AntitrustConnect Blog

You Are A Competitor If You Say So–My Disagreement with Fourth Circuit's Brewbaker Opinion

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I have not written a blog post in some time. Been busy, or perhaps a bit lazy, but the Fourth Circuit opinion in *United States v. Brewbaker*, __ F. 4th __(4th Cir. 12/1/2023), 2023-2 Trade Cases ¶82,716; 2023 Westlaw 8286490 caught my attention. The decision represents a surprising departure from black letter law that collusion between competing bidders is a criminal (i.e. per se) violation. The *Brewbaker* court overturned the bid rigging conviction of a Brewbaker, former executive of aluminum pipe maker, Contech, finding that his indictment did not allege a per se antitrust violation. For years, Contech and Pomona [Contech's distributor] had bid against each other competitively for contracts with North Carolina's Department of Transportation. When Brewbaker was put in charge of Contech's bidding in 2009 he reached an agreement with Pomona to have Contech put in purposefully high (i.e. complementary bids) so that Pomona would win the contracts. To carry out the plan, Brewbaker would get Pomona's bid number and then add a markup to inflate Contech's bid and insure Contech would lose.

The Brewbaker indictment alleged:

> From at least as early as 2009 and continuing through at least June 2018, Defendant BRENT BREWBAKER and Defendant … obtained bid prices from [Pomona] and submitted bids to NCDOT for aluminum structure projects that were intentionally higher than [Pomona's] bids.

Despite this clear "per se" allegation, the indictment went on to state that Contech (which pleaded guilty to the indictment) supplied aluminum to its co-conspirator, putting the two competitors also in a vertical relationship. The Fourth Circuit held that because there was also a vertical relationship between the bidders (i.e. horizontal competitors), the "rule of reason" applied. Thus, "the factual allegations in the indictment did not state a per se violation of the Sherman Act.

The Fourth Circuit is wrong because the agreement alleged to be illegal here was the *agreement to submit rigged complementary bids*. That agreement was between two formerly competing horizontal competitors. They were competitors because they said so—they each submitted bids to the NC Department of Transportation. But pursuant to a secret agreement between themselves to rig those bids. This agreement falls squarely within the definition of bid rigging the Fourth Circuit actually cited in its opinion. The *Brewbaker* court acknowledged that it is settled law that "per se

unlawful bid rigging [is defined] as an agreement between competitors," adding "that is precisely how the Supreme Court defines a horizontal restraint." This is blackletter law and there is no basis in law and/or economics to find a bid rigging agreement between competitors is **not** subject to the per se rule if the bidders also have a vertical relationship.

The Fourth Circuit accurately stated: "For if the restraint is horizonal, then the per se rule will generally apply. And if the restraint is vertical, then the rule of reason will apply." The restraint the government alleged was illegal was horizontal: Contech [Brewbaker} got bid prices from another bidder and agreed to submit intentionally higher bids. The indictment did not allege that the agreement between Contech and Pomona (the vertical relationship) was illegal. That relationship existed when Contech and Pomona were actually competing. It made bid rigging convenient—not procompetitive. As it had no relation to the horizontal agreement alleged as illegal, it should also have been irrelevant to the per se nature of the agreement.

There is an irony flowing from the Fourth Circuit's deviation from the per se rule applying to competitive bidders if they also have some vertical relationship. One of the ways conspirators sometimes share the spoils of collusion is for the winning bidder to subcontract to the losing bidder. See e.g., "After the bid is awarded, the winning bidder may pay off the co-conspirators through cash payments or subcontracts." FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT PERSONNEL p3. How odd it would be, and inviting to would-be colluders, if by establishing a vertical relationship, they took themselves out of the per se rule. In fact, it is not unusual for competing bidders to have some vertical relationship between them. In the olden days when I was bringing public procurement bid rigging cases on behalf of the Division, when the evidence showed competitors communicating with each other (particularly right before a bid) the excuses often had a flavor of vertical relationship: I wanted to rent some equipment; I wanted to sub out part of the contract; I wanted to purchase material." These relationships are not of themselves illegal and the indictment, but they also would they take an agreement out of the per se rule.

