

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,) Civil No. C 75-0380 L(A)
)
 v.)
)
 WHITTENBERG ENGINEERING &)
 CONSTRUCTION CO.;)
 F. W. OWENS & ASSOCIATES, INC.;)
 GARST-RECEVEUR CONSTRUCTION)
 COMPANY;)
 STRUCK, INC.;)
 SULLIVAN & COZART, INC.;)
 COUPE CONSTRUCTION COMPANY;)
 PLATOFF CONSTRUCTION COMPANY,)
 INC.;)
 ALE BORNSTEIN, INC.;)
 HAYS & NICOLIN, INC.;)
 E. L. NOE & SONS, INC.; and)
 W. C. SCHICKLI CONSTRUCTION)
 COMPANY, INC.,)
)
 Defendants.)

filed: AUG 4 1978

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b) - (h), the United States files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDING

On November 20, 1975, the United States filed a civil anti-trust Complaint alleging that eleven corporations combined and conspired to submit noncompetitive bids in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The Complaint alleged that beginning sometime prior to 1970 and continuing thereafter up to and including December 1, 1974, the defendants engaged in a combination and conspiracy (a) to exchange information concerning bid amounts or bid ranges with

respect to general contracting jobs and (b) to submit non-competitive, collusive, complementary bids on projects requiring general contracting services in the territory encompassed by the City of Louisville and Jefferson County in the Commonwealth of Kentucky (hereinafter, the "Louisville market").

The Complaint sought a judgment by the Court declaring that the defendants had engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act. It also sought an Order by the Court to enjoin and restrain the defendants from such activities in the future and, for a period of five years following the date of entry of such Order, to require each of the defendants to affix to every bid and quotation for general contracting services a written certification that such bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any other general contracting company.

The corporations named in the Complaint were: Whittenberg Engineering & Construction Co.; F. W. Owens & Associates, Inc.; Garst-Receveur Construction Company; Struck, Inc.; Sullivan & Cozart, Inc.; Coupe Construction Company; Platoff Construction Company, Inc.; Ale Bornstein, Inc.; Hays & Nicoulin, Inc.; E. L. Noe & Sons, Inc.; and W. C. Schickli Construction Company, Inc.

All of these defendants to this action have previously pleaded nolo contendere to criminal misdemeanor charges with respect to this alleged conspiracy and fines ranging from \$50,000 to \$5,000 were levied against the defendants. This civil action had been held in abeyance until the criminal misdemeanor charge was resolved.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

For the purpose of this case, the Complaint defined "general contracting services" as the supervision of and/or the responsibility for the installation of various building materials for the construction, renovation, alteration, or repair of buildings. The furnishing of these services is a specialized field engaged in by a limited group of companies equipped by technical training and experience to perform this work.

General contracting services are purchased by customers either through negotiations with, or through the solicitation of bids from, general contracting companies. The nature and extent of the project, as well as the time within which it must be completed, are often determinative factors influencing a customer in the means used in selecting a general contracting company. The customers for general contracting services include commercial, industrial, and institutional concerns, and governmental units such as the Louisville Board of Education and the Jefferson County Board of Education.

During the period of time covered by the Complaint, the defendants were among the leading general contracting companies serving commercial, industrial, institutional, and governmental customers located in the Louisville market. In 1974, the defendants had revenues of approximately \$50 million from the sale of general contracting services to such customers.

The Complaint alleges that the defendants engaged in a combination and conspiracy beginning sometime prior to 1970 that consisted of an agreement, understanding, and concert of action among themselves and co-conspirators, the substantial terms of which were:

- (a) to exchange information concerning bid amounts or bid ranges with respect to general contracting jobs;
- (b) to submit noncompetitive, collusive, complementary bids on projects requiring general contracting services.

The Complaint further alleges that the combination and conspiracy had the following effects, among others:

- (a) price competition in the sale of general contracting services in the Louisville market has been restrained; and
- (b) customers in the Louisville market have been deprived of the benefits of full, free, and open competition in the purchase of general contracting services.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The Stipulation between the parties provides that there is no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest.

The proposed Final Judgment enjoins any direct or indirect renewal of the type of conspiracy alleged in the Complaint. Specifically, Section IV provides that the defendants are enjoined and restrained from entering into, adhering to, participating in, maintaining, furthering, enforcing or claiming, either directly or indirectly, any rights under any contract, agreement,

understanding, arrangement, plan, program, combination or conspiracy with any other general contractor to:

- (A) Submit any noncompetitive, collusive, or complementary bid for any project requiring general contracting services;
- (B) Include any agreed-upon charge in any bid on a project requiring general contracting services;
- (C) Compensate unsuccessful bidders on a project requiring general contracting services;
- (D) Refrain from bidding on a project requiring general contracting services;
- (E) Exchange information concerning bid amounts or bid ranges with respect to general contracting jobs.

