



NECA
2020 
LIVE

sponsored by

POWERING **BETTER** CONSTRUCTION.
CHICAGO **CAREERS.**
NEW YORK **BETTER** COMMUNITIES.



Antitrust Issues for Construction Contractors

Jeffrey Tenenbaum

Wednesday, October 7th, 2020

12:05 PM – 12:45 PM EST

CONVENTION EDUCATION

Agenda

- Antitrust Basics
- Application of the Antitrust Laws to Associations like NECA
- Compliance Programs and Associations
- Discussion and Q&A



Antitrust Basics

- Most countries use the term “competition law” rather than antitrust
- Basic idea – prevent firms or groups of firms from obtaining the power to control a market through means other than competition on the merits
 - Generally not a violation to exercise that power
 - Nothing wrong with winning by innovating or running a better business

Basics – Different Types of Antitrust Rules

- Agreements and other coordinated and multilateral conduct – Section 1 of the Sherman Act
 - Most of the issues for associations relate to this
- Monopolization – Section 2 of the Sherman Antitrust Act
- Mergers – the Clayton Antitrust Act
- Agreements and other coordinated and multilateral conduct – Section 5 of the Federal Trade Commission Act (similar to Section 1 of the Sherman Act)

Basics – Agreements and Coordinated Conduct

Sherman Antitrust Act §1:

“Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”

Basics – Agreements and Coordinated Conduct

“Every contract, combination in form of trust or otherwise, or conspiracy...”

- This means agreements
- Often it is hard to show that there is an agreement –
Firms generally don't enter into formal agreements to fix prices

Basics – Agreements and Coordinated Conduct

Proof of Agreement

- Actions of an association are often taken as evidence of an agreement among the members of the association to take that action
- Even actions of an individual working for the association can be evidence of an agreement among the members to the association

Basics – Agreements and Conduct

“...in restraint of trade or commerce...”

Does the agreement harm competition – two types of potentially anticompetitive agreements:

- Those that are deemed to be anticompetitive on their face – *per se* illegal agreements
- Those that might be anticompetitive but that must be analyzed under the “rule of reason”

Basics – Per Se Illegal Agreements

Per se illegal agreements

These are agreements that always or almost always restrict competition and reduce output

- Price fixing – including components of price and price-related terms like discounts, credit terms, and trade-in allowances
- Market allocation – where firms agree to stay out of each others' markets so they don't compete
- Bid-rigging – where the parties agree to not bid against each other
- Some group boycotts – competitors get together to enforce a price fixing agreement, not do business with an entity, or harm a rival

Basics – Agreements and Coordinated Conduct

***Per se* violations like price fixing, market allocation and bid rigging can be crimes, leading to jail time for those found guilty**



Basics – Criminal Violations

- Associations have been used as cover for criminal antitrust violations
- Penalties are severe
 - Incarceration
 - Fines of up to \$1 million for individuals and \$100 million for organizations
- Evidence of criminal violation needs to be reported to the responsible officer of the association immediately

Basics – Agreements and Coordinated Conduct

Rule of Reason – a more-or-less detailed look at the restraint to see if it promotes competition or suppresses competition:

- Look at the restraint itself
- Look at the market power of the firms imposing the restraint
- Look at potential efficiency justifications for the restraint

Key Antitrust Issues for Associations

- Price fixing through association statistical reporting, information exchanges, and the like
- Price fixing through inappropriate communications between members at meetings or association-sponsored online forums
- Group boycotts – competitors get together and agree not to deal with a competing firm; applies to membership restrictions as well
- Codes of ethics and other self-regulation – regulation of member competitive conduct
- Certification, accreditation and standard-setting
- Market allocation
- Illegal tying arrangements

Enforcement of the Antitrust Laws

- Federal and state antitrust law
- Civil and criminal
- Very significant potential fines and penalties, including treble (triple) damages and attorneys' fees and costs in private litigation
- Enforced by:
 - U.S. Department of Justice Antitrust Division
 - Federal Trade Commission
 - State Attorneys General
 - Private Plaintiffs

