

# Understanding, Detecting and Preventing Antitrust Violations

Rod Kimura  
Deputy Attorney General  
Department of the Attorney General  
State of Hawaii



(SPO Workshop No. 127)

## Objective of this Workshop

- Provide procurement professionals
- With basic training
- On detecting and preventing certain **economic crimes**
  - Bid rigging
  - Price fixing
  - Market allocation

## Why Procurement Professionals?

- You play a critical role in the **award** and **distribution** of a very valuable asset – tax dollars.
- These **economic crimes** are FRAUD - THEFT of tax dollars.
- These **economic crimes** can have a devastating effect on our economy.
- As procurement professionals, you can play a key role in the prevention, as well as the detection, investigation, and prosecution of these **economic crimes**.

3

## Crimes?

- **Yes - crimes!!!**
- Bid rigging, price fixing, and market allocation are economic crimes and are subject to:
  - Criminal investigation and prosecution; and
  - **Stiff Penalties**

4

## What Sort of Penalties?

### **Federal Prosecution**

- **Corporation**
  - Fine up to \$100 million.
  - (The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime)
- **Individual**
  - Fine up to \$1 million; and/or
  - Up to 10 years imprisonment

### **State Prosecution**

- **Corporation**
  - Fine up to \$1 million.
- **Individual**
  - Fines up to \$100,000; and/or
  - Up to 3 years imprisonment

5

## Criminal Penalties Obtained by the USDOJ

- Largest single fine - \$500 million
- Largest collective fine in a case - \$1.6 billion

6

## Examples of USDOJ Activities

- December 6, 2013  
Former Sea Star Line President Sentenced to Serve 60 months in Prison for Role in Price-Fixing Conspiracy Involving Coastal Freight Services Between the Continental United States and Puerto Rico
- April 29, 2013  
An executive of an LCD producer was sentenced to serve 24 months in prison and pay a \$50,000 criminal fine for his role in a conspiracy to fix the prices for LCD panels.
- October 18, 2012  
Three former executives at General Electric Co. finance companies were sentenced Thursday to prison terms of at least 36 months for participating in a municipal bond-related bid-rigging conspiracy, and fined.  
-- Prosecutors had asked for prison terms between 10 and 17 years.

7

## Examples of USDOJ Activities

March 18, 2011

Individual pleaded guilty to: (i) bid rigging whereby real estate speculators agreed not to bid against each other at public real estate foreclosure auctions; and (ii) conspiracy to commit mail fraud.

-- Was facing up to 10 years in prison and a \$1 million fine for bid rigging, **and up to 30 years in prison and a \$1 million fine for mail fraud.**

December 2, 2010

A purchasing official at Mount Sinai Medical Center and School of Medicine in New York pleaded guilty to: (i) participating in bid rigging of maintenance and insulation services contracts using bogus bids; and (ii) mail fraud for asking and receiving cash kickbacks of at least \$20,500.

-- Was facing up to 10 years in prison and a \$1 million fine for bid rigging, **and up to 20 years in prison and a \$250,000 fine for mail fraud.**

8

## What are these laws that can impose stiff penalties?

They are the **ANTITRUST LAWS** – laws that:

- **Protect competition** by prohibiting anti-competitive behavior and unfair business practices.
- **Encourage competition** in the marketplace.

9

## Why Do We Want to Encourage Competition?

**Competition provides benefits such as:**

- Lower prices to consumers
- Encouraging innovation
- Improvement of service quality
- Lower supplier costs
- Improvement of information and the fostering of informed decisions

10

## So what are the Antitrust Laws?

- Federal laws
  - Sherman Antitrust Act
  - Clayton Act
  - Federal Trade Commission Act
  
- Hawaii law
  - Found in Haw. Rev. Stat. Chapter 480
    - Incorporates various provisions from the federal laws

11

## Our Focus:

### Sherman § 1 & its Hawaii Counterpart

#### Sherman § 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 declared to be illegal. . . .

#### Hawaii counterpart – § 480-4(a)

- Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal.

