federal inspectors general, and other agencies. See <http://www.justice.gov/criminal/npftf>. The initiative is also a part of the Financial Fraud Enforcement Task Force, which was established in late 2009. See <http://www.stopfraud.gov>.

⁵ Rosalind Donald, *An Interview with Scott Hammond*, GLOBAL COMPETITION REVIEW, May 18, 2010, available at <http://www.globalcompetitionreview.com/news/article/28459>.

⁶ 15 U.S.C. § 1.

⁷ DOJ, *Antitrust Division Manual at I-2 - I-3* (July 2009, 4th ed.), <http://www.justice.gov/atr/public/divisionmanual/index.htm>.

⁸ A variety of other antitrust violations may give rise to criminal prosecutions. Violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (prohibiting monopolization and attempts to monopolize), are also felonies, although not normally the subject of criminal enforcement. See also, e.g., Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13A (prohibiting certain discriminatory conduct for the purpose of destroying competition); the Wilson Tariff Act, 15 U.S.C. § 8 (prohibiting con-

ties for criminal antitrust violations include incarceration of up to 10 years and potentially staggering corporate penalties.

Government Contractors Face Unique Risks of Antitrust Scrutiny

Many government contractors are particularly susceptible to antitrust risk because they operate in an environment in which they are, often at the same time, competitors, customers (as a prime contractor), suppliers (as a subcontractor), and joint venture partners of one another. This means they communicate directly about prices, bidding intentions, and the like, and they do so frequently.

Such communications are very ordinary for firms in customer-supplier relationships, but they are very risky from an antitrust standpoint for firms that are competitors. Communications about price or bidding intentions between competing firms can be viewed as circumstantial evidence the firms had an “understanding” that had the purpose or effect of reducing or eliminating competition. If firms communicate and then take actions consistent with the existence of such an understanding, they have wandered into a high-risk zone whether or not they intended to reduce competition.

In addition, government contractors are routinely required to sign non-collusion affidavits or similar certifications that their conduct in submission of a bid has been in compliance with all applicable laws and regulations. If in fact collusion or fraud has occurred, then companies may be charged not only with antitrust violations but also with fraud or false statements in the submission of a non-collusion affidavit.

Antitrust Enforcement Against Government Contractors

Because of the nature of government procurement processes, Antitrust Division enforcement actions against government contractors generally focus on bid rigging and the Recovery Initiative will likewise focus on this conduct. Bid rigging conspiracies generally fit into familiar patterns. For example, the conspirators may designate which company will win a particular government contract and rotate winning bids among themselves. A number of bid rigging conspiracies have also included payments to losing bidders (“loser’s fees”) either in the form of cash payments or lucrative subcontractor assignments. For instance, one conspirator may agree not to bid, or submit a non-competitive “complementary” bid, on a particular contract in exchange for an agreement that it will be retained by the winning bidder as a subcontractor at inflated prices. A number of bid rigging investigations have also uncovered schemes to bribe government contracting officers. Others have uncovered conspiracies that included kick-back schemes under which, for example, a subcontractor would make payments to a contractor in exchange for a subcontractor assignment at inflated prices.

spiracies in restraint of import trade); and Section 10 of the Clayton Act, 15 U.S.C. § 20 (prohibiting certain transactions with companies involving interlocking directorates). Unlike the Sherman Act provisions, however, violations of these sections are misdemeanors and are rarely, if ever, criminally prosecuted.

In one extensively litigated matter, for example, the government charged several companies and individuals with a conspiracy to rig bids for construction projects in Egypt that were financed by the U.S. Agency for International Development.⁹ The conspirators held secret meetings to designate the winning bidder and set “loser’s fees.” They then added the cost of the loser’s fees to the bid price, saddling USAID with additional costs above the anticompetitive prices set through the bid allocation.