The agreement between Contech and Pomona to submit complementary bids restrained trade just as an agreement between two bidders with no vertical relationship. By holding themselves as a competitors (as they once were):

- The agreement was designed to and did satisfy the "three bid rule." In public procurement there is often, as ther was here a three bid requirement before making the award. Without three bids, the buyer often switches to a "Cost plus" negotiation to insure it is getting a competitive price. Avoiding this is often the motivation for collusion and complementary bids in public procurement.
- Even more than the three bid rule, competition is restrained because, had the buyer known there was no competition for the projects, it could have changed the specs, sought new bidders, or otherwise taken steps to create a competitive environment.
- Similarly, because there were three bidders other potential bidders may have been discouraged from devoting the resources to bid.
- Two companies which had been submitting competitive bids reached a secret agreement to submit complementary bids, eliminating competition and allowing the "winning" bidder to inflate its bid–the exact reason cartels are condemned as "the supreme evil of antitrust."

In short, the complementary bidder agreement between Pomona and Contech created the same anticompetitive effects that courts have universally found worthy of per se treatment.

It is also revealing that the court acknowledged that Brewbaker went to some lengths to keep the complementary bidding scheme hidden. "Also during this time (of submitting complementary bids) Brewbaker tried to cover his tracks." [by deleting conversations and making phone calls instead of emails]. Procompetitive agreements are measured by their potential benefits to the consumer and they not kept secret from those the agreement is supposedly intended to benefit.[1] The Contech/Pomona agreement was kept secret because it had no procompetitive effects *for the consumer*. Sure, the bid rigging agreement made Pomona and Contech happy and perhaps strengthened their relationship—splitting inflated spoils can do that.[2] The consciousness of guilt evidence shows the defendant knew he was engaged in a "restraint of trade" not an agreement reached for the benefit of the consumer who was kept in the dark.

The *Brewbaker* opinion opens a new defense to defeat the per se rule—the existence of a vertical relationship between bidders. The opinion could be defended on the basis that a supplier-distributor relationship is a significant vertical relationship but how extensive does that vertical relationship have to be in order for a defendant to escape the per se rule? Who knows? But just conducting the inquiry would further embed the court as a fact-finder on an element of a Sherman Act criminal offense (because if the agreement is found by the court to be per se, it is no longer an issue for the jury.)[3]

Brewbaker Convicted on Five Fraud Counts

In addition to the Sherman Act count, Brewbaker was convicted on five fraud counts. I am probably missing something because I am puzzled that the Fourth Circuit upheld these convictions. The indictment alleged mail fraud violations in that Contech and Brewbaker misled NCDOT by submitting intentionally losing bids and by falsely certifying that the bids were submitted competitively and without collusion. But the district court's per se ruling prevented Brewbaker from introducing evidence that his bids were "submitted competitively." ["They [jury] didn't hear evidence, however, as to the procompetitive intent or effects of Contech and Pomona's particular setup."]. The Fourth Circuit reversed the district court's per se holding because it thought the vertical relationship between the bidders may have been procompetitive—or at least Brewbaker should have been able to argue that. Fraud crimes are specific intent crimes, and while it is sometimes attractive to prosecutors to add fraud counts to a bid rigging indictment to highlight the fraudulent nature of the Sherman Act violation, the down side is that it is a specific intent crime and opens the door to justifications (or so I thought when I was doing this). Bottom line, if the Fourth Circuit thought the Sherman Act count should have been "rule of reason," with the defense allowed to advance procompetitive justifications, I think the fraud counts also should have opened the door to a procompetitive (i.e. not fraudulent) explanation.

When it comes to public procurement, I think the rule should be "When bidders say they are competing, believe them" or "When someone shows you who they are, believe them the first time." Maya Angelou. I expect the DOJ will seek further review of the *Brewbaker* opinion so I'll be curious to see if any of my musing "hold water."

Thanks for reading.

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[1] In *McMullen v. Hoffman*, 174 U.S. 639 (1899) the Court refused to enforce a contract when one conspirator sued for his portion of the profits from a successful collusive bidding scheme. The

Court distinguished a secret agreement from a known joint venture, where “[t]he public may obtain at least the benefit of the joint responsibility. . . . The public agents know then all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid.” Id. at 652.

[2] I worked on one cartel case where the collusion was so successful, all the “competitors” hosted a retirement dinner for the most active conspirator. I’m not sure if there was an MVP plaque was also awarded.

[3] And this is why I think the per se rule is unconstitutional.

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