



TAUC – The Association of Union Constructors

ANTITRUST COMPLIANCE PROGRAM

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I. APPLICATION OF ANTITRUST LAWS TO TAUC ACTIVITIES

Trade associations, such as The Association of Union Constructors (TAUC), are subject to strict scrutiny under both federal and state antitrust laws. Since competitors in a particular industry join a trade association to pursue a common business purpose, trade associations are especially vulnerable to antitrust attack under federal and state laws. Trade associations and trade association members should exercise a great deal of care when carrying on certain activities so as to avoid any violation of the federal and state antitrust laws.

The consequences for violating the antitrust laws are severe. A conviction can carry stiff fines for the association and its members, jail sentences for individuals who participated in the violation, and a court order dissolving the association or seriously curtailing its activities.

II. THE SHERMAN ACT AND THE FEDERAL TRADE COMMISSION ACT

With regard to trade association activities, the most important antitrust statutes are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of

the Sherman Act prohibits "contracts, combinations, or conspiracies ... in restraint of trade." By their very nature, trade associations involve a "combination" of competitors so they are especially prone to antitrust attack.

Under the Sherman Act, any understanding or agreement affecting the price of a product or bid on a contract such as a construction job, is prohibited, regardless of the purpose of the understanding. Even if the agreement will benefit consumers, it is prohibited.

Of great importance to TAUC members is the fact that the Sherman Act is a criminal conspiracy statute. Consequently, an executive who attends a trade association meeting at which competitors engage in illegal discussions which relate to prices or bids may be found to have participated in a conspiracy and may be held criminally responsible, even if he says nothing at the meeting. The executive's attendance at the trade association meeting may be sufficient to imply acquiescence in the discussion, making him liable to as great a penalty as those who actively participated in the price-fixing or bid-rigging agreement.

Section 5 of the Federal Trade Commission Act forbids "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." It is distinct from Section 1 of the Sherman Act in that it does not require a "combination" in order to reach anticompetitive acts committed by an association or a company. On the other hand, it will, like the Sherman Act, cover joint actions. The Federal Trade Commission's authority in determining what constitutes an unfair method of competition or unfair or deceptive act or practice is extremely broad. As a result, antitrust actions can be brought to cover a wide range of charges.

Given this wide range of charges, as well as the severe penalties which can be invoked under the antitrust laws, TAUC has established an antitrust compliance program. Under this

program, every effort will be made to stop any potential antitrust violation before it begins. All TAUC officers, directors, and staff will receive a copy of the TAUC Antitrust Compliance Program. Counsel will explain the program to the Board and to staff.

III. PENALTIES FOR VIOLATION OF THE ANTITRUST LAWS

The federal antitrust laws may be enforced against associations, association members and the association staff, both by government officials and by private parties through treble damage actions. In each case, the potential penalties are quite severe.

The maximum penalty for an individual convicted of a criminal violation of the Sherman Act is a fine of \$1,000,000, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer, whichever is greater. In addition, an individual may be imprisoned for up to ten years. However, in no case will an individual convicted of a criminal Sherman Act violation be sentenced to less than 90 days of jail time. A corporation convicted of such a criminal offense may be fined as much as \$100 million, twice the pecuniary loss of the victims, or twice the pecuniary gain of the wrongdoer.

A violation of the Federal Trade Commission Act can result in the issuance of a cease and desist order, thereby placing extensive governmental restraints on the activities of an individual company, its officers and directors, an association and its members. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

In addition to governmental prosecution for a criminal or civil antitrust violation, a company or an association can face a private treble damages action brought by competitors or

consumers. A finding of a violation of an antitrust law in a private action may result in payment by the defendant of three times the damages suffered by the plaintiff plus attorneys fees.¹

IV. ANTITRUST PROBLEM AREAS OF ASSOCIATION ACTIVITY

A. Areas of General Concern

As a practical matter, all trade associations such as TAUC should focus their attention on five principal antitrust problem areas:

1. Price-Fixing and Bid-Rigging

Experience shows that trade association members are most likely to violate, and the government is most likely to strictly enforce, the Sherman Act's ban on price-fixing or bid-rigging. Antitrust violations in the price-fixing or bid-rigging areas can be inferred simply from similar price or bid behavior by association members. An oral or a written agreement is not needed to ground a charge of price-fixing or bid-rigging. Neither the reasonableness of the prices set or the amounts bid nor the potentially beneficial purposes underlying the agreement will constitute a defense in the event that price-fixing or bid-rigging is established.

2. Agreement to Allocate Customers or Divide Territories

An agreement among members of an association to allocate customers or divide geographical territories is, in and of itself, a per se violation. The antitrust laws expressly prohibit any understanding or agreement between competitors or members of an association involving division of territories or allocation of

¹ For example, if the antitrust violation at issue is a price-fixing conspiracy, the measure of damages to one of the conspirators' customers is the difference between the prices actually paid and the prices that would have been paid absent the conspiracy. See, .@. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979), cert. denied 444 U.S. 914 (1983).

customers. Even an informal agreement whereby one member agrees to stay out of another's territory will constitute a criminal violation of the antitrust laws.

