



# **Antitrust Basics for Government Purchasers**



# Topics Covered

## ▶ **Background**

- What is antitrust law and what does it prohibit?

## ▶ **Bid-rigging**

- What is it and how can you guard against it?



# Why “Antitrust”?

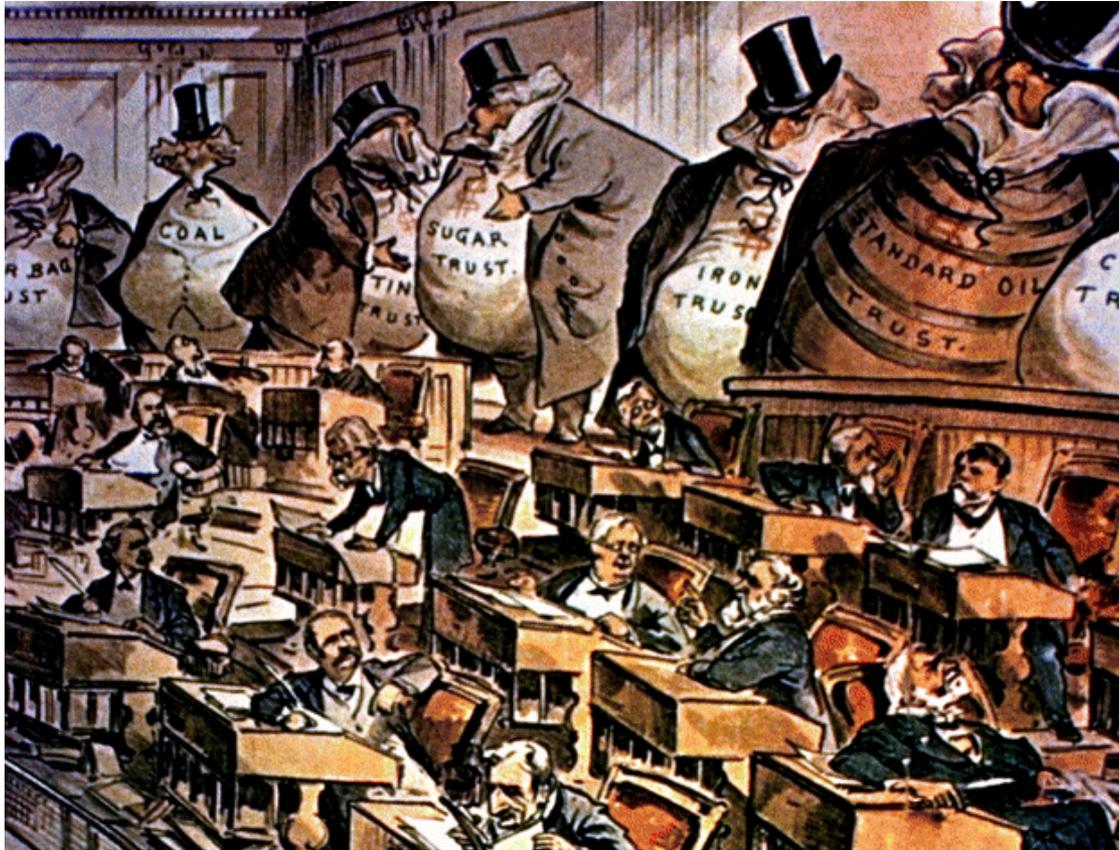


Trust certificates were used to consolidate ownership of groups of businesses operating as a highly disciplined monopoly



# History of Antitrust

## Origins



Monopolies or “trusts” dominated the national economy and wielded enormous political power in the late 1800s



# Effects in the Marketplace

## ▶ Without Competition:

- **Higher Prices**
- **Poorer Quality**
- **Less Choice**
- **Less Innovation**

Antitrust statutes are premised on a congressional determination that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress....” *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958)



# Effects in the Marketplace

## ► With Competition:

Opportunities for a business to grow market share



Opportunities for another business to take market share



# Consequences of Collusion

## Potential Consequences for Antitrust Violators:

- ▶ Government prosecution
  - State &/or federal
  - Civil &/or criminal
    - Criminal consequences can include jail time & large fines
- ▶ Private litigation (including massive class actions)
- ▶ Treble damages, penalties, attorneys' fees and investigative costs
- ▶ Debarment or suspension





# Limits of Antitrust

## ▶ What we don't do:

- Direct officials to choose one procurement method over another.
- Investigate procurement or bidding violations that don't raise antitrust concerns.
- Make sure public entities get the best price or value for goods and services.