In an ongoing high-profile investigation in the marine hose industry, the Antitrust Division has prosecuted more than a dozen companies and individuals. Among other things, the conspirators allocated market share for marine hoses—flexible rubber hoses used to transfer oil between tankers and storage facilities—and agreed not to compete for one another’s customers. They implemented the conspiracy through secret meetings and other communications, including communications through a “coordinator” who was not an employee of any marine hose manufacturer but was paid by the conspirators to act as a clearinghouse for pricing and other information.¹⁰

The Antitrust Division understands these patterns well and its Recovery Initiative is focused in large part on training contracting officials to identify suspect patterns of conduct and market characteristics. To that end, the Division has developed a brief checklist entitled “Red Flags of Collusion” that has become a cornerstone of its training efforts.¹¹

‘Companion’ and ‘Process’ Crimes

Bid rigging cases often involve charges for “companion” crimes in addition to collusion, and the Recovery Initiative will certainly focus on these as well. It has long been the case that conduct accompanying an antitrust violation may give rise to prosecution for other federal offenses. Consistently over more than three decades, a substantial number of antitrust indictments, particularly in bid rigging cases, have contained counts charging offenses committed in furtherance of an alleged anticompetitive scheme. And on some occasions, the Antitrust Division has prosecuted Title 18 offenses in cases where no criminal antitrust charges are filed.

Charges for companion crimes can be a powerful weapon in the Antitrust Division’s arsenal because these crimes are often easier to prove than collusion and because they give prosecutors added leverage in plea negotiations.¹² Historically, the most common “companion” crimes have included: (1) conspiracy to

⁹ See *United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003).

¹⁰ DOJ press release, *Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products*, at 2-3 (Dec. 10, 2008), http://www.justice.gov/atr/public/press_releases/2008/240307.htm.

¹¹ Red Flags of Collusion, http://www.justice.gov/atr/public/criminal/red_flags_collusion.htm.

¹² As Tom Barnett, when head of DOJ’s Antitrust Division, emphasized: “Antitrust prosecutors should have the power and the inclination to pursue a cartelist for each and every criminal violation, both to vindicate such proscriptions on their own merits and to induce cooperation against other members of the cartel.” Thomas O. Barnett, *Seven Steps to Better Cartel Enforcement* (June 2, 2006).

defraud the United States (18 U.S.C. § 371), which is generally implicated in all bid rigging cases involving federal government contracts; (2) false statements to a government agency (18 U.S.C. § 1001), which is often implicated because government contractors are required to sign affidavits of noncollusion or certificates of independent bid price determination; and (3) mail and wire fraud (18 U.S.C. §§ 1341 & 1343). In addition to these, the Antitrust Division may also bring charges for kickback schemes and bribery offenses, including bribery of foreign government officials under the Foreign Corrupt Practices Act, a variety of tax-related crimes, bank fraud, money laundering, and other offenses.

Criminal antitrust investigations have also given rise to prosecutions for what may be termed “process” crimes. Federal law recognizes as separate crimes various actions undertaken to conceal antitrust violations or to mislead or obstruct their investigation. These include destroying documents relevant to an investigation, making false statements or representations to federal agents, obstructing investigations through bribery or witness tampering, and lying under oath.¹³ Each of these crimes is punishable by imprisonment, the terms of which may exceed those imposed for federal antitrust crimes. The Martha Stewart case provides a prominent example of an investigative process charge, based on misstatements to investigators, being brought as the result of conduct engaged in after an investigation has begun.¹⁴

Consequence of Antitrust Violations In Government Procurement

As noted above, antitrust violations like bid rigging are felonies punishable by significant monetary penalties and imprisonment. Government contractors involved in bid rigging have significant exposure to these penalties as well as the prospect of being debarred or suspended from government contracts, potentially losing what may be their only or primary customer.

Corporations found guilty of criminal antitrust violations face a maximum statutory fine of \$100 million or, in the alternative, twice the pecuniary gain derived from or twice the pecuniary loss caused by the violation.¹⁵ The potential penalties facing individuals are also severe. For individuals convicted of criminal antitrust violations, the maximum personal fine is \$1 million, although in practice—in contrast to the situation with corporations—individual fines tend to be lower, more

often in the five-figure range. The Antitrust Division places greater emphasis on prison terms for executives because it views incarceration as a stronger deterrent, for individuals, than monetary penalties.