3. Membership Restrictions

Assuming that the members of an association derive an economic benefit from membership, the denial of membership to an applicant may constitute a restraint of trade because such a denial may limit the ability of the applicant to compete. Therefore, membership criteria must be carefully established with a view toward avoiding antitrust problems.

4. Standardization and Certification

An association that develops voluntary industry standards may face antitrust problems if such a standard favors some competitors and discriminates against others. Similarly, association certification activities which further the interests of certain groups of members, to the exclusion of others, may result in antitrust problems.

5. Industry Self-Regulation

Associations commonly establish codes of ethics for their members, including procedures for enforcement of such codes. The association must guard against any efforts to enforce such codes of ethics if such enforcement would result in economic injury to certain members. At the present time, TAUC does not engage in self regulation activities.

B. Bid-Rigging -- An Area of Special Concern for the Construction Industry

Bid rigging is obviously the major concern for companies engaged in the construction industry.

We recently surveyed the Antitrust Division's enforcement activities involving bid rigging from 2006-2009. During that period of time, the Antitrust Division convicted eleven corporations of bid rigging. The corporations paid fines totaling over \$19 million. The average fine was almost \$2 million. During the same time period, thirty-five individuals were found guilty of bid rigging. The individuals received jail sentences ranging from a minimum of six months to a maximum of one-hundred and eight months. Individual fines ranged from a minimum of \$20,000 to a maximum of over \$5 million.

Bid rigging can take many forms. The most blatant form of bid rigging would be an agreement among competitors that establishes what each competitor will bid on one job or on a series of jobs. However, bid rigging can take a more insidious form. Competitors could establish a "floor" and agree that no one will bid below the floor. Such a practice would also constitute bid rigging.

Another form of bid rigging would be an agreement that a certain competitor would bid low on jobs within a defined geographic area and other competitors would bid low in other areas. A practice where certain competitors agree not to bid in certain areas also constitutes bid rigging. There is no need to have an agreement on price to institute bid rigging. Any agreement to add certain types of charges, ancillary costs, finance charges or other add-ons to a bid also constitutes bid rigging.

Finally, we have bid rigging in the form of a "friendly" bid. Your competitor calls you and asks you to do him a favor. He tells you that he is bidding on a job and the RFP calls for a minimum of three bids. He says that he knows that there will be another bid besides his bid but he is afraid that the contract will not be awarded unless the owner receives three bids. He asks

you to submit a “friendly” bid knowing that you do not want the job. He tells you what he is bidding so you can bid high and you don’t have to be concerned about actually getting the job.

Agreeing to submit a “friendly” bid constitutes “bid rigging” and may be held to be a criminal antitrust violation.

Contractors should avoid any agreements with competitors or any discussions which could be construed as bid rigging. TAUC will not permit any such discussions at TAUC meetings.

V. HOW TO AVOID ANTITRUST PROBLEMS

TAUC has adopted the following rules in order to insure against possible violations of the antitrust laws:

A. General Operating Procedures

1. A full description of the association's intention to comply fully with the antitrust laws will be included in the written policies of the association.
2. All members of the Board of Directors of the association will receive a copy of the association's antitrust policy statement, detailing what can and cannot be done at association meetings.
3. The association's legal counsel will update members concerning antitrust problems periodically and has formalized the association's antitrust compliance program.
4. The association's legal counsel approves, in advance, all new association programs or changes in existing programs that may have potential antitrust

implications. In this regard, special attention is given to statistical reporting programs.

5. All association meetings are regularly scheduled, and members are not permitted to hold "rump" meetings.

6. An agenda is prepared for each meeting of the association, and the agenda is reviewed in advance by legal counsel if antitrust sensitive subjects are involved.

7. Legal counsel is present at all meetings of the Board of Directors and at any other meeting at which antitrust sensitive issues will be discussed.

8. The minutes of all meetings are approved by legal counsel. The minutes reflect the association's policy of complying with the antitrust laws.

9. The minutes of all association meetings are accurate, and the TAUC staff never submits minutes which have been doctored, which are incomplete, or which have not been approved by legal counsel.

10. No action by the association or its board of directors which has the effect of rejecting a membership application becomes final without approval by legal counsel.

11. The association has a formal record retention program.

12. No association staff member has authority to communicate with officials of the Federal Trade Commission or the Antitrust Division of the Department of Justice without prior approval of the association's legal counsel.