12

## What Does Sherman § 1 Do?

**THE GIST:** § 1 prohibits agreements among competitors that restrain trade or commerce, aka **COLLUSIVE AGREEMENTS**.

- and -

- Bid rigging, price fixing, and market allocation are forms of collusive activity:
  - Involve agreements among competitors; and
  - Are unreasonable restraints of trade.

- - - - -

13

## So What Do We Need to Show a Violation?

**We need:**

Agreement + Unreasonable restraint of trade

14

## What is an Agreement?

- **A meeting of the minds/an understanding.**
  - i.e., a situation where there is a common understanding about something.
- **Between two or more unrelated persons.**

**Note:** The agreement does not have to be expressed or in writing.

**Proving an agreement is NOT easy!**

15

## What about restraints of trade?

- **Trade is often restrained.**
  - E.G., when you agree to only buy from a specific vendor.
- **Our concern is where there is an unreasonable restraint of trade.**

16



## Seque Slide

With that overview, let's dive in and look at the types of collusive arrangements.



17

## Let's Talk About – **Bid Rigging**

- **CONTEXT:** A bid solicitation by state, local, or federal government.
- Bidders **agree in advance** who will submit the winning bid.
- **The harm** – by agreeing on the winning bidder, the bidders eliminate **competition**.

18

## Let's Talk About – **Bid Rigging**

### Forms of bid rigging:

- 1-Bid Rotation
- 2-Bid Suppression
- 3-Complementary Bidding

19

## Let's Talk About – **Bid Rigging**

**1-Bid Rotation** - Competitors agree to ROTATE or take turns on being the low (winning) bidder

Can be by an agreement on:

- Time
- Product
- Geographic Area

20

## Let's Talk About – Bid Rigging

- 1-Bid Rotation – by year

	2010	2011	2012	2013
Bidder 1	<b>Bids low - wins</b>	Bids high - loses	<b>Bids low - wins</b>	Bids high - loses
Bidder 2	Bids high - loses	<b>Bids low - wins</b>	Bids high - loses	<b>Bids low - wins</b>

21

## Let's Talk About – Bid Rigging

- 1-Bid Rotation – by product

2013	Product A	Product B
Bidder 1	<b>Bids low - wins</b>	Bids high - loses
Bidder 2	Bids high - loses	<b>Bids low - wins</b>

2012	Product A	Product B
Bidder 1	Bids high - loses	<b>Bids low - wins</b>
Bidder 2	<b>Bids low - wins</b>	Bids high - loses

22

## Let's Talk About – Bid Rigging

### ▪ 1-Bid Rotation – by geographic area

2013	Oahu	Kauai, Maui & Hawaii
Bidder 1	<b>Bids low - wins</b>	Bids high - loses
Bidder 2	Bids high - loses	<b>Bids low - wins</b>

2012	Oahu	Kauai, Maui & Hawaii
Bidder 1	Bids high - loses	<b>Bids low - wins</b>
Bidder 2	<b>Bids low - wins</b>	Bids high - loses

23

## Let's Talk About – Bid Rigging

### 2-Bid Suppression

- Where a bidder agrees to NOT SUBMIT A BID even though the bidder is capable of doing the job.

----- Example -----

- RFP is issued
- 3 qualified bidders in the market
- Only one submits a bid
- No logical reason for others not bidding

24

## Let's Talk About – **Bid Rigging**

### **3-Complementary bidding**

- Where a bidder agrees to bid high.

- - - - - **Example** - - - - -

- RFP is issued.
- 3 qualified bidders in the market
- Two bidders submit high bids and another bidder submits the winning low bid.

25

## Segue Slide

- So we talked about bid rigging - let's move to

### **Price Fixing**

26

## Let's Talk About - **Price-Fixing**

**Q: What is price-fixing?**

**A: Price-fixing is:**

- an agreement
- among competitors
- which affects the price or terms of sale for a product or service.

27

## Let's Talk About - **Price-Fixing**

- **Can involve agreements on specific prices.**
  - But it does NOT have to always involve an agreement on a particular price.
- **Could involve an agreement that affects prices, e.g., an agreement on:**
  - Maintaining a certain profit margin;
  - Establishing uniform price discounts;
  - Eliminating discounts;

28

## Let's Talk About - Price-Fixing

Could involve an agreement that affects prices by: (continued)

- Adopting a standard formula for the computation of selling prices;
- Fixing credit terms;
- Maintaining predetermined price differentials between different quantities, types, or sizes of products.