# What Does Antitrust Prohibit?

## Three Primary Types of Antitrust Violations

### ▶ **Monopolization**

- Unlawfully acquiring or maintaining the power to fix prices and exclude competitors.

### ▶ **Collusion and Conspiracy**

- Competitors making agreements to remove or reduce competition in the marketplace.

### ▶ **Illegal Mergers**

- Where the effect of the merger may substantially lessen competition.



# Monopolization & Mergers

## What Can You Do About Monopolies/Mergers?

- ▶ Let us know if you suspect a dominant vendor is trying to drive its competitors out of business.
- ▶ Let us know if you are unable to buy product due to restrictions imposed by manufacturers, suppliers, or vendors.
- ▶ Let us know if you hear of a merger that could reduce your buying options or lead to higher prices.
- ▶ Assist us when contacted for interviews.



# Anticompetitive Agreements

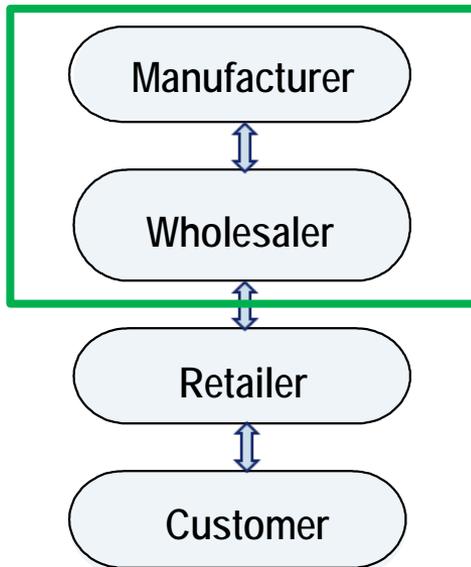
## Collusion: What's Prohibited

- ▶ “Contracts, combinations or conspiracies in restraint of trade”
  - There must be an agreement, but agreements may be hard to detect.
    - Independently matching prices is not a violation.
    - Conspirators try to hide agreements.



# Types of Anticompetitive Agreements

## Vertical Agreements Typically less suspect



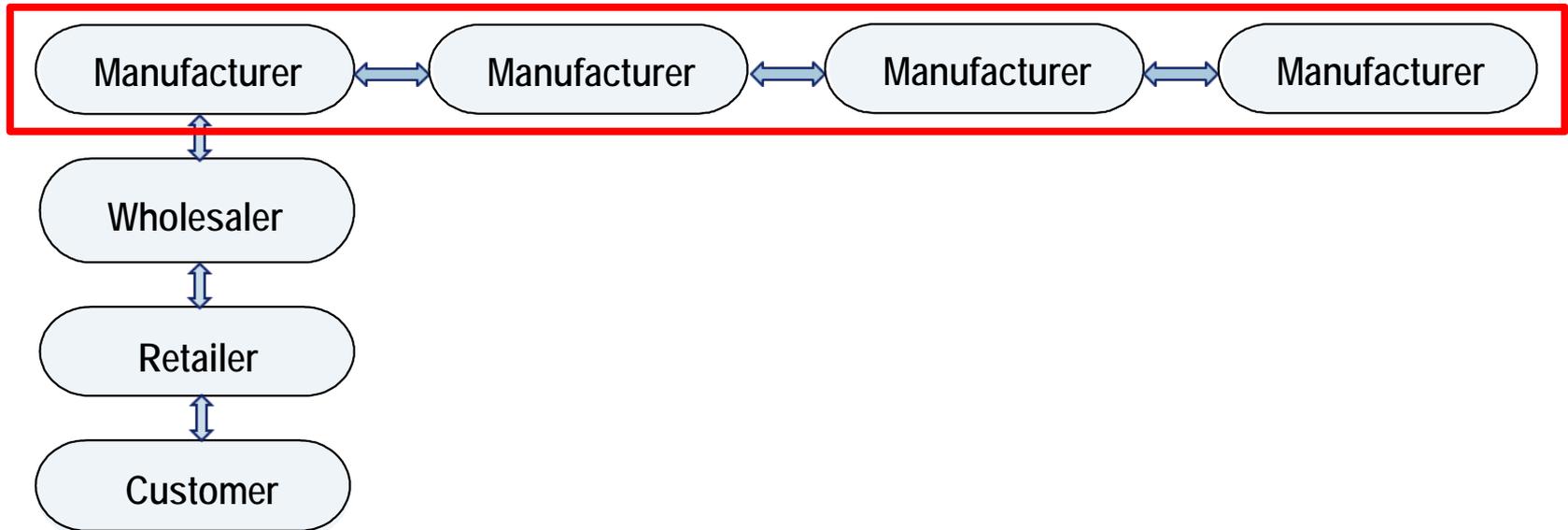
### Examples:

- Resale Price Maintenance
- Tying
- Exclusive Dealing



# Types of Anticompetitive Agreements

## Horizontal Agreements Inherently suspect





# Types of Anticompetitive Agreements

## ▶ Horizontal Agreements

- Price Fixing
- Market Allocation / Customer Allocation
- Group Boycott (Concerted Refusal to Deal)
- Bid Rigging
  - Basic types:
    - Complementary Bidding
    - Bid Suppression
  - Incentives:
    - Bid Rotations
    - Subcontracting

Conspirators often mix and match



# Communicating Agreements

## A Classic Example:



“The Result Was the Usual One”

## Modern Examples:

- ▶ In-Person Meetings
  - whether or not in a smoke-filled room
- ▶ Phone Calls
- ▶ Text Messages
- ▶ Emails
- ▶ Business Documents
- ▶ Instant Messaging
- ▶ Chat Rooms
- ▶ Video Chat
- ▶ Social Networking
- ▶ New/creative methods





# Red Flags Part 1: Conditions Favorable to Collusion

## What Can You Do About Collusion?

- ▶ Recognize Conditions Favorable to Collusion.
  - Few vendors in the market.
  - No easy substitutions.
  - Long-established firms continually dominate.
  - Frequent interactions or information sharing between competitors; a high probability the vendors will interact in the future.



# Red Flags Part 2: Suspicious Statements & Behavior

## What Can You Do About Collusion?

- ▶ Recognize Suspicious Statements or Behavior.
  - Irregularities in appearance or submission of bids, e.g., suspicious joint bid.
  - Refusals to bid alluding to agreement or understanding with competitor.
  - Refusal to bid or offer quote due to “ethical concerns” about poaching customers.
  - No bid from a firm you otherwise expect to make a bid.



## Red Flags Part 2: Suspicious Statements & Behavior (Con't)

- The absence of bids or responses when more are expected.
- Certain vendors bid frequently but never or almost never win.
- A vendor requests confidential information to gain an advantage for itself and others.
- High bids from a vendor you suspect wouldn't be able to successfully perform the contract.
- Line items are close, except one or two crucial ones from losing bidders are much higher.
- Suspicious explanations for price increases



# Red Flags Part 3: Suspicious Bidding & Pricing Patterns

- Existing vendors drop prices when a new or infrequent vendor bids.
- Suspicious subcontracting
- Some bids are much higher than previous bids or estimated costs.
- Consistent \$ or % margins between winning and losing bids.
- A vendor always wins a bid in a certain area for a particular product or in a fixed rotation with other bidders.
- Two bids are tied and the odds of two bidders submitting the same number independently are low.



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Be aware of the red flags; contact us if you suspect collusion.
- ▶ Draft RFPs to encourage maximum participation.
  - Minimize use of tight specs:
    - Don't tailor bids to one particular product or supplier.
    - Don't use specs written by or copied from a manufacturer.
    - Don't use brand names in specs.
  - Make sure a vendor is an actual sole source before proceeding with a sole source procurement.
- ▶ Evaluate your process with an eye towards ensuring competition.



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Advertise in a variety of ways.
- ▶ Insist on compliance with procedures.
- ▶ Maintain and review procurement records.
- ▶ Don't disclose cost estimates before awarding a contract (unless required).
- ▶ Don't disclose the identity or bids of proposal holders or other bidders (unless required).



# Guarding Against Collusion

## What Can You Do About Collusion?

- ▶ Antitrust Certification Statement--Gov. Code § 2155.005
- ▶ Antitrust Assignment Clause--Part B.5.6, Comptroller's RFP Template



# Contact Information

## To Sum Up:

- Use us as a resource
  - All questions, ideas, tips are welcome
- Be alert and proactive in making sure you have competitive options
- Assist us with our investigations

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