B. Membership Policy

TAUC does not:

1. Exclude certain competitors from membership in the association, if the applicant meets Bylaw requirements.
2. Restrict members from dealing with nonmembers.
3. Limit access to information developed by the association, unless such limitation is firmly grounded upon the need to protect trade secrets.

C. Self-Regulation and Codes of Ethics

TAUC does not:

1. Adopt regulations or policies which have price-fixing implications, such as restrictions on advertising of prices or bidding, or which unreasonably inhibit the ability of any member or group of members to compete.
2. Require members to refrain from dealing with any vendor, supplier, customer or other member.

D. Topics of Discussion Which Must Be Avoided at Association Meetings

1. Current or future prices or bids. (Great care must be taken in discussing past prices or bids.)
2. What constitutes a "fair" profit level.
3. Possible increases or decreases in prices.
4. Standardization or stabilization of prices.
5. Pricing procedures.
6. Any topics which could constitute an attempt to affect the bids submitted on a job or series of jobs.
7. Credit terms.
8. Control of sales.

9. Allocation of markets.
10. Refusal to deal with a corporation because of its pricing or bidding practices.
11. Whether or not the pricing or bidding practices of any industry member are too high or too low.

VI. WHAT TO DO IF ANTITRUST ISSUES ARISE?

A. TAUC Meetings. If you are at a TAUC meeting where a subject matter comes up that you believe raises antitrust issues, request that the subject be tabled until an opinion can be obtained from counsel as to the legality of the discussion.

1. If the discussion is not tabled, leave the room and announce that the reason that you are leaving is because you believe that the topic of the discussion raises antitrust issues.
2. Whether the discussion is tabled or not, contact TAUC Chief Executive Officer Steve Lindauer or TAUC General Counsel Steve Fellman and advise them of the issue involved.
3. Consult with your company antitrust counsel.

B. Discussions with Competitors

1. Informal discussions at TAUC meetings: If during the course of a TAUC meeting, you have a discussion with a competitor or group of competitors during a break, on the golf course, during a meal or at any social gathering and a subject

matter comes up that you believe raises antitrust issues, request that the subject be dropped.

a. If the subject is not dropped, walk away and announce to the others that the reason that you are walking away is because that you believe that the subject of the discussion raises antitrust issues.

b. Whether the discussion is stopped or not, contact TAUC Chief Executive Officer Steve Lindauer or TAUC General Counsel Steve Fellman and advise them of the issue involved.

c. Consult with your company antitrust counsel.

2. Discussions with Competitors - - Not at TAUC Meetings.

a. If a discussion occurs with a competitor or a group of competitors at a venue other than at a TAUC meeting that you believe raises antitrust issues:

(1) Ask that the discussion of the problem topic stop.

(2) If the discussion does not stop, walk away and announce that the reason that you are walking away is because you believe that the subject of the discussion raises antitrust issues.

(3) Follow your company antitrust policy.

(4) Consult with your company antitrust counsel.

VII. COMPANY ANTITRUST COMPLIANCE POLICIES

A. All contractors should have a corporate antitrust compliance policy

1. An antitrust compliance policy protects the company.

2. An antitrust compliance policy protects top management.
- B. Your antitrust compliance policy should include as a minimum:
1. A letter from the CEO to all managers and employees engaged in bidding or other antitrust sensitive practices which spells out the corporate commitment to antitrust compliance.
 2. A statement of the corporate antitrust compliance policy.
 3. A requirement that all managers or employees engaged in bidding or antitrust sensitive activities sign a statement indicating:
 - a. They have received the company antitrust compliance policy;
 - b. They have read and understood the policy;
 - c. They agree to comply with the policy and understand that employees who violate the policy are subject to corporate sanctions including job termination.

VIII. QUESTIONS

Any TAUC members who have questions regarding the TAUC Antitrust Compliance Program should contact TAUC Chief Executive Officer Steve Lindauer or TAUC General Counsel Steve Fellman.

ABOUT THE AUTHOR

Steve Fellman is TAUC's General Counsel. His primary expertise is in the area of antitrust law.

Steve began his career as a trial attorney at the Federal Trade Commission. Since entering private practice, he has represented numerous corporations and trade associations in FTC litigation, Department of Justice Civil and Criminal litigations and in private antitrust treble damage actions.

Steve has served as Chair of the Trade Association Committee of the Antitrust Section of the American Bar Association; Chair of the Antitrust and Trade Association Committee of the Bar Association of the District of Columbia and Chair of the Legal Section of the American Society of Association Executives. He has written numerous articles on antitrust issues and is the author of the Chapter on Antitrust Compliance in the Antitrust Advisor, a well known antitrust guide for lawyers published by the West Group.

Steve is a shareholder in the Washington, D.C. law firm GKG Law, P.C. He is the Chair of the Firm's Antitrust and Association practice group.

TAUC has presented Steve Fellman with its President's Award for his outstanding service to the Association and its members.

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