In addition to significant fines, companies that engage in bid rigging face debarment and suspension from government contracts. A company may be debarred from federal contracts for a conviction or civil judgment for violations of federal or state antitrust statutes relating to the submission of bids.¹⁶ A company may also be *suspended* from federal contracts during the pendency of an investigation or of legal proceedings if there is *adequate evidence* of such an antitrust violation.¹⁷ Moreover, debarment and suspension are available for conduct that may not violate the antitrust laws but is frequently uncovered during bid rigging investigations, including fraud in connection with obtaining government contracts, bribery, falsification and destruction of records, and tax evasion.¹⁸ A company may also be debarred based on a *preponderance of the evidence* that its principal knowingly failed to disclose to the government “significant overpayments” on a contract, or violations of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations.¹⁹

The more serious concern for individuals is imprisonment. The statute carries a 10-year maximum jail sentence. Here again, sentences approaching the maximum are quite rare, but jail terms imposed in criminal antitrust cases have been ratcheting upward in recent years, and sentences of a year or two are now quite common.²⁰ In fact, the average jail sentence imposed in the Antitrust Division’s criminal matters in 2009 exceeded two years and the Division has recently secured significantly higher sentences in bid rigging cases.

For example, in January 2009, the Division secured a 48-month sentence pursuant to a plea agreement with a former shipping executive, Peter Baci, for his role in a bid-rigging conspiracy involving maritime transport of goods from the continental United States to Puerto Rico. The sentences imposed on Baci’s co-conspirators ranged from 20 to 34 months.²¹ In another recent enforcement matter, although the Division did not bring antitrust charges, it entered into a plea agreement with Christopher Murray, a former Army major, for non-antitrust offenses that ultimately produced a prison term that exceeded those typically imposed in criminal antitrust cases. Murray pleaded guilty for accepting

¹⁶ 48 C.F.R. § 9.406-2(a)(2).

¹⁷ *Id.* § 9.407-2(a)(2).

¹⁸ *Id.* § 9.406-2(a)(1)-(3); § 9.407-2(a)(1)-(3).

¹⁹ *Id.* § 9.406-2(b)(1)(vi).

²⁰ DOJ, Antitrust Division, Division Update Spring 2010, <http://www.justice.gov/atr/public/update/2010/criminal-program.html>. Note that the maximum sentence was increased from three to 10 years in 2004, so that only in the past few years have cases dealing with conduct subject to the 10-year maximum come along.

²¹ DOJ press release, *Four Shipping Executives Agree to Plead Guilty to Conspiracy to Eliminate Competition and Raise Prices for Moving Freight* (Oct. 1, 2008), www.justice.gov/atr/public/press_releases/2008/237849.pdf; Judgment, *United States v. Baci*, No. 3:08-cr-350 (M.D. Fla. Feb. 5, 2009); Judgment, *United States v. Gill*, No. 3:08-cr-351 (M.D. Fla. May 14, 2009); Judgment, *United States v. Glova*, No. 3:08-cr-352 (M.D. Fla. May 13, 2009); Judgment, *United States v. Serra*, No. 3:08-cr-349 (M.D. Fla. May 13, 2009).

¹³ See e.g., 18 U.S.C. §§ 1505, 1510-13, 1519, 1621-23.

¹⁴ *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006).

¹⁵ There have been a number of corporate fines in U.S. criminal antitrust cases that have been greater than \$100 million, with several in the \$300 million-\$500 million range.

The methodology by which DOJ arrives at such staggering numbers in its plea negotiations with corporate defendants bears brief mention. DOJ uses the U.S. Sentencing Guidelines, which are advisory and not binding on federal courts, in calculating proposed fines and sentences. In the case of corporations, the Guidelines contain a presumption that the loss from a criminal antitrust violation is 20 percent of the volume of commerce. U.S. Sentencing Commission, U.S. Sentencing Guidelines § 2R1.1.(d)(1). If the sales of a product allegedly affected by a bid rigging company are substantial, then use of this presumption can give DOJ a very large amount as a starting point in fine negotiations.

bribes to award military contracts to favored contractors and was ultimately sentenced to 57 months imprisonment and three years supervised release.²²

Antitrust Division Investigative Practices

Over the last two decades, the Antitrust Division has been remarkably successful in uncovering and prosecuting bid rigging and other criminal antitrust offenses. This success is attributable both to increasingly aggressive and sophisticated investigative practices and to the Division's unique leniency program, which creates powerful incentives for cartelists to turn in themselves and their co-conspirators.

