

with its members to restrain competition by adopting and enforcing certain rules that restrict bidding on construction projects in Hawaii. The United States and each of the nine defendants have agreed to Final Judgments in settlement of the cases. The Complaints and proposed Final Judgments in the nine cases are similar.

Defendant Maui Contractors Association ("MCA") is a Hawaii corporation with its principal place of business in Wailuku, Maui, Hawaii. MCA modeled its rules on the rules of the General Contractors Association ("GCA"), the first construction trade association in Hawaii to adopt bidding rules.

Plaintiff and defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless plaintiff withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to interpret, modify, enforce, and punish violations of the Final Judgment.

II

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

A. The Bid Depository System in Hawaii

A bid depository is a system for the collection and dissemination of bids or sub-bids for the performance of construction services. A bid depository collects and compiles bids submitted by a date certain and then disseminates them to bidding authorities or general contractors seeking the bids or sub-bids, respectively. By facilitating the bidding process, bid depositories can improve the efficiency of the contracting process

and thereby promote rather than harm competition. The complaint in this case alleges, however, that the defendant adopted a number of rules governing the operation of its bid depository that restrained competition for subcontracts on construction projects governed by the MCA bidding procedure, by prohibiting and precluding negotiation of sub-bids once they were submitted to the bid depository.

On most major construction projects in Hawaii, including most government projects, the governmental and private entities that contract for construction services (known as "awarding authorities") do so by soliciting and accepting bids from general contractors. In preparing their respective bids, general contractors usually solicit and accept bids from the various specialty contractors (e.g., plumbing, electrical, masonry contractors) and material suppliers whose work will be needed on the project. A bid to a general contractor by a specialty contractor or material supplier to provide services or materials for a construction project is known in the trade as a "sub-bid."

Since 1949, GCA has maintained and enforced rules that regulate bidding by specialty contractors to general contractors on a substantial number of construction projects in Oahu, Hawaii. The rules, known collectively as the "GCA bidding procedure," govern the operation of GCA's bid depository. Two other general contractor associations in the State of Hawaii operate bid depositories: the Hawaii Island Contractors' Association (since 1972) and the Maui Contractors Association (since 1977).

Six specialty contractor associations operate bid depositories in conjunction with the three general contractor associations in Hawaii. These associations are: Gypsum Drywall Contractors of Hawaii, Mason Contractors Association of Hawaii, Pacific Electrical Contractors Association, Painting & Decorating Contractors Association of Hawaii, Plumbing & Mechanical Contractors Association of Hawaii, and Sheet Metal Contractors Association. All of these bid depositories have rules similar to the MCA bidding procedure.

Under its rules GCA determines which construction projects will be subject to its bid depository rules. If GCA chooses a particular project, then pursuant to the rules of the other associations, that project is also subject to the depository rules of those other associations. Under the controlling GCA rules, the bid depository rules apply to all construction projects that are listed in the GCA Weekly Bid Bulletin. GCA selects the projects to be included in the Bulletin on its own and without the authorization or direction of the affected awarding authorities. In fact, GCA selects almost exclusively government construction projects for inclusion in the GCA Weekly Bid Bulletin and seldom includes any private projects. All significant construction projects in Hawaii that are awarded by federal, state, or local governmental entities are listed in the GCA Weekly Bid Bulletin.

All significant general contractors operating on Maui are members of MCA and abide by the rules and procedures of MCA's bid depository with respect to construction projects on Maui that are listed in the GCA Weekly Bid Bulletin. The bidding rules are only

suspended by MCA if non-Hawaiian general contractors who may be unwilling to abide by the procedures appear on the bidders list for a project. On construction projects to which the MCA bidding procedure applies, in almost all instances the only bids received by awarding authorities from general contractors are bids developed in accordance with that procedure.

