

When The Government Comes Knocking

The Justice Department is Now Targeting Construction Industry For Anti-Trust Violations, Particularly Non-Competitive Acts

By McNeill Stokes, AWCI General Counsel

Recent newspaper articles make it clear that the United States Department of Justice and many state Departments of Justice are targeting construction industries for antitrust investigation and prosecution.

A number of factors have caused this emphasis. One of these is the recent change in state and federal laws converting antitrust violations from misdemeanor to felony status. Another factor is the federal government's deemphasis of civil remedies for alleged antitrust violations and contemporaneously emphasizing criminal remedies.

Both the state and federal governments realize that by using the criminal vehicle they can have their cake and eat it too. That is, they can use the grand jury system to subpoena documents and witnesses (a vehicle which would be unavailable in civil litigation), return an indictment, institute criminal litigation, and at the resolution of the criminal litigation then commence litigation to obtain a civil remedy utilizing the evidence procured during the criminal investigation.

Currently, the states of Texas, Georgia, Virginia, and North Carolina as well as the federal Department of Justice appear to be utilizing this practice. They appear to be targeting the construction industry for a number of reasons, not the least of which is that the decline in construction starts and



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the high risk nature of the industry have made it the type of industry which is extremely prone to noncompetitive practices.

What to Do?—

All this leads to the frequently asked question, what do I do when the government comes knocking?

The first indication that most companies have of law enforcement interest in their practices is the service of a subpoena. In more extreme cases, the first indication is by the service of a search warrant. Another, less frequently seen indicator, is a letter from the antitrust division notifying the re-

ipient that it is a "target" of a grand jury investigation. This initial phase, the investigatory phase, is the most important part of the process for the company. It is at this stage that the company must determine whether or not its practices may cause it to be criminally liable, and whether or not cooperation with the investigating authorities can be utilized to the benefit of the company by reducing the company's and the company's personnel potential criminal liability.

In order to do this, it must be informed about certain basic criminal law facts of life. We will set the stage this way: Calvin Ledbetter of Ledbetter Partitioning Contractors is in Atlanta, Georgia in July of 1977 for the bid opening to award a contract for the construction of the municipal hospital wing. While in Atlanta, Calvin stays in a downtown motel. Coincidentally, the other seven wall and ceiling contractors bidding on the hospital job are staying at the same motel. The night after the bid opening, over drinks in the bar, Joe Ralston, vice president of the Do-Good constructors asks all seven of the corporate officers for the different corporations whether any of them are interested in bidding on the partition work to be performed in constructing the Atlanta Municipal Jail, the bids for which will be opened in two months. For various reasons, all contractors state that their companies are not interested

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in bidding. The following day, Calvin returns to his home office in Orlando, Florida and Joe returns to the Do-Good home office in Hihira, Georgia.

A week and a half later Calvin gets a call from Joe who is at his home office. Joe asks Calvin whether his company has changed its mind about not bidding on the Atlanta jail job. Calvin says they are still not interested. Joe then asks Calvin if he would do him a favor and submit a complimentary bid.

Calvin thinks about it, doesn't really want to, but remembers what a good guy Joe has been over the years and thinks about the probability that

he and Joe may want to joint venture a job sometime in the years to come. Even though Joe offers Calvin nothing, Calvin says that he will go ahead and send in a complimentary bid. He will have his folks look over the plans and write down a few figures and call a couple of materialmen. Joe should call him a couple of days before the bids are due and gives him a number to fill in for his bid.

A few weeks later, Joe calls Calvin, gives him a number to fill in on his bid for the jail, whereupon Calvin fills in the bid, signs it and mails it off to Atlanta.

In a few days Calvin gets a letter

from the City giving him notice that he was not awarded the contract and releasing Calvin's bid bond. Later, through industrial publications, Calvin learns that Do-Good was the low bid on the job and were able to finish work within the 24 month CPM schedule and came in within 50% of their bid. Since Calvin was uninterested in the job in the first place he feels happy for Joe, but thinks nothing more of it.

Years later, in 1981, the Marshal knocks on Calvin's door and presents him with two subpoenas. The first is for the custodian of records of Calvin's company to produce all rec-

ords "relevant to, in connection with, contemporaneously to, referring to, [the Atlanta bid] including but not limited to: bid workup sheets, proposals for purchase orders, estimators worksheets, cash flow calculations, and originals or duplicates of all bid documents and documents made in anticipation of bidding." The second subpoena is for Calvin to appear before and give testimony to a federal grand jury.

A Conspiracy . . .

Let's analyze what took place. First of all, Calvin may well have joined in a "contract, combination in the form of trust and otherwise, and conspiracy, in restraint of trade . . ." known colloquially as the Sherman Act. The maximum potential is a fine of \$1 million to the company and a fine of \$100,000.00 to Calvin and imprisonment for a term not to exceed three years for Calvin.

In addition, Calvin may have well joined a conspiracy to defraud the United States and to violate the laws of the United States. What Calvin did not know was that part of the money used to build the jail came from the federal assistance to local law enforcement agencies funds. Calvin did not need to be aware of this to be guilty of conspiracy to defraud the United States. Calvin was also guilty of conspiracy to commit mail fraud and conspiracy to commit wire fraud.

