

Time to Reopen Some Antitrust Division Field Offices?

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There has been much speculation about what a Trump presidency will mean for antitrust enforcement at the Antitrust Division and Federal Trade Commission. Much of the wonder is about whether Trump will take an activist approach he suggested during the campaign, for example, when he said he thought Amazon had “a huge antitrust problem” and he voiced opposition to AT&T’s effort to acquire effort to acquire Time Warner. Or does the placement of Joshua Wright on the transition team signal a return to a more traditional Republican “hands off” role where the pendulum swings back to a belief that the market will correct concentration issues and the concern is more to prevent wrong -headed government intervention.

I have been thinking about whether there should be any adjustment in criminal enforcement. Criminal enforcement has generally been pretty steady over various administrations. They all have shared the belief that cartels are the “supreme evil of antitrust” and that jail sentences for culpable executives is the best deterrent. Two noteworthy developments in criminal enforcement, however, come to mind. Shortly after World War II, the legendary Thurman Arnold, head of the Antitrust Division, opened field offices to combat bid rigging in the construction trades. And, in 2013, then Assistant Attorney General Christine Varney closed four of the Division’s seven regional offices. The closed offices were Atlanta, Cleveland, Dallas and Philadelphia. New York, Chicago and San Francisco remained open. I think President-elect Trump should reverse that contraction and reopen field offices.

President-elect Trump has promised a massive public procurement effort to help rebuild America’s infrastructure. Two recent international cartel enforcement items brought to mind the wisdom of ramping up regional and local enforcement efforts to deter, investigate and prosecute bid rigging on these public projects. A couple of items caught my attention as I have been thinking of this subject.

From Canada.

On December 5, 2016, the Canadian press reported that:

The Competition Bureau of Canada says its efforts to identify and prevent bid rigging in construction contracts this year has already turned up potential criminal activity — just as new federal infrastructure money begins to flow.

Pierre-Yves Guay, the bureau’s assistant deputy commissioner, said some of the educational outreach the bureau has delivered since April has resulted in illegal activities

being uncovered and inquiries being launched. ([here](#))

From Brazil

USA Today reports on December 6, 2016:

“So far, there are indications that at least five bids related to World Cup stadiums were the subject of the cartel,” the anti-trust body CADE said in a statement....Reports have been widespread about corruption linked to World Cup stadiums. Investigations are also on-going involving construction projects tied to this year’s Olympics in Rio de Janeiro.” ([here](#))

I am going to write more about why I think it would be a good investment to open additional field offices. But first a disclaimer. I was the Chief of the dearly departed Philadelphia Field Office and went down with the ship when the office was closed in 2013. I am not lobbying for my old job back, and in fact if I were adding field offices I would not at this time put one in Philadelphia. The main value of the Philadelphia office was the talent and experience of the staff there—and that, like Humpty Dumpty, can’t be put back to together again. I do, however, think that the regional offices in Atlanta and Dallas should be reopened.

International cartels are a worthy focus of Antitrust Division resources but it’s worth remembering that the field offices played a huge role in the development of the Division’s international cartel program. The modern era of international cartel enforcement was the Archer Daniels Midland case brought by the Chicago Field Office. The Dallas Field Office followed with a record \$500 million fine and other convictions in the vitamins investigation. The Philadelphia Field Office had some “firsts” with the graphite electrode investigation and the extradition, trial and conviction of British executive Ian Norris. San Francisco has had accomplishments too numerous to mention as do the criminal sections headquartered in DC, with blockbusters like air cargo and auto parts. The point is that international cartels can be investigated and prosecuted wherever there are talented and dedicated antitrust enforcers. But as for regional conspiracies, I don’t believe the opposite is true. The strength of the field offices had always been their ability to network with investigative agencies from the FBI, the gamut of federal IG’s offices, state and local prosecutors and public procurement officials. These local contacts were crucial to educating agents and purchasers about antitrust violations, and giving them the information needed (and motivation) to spot and report possible collusion.

Regional conspiracies do not produce the extraordinary fines that international cartels can. But, there is merit to investigating and prosecuting regional cartels. First, the harm from bid rigging on public procurement is very focused. It isn’t a case of millions of consumers losing pennies on a purchase, but a federal, state or local entity losing a big chunk of its scarce tax dollars. Bid-rigging schemes are also often more effective at raising prices. They can also be very long-lasting as the structure of public procurement can make these awards both more susceptible to bid rigging and more difficult for market forces to disrupt in the short-term. For these reasons, the Sentencing Guidelines give a modest one-point bump for bid-rigging, recognizing it generally has a more serious impact on the victim.

Finally, successful prosecution of a bid-rigging scheme can bring meaningful restitution to the public victim in the form of treble damages. It restores public confidence that tax dollars are being spent wisely. And the cost of publicly procured goods often sees a dramatic drop, sometimes even simply by the start of an investigation. I also think the prosecution and imprisonment of domestic price fixers and bid-riggers can generate publicity and pack more of a “deterrent punch” than prosecution

of foreign executives, many whom remain fugitives.

These are just some quick thoughts on why I think a couple of field offices in strategically placed geographic areas would be a boon for antitrust enforcement. I'll be thinking and writing more about this subject as I get some free time. But, what do you think? If you have any thoughts on the matter, I'd be happy to hear them.

Thanks for reading. More to come.