29

## Let's Talk About - Price-Fixing

**The harm** – the agreeing parties deprive the market of competition.

The aim and result of every price-fixing agreement, if effective, is the **elimination of one form of competition**. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices.

30

## Let's Talk About - Price-Fixing

### The Lysine Conspiracy

- Lysine is a feed additive used by farmers for livestock.
- A \$600 million/year industry.
- The world's major producers secretly met at trade association meetings to agree on the exact tonnage for each and a price that was fixed to the penny.
- With the assistance of an informer, the USDOJ was able to record some of the meetings!

31

## Let's Talk About - Price-Fixing

### March 10, 1994: Cartel Meeting In Maui, Hawaii

- Cartel members discuss the use of a trade association meeting as a cover for conspiracy meetings.

32



## Let's Talk About - **Price-Fixing**



33

## Segue Slide

- We have talked about bid rigging and price-fixing - let's move on to **Market Allocation**

34

## Let's Talk About – Market Allocation

**Q: What is market allocation?**

A: Market allocation involves agreements among competitors to **divide the market** among themselves on the basis of:

- 1-Customers;
- 2-Territories;
- 3-Products; or . . .

**The harm** – the competitors deprive the market of \_\_\_\_\_ (*fill in*).

35

## Let's Talk About – Market Allocation

### 1-By Customer

#### **2008 to 2011:**

- A, B, and C bid on all government projects – Federal, State, and County.

#### **2012 & 2013:**

- A is the sole bidder on Federal projects;
- B is the sole bidder on State projects; and
- C is the sole bidder on County projects.

36

## Let's Talk About – Market Allocation

### 2-By Territory

**2007 to 2012** – A & B bid  
for work on all islands



**2013-** A bids for work on Oahu and Hawaii;  
- B bids for work on Maui and Kauai.

37

## Let's Talk About – Market Allocation

### 3-By Product

**2007 to 2012**

- A and B submit competing bids to provide **both** office supplies **and** copier paper to the government.

**2013**

- A is the sole bidder/supplier of office supplies.
- B is the sole bidder/supplier of copier paper.

38

## Segue Slide

- We have talked about bid rigging, price-fixing, and market allocation.
- Let's talk about conditions that might foster collusion.

39

## Conditions Conducive to Collusion

**Q: Are there situations where collusion is more likely to occur?**

**A:** Yes, there are situations that:

(i) create opportunities for competitors to collude; or

(ii) make it easier for competitors to collude.

40

## Conditions Conducive to Collusion

- Market has few sellers/bidders or a small group of controlling vendors – **easy coordination**
- Standardized product – **key variables are price & quantity**
- Repeated sales to the same buyers – **recurring event**
- Bidders have opportunities to meet, e.g., via social conventions, trade associations, shifting employment, etc. – **opportunities and a cover for meeting**
- All bidders submit bids in person at the same time & location, and stay for the bid opening – **can watch for new bidders or discuss**

41

## TRANSITIONING...

**We are going into the last third of the presentation – the critical part where we talk about RED FLAGS and what you can do.**

