ANTITRUST FOR PURCHASING PROFESSIONALS
Protecting Competition in Florida
AN ACT

To protect trade and commerce against unlawful restraints and monopolies.

1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2. SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. SEC. 2. Every contract or agreement entered into for the purpose of preventing competition in the sale or purchase...
ANTITRUST LAWS

SHERMAN ACT

Section 1

- Condemns concerted action by two or more persons that unreasonably restrains trade
- Horizontal price fixing
- Horizontal customer and territorial allocations
- Boycotts
- Resale Price Maintenance
- Tying
- Refusals to Deal
- Exclusive Dealing
ANTITRUST LAWS

SHERMAN ACT
Section 2

- Prohibits a firm, acting alone or with others, from monopolizing, attempting to monopolize, or conspiring to monopolize.
ANTITRUST LAWS

CLAYTON ACT

• Prohibits mergers, acquisitions of stock assets, and the formation of joint ventures where the effect of the proposed transaction would substantially lessen competition or create a monopoly.

• Governs exclusive dealings and tying arrangements and corporate interlocks at the director and officer levels.

• Contains enforcement provisions, including Attorney General authority to bring antitrust actions under Federal antitrust laws.
DIFFERENT ENFORCEMENT PERSPECTIVES

US DOJ
Criminal Actions
Collects Fines
Jail Time

FLORIDA AG
Civil Actions
Collects Damages
Penalties
$$Public Entities
$$$
FL General Revenue
"How do you feel about doing time?"
SUCCESSFUL
PROSECUTIONS CAN RESULT IN AWARDS OF TREBLE DAMAGES, ATTORNEYS FEES, AND COSTS OF LITIGATION.
LCDs Total Settlement ~ $1.1 Billion
FL Civil Penalties = $14.7 Million
DRAM Settlement
$310 Million
AIRLINES $40 Million
FL Share = $4 M
DAIRY
$33.06 Million
INFANT FORMULA
$13.0 million
DREDGING
$4.49 Million
CL₂: $800,000
COMMERCIAL
TISSUE
$3.0 Million
CARDIZEM

$1.98 million Consumer

$11,350 General Revenue
CO₂

$1.16 Million Recovered
FLORIDA ANTITRUST LAW

Passed in 1915

Florida’s Reform Act (Florida Statute 542 et seq.) enacted in 1980. Closely tracks its Federal counterpart.

Under this act, the Attorney General uses its subpoena power to investigate anticompetitive and collusive conduct.

The Attorney General represents Florida public entities in antitrust cases.
ELEMENTS OF ANTITRUST CIVIL OFFENSES

Agreements between 2 or More Competitors to Restrain Trade Unreasonably

In or Affecting Interstate or Intrastate Commerce
STATUTE OF LIMITATIONS
4 YEARS

- This is for beating me up back in high school.
- Well this statute says it's a little too late!
WHAT IS THE PURCHASE AGENT's ROLE in ANTITRUST ENFORCEMENT?

YOU ARE THE FRONT-LINE DEFENSE!

Purchasing Agents = The front-line defense against bid rigging

YOU ARE THE FRONT-LINE DEFENSE!
What is the role of a Purchasing Agent in Antitrust Enforcement?
Those with long experience in a particular area of purchasing often develop hunches about suspicious patterns of bidding.
Comparing actual bids to what your experience tells you should be the theoretical norm. This enables astute purchasing agents to conclude something is amiss.
ATTORNEY GENERAL’s ROLE

While you are the market experts, you often do not have the time, tools or complete information to analyze markets.
STOP PRICE FIXING

Our office can fill that void by devoting time and attention to market analysis.
TOGETHER
The FL AG legal staff and economists can work with purchasing agents to detect and halt collusion.
The key to analyzing bids is the ability to examine patterns over a period of many cycles or years, and often over a large geographic area.
Mead Johnson, Ross, & Wyeth
Wholesale Truckload Prices
13 oz Concentrate

YEAR

PRICE
0.00 0.20 0.40 0.60 0.80 1.00 1.20 1.40 1.60 1.80 2.00

Ross's Distributed Cost

WIC Net Price
General points to keep in mind as you go about your daily duties.
How Can You Help Us?