It is now common for DOJ attorneys and investigators to kick off an investigation by visiting executives of target firms at home, at night, before any notice of the inquiry has been given. These "drop in" interviews raise serious risks, as the consequences of false statements for an individual under investigation can amount to "jumping from the frying pan into the fire." A prominent example of this risk is Martha Stewart, who was convicted not of a securities law violation but of lying to an investigator about what happened.

The Division also works closely with other federal agencies, including the FBI, and has conducted a number of investigations that included sting operations, catching cartelists in the act. A now famous example is the lysine investigation, which served as the inspiration for the recent movie *The Informant*, and included extensive FBI surveillance of actual cartel meetings with the aid of a cooperating witness who participated in those meetings. More recently, as part of the marine hose investigation discussed above, the Division arrested eight foreign executives in Houston and San Francisco following a cartel meeting to rig bids. Because it arrested these executives in the United States, the Division was able to secure significantly higher sentences than it normally does in cases against foreign nationals, including a number of sentences of 20 months or more.²³

Leniency and Self-Reporting Incentives

In addition to employing increasingly sophisticated and aggressive investigative techniques, the Antitrust

²² Plea agreement, *United States v. Murray*, No. 4:09-cr-00001 (M.D. Ga. Jan. 8, 2009); Judgment, *United States v. Murray*, No. 4:09-cr-00001 (M.D. Ga. Dec. 28, 2009).

²³ Foreign nationals located outside the United States can often effectively resist U.S. jurisdiction by avoiding extradition because most other countries do not have criminal laws against price fixing. Interestingly, a number of important jurisdictions criminalize bid rigging, even though they do not criminalize general price fixing or market allocation. This suggests that extradition may become a more powerful DOJ weapon in bid rigging cases in today's global economy where even governments often source products and services from foreign companies. Extradition is also more likely when DOJ brings charges for companion offenses that have counterparts subject to criminal prosecution in other jurisdictions. Moreover, foreign nationals who resist U.S. jurisdiction but travel outside of their home country face some extradition risks because the number of countries that do criminalize antitrust offenses is increasing and the Antitrust Division uses Interpol Red Notices that can bring an individual to the attention of local authorities for potential extradition to the United States.

Division has used its leniency program to significantly increase cartelists' risks of detection and prosecution.²⁴ Under its leniency, or "amnesty," program the Division will give immunity from criminal antitrust prosecution to the first member of a conspiracy to turn itself in if the applicant fulfills certain requirements, including cooperating with the Division in its prosecution of the other cartel participants. The leniency program creates powerful incentives for cartelists and has become the Division's single most powerful weapon in the prosecution of antitrust offenses.²⁵

Leniency may be granted either before or after an investigation has begun, if the conditions enumerated in the policy are satisfied. Basically, a corporate leniency applicant must report its participation in a criminal antitrust violation, providing information not already available to the Antitrust Division. The applicant must also demonstrate that it took prompt and effective action to terminate its illegal conduct²⁶ and that it did not coerce another party to participate in the illegal activity. Moreover, the company must report its illegal conduct in a truthful, candid, and complete manner and provide full and continuing cooperation throughout the government's investigation of its co-conspirators.

Although cooperation is a substantial commitment for a successful amnesty applicant, the benefits are substantial as well. As noted above, the company will receive immunity from prosecution. Often this will save the company millions in corporate fines and likely provide it an advantage in the early settlement of any ensuing civil litigation.²⁷ In addition, its cooperating executives will not be subject to prosecution and imprisonment.