Similarly, the membership of each of the six defendant specialty contractor associations includes all significant specialty contractors in each of the trades in Hawaii, and all association members abide by the rules and procedures of their association's bid depository. Thus, even if a general contractor were not a member of MCA and did not want to go through the bid depository procedures, it generally would be forced to agree to the procedures because, if it did not, the Hawaiian specialty contractors would be precluded by their rules from dealing with that general contractor. Hence, the general contractor would not be able to obtain an adequate number of sub-bids from qualified specialty contractors. Indeed, on construction projects to which the associations' bidding procedures apply, in almost all instances the only bids received by awarding authorities from general contractors are bids based on sub-bids submitted in accordance with those procedures. (In a small number of projects, non-Hawaiian general contractors bring in mainland subcontractors to work on Hawaiian projects.)

The three general contractor and six specialty contractor associations are interrelated. Many specialty contractors are members of both their specialty trade association and a general

contractor association. The general contractor associations have virtually identical bid procedures, and they cooperate with one another by transmitting or receiving bids from members of one depository for construction projects on an island under the jurisdiction of another. The six specialty contractor associations have bidding procedures modeled after the General Contractors Association's rules. The general and specialty contractor associations often cooperate in enforcing their bidding procedures.

B. The MCA Bidding Procedure

The Complaint filed against MCA alleges that MCA's bidding procedure provides, among other things, that:

1. Confirmation bids for all specialty subcontracts or material supplies must be filed with the MCA bid depository;
2. General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the MCA bid depository in compliance with its rules and procedures;
3. Filed bids may not be altered or changed after the deadline for their filing;
4. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;

5. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
6. Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
7. If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

The Complaint also alleges that beginning at least as early as 1977 and continuing to the present, the defendant engaged in a conspiracy consisting of an agreement, the substantial terms of which were to:

1. Assure that a substantial number of construction projects in the State of Hawaii would be governed by the MCA bidding procedure and other rules and procedures established by bid depositories operated by other associations of contractors in the State of Hawaii;
2. Restrain and prohibit the negotiation of sub-bids on construction projects governed by the MCA bidding procedure by, among other things, inhibiting the seeking of lower prices by general contractors or the offering of lower prices by specialty contractors or material suppliers; and

3. Restrain and prohibit the receipt of sub-bids from, or the award of subcontracts to, specialty contractors or material suppliers that do not comply with the MCA bidding procedure on construction projects governed by the MCA bidding procedure.

In addition, the Complaint alleges that the conspiracy had the following effects:

1. Competition among specialty contractors and material suppliers in the sale of specialty contracting services and materials to general contractors on construction projects governed by the MCA bidding procedure has been unreasonably restrained, suppressed, and eliminated; and
2. Competition among general contractors in negotiating sub-bids for specialty contracting services and materials for construction projects governed by the MCA bidding procedure has been unreasonably restrained, suppressed, and eliminated.

The regulation of negotiations between general contractors and subcontractors is not anticompetitive in all situations. Here, however, as explained above, the general contractor associations and the specialty contractor associations each possess market power for construction projects in Hawaii. In addition, the decision to limit negotiations between general contractors and specialty contractors was not the decision of the awarding authority, but rather was the decision of the general contractors acting in concert and the decision of the specialty contractors acting in concert. In this context we concluded that

the association rules were anticompetitive because they unreasonably deprived the awarding authority of free and open competition in negotiations between general contractors and specialty contractors and material suppliers, for the performance of subcontracts on construction projects subject to the bidding procedures.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment enjoins MCA from continuing or renewing the anticompetitive conduct alleged in the Complaint. Specifically, Section IV prohibits MCA from maintaining, directly or indirectly, any written or unwritten rule that has the purpose or effect of:

1. Suppressing, restraining, or discouraging general contractors and specialty contractors or material suppliers from negotiating at any time sub-bids on construction projects;
2. Suppressing, restraining, or discouraging general contractors from receiving sub-bids from, or awarding subcontracts to, specialty contractors or material suppliers; or
3. Stating that negotiation of sub-bids is contrary to any policy of MCA.