Respond timely to requests for information from our office.
Retain Purchasing Records.
&
Do not destroy electronic data.
Maintain correspondence of all communications with vendors.
Take seriously any idle rumors or comments indicating collusion. Notify our office.
“Remember, it’s not a lie if it makes us money.”
Procurement professionals know the value of purchases. Examine bids in relation to independent estimates of projects costs. Gather information. Consult with colleagues.
Get as many bidders as possible.
Examine the bids in relation to each other.
More than 95% of collusively bid highway contracts had only one bidder.
WHAT TO WATCH FOR

Geographically close bidders who lose or barely beat far away incumbents.
Be wary of bidders who wait to the last minute to submit their bids and exhibit interest in whether non-local or occasional bidders are present.
LOOK FOR

**Identical Bids:**
To determine possible signs of anti-competition or collusion, ask:
How often? Who? How likely? How do you decide?
Random is best. Do not alternate, split, divide, or go with incumbent.
Choose winners in tie bid situations randomly.

**Throwing the Bid:**
Line items are close among certain of the bidders but one bidder is higher on a crucial item.
NO BIDS

Watch for vendors who:

Bid some years – not others.

Bid (or win) elsewhere – close by.

Do not bid but want results.
WITHDRAWN BIDS – MISTAKES.
Don’t let them off the hook.
NON-SERIOUS BIDDERS

Watch for bidders who:

- Always bid unreasonably high.
- Refusals by vendors to bid all or none.
- Always registering to bid but don’t bid.
Watch out for “eternal incumbents” that *always win*.
Other Patterns:
Equal or static market shares.
Bids rotating.
All vendors win work in area.
“Get ready! There’s new competition!”
Other Things to Look For

Unusual price drops – cheaters.

Price drops when new bidders appear.

Strong indication of collusive bidding among the customary bidders whose agreements are only disrupted by the pressure of the occasional bidders.
**Damage Measures**

The damages awarded under antitrust law are usually the difference between the “fixed price” and “competitive price.”

**Treble Damages**

Damages awarded to Antitrust Plaintiffs’ are automatically trebled.
INDUSTRY insiders often try to convince you of certain facts which may have superficial appeal but in reality only serve the purposes of the vendor.
INDUSTRY MYTH: “Too much competition is disastrous—it will drive good people out of business.”

Efficient competitors will prevail; competition breeds efficiency and innovation.
Industry Myth: “We know what you want better than you do.”
INDUSTRY MYTH

“We hardly make any money on government business.”

(Yeah, RIGHT!!!)

Insuring a company high profits isn’t your concern.

If and when they don’t make enough money, they will exit.
Business is profit motivated. If the business wasn’t profitable, they wouldn’t want it.
Antitrust laws apply to all, both big and small.
INDUSTRY MYTH:
“The prices we charge government entities are fair, reasonable, & stable.” Antitrust laws prohibit the fixing of prices. It doesn’t matter whether the price is reasonable.
ASSIGNMENT CLAUSES

• **Illinois Brick** Bars Recovery by Indirect Purchasers under Federal & Florida Antitrust Laws.

• **Assignment Clauses** allow the Public Entity to Stand in the Place of the Direct Purchaser & to Recover Direct Damages Under Both Florida and Federal Antitrust Laws.
ANTITRUST ASSIGNMENT
The Contractor & the State of Florida recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the State of Florida.
ANTITRUST ASSIGNMENT

The contractor assigns to the State of Florida any and all claims of overcharges for goods, materials and services purchases in connection with contracts.
Florida enacted its own Deceptive & Unfair Trade Practices Act (FDUTPA), Florida Statute 501.201 et seq. Similar to the FTC Act, this act prohibits “unfair methods of competition, unconscionable acts or practices in the conduct of any trade or commerce.”
FDUPTA provides a way to recover Indirect Purchaser damages.
FOR MORE INFORMATION
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