The leniency policy has also been extremely successful in identifying cartel conduct unrelated to that reported by the amnesty applicant. More specifically, companies implicated by an amnesty applicant in a particular violation may still avail themselves of the amnesty program, if they have information on violations in addition to those reported by the initial applicant. Thus, a corporation may seek "Amnesty Plus" when it self-reports and cooperates in a second matter. In this situation, the corporation receives amnesty and pays no fines for participating in the second offense. Additionally, the government will grant a "discount" in its calculations of an appropriate fine for the corporation's participation in the first conspiracy.

In the event that the corporation is aware of a second offense, there may be little choice but to seek "Amnesty

²⁴ Leniency Policy for Individuals (Aug. 10, 1994), <http://www.justice.gov/atr/public/guidelines/0092.htm>; Corporate Leniency Policy (Aug. 10, 1993), <http://www.justice.gov/atr/public/guidelines/0091.htm>.

²⁵ The Division's leniency program has been emulated by dozens of other antitrust enforcement agencies around the world.

²⁶ The one case in which DOJ rescinded an applicant's admission into the leniency program involved an alleged failure to take prompt and effective action to terminate cartel conduct. DOJ then indicted the company, but the indictment was ultimately dismissed after the court held that DOJ had received the benefit of the amnesty bargain by virtue of the company's cooperation. See *United States v. Stolt-Nielsen SA*, No. 2:06-cr-00466 (E.D. Pa. Nov. 29, 2007).

²⁷ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004).

Plus.” If it is later discovered that a corporation participated in a second antitrust offense and did not report it, the government may urge a sentencing court to consider the failure to report as an aggravating factor, will request probation for the corporation pursuant to U.S.S.G. § 8D1.1, and will pursue a fine and imprisonment at the upper end of the guidelines range. Division officials have called this “penalty plus.”²⁸

In addition to the possibility of Amnesty Plus, companies closer to the front of the queue—e.g., “second in” as opposed to “third in”—may, in exchange for cooperation, be able to negotiate lower corporate fines and secure relatively better treatment for their executives in terms of the number of “carve outs” and the sentences demanded of them in plea negotiations.²⁹ These considerations—whether Amnesty Plus is available and whether other favorable treatment is possible—will be on counsel’s mind from the first call in an investigation and must be discussed with the company immediately.³⁰

The Antitrust Division’s leniency policy creates a number of difficult issues for companies considering whether to turn themselves in, some of which are particularly significant for government contractors, and it remains to be seen how important a role it will play in Recovery Initiative investigations. For example, the policy applies only to acts committed “in connection with the anticompetitive activity reported.”³¹ A grant of leniency would protect the applicant from Antitrust Division prosecution of conduct “integral to the commission of the criminal antitrust violations,” which would likely include conduct like mail and wire fraud and some bribery and kickback schemes. It may not, however, extend to other companion crimes like bribery of foreign officials in violation of the FCPA.

Moreover, the grant of amnesty is only binding on the Antitrust Division. As a result, even if the Division determines that companion crimes would fall within the grant of amnesty, DOJ’s Criminal Division or other government agencies could bring charges or file claims against an applicant for those crimes. While the Antitrust Division has noted “there have been no instances where a separate prosecuting agency has elected to prosecute” conduct by a leniency applicant that falls within the grant of amnesty,³² the risk of such prosecution remains and therefore cannot be disregarded.

Finally, for government contractors, the decision whether to seek amnesty is further complicated by the

²⁸ See Scott D. Hammond, *A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, White Collar Crime 2003, 0-1 (2003).

²⁹ See, e.g., Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* (March 29, 2006).

³⁰ As noted above, amnesty is not limited to the United States. Numerous jurisdictions, including the European Union, Canada, Australia, and Japan, all have amnesty programs. While details of the numerous programs vary, they all reward self-reporting of cartel activity with an elimination or reduction in fines. As in the United States, these programs have become central to cartel enforcement in the international community.

³¹ Model Corporate Conditional Leniency Letter (Nov. 19, 2008), <http://www.justice.gov/atr/public/criminal/239524.htm>.

³² Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program (Nov. 19, 2008), <http://www.justice.gov/atr/public/criminal/239583.htm>.