Associations and Group Boycotts

- Group boycott issues can arise in a number of ways for associations (more about each later):
 - Self-regulation and codes of ethics
 - Standard-setting and certification
 - Membership requirements and access to association services and activities
- Might be illegal *per se* or may be looked at under the rule of reason

Association Liability

- Where the association directly violates the Sherman Act – negotiating prices on behalf of members
- Apparent Authority – member violates the antitrust laws through the machinery of the association which doesn't have safeguards to prevent it
 - *Hydrolevel v. American Society of Mechanical Engineers* case – members in leadership positions use their positions to harm competitor in the market by interpreting safety standards

Antitrust Liability for Officers and Directors of Associations

17

- There **should not** be personal liability for those who exercise ordinary and reasonable care in the performance of their duties, showing honesty and good faith
- There **may be** personal liability for those who participate in or knowingly approve of an antitrust violation

Application of Antitrust Law to Associations

- Discussions at meetings and online forums
- Membership restrictions
- Services to members and non-members
- Statistical reporting and information exchanges
- Standard-setting and certification and accreditation programs
- Regulation of business conduct
- Lobbying

Discussions at Meetings

- Proof of an anticompetitive agreement can start with proof of parallel conduct plus potentially illicit communications between rivals
 - Because association meetings generally involve communications between rivals, care must be taken to avoid illicit communications
- That means that discussions at meetings are often formalized and laid out ahead of time to a great extent

Discussions at Meetings

- Agendas and presentations prepared and distributed in advance of meetings
- Care should be taken to keep to these materials at the meeting unless there is a good reason to depart
- Minutes of the meetings should be prepared that concisely reflect the discussions
 - Especially where they diverge from the pre-prepared materials

Discussions at Meetings

- There are a number of off-limit topics where discussions could lead to illegal agreements
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price
 - Whether to do business with suppliers, customers or competitors
 - Complaints about business practices of other firms
 - Confidential firm plans regarding output decisions or decisions regarding future offerings

Statistical Reporting

- There can be per se and rule of reason violations as a result of information collection and dissemination
- Recall that per se violations include:
 - Price fixing
 - Agreements to restrict output – which is really the same thing as price fixing
 - Market allocation
 - Certain group boycotts (particularly ones rooted in price)

Statistical Reporting – Per Se Violations

- It is hard to succeed at committing these violations unless you know what your competitors are doing
- What if you and your rival agree to raise prices by \$100 but you can't tell what they are actually charging?
- So when competitors are communicating pricing information, it is always possible they are doing that to help make a price fixing agreement stick

Statistical Reporting

- These types of communications within an industry are often done through third parties (e.g., associations) to avoid direct contact between rivals
- Important issues for an association when acting as a third party for communications
 - Type of information (price v. cost, current v. older, specific as to parties and transactions v. more general and aggregated, only for sellers v. available to customers also)
 - Purpose of the information reporting – can't be for anticompetitive reasons
- Can you articulate pro-competitive reasons?

Statistical Reporting

- Make sure that firms can't derive info about their competitors from the disclosures (DOJ/FTC safe harbor):
 - Aggregate info rather than individual firm data
 - Old/historical data rather than forward-looking data (at least three months old)
 - Only where there is enough firms that it is hard to guess who did what
 - Data submitted should be kept confidential; no member should be given access to the data submitted by another member
 - Competitors cannot handle the data collection process (use third party, such as an industry association)
 - Member participation must be voluntary
 - Each member should separately analyze the data and make independent business decisions based on the data; no group discussions of the data
- Where there are only a few firms in the industry, it might be easier to pick out their data from the distributed information

