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Ralph S. Locher

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## Collusive Bidding

## COLLUSIVE BIDDING

By RALPH S. LOCHER

Mr. Ralph S. Locher has been Director of Law of Cleveland, Ohio, since 1953. He received the A.B. degree from Bluffton College in 1936, and the LL.B. degree from Western Reserve University Law School in 1939. In 1945, he became Secretary to the Industrial Commission of Ohio and was appointed Executive Secretary to Governor Lausche in 1946.



Collusive bidding practices are a real and ever-present problem facing local, state and federal governments. On the federal or state levels, the governmental units have at their disposal a large body of comparative figures that focuses attention on instances when collusion among the bidders is likely to be present. Local governmental subdivisions usually lack the necessary investigative staff to make them aware of collusion among bidders.

Collusion may take many forms. Recently the federal government returned indictments against five electrical companies which disclosed "rigged" bidding, principally among suppliers to municipalities. The indictments alleged that they conspired to share local government business on a fixed percentage basis, and that they connived and bid at certain fixed amounts so that predetermined percentages would be realized. To achieve this result, one group of conspirators met thirty-five times. To effect the scheme, or formula, for quoting nearly identical prices to electric utility companies and others, a cyclic, rotating, positioning formula was employed whereby one defendant manufacturer would quote the low price, other defendant companies would quote intermediate prices, and others would quote high prices. These positions would be periodically rotated among the manufacturers. With reference to these matters, purchases in the city of Cleveland within the past twelve months total \$94,961.00. Assuming that other municipalities, counties, townships, school boards, and the state governments have been similarly duped, the magnitude of the problem becomes self-evident.

It is apparent that such rotation would preclude a local government's awareness of the collusion inasmuch as the entire country figures in the rotation and because all of the bids would vary somewhat under the formula submitted. Not all collusive bidders, however, can take such precautions against discovery.

Probably the most apparent cases of collusive bidding are those in which all bids received are identical except for one, which is slightly lower. This immediately throws up a red flag for the alert

purchasing agent, director of a department, or anyone who is directly responsible for the purchasing of the specific items being bid upon. Identical bidding, however, is not proof, in and of itself, that there has been collusion in entering bids.

If the product is such that there is a leader in the field, and others follow the leader without collusion, identical bids mean little as proof of collusion. If there is but one supplier, and all bidders use cost plus a commonly recognized percentage of profit, there certainly is no collusion. The problem, of course, is the ability to recognize collusive bids as they appear.

In the city of Cleveland, a superficial survey disclosed that in the period of one year, purchases amounting to over one-half million dollars were made in cases where all bidders submitted identical bids. This figure does not include bids which are identical but for the one low bid.

One of the practices that gives impetus to identical bids is rotating the award of contracts, i. e., when all bids are identical the award is made to one other than the last successful bidder for that particular product. Of course in this situation, the bidders know that if they submit identical bids, a certain rotation will be followed. If they are satisfied with an award on that particular product when this "turn" comes up, the governmental unit has unwittingly assisted the operation of collusion, though it was attempting to do only what was fair under the circumstances. A possible solution is for the award to be made to the last successful bidder if all bids are identical.

Generally, in order to prevent the evil of collusion between officials and suppliers, governments require sealed bids and further require that the award be given to the lowest and best, or, the lowest responsible bidder. These requirements have made collusive bidding to governmental subdivisions feasible and attractive to the bidders. Admittedly, the bid requirements cannot be removed or even greater evils will result. However, when the bidders know that the lowest bid, generally speaking, will get the award, even though at a figure higher than is justified by the market, collusion is a tempting means for making a sure profit.

How can such practices be prevented short of court proceedings after lengthy investigations that probably could not produce enough evidence if conducted by local independent governmental units?

If case law or statute permit, rejection of all bids is one possibility. Rejection however, can work an even greater pecuniary loss to the governmental subdivision than collusion. If the product is needed immediately, as is often the case, rejection of all bids may introduce a costly and time consuming delay. Query: (1) Should the law provide that where bids are identical, public auction may be made upon the opening of bids, the lowest then receiving the award? (2) Should the award be made one, two, or three weeks later, thus permitting others to bid below the identical bids? (3) Should a coin be tossed to select the successful bidder?

Some formula to discourage identical bids is certainly needed. The purpose of sealed bids, and awards being made to the lowest and best, is to achieve true competitive bidding. The law in this field, as in all other fields, must change with the changing times.

Rather than penal statutes, the need seems to be for law which will forestall the occurrence.

In the early part of this year, the city of Cleveland asked for bids on items having two sources of supply. Four bidders submitted identical bids of \$60,120.00. Each of the bidders was then asked to have a representative appear at a meeting with the Director of Law where they were asked, quite frankly, "How could four bidders return identical bids on a contract of this size?" The reply was that each, without collusion with the others, added a certain percentage to the cost from the manufacturer and thus identical bids resulted. All bids were rejected. Upon re-advertising, the same companies bid again. The bids were no longer identical and, on these bids, the city did realize a saving. If the Department of Law had not taken the initiative, this saving would never have been realized nor would this irksome practice, at least in this instance, have been stopped. Fortunately, in this case the material was not urgently needed.

The boldness of some bidders can be seen by the following examples of bids received by the city of Cleveland, within one year:

Load Break Oil Switches - 4 bids	(identical)		\$ 4,869.00
Rock Sale - 2 bids	(identical)		248,000.00
Fuse Cutouts (1000) - 5 bids	(identical)		13,500.00
Lightning Arresters - 5 bids	(4)	\$976.20;	(1) 976.80
Anhydrous Ferric Chloride (800 T.) - 2 bids	(identical)		64,000.00
Sodium Silico Fluoride (250 T.) - 7 bids			
Minimum Delivery 25 T.	(identical)		34,350.00
Minimum Delivery 18 T.	(identical)		34,700.00
Cable, 10,000 Ft. - 5 bids	(identical)		13,320.00
Cable - 5 bids;	(4)	\$9,455.00;	(1) 9,395.00
Cable - 5 bids	(identical)		13,970.00
Cable - 5 bids;	(4)	\$8,462.00;	(1) 8,742.00
Cable - 5 bids	(identical)		67,520.00

One request or bids covering twenty items of fiber conduit was conditioned upon the bid being broken down per item after which there was response from four bidders. Items ran from \$10.50 for 50 fiber caps to \$11,000.00 for conduit. Three of the bidders were identical to the penny on each and every item. The fourth bidder was low on each and every item by  $\frac{1}{2}$  of 1%.

It is inconceivable that such a large total of unvarying bids on such varied articles of merchandise would have been presented by a number of separate bidders if the healthy interplay of competition were present. It is reasonable to assume that when two or more suppliers bid the same dollar figure, the municipality or other governmental body is not receiving a dollar's worth of merchandise for each dollar spent.

Scrutiny of the pleadings and evidence in the federal cases should be of significant advantage to local governments. In the event that the government is successful in convicting the defendants, the municipalities that purchase from them will then have a cause of action in treble damages.<sup>1</sup>

The public spotlight must be placed upon organizations which

<sup>1</sup> 15 U.S.C.A., § 15.

insist upon thwarting the spirit and the law of competitive bidding. Most states have some form of legislation prohibiting collusive bidding or statutes prohibiting agreements in restraint of trade, but proof of an agreement in restraint of trade is difficult to obtain. The problem should be tackled by making it unprofitable or unfeasible on a local level to enter into such agreements.

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