Federal Acquisition Regulations and debarment issues. For example, as noted above, the Federal Acquisition Regulations provide that the failure to report “significant overpayments” on a government contract as well as the failure to report certain crimes often prosecuted as companion offenses in antitrust investigations may result in debarment. At the same time, reporting an antitrust offense and related conduct and obtaining Antitrust Division amnesty does not confer immunity from debarment and suspension from federal contracts. Any federal agency can determine to debar or suspend a contractor and, as discussed above, it may do so in some circumstances in the absence of a conviction. The debarment and suspension risks are particularly significant because debarment or suspension by one federal agency is generally effective throughout the executive branch.³³

In short, there are a number of crosscurrents here not found in more conventional cartel investigations. We believe that, on balance, the Division’s Amnesty Program will increase the risk of detection for conduct that is under Recovery Initiative scrutiny. The possibility of immunity from antitrust prosecution and at least some companion crimes will continue to serve as a powerful incentive to self-report.

Taking Steps for Prevention and Preparation

Stir all of this together and you have a rich brew of risk, one that government contractors and their directors and officers can ignore only at great peril. DOJ prosecutors, investigators, and other enforcers are freshly trained and alert for signs of collusion and fraud on myriad projects funded by the Recovery Act. To reduce the legal risk inherent in this environment, prudent companies and their counsel will consider the points made above, with particular emphasis on the following:

- Compliance programs and instruction are vital, for managers must have a “feel” for risky terrain in their dealings with other firms, and sensitivity to high risk conduct must be ingrained in a company’s culture in order for compliance to be most effective in reducing risk. Window dressing has long since ceased to be enough.

- Companies that are actual or potential competitors must exercise great care in structuring joint bids—as prime contractor and subcontractor or as joint venturers—as well as all related communications. Subcontractors partnering with more than one prime contractor on a single bid must similarly exercise great care and should always consider erecting Chinese walls between teams that partner with competing prime contractors.

- Special attention needs to be paid to the creation of documents, lest cryptic e-mails create appearances that are worse than reality.

- If conduct that appears to violate the law is uncovered, or if an investigation begins, prompt evaluation of the situation is crucial. Immediate action to determine the appropriate strategy is essential, especially given the “first in” rules of amnesty programs in the United States and abroad. There is no substitute for being prepared to act in response to a government inquiry, and having in place compliance programs and the right “culture” can position a firm well in this regard.

³³ 48 C.F.R. §§ 9.406-1(c) & 9.406-1(d).

■ Because of the limits of the Antitrust Division's amnesty program, counsel should also consider seeking non-prosecution or deferred prosecution agreements for non-antitrust offenses from other relevant authorities, such as the Criminal Division.

■ Counsel should also develop a strategy for resolving debarment and suspension issues and should consider self-reporting to the relevant regulatory agency such as the Department of Defense.

■ Antitrust enforcement is not limited to conduct in the United States. Companies with operations abroad must consider the implications of conduct occurring elsewhere both under U.S. law and the laws of other jurisdictions with active enforcement programs.

■ Because the Antitrust Division frequently brings charges for mail and wire fraud and false statements to a government agency, attorneys investigating potential bid rigging conduct must fully understand communications and representations to the government in the course of bidding for government contracts.

■ Once an investigation has started, defense counsel also need to be particularly mindful of the danger that

implicated individuals will attempt to destroy or hide evidence, which can have dire consequences for all concerned. There is a legion of examples of employees destroying documents or hiding documents or computers at their home in order to avoid detection.

■ Counsel must also be on the lookout for attempts to hide a conspiracy through the use of code names, personal e-mail accounts and telephones, and the falsification of travel records and documents.

In short, investment in both robust compliance programs and well-considered contingency plans will almost always pay off in the event of an investigation. A genuinely strong compliance program can be a mitigating factor in charging decisions or in plea negotiations. And, given the "need for speed" when an investigation begins, careful advance planning can enhance a company's ability to deal with the numerous critical actions and decisions that must be engaged immediately following the receipt of a subpoena or the execution of a search warrant.