

AVOIDING THE DOJ'S RED FLAGS OF COLLUSION

The U.S. Department of Justice appears to have collusion in its crosshairs with its formation of a procurement and collusion strike force. Here are typical schemes and red flags in the context of new DOJ guidance.

Last November, the U.S. Department of Justice (DOJ) announced the formation of a new Procurement Collusion Strike Force (PCSF). The PCSF will focus on “detering, detecting, investigating and prosecuting antitrust crimes, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant and program funding.” (See tinyurl.com/y4c3lbeK.) Government procurement officials and members of the public can review information on the PCSF’s website (tinyurl.com/rustjzn) about the federal antitrust laws and training programs, and report suspected criminal activity affecting public procurement.

The scope of this strike force is limited to companies doing business with the U.S. government. However, all organizations can learn from the schemes and red flags described in the DOJ guidance. “Across various industries, companies are appropriately focused on this new enforcement initiative,” says Andrew Levine, a white collar, regulatory defense and internal investigations partner with Debevoise & Plimpton, LLP. “Consistent with best practices,



companies should conduct periodic compliance risk assessments to determine their relevant exposures to fraud, abuse and collusion, and implement risk-based controls to mitigate such risks, including appropriate policies and procedures, training for relevant

employees, and periodic auditing and testing,” Levine says.

Most CFEs are already knowledgeable of the various forms of collusion, but it’s helpful for all organizations around the world to evaluate their anti-fraud programs and risk assessments in

line with how the DOJ views collusion — just in case DOJ agents ever come knocking at your door.

Various forms of collusion

The COSO/ACFE *Fraud Risk Management Guide* defines collusion as a secret agreement between two or more parties for fraud or deceit. (See tinyurl.com/uo4fwfm.) CFEs (and perhaps fans of the HBO TV series “The Sopranos”) know that collusion can take place in various forms, including price-fixing, bid-rigging and market-division schemes.

According to the DOJ, price fixing involves competitors making an agreement to fix, raise or maintain the price at which they sell their goods or services. (See tinyurl.com/jjeamqp.) In bid-rigging schemes, conspiring competitors decide and agree in advance on who’ll submit the winning bid on a contract. Market division or allocation schemes are agreements where competitors divide markets among themselves, whether by geography, customer profile or certain products.

Perpetrators usually collude in secret, so crimes can be difficult to detect. Fraud examiners can increase detection by being aware of conditions most favorable to collusion combined with some data analytics techniques I’ll describe.

The DOJ guidance says that collusion is more likely to occur with particular conditions such as:

- “Collusion is more likely to occur if there are few sellers. The fewer the number of sellers, the easier it is for them to get together and agree on prices, bids, customers, or territories. Collusion may also occur when the number of firms is fairly large, but there is a small group of major sellers



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and the rest are ‘fringe’ sellers who control only a small fraction of the market.

- “The probability of collusion increases if other products cannot easily be substituted for the product in question or if there are restrictive specifications for the product being procured.
- “The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on other forms of competition, such as design, features, quality, or service.

- “Repetitive purchases may increase the chance of collusion, as the vendors may become familiar with other bidders and future contracts provide the opportunity for competitors to share the work.
- “Collusion is more likely if the competitors know each other well through social connections, trade associations, legitimate business contacts, or shifting employment from one company to another.
- “Bidders who congregate in the same building or town to submit their bids have an easy opportunity for last-minute communications.”

DOJ framework for identifying red flags

In its November 2019 release, the DOJ provided a simple, four-part analysis framework using the acronym MAPS:

M = market

Who’s in the market for this award? To look for red flags, first determine how many vendors can compete for an award. Then, identify those vendors that are best positioned to perform it. There might be collusion if only a few vendors in the market fit the criteria for the award, or only a few vendors control a large share of the market. Another red flag is when the “good or service is standardized, so that the determining factor in the award is price rather than other competitive factors (such as design, quality, or service).”

A = applications

“Do you see similarities between vendor applications or proposals?” DOJ guidance calls for closely examining the proposals or applications submitted



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by competitors. Be suspicious if two or more of the proposals “contain similar handwriting, typos, or mathematical errors.” Are multiple proposals sent from the same mailing address or email address? Do they reflect last-minute changes to price quotes? Check file properties on electronic documents to see if a single user created or edited multiple proposals.

