



and

**TAUC**

Present

# **CONTRACTOR COLLABORATION**

What Antitrust Boundaries Separate Legal  
Joint Ventures from Illegal Bid Rigging

**Steven John Fellman**

GKG Law, P.C., Washington, DC

TAUC General Counsel

[sfellman@gkglaw.com](mailto:sfellman@gkglaw.com)

In recent years, construction projects have become so large and complex that contractors establish joint ventures to bid on the project.

There are many reasons for establishing a joint venture:

- The owner is looking for a single bidder for all or a portion of the job.
- The risk is too large for a company to assume without a partner.
- You need to bring in skill sets that your company does not have.
- You need to utilize technology which you have not used on other projects.
- You don't have sufficient capital.
- The job is simply too large for you to handle alone.

By establishing a joint venture, you promote competition by:

- Creating another entity that can submit a bid when none of the individual joint venture members would have bid the project alone.
- Providing efficiencies of scale that permit lower bids.
- Providing combinations of technology that enhance productivity.

At the same time, one could argue that a joint venture is anticompetitive since it:

- Is a collaboration of competitors.
- Reduces competition by eliminating a potential bidder.
- Is an agreement by competitors to submit a single price and “rig” the bid.
- Restrains trade by eliminating competition.
- Is a violation of the antitrust laws.

Which position is legally correct – either position may be correct depending on:

- The nature of the joint venture agreement.
- The identity of the joint venture partners.
- The project itself.
- The market involved.
- How the joint control affects the price.
- Does the joint venture decrease output.
- Does the challenged conduct promote competition or restrain trade.

To evaluate those questions – you need to have a basic understanding of antitrust theory.

- Antitrust laws are designed to promote competition and prohibit restraints on trade.
- Antitrust questions are almost always dependent on making an economic analysis of the joint venture.
- From an economic standpoint – would it be reasonable for each of the joint venture partners to bid independently?
  - If so, why didn't they?
  - If not, then we may have a justification for the joint venture.

## Rule of Reason vs. Illegal “per se”

- Many years ago, the Supreme Court found that certain conduct of competitors was so illegal that whenever it was discovered – it was illegal regardless of economic justification.
- This conduct was considered illegal “per se” and included price fixing, bid rigging and customer or territorial allocation.
- As the economy turned into a global economy, some transactions such as construction projects got larger and technologically advanced. The courts began recognizing that certain conduct between competitors might promote competition.
- Courts decided that this type of conduct would be evaluated under the “rule of reason.”
- The test is whether the proposed conduct promotes competition rather than restrains trade. This is not a bright line test.

The measurement of legality is based on economic analysis. Let's look at some examples:

- Mid-size project, 6 potential bidders. All six invited to bid. Three largest bidders agree to submit one bid as part of a joint venture. Three remaining smaller bidders present a problem for owner based on information provided by one of the joint venture partners. Joint venture probably illegal.
- Same facts, 4 largest bidders submit separate bids. 2 smallest bidders that total of less than 20% market share submit a bid as a joint venture – definitely legal.
- Other combinations – rule of reason.

You need to be able to economically justify the joint venture.

- The argument that there are only two potential bidders and by establishing a joint venture – you are each guaranteed a piece of the pie at a reasonable price – may put you in jail.
- The argument that there are only two potential bidders and neither company could get a bond without the joint venture – puts you under rule of reason.

## Joint Venture vs. general contractor/subcontractor agreement.

- General contractor/subcontractor agreements usually not among direct competitors.
- Subcontractor brings special skills to the table.
- Not a strictly horizontal agreement.
- OK, if owner hires the general contractor or construction manager and then the general contractor or construction manager subcontracts with one of the unsuccessful bidders unless deal was pre-arranged to split the job – maybe able to justify other “arrangement” based on economics.

Before agreeing to participate in a joint venture, make an economic analysis.

- Are your potential partners horizontal competitors?
- Do the members of the joint venture collectively hold more than a 20% market share?
- What is the economic necessity of the joint venture?
- How does it promote competition, provide increased efficiency and lower costs to the customer?
- A significant joint venture requires lawyers to draw up the agreement. Ask counsel to provide an antitrust opinion.

## Bid Rigging

- Bid rigging is a subset of price fixing
- Can take many forms
- All forms of bid rigging are criminal offenses
  - can go to jail for up to 10 years

## Simple Bid Rigging

- Road cases
- Cast Iron Pipe cases
- Easy to prove

## More Sophisticated Bid Rigging

- Commercial bribery
- Conspiracy to be mutually non-responsive
- The friendly higher bid
- Includes potential territory divisions

## Proving Bid Rigging

- Smaller player always turns everyone in to avoid going to jail
- No honor among thieves
- Simple statistical analysis often shows agreement
- Government loves bid rigging cases

## Simple Rules

- Don't discuss possible jobs with competitors
- "Are you going to bid?" becomes "What are you going to bid?"
- You will loose on "I didn't agree" argument if pattern of conduct shows otherwise – invitation to collude
- If you have questions – get legal advice before you act

# Conclusion

- Antitrust is nasty business
- Criminal penalties
- Large fines
- Treble damages
- International as well as US laws apply

Make sure you know what you are doing



## **Steven John Fellman**

1054 31<sup>st</sup> Street, N.W., Suite 200  
Washington, D.C. 20007  
Telephone: (202) 342-5294  
Fax: (202) 342-5201  
E-mail: [sfellman@gkglaw.com](mailto:sfellman@gkglaw.com)

**[www.associationlawfirm.org](http://www.associationlawfirm.org)**