Antitrust Isn’t Just for Big Guys

The Justice Department Wants Competition in the marketplace and no illegal arrangements among any firms

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He was a fine contractor.

And—like so many other contractors these days— inflation and rapidly increasing material costs were clipping him hard on nearly every job.

Still, though, he wasn’t interested in doing anything illegal about it.

That’s why he didn’t give much of a care when the conversation started to drift into the area of prices. It was at the monthly breakfast meeting of the local construction council. That’s where the trouble started.

He and a few of his competitors began rehashing old shop talk and before anyone knew it prices were getting discussed. Then a contractor suggested, “Let’s all go up 10%.”

The contractor nodded his head. He hadn’t even opened his mouth—but that comment was all it took.

Today, the close-mouthed contractor and the price suggestor are both holding a summons in their hands. They—and every other contractor in that small discussion group—have been charged with a felony: conspiring to fix prices in restraint of trade.

If convicted, the contractors will each possibly spend three years in jail and pay $100,000 fines. The companies can each be fined as much as one million dollars. Any customers are now eligible to file suit against him for treble damages—three times the amount he overcharged his customers.

And all because he nodded his head.

Many speciality contractors and other small businessmen may feel that antitrust laws generally apply only to large corporations and stranglehold monopolies. Nothing could be further from the truth. In the last five years alone, the Justice Department has brought 263 price-fixing suits against firms with annual sales of less than $5 million.

One government attorney explained that too many small business owners are “very unsophisticated” about antitrust.

Following then are some of the broad areas that contractors should know about when it comes to antitrust laws.

Avoid Price Talk With Competitors.

The biggest area, of course, involves discussion of prices with competitors. Even when no agreements are made, later pricing activities can lead a court to believe that price-fixing was involved.

The rule is: absolutely no agreements between competitors fixing prices are legal. And ignorance of the law—as any informed individual knows—is no defense.

Even when an illegal discussion of price doesn’t result in any actual coordinated pricing action, the participants can be charged with a criminal violation.

Nor is price the only no-no. Any agreement to allocate customers or territories likewise amounts to illegal agreements not to compete. You can also add the following to illegal activities: understandings about the terms of sale they offer to their customers, credit arrangements, discounts, and the availability of service.

Illegal group boycotts also include agreements on what services contractors will offer, concerted action with or against any supplier or manufacturer.

The opportunity for illegal action is a constant danger. There are many joint actions, including most association activities, that are without risk of antitrust violations. But a prudent contractor will always make certain he is well behind the thin, narrow line of legality.

Small Companies Can Be Monopolies

Call the average wall and ceiling contractor a monopoly and, chances are, he’ll be amused. Most people think of huge corporations when the word “monopoly” is brought up.

Not true. Antitrust law defines an illegal monopoly as control over enough of the business in a “certain market” to dictate prices and keep out competition.

In this sense, it’s not unreasonable that a small business could, indeed, be a monopoly. Size doesn’t count when you’re counting sales volume alone.

When a company gains 60% or more of a market, it has reached the junction where it can be considered monopolist. A company has the right to choose its customers. But when the company is a monopoly it no longer has that right and is generally required to deal with any customer.

Absence of an alternative source is the catch. In lawsuits involving this accusation, both sides seek to define the “relevant product market.” A customer obviously

Continued on next page
would want a narrow interpretation, while a seller would argue for a broad definition so it could spread its share out over a wider market and thus, perhaps, show less dominance.

Again, it’s not essential to actually have a monopoly in a market to violate the antitrust laws. An attempt to monopolize is also illegal.

In the case of contracting, it’s just about impossible to achieve a monopoly situation even in a local market. An out-of-town contractor can come into the backyard and wreak havoc.

The monopoly question comes into the front end of the situation when a contractor seeks to get some kind of understanding with the “outsider.” That’s when restraint of trade rears its head—regardless of whether an agreement was put into practice or not.

**Tie-In Safes Can Be Illegal**

Wall and ceiling contractors aren’t particularly apt to be in a position to exert illegal tie-in sales arrangements—but they can be the victims of such actions.

By using the strength of one product to compel a customer to buy another he may not want, a tie-in restricts the buyer’s freedom to choose and thus hinders competition.

To the justice department, tie-ins of that nature are taboo. In an early tie-in decision, the Supreme Court told IBM in 1936 that it could not require customers who leased its tabulating machines that it had to use IBM’s cards.

Another type of improper tie-in is arranging the price on two items so that it is more expensive to buy just one.

Another area, though, that contractors might possibly get into hot water is price cutting to injure a competitor.

In an industry where bid shopping and bid peddling are more or less accepted forms of doing business and where practitioners will admit that accurate bids are almost as important as “the last 10 minutes of bidding,” price cutting is a difficult concept.

Yet a contractor—or a supplier or manufacturer—is acting illegally when a price is cut for the principle purpose of knocking out a competitor and thus reducing competition.

A manufacturer has the problem of geographic price discrimination—made illegal by the Robinson-Patman Act—which is lowering the price in one area to knock out a competitor while keeping it higher in another.

Specialty subcontractors change their prices in geographic areas all the time to respond to changes there. They also submit different prices to different general contractors and customers.

In many cases, though, these price differentials are established by a recognition of the area and the customer. A competent, good paying, hard driving general contractor will often get a better price from a sub on a job than will a GC who is known for running sloppy, poorly managed operations.

It’s when a sub drops his price below his costs just to cut down a competitor that trouble could arise. Obviously, intent is the main issue in a case where someone is charging that lower prices is lessening competition—or seeking to do so.

In any event, contractors would be well advised to steer clear of possible antitrust involvement. The Justice Department has already announced that it will be cracking down hard on violators—and this means small business.

Price-fixing is the most common violation of the antitrust laws and the best illustration of the fact that no businessman is too small to become the target of an antitrust filing.