**I NEED YOUR  
ATTENTION!!!**

42

## Red Flags

**Red flags are not violations.**

**Red flags** tell you that there is something unusual going on and to ask questions.

43

## Red Flags

**Two general types of red flags:**

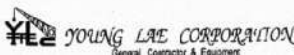



- Immediate **red flags**
- Pattern **red flags**

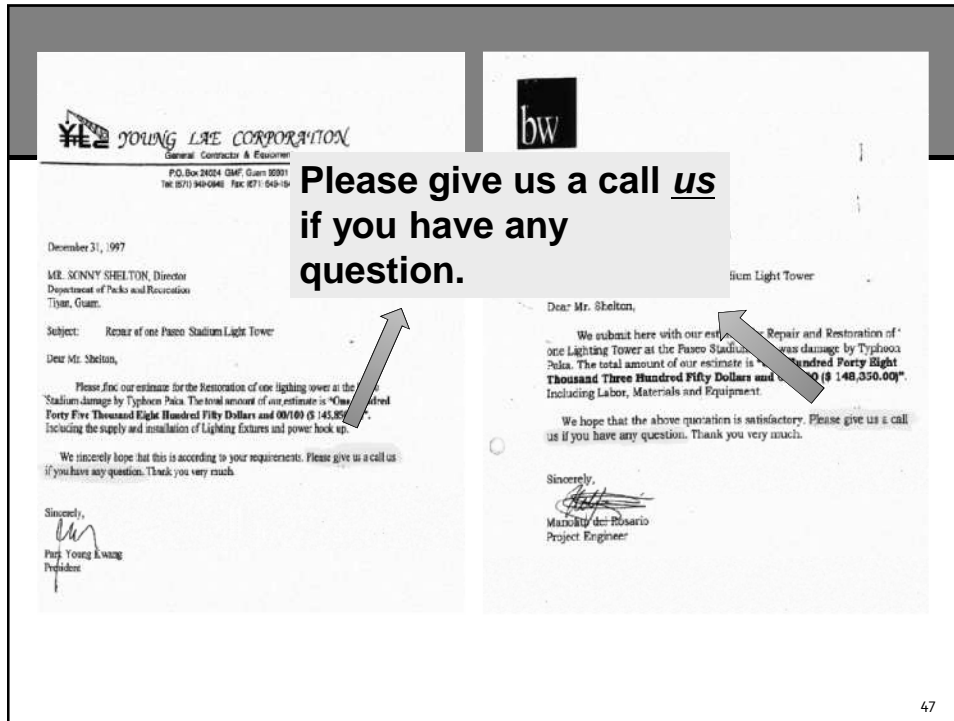
44

# Red Flags - Immediate Red Flags

## Red Flags on the Bid Documents

- Identical syntax or spelling errors

 <p><b>YOUNG LAE CORPORATION</b> General Contractors &amp; Equipment P.O. Box 24224, GMP, Guam 98911 Tel: (871) 548-0545 Fax: (871) 643-1549</p> <p>December 31, 1997</p> <p>MR. SONNY SHELTON, Director Department of Parks and Recreation Tiyán, Guam.</p> <p>Subject: Repair of one Paseo Stadium Light Tower</p> <p>Dear Mr. Shelton,</p> <p>Please find our estimate for the Restoration of one lighting tower at the Paseo Stadium damaged by Typhoon Paka. The total amount of our estimate is <b>"One Hundred Forty Five Thousand Eight Hundred Fifty Dollars and 00/100 (\$ 145,850.00)"</b>, including the supply and installation of Lighting fixtures and power hook up.</p> <p>We sincerely hope that this is according to your requirement. Please give us a call us if you have any question. Thank you very much.</p> <p>Sincerely,  Paul Young Kwang President</p>	 <p>December 31, 1997</p> <p>MR. SONNY SHELTON, Director Department of Parks and Recreation Tiyán, Guam.</p> <p>Subject: Repair of one Paseo Stadium Light Tower</p> <p>Dear Mr. Shelton,</p> <p>We submit here with our estimate for Repair and Restoration of one Lighting Tower at the Paseo Stadium that was damaged by Typhoon Paka. The total amount of our estimate is <b>"One Hundred Forty Eight Thousand Three Hundred Fifty Dollars and 00/100 (\$ 148,350.00)"</b>, Including Labor, Materials and Equipment.</p> <p>We hope that the above quotation is satisfactory. Please give us a call us if you have any question. Thank you very much.</p> <p>Sincerely,  Maroilo de Rosario Project Engineer</p>
---	---



## Red Flags - Immediate Red Flags

### Identical items in "competing" bids:

- Postmarks, return addresses, telephone numbers, fax numbers;
- Calculations;
- Handwriting, stationery, or typeface; or
- Email addresses and metadata for electronic bids.