Although this conspiracy had many illegal purposes it is but one conspiracy and the maximum potential punishment is a fine of \$10,000 and imprisonment for not more than five years.

It does not stop here.

Because the telephones between states were necessary and foreseeably necessary to effect the objects and purposes of the conspiracy (remember, Joe called Calvin from Georgia to Florida). Calvin may well be guilty of wire fraud. Maximum permissible penalty for wire fraud is \$1,000 fine or five years imprisonment or both. Additionally, Calvin and possibly other members of the conspiracy, mailed his bid to Atlanta. The reasonable and foreseeable use of the mails to perpetuate this fraud makes Calvin vulnerable to a charge of mail

fraud, the maximum potential penalty for which is five years imprisonment or \$1,000 fine or both. It should be noted that each independent use of the wire and use of the mail is a separate count.

Therefore, because Joe called Calvin twice, Calvin mailed in his bid, and the City of Atlanta mailed back his rejection slip and release of bond, Calvin is liable to four separate counts each having an independent maximum

potential penalty of five years imprisonment.

The bottom line is that, although Calvin received not a penny for his efforts, he is facing 28 years imprisonment and \$114,000.00 fine and his company is facing a \$1 million fine.

A Lawyer is Needed

What should he do? First of all, Calvin needs a lawyer. He needs

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someone who can negotiate in his behalf without making statements which might be used to incriminate him and, if necessary and possible, move to quash those subpoenas.

What Calvin should not do is destroy, secret, or otherwise dispose of any of the records of his company notwithstanding the fact they may be highly incriminating. This is for two reasons.

The first is that because in the highly communicative world that we live in he can fairly well rest assured that additional copies of any documents which his company has in their possession are available from some other source, and their absence in his files may be just as damning as their presence.

The second reason is that a grand jury has been impaneled and process issued to investigate alleged violations of the law and he may well be guilty of obstruction of a criminal investigation and be subject to \$5,000 fine or five years imprisonment or both.

Another thing that Calvin should not do is appear before the grand jury. If Calvin goes before the grand jury at this juncture without any agreement with the government he may either lie and subject himself to the penalties for perjury, which are a \$2,000 fine or five years imprisonment or both; or tell the truth and get indicted for a cornucopia of violations of the law.

The best thing that Calvin can do is to appear, and refuse to testify. Although he could be granted com-

pulsory immunity and be compelled to testify or be jailed for up to 18 months for refusal to testify after being given immunity, this is not a very likely occurrence. If he is granted immunity, none of the testimony which he gives under the grant of immunity can be used against him or can be used to procure evidence to be introduced against him and he is on pretty safe ground.

A Time to Decide—

What Calvin and his attorney need to do is weigh the probabilities of criminal charges stemming from this investigation. One of the resources they can use to determine these probabilities are by examining the other

subpoenas issued by the same grand jury in this investigation and try to make a determination of what, if anything, has gone on within the secrecy of the grand jury room.

They should also weigh the probabilities of other members of the conspiracy introducing evidence which would implicate Calvin. Calvin can rest assured that the investigators have already obtained copies of his telephone records, the telephone records of the other bidders and the postmarked correspondence to the City.

If the probability of indictment and conviction appear substantial, and even if they don't, Calvin's attorney will be communicating with the prosecuting attorneys to determine what sort of negotiated resolution can be made at this inquiry. Calvin and his attorney will keep closely in mind that Calvin's company is a sole proprietorship and that it is facing substantial fines and penalties in both criminal and civil litigation and that any resolution of this matter should encompass a complete agreement concerning civil liability.

Here's what Calvin might expect. The best of all possible worlds would be a determination by the prosecutors and the grand jury that there is insufficient evidence to warrant indictment and have the matter closed without prosecution.

Since they knew Calvin was out there, and subpoenaed his presence and records to the grand jury, it is fairly probable that they have a strong foothold in this investigation and the matter will not be closed.

Absent that, the second best alternative for Calvin would be complete immunity for both him and his company in exchange for their cooperation into this, and any other collateral investigations and prosecutions. If this is unavailable, Calvin can negotiate for any of a myriad of alternatives.

The least onerous alternative would be a form of pre-trial diversion; where the subject agrees to participate in a set period of supervision, similar to probation, which, if successfully concluded, results in all charges being dismissed. Another alternative would be a plea or pleas of guilty or nolo contendere to lesser, misdemeanor, offenses which are collateral to the felony violations being investigated.

This is not to say that an early negotiated settlement of the case is always in the best interest of the suspect. But it is certainly to say that it is absolutely in the best interest of any suspect or potential suspect to become aware of his potential liability and potential options as early as possible and to investigate exercising those options immediately, so that he may make a well informed purposeful

decision at each stage of the litigation process.

That is, that he does not wait until the last minute and be forced into a trial with extremely serious criminal exposure before realizing the gravity of the situation or the alternatives he has for resolving the case. Later editions of this newsletter will address the criminal trial process and additional alternatives for negotiations.