Membership Restrictions

- These are looked at as potential group boycotts
- Rules and decisions on membership and expulsion are generally considered under the rule of reason; not per se
- Exception:
 - The rule or decision relates to access to some business input that is essential for effective competition, and
 - There are no plausible justifications stemming from the association's pro-competitive purposes

Membership Restrictions

- Under the rule of reason, we look to see the effect of the requirement or decision
- A number of factors depending on the case
 - Are the rules objective and consistently applied
 - If the rules are subjective, is there a legitimate reason for the rule based on the pro-competitive needs of the association
 - Is due process given to those expelled
- Notice and opportunity to respond
- Appeal process
- Disinterested decision-makers

Membership Restrictions

- ***Vermont Dairy Herd Improvement Association case*** – a herd owner was suspended from participating in the association's milk testing program
- The herd owner argued that the program was necessary for him to compete
- The court held that the expulsion had to be evaluated under the rule of reason because the expulsion might improve competition if the exclusion was to protect the testing program, which was intended to encourage competition

Services to Members

- Competitive issues closely tied to the membership requirements
 - The more competitively important the services are, the more important that firms are not excluded from those services for anticompetitive reasons (e.g., certification or accreditation programs)
 - Sometimes the courts decide that the service should be provided to non-members rather than requiring that the non-members should be allowed to join the association
- Rule of reason analysis here generally too

Services to Members

- Some general guidelines:
 - Take a look at the services that the association provides periodically to see if any are essential for effective competition by firms in the industry
 - Make sure that services like that are made available to non-members, or if not, that there is a good reason and tied to the benefits the association provides to members
 - There can be a higher fee for non-members than for members but the fee should be related to the cost for providing those services to non-members

Services to Members – Trade Shows

- Access to trade show sponsored by association:
 - Rules of reason analysis generally
 - Important questions and issues:
 - Are the rules objective?
 - How important is the trade show to competition in the market?
 - Is there is limited room?
 - replacing one firm with another is not likely to have an impact on competition
 - Why was the firm excluded – don't exclude a firm for competitive reasons?
 - Similar rules apply to decisions relating to allocating space or location

Services to Members – Trade Shows

- Some “Don’ts”
 - Don’t apply rules in a discriminatory manner
 - Don’t base decisions on whether the firm engages in competitive pricing
 - Don’t condition decisions on whether a firm agrees to not appear at a competing trade show
 - Generally don’t use subjective criteria for participation or allocation of resources

Standard-Setting and Certification and Accreditation Programs

- Two kinds of standard setting (with different issues)
 - Health and Safety
 - Industry gets together as experts to figure out best practices for health or safety
 - Example: fire safety for building materials by the NFPA
 - Compatibility – members of a variety of related industries get together to develop a standard that will make sure that their products work together
 - Example: Wall outlets and plugs on electrical devices – different companies make different devices but they have to work together
 - Example: computing technology and telecommunications

Standard-Setting – Health and Safety

Guidelines:

- There should be a justification for the development of a standard at the outset
- To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified
- Avoid allowing the process to be dominated by economically interested parties
- Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process
- If possible, avoid any concerted efforts to enforce the standard

Standard-Setting – Health and Safety

- *Allied Tube & Conduit Corp. v Indian Head Case*
 - National Fire Protection Association standard on conduits
 - Previously conduits made of steel and NFPA was considering approving PVC conduit
 - Steel conduit manufacturers packed the meeting with enough people who voted against the standard to defeat it
 - Since standard was adopted by state and local governments, that meant that PVC manufacturers were excluded from the market

Compatibility Standards

- Some of the same rules apply:
 - To the extent that the standard is going to limit access to the market for some firms, that exclusion must be justified
 - Avoid allowing the process to be dominated by economically interested parties
 - Ensure that all parties with a stake in the standard have an opportunity to participate meaningfully in the process

Compatibility Standards and Patents

- Compatibility standards are often in cutting-edge high-tech industries where patents are prevalent
- If an industry becomes locked into a standard that is covered by a patent, then the holder of the patent will be able to extract profits from the rest of the industry