## Red Flags - Immediate Red Flags

### Unusual items or events:

- Bid documents have white-outs or other indications of a possible last minute change;
- A bidder requests a bid package for a competitor;
- A bidder submits a bid when the bidder is incapable of performing the bid (expertise, equipment, labor, etc.); or
- A bidder is seen with multiple bids at a bid submission and submits a bid only after seeing the competing bidders.

49

## Red Flags - Immediate Red Flags

### Unusual items or events:

- A successful bidder subcontracts work to competitors that submitted unsuccessful bids for the same project; or
- A company withdraws its successful bid and subsequently is awarded a subcontract by the winning contractor.
- Price increases do not appear to be supported by increased costs or a known or documented reason.
- Bids are significantly over the cost estimates.

50

## Red Flags - Immediate Red Flags

### Tunnel Construction Case

BIDDER	BID	% OVER ESTIMATE
Flatiron Paving	\$4.4 million	6%
Corn Construction	\$4.5 million	7%
Asphalt Paving	\$4.6 million	11%
Peter Kiewit	\$4.6 million	11%



Bids were significantly higher than the engineering cost estimate.

51

## Red Flags - Immediate Red Flags

### Unusual statements:

- References to industry-wide or association pricing;
- Statements that a customer, territory, or contract belongs to a certain bidder, e.g.:
  - It is/was our turn to win.
  - We are/were supposed to be the lowest bidder.
- Statements that a bid was a courtesy, token, cover, or complementary bid; or
- Use of "we" in statements referring to the industry

52

## Red Flags - Pattern Red Flags

### Bidding Patterns

- The **same suppliers** bid and appear to **take turns** on being the successful bidder;
- The same bidder **always wins** a particular procurement;
- Capable companies consistently **don't bid or submit high bids**;

53

## Red Flags - Pattern Red Flags

### Bidding Patterns

- **Bids received are much higher than** previous bids by the same firms, or engineering cost estimates.
- Fewer number of competitors submit bids in comparison to past RFPs - no economic explanation (i.e. full workload, bankruptcy, etc.);
- Bidder submits a substantially higher bid on one RFP than on another RFP for the same product, with no apparent cost differences to account for the higher bid;

54

## Red Flags - Pattern Red Flags

### Pricing Patterns

- Identical prices when past prices were consistently different;
- Discounts are eliminated where discounts were standard in the past.
- A company that consistently competed on price begins quoting unreasonably high prices, or refuses to quote a price.

55

## Red Flags - Pattern Red Flags

### Market Patterns

- Companies that have consistently sold in the territory (or to a customer) suddenly stop selling in that territory, or refers you to its competitor - and there is no economic or logical explanation for doing so.

56

## Seque Slide

You are very close to the end!!!



57

## What Can You Do?

- **Know the market**
  - Become familiar with the market in which you make your purchases.
  - Look over the bidding history.
- **Be familiar with the red flags**
- **Retain bid documents**
  - Retain all bids, envelopes, facsimile transmittal sheets, and/or e-mail transmittal messages used to transmit the bids.

58

## What Can You Do?

- **Bid List**
  - **Expand the bidder list**– solicit as many reliable sources as economically possible and keep track of possible bidders who express interest in the project.
- **Bid Submissions**
  - Date and time stamp the bids when they are received.
  - Set the public bid opening at least one day after the specified due date.

59

## What Can You Do?

- **Certification**
  - Require a Certificate of Independent Price Determination to be submitted with all bids.
- **Ask Questions**
  - If the prices or bids submitted don't make sense, press your vendors to explain and justify their prices.

60

## What Can You Do?

- **Trust and use your spidey senses**
- **Call us**
  - If you suspect a problem, call me ASAP.
  - If you don't want to call me, then call the U.S. Department of Justice in San Francisco

**NOTE: All calls are kept confidential!!!**

61

## Contact Information

**Rodney Kimura**  
Deputy Attorney General  
Department of the Attorney General  
(808) 586-1180  
[Rodney.i.kimura@hawaii.gov](mailto:Rodney.i.kimura@hawaii.gov)

**Jacklin Chou Lem**  
USDOJ, Antitrust Division  
(415) 436-6660  
[Jacklin.Lem@usdoj.gov](mailto:Jacklin.Lem@usdoj.gov)

62