Section V further enjoins each defendant from furnishing to or exchanging with any other defendant or with any other general contractor any information concerning the prices, terms or other conditions of sale or lease which any general contractor has submitted, intends to submit or is considering submitting to any prospective customer prior to the release of such information to the public or to the trade generally. The injunctions in Sections IV and V run perpetually.

For a period of five (5) years from the date of entry of the Judgment, each defendant is ordered and directed to affix to every bid or quotation for the rendering of general contracting services a written certification, signed by an officer of such defendant responsible for the preparation of bids or quotations, that such bid or quotation was not in any way the result, directly or indirectly, of any discussion, communication, agreement, understanding, plan or program, whether formal or informal, between such defendant and any other general contractor.

Section VIII of the proposed Judgment orders and directs each defendant to:

- (A) Furnish a copy of the Judgment to each of its officers, directors, sales managers and service managers within thirty days after the date of entry of the Judgment;
- (B) Furnish a copy of the Judgment to each successor of those persons described in subparagraph (A), above, within thirty days after each such successor is employed;
- (C) Attach to each copy of the Judgment furnished pursuant to subparagraphs (A) and (B), above, a statement advising each person of his obligations and of the defendant's obligations under the Judgment, and of the criminal penalties which may be imposed upon him and/or upon such defendant for violation of the Judgment; and
- (D) File with the Court and serve upon the United States within sixty days after the date of entry of the Judgment, an affidavit as to the fact and manner of its compliance with subparagraphs (A) and (C), above.

There are several limited exceptions to the prohibitions against exchange of information set forth in Sections IV and V of the Judgment. These exceptions, found in Section VI of the Judgment, relate to possible purchase, sale, lease, or rental of general contracting supplies or general contracting equipment between a defendant and any other general contractor, or possible joint venture or sub-contract agreements, provided that the transaction is denominated as a joint venture or sub-contract agreement in the bid submitted to the prospective customer.

The proposed Judgment is applicable to each of the defendants and to the subsidiaries, successors, assigns, officers, directors, agents, servants and employees of each defendant, and to all persons in active concert or participation with any of them who shall have received actual notice of the Judgment by personal service or otherwise.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any potential private plaintiffs who might have been damaged by the alleged violations will retain the same right to sue for monetary damages and any other legal and equitable remedies which they may have had if the Judgment had not been entered. The Judgment may not be used, however, as prima facie evidence in private litigation pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to John A. Weedon, Chief, Cleveland Field Office, Antitrust Division, United States Department of Justice, 995 Celebrezze Federal Building, Cleveland, Ohio 44199 (telephone: 216-522-4070), within the 60-day period provided by the Act. These comments, and the Department's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to its entry if it should determine that some modification of it is necessary. The proposed Judgment provides that the Court

retains jurisdiction over this action, and the parties may apply to the Court for such orders as may be necessary or appropriate for its modification, interpretation or enforcement.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The only alternative to the proposed Judgment considered by the Antitrust Division was a full trial of the issues on the merits and on relief. The Division considers the substantive language of the Judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the Judgment provides appropriate relief against the violations charged in the Complaint.

In reaching an agreement on the proposed Judgment, two matters were the principal subject of negotiation. Both of the matters concerned the limited exceptions to the prohibitions against the exchange of information. Initially the United States proposed that the first exception be limited to the purchase, sale or lease of general contracting equipment between a defendant and any other general contractor. The second exception was to be limited to joint ventures or sub-contract agreements on projects which were of such size or nature, or performable at such time, that a defendant would be unable to handle the entire project alone. The United States ultimately decided to amend these limitations to allow for a general contractor's normal legitimate business activities. The first exception was changed to allow rental, as well as purchase, sale, or lease, of equipment to other contractors. It was found that the initial capital investment for general contracting equipment was often made with the expectation that, when not in use, rentals of the equipment

would occur and, thereby, help defray a portion of the investment. The second exception was changed to allow joint ventures and sub-contracting even if a defendant is able to handle the entire project alone. The defendants were found to frequently sub-contract work from and to other more specialized general contractors even though a particular project was not impossible for one contractor to handle alone.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the Government considered determinative in formulating this proposed final judgment. Therefore, none are being filed along with this Competitive Impact Statement.

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