Compatibility Standards and Patents

- Antitrust issues come up when an industry standard is covered by a patent
 - If the patent was not disclosed to the standard-setting body by the owner, then the patent holder may be liable for monopolization
 - It may depend on the rules of the organization and the knowledge of the patent holder

Compatibility Standards

Sherman Antitrust Act §2:

- “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, shall be deemed guilty of a felony...”
 - DOJ can bring civil suits to enjoin monopolization
 - FTC can also stop this conduct

Compatibility Standards

- Patent policies should be clear, consistently enforced and regularly announced
 - When should there be disclosure?
 - What should be disclosed (patent applications or just patents)?
 - Is there a requirement to search a member's patent portfolio?
 - What sort of commitments are required by the patent holder, if any, after disclosure?
 - RAND/FRAND
 - License negotiations
 - Disclosure of most onerous terms
 - License offer

Certification and Accreditation

- Certification programs can determine whether products comply with a standard or whether professionals have sufficient ability, education and experience
- Not certifying a product or a professional can create competitive harm
- Courts look at the process of how a certification program is implemented to ascertain whether they help customers or are a way to harm rivals
- Accreditation programs generally accredit entities, while certification programs certify professionals, products or services

Certification and Accreditation

- Some factors:
 - Who are the decision-makers – competitors or customers or a mix?
 - Are the criteria objective and related to the function being certified?
 - Were the criteria applied consistently and without discrimination?
 - Were the association's procedures followed?
- Important to the extent that it might show that a refusal to certify was due to anticompetitive goals

Self-Regulation

- Many associations have codes of ethics regulating various aspects of the businesses of the members of the association
- This sort of regulation can be good
 - Industry members themselves often have the best incentives and the knowledge to maintain the reputation of the industry
 - For example, can improve the services offered to consumers and improve the truthfulness of advertising

Self-Regulation

- This sort of code of conduct also can be anticompetitive
 - Restrictions on truthful advertising especially relating to price
 - Restrictions on competitive bidding
 - Restrictions on the business hours of members
 - Restrictions on business relationships with suppliers or competitors
 - Restrictions on fees or output set by members
- This type of conduct is often viewed by the courts under an intermediate level of scrutiny

Association-Sponsored Online Forums

- Really an extension of the rules in the physical world
- Concern that competitors can use these to violate the antitrust laws in the same way they could at in-person association meetings
 - Rules regarding off-limit discussions should be clearly laid out
 - The boards should be monitored by well-trained and responsible association staff
 - The staff should be able to (and should) promptly take corrective action when inappropriate messages are posted

Lobbying

- In general, petitioning the government cannot form the basis of an antitrust violation based on the effect of the petition succeeding; First Amendment-based exception to the antitrust laws
 - E.g., lobbying a legislature or agency to get that body to pass a law that would block the entry of a competitor is shielded from liability under *Noerr-Pennington* doctrine
- But if the petitioning is a sham and itself (rather than the government policy) has an anticompetitive impact, then that can form the basis of an antitrust violation

Antitrust Compliance Programs

- Antitrust policies have effectively become mandatory for associations
 - Absence of a policy is viewed as poor business practice, can be evidence of wrongdoing, and may increase penalties for any violations that occur
 - Antitrust policies can have an effect on the behavior of members
- Prudent antitrust practices:
 - Legal review of meeting agendas and minutes
 - Legal counsel attendance at meetings where antitrust-sensitive may be discussed
 - Legal review of new or revised association programs and services (e.g., membership restrictions, codes of ethics, certification and accreditation, information exchanges, rules for online forums) that could give rise to antitrust liability

Questions?

Jeffrey S. Tenenbaum, Esq.
Managing Partner
Tenenbaum Law Group PLLC
Washington, DC

Telephone: 202-221-8002

Email: jtenenbaum@TenenbaumLegal.com

Website: www.TenenbaumLegal.com