P = patterns

“Have patterns developed among competing vendors?” Prior awards for a product or service can show patterns over time. Red flags include seeing a rotation of winners among competing vendors, and/or similar amounts of work for each vendor over time. Conversely, a red flag is if one vendor

always wins regardless of competition. As the DOJ states, be suspicious when “a vendor that wins the award subcontracts work to losing vendors or to vendors that withdrew their proposals or refused to submit proposals.” Another red flag is if fewer vendors submit proposals for an award compared to prior awards.

S = suspicious behavior

This is a catch-all for everything outside of the previous three elements. Have vendors demonstrated behavior that suggests they worked together on the award? Be suspicious if a vendor submitting a proposal lacks the ability to provide the requested goods or services. Also beware of a vendor who

“brings multiple proposals to an in-person procurement or grant process or submits multiple proposals” or “makes statements on the phone or by e-mail indicating advance knowledge of a competitor’s prices or likelihood of winning the award.”

Technology innovations for combating collusion

Data analytics techniques such as comparisons, averages, anomalies and even suspicious terms or justification descriptions — methods I’ve discussed in previous columns — can provide tip-offs in suspicious patterns (“P” in the DOJ framework above). We can also use interactive dashboards, time series analysis, statistical anomaly detection, text mining and artificial intelligence techniques, among other data analytical techniques.

“Given the regulatory scrutiny around the procure-to-pay business process in today’s mid-to-large organizations — especially around anti-bribery and corruption, sanctions and trade compliance, and collusion — business transparency into third-party spend is no longer just a finance and accounting topic of concern; it is a legal, risk and compliance concern,” says Anant Kale, CEO of AppZen Inc., during a recent *Fraud Magazine* interview. AppZen says it’s using artificial intelligence on finance and expense monitoring systems to root out collusion and bring more transparency into businesses.

Here are some of my personal favorite anti-collusion testing algorithms that tend to be effective when I’ve deployed them in data analytics technology:

- Shorter-than-average word count on award justifications.
- Less-detailed award justifications.
- Higher-than-average sole source justifications.
- Higher percentage of awards with the same company.
- Higher-than-average complaints or issues such as poor quality, late delivery, shortages, substitutions, etc.
- Higher-than-average complaints from losing bidders.
- Lower-than-average awards to the lowest bidder (more awards to a non-lowest bidder).
- Higher-than-average change orders/modifications.
- Higher-than-average dollar value of change orders/modifications.
- Higher-than-average requests for proposal (RFP) changes or re-requests.
- Higher-than-average bid date extensions.
- Faster-than-average date to first change order/modification.
- Higher-than-average supplier visits or meetings.
- Higher-than-average spread between bidders.
- Higher-than-average approval of late bidders.
- Faster-than-average payments to buyer’s vendors.
- Bidders who have a high loss percentage.
- Winning bidders who consistently submit the last bid.
- Bid documents from vendors with similar language or phrases
- Consistently low or high margins on a particular product or product category.

- Bidders with similar names, numbers, addresses, etc.
- Contractors who’ve submitted losing bids, or withdrew and become subcontractors.

Collaborating with your procurement department

Fraud examiners and other anti-fraud professionals should brainstorm with colleagues in procurement departments about fraud risks related to DOJ collusion guidance — perhaps even walking through the questions and risk areas pointed out in the MAPS analysis.

Preventing and detecting collusion within the procurement function is now easier and more efficient with leading compliance monitoring and data analytics tools, despite the secretive nature of this category of fraud outside a company’s books and records.

Everyone in an organization represents the front line of fraud prevention and detection. However, it’s our duty to help raise awareness and carry the torch (ACFE logo pun intended). Combined with preventive and detective anti-collusion controls, and monitoring activities, aligning your program and assessment to the DOJ’s new framework will help further strengthen your program and add credibility to your general counsel, chief procurement officer and chief compliance officer who someday, in an unfortunate event, might have to meet and negotiate with the DOJ. ■ **FM**

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