Section V orders MCA to eliminate within 60 days all written and unwritten rules that are inconsistent with the Final Judgment, including provisions in its bidding procedure which provide that:

1. Confirmation bids for all specialty subcontracts or material supplies must be filed with the MCA bid depository;
2. General contractors may award a specialty or material supply subcontract only to bidders who have formally filed bids with the MCA bid depository in compliance with its rules and procedures;
3. Filed bids may not be altered or changed after the deadline for their filing;
4. A specialty contractor or material supplier who withdraws a filed bid may not rebid or negotiate a subcontract with the general contractor;
5. Filed bids shall be frozen if there is a postponement of less than 15 days in the time for the submission of prime bids, and, if there is a longer postponement, must be formally resubmitted through the bid depository;
6. Prior to the prime bid opening, general contractors may not divulge any information to a specialty contractor or material supplier regarding any sub-bid received; and
7. If a construction project is altered in scope, the general contractor must continue to deal with the low filed bidders or parties he used in covering the affected item(s) of work.

Section V.B orders MCA to include in any MCA rules on bidding for contracts on construction projects a statement that no MCA policy prohibits negotiation of sub-bids, or requires that

subcontracts be awarded only on sub-bids filed in accordance with MCA rules.

Section VI.A provides, however, that defendant is not enjoined from complying with any requirement of an awarding authority regarding the procedures general contractors must follow in obtaining sub-bids for the preparation of prime bids. This provision ensures that the proposed Final Judgment does not in any way limit awarding authorities' ability to establish bidding requirements for contractors. If the awarding authority decided that a regulated bidding system which prevented post-filing negotiations between contractors and subcontractors was appropriate, it could insist on it, and the contractors and subcontractors could comply without violating the decree.

Section VI.B further states that defendant is not enjoined from maintaining a facility that gathers sub-bids from specialty contractors and material suppliers and forwards them to general contractors, so long as use of the services it provides is voluntary. This provision ensures that the proposed Final Judgment does not prohibit MCA from operating a bid depository so long as the services provided are voluntary and do not prohibit negotiations between general and specialty contractors.

Sections VII and VIII ensure that full notice of the requirements of the Final Judgment is given to all of MCA's officers, directors, managers, and members.

Section IX requires MCA to establish and implement a plan for monitoring compliance with the terms of the proposed Final Judgment. MCA is also required to file with the Court and the

United States within ninety (90) days after date of entry of the Final Judgment, an affidavit explaining the steps it has taken to comply with the Final Judgment. MCA is required to file similar affidavits each year the Final Judgment is in effect.

Section XII makes the Final Judgment effective for ten (10) years from the date of its entry.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney fees. Entry of the Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendants.

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The APPA provides that any person wishing to comment on the proposed Final Judgment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. Any person who believes that the proposed Final Judgment should be modified, may submit written comments within the statutory 60-day period to Gary R. Spratling, Chief, San Francisco Office, Antitrust Division, United States Department of

Justice, 450 Golden Gate Avenue, 16th Floor, Box 36046, San Francisco, California 94102 (Telephone: 415/556-6300). These comments and the Department's response 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 Final Judgment at any time prior to its entry. Further, Section XI provides that the Court retains jurisdiction over this action and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Antitrust Division was a full trial on the merits and on relief. The Division considers the proposed Final Judgment to be of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violations alleged in the Complaint.

The effect of the proposed Final Judgment should be to eliminate entirely the alleged restraints on competition that are set forth in the Complaint. In particular, under the proposed Final Judgment, general contractors and specialty contractors and material suppliers can no longer agree to limit negotiations on the terms of sub-bids with each other. General contractors will be able freely to consider bids from any and all capable specialty contractors and material suppliers. Price competition among

general contractors and among specialty contractors and material suppliers will be facilitated, to the benefit of awarding authorities and, indirectly, to the benefit of federal and state taxpayers. The proposed Final Judgment adequately redresses all aspects of the government's Complaint in this case.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

The United States considered no materials or documents to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed pursuant to the APPA, 15 U.S.C. § 16(b).

Dated:

Respectfully submitted,

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