

U.S. Department of Justice foreshadows criminal investigations into antitrust violations in public procurement

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Japanese companies involved in U.S. public procurement should be aware: The Department of Justice (DOJ) Antitrust Division (Division) has publicly announced that it is prioritizing investigations of criminal antitrust violations in the procurement process.

At a press conference announcing the plea agreements and indictment of two South Korean companies, Makan Delrahim – the Assistant Attorney General of the Division – explained that “[o]ne of the Antitrust Division’s top priorities is to protect the US government and tax payers.” Delrahim also said that the fuel supply investigation may spur investigations into other types of military supply around the world and that the Department of Defense (DOD) has “brought other matters to” the attention of the Department of Justice (DOJ). The top criminal antitrust official at the Division, Deputy Assistant Attorney General for Criminal Enforcement Richard Powers, echoed Delrahim’s statements at the American Bar Association (ABA) white collar conference where he identified public procurement cases as a priority for the Division’s criminal program.

The Division recently announced that two companies have agreed to plead guilty as part of an ongoing investigation into bid rigging and fraud on DOD fuel supply contracts for U.S. military bases in South Korea. The Division simultaneously unsealed an indictment charging seven individuals with violating criminal antitrust laws as well as committing fraud against the federal government. To date, five companies have pleaded guilty as part of the Division’s probe into these DOD fuel supply contracts.

Penalties for violating criminal antitrust laws in the United States are steep. Companies face maximum fines of US\$100 million. In addition to criminal fines, the DOJ can pile on treble damages under both Section 4a of the Clayton Act and the False Claims Act (FCA) when the government is the victim of criminal antitrust conduct. For example, one of the companies that pleaded guilty in the fuel supply investigation – GS Caltex – has agreed to pay a total of US\$104.17 million to the government in order to resolve the matter: US\$46.67 million in criminal fines, US\$14.88 million to settle the civil antitrust claims, and US\$42.62 million to settle the FCA claims.

For individuals, the penalties are also severe. In addition to fines of up to US\$1 million, individuals face imprisonment of up to 10 years. Foreign individuals are not protected from the consequences of indictment. The Division has previously extradited indicted non-U.S. citizens from countries such as Canada and Germany. The current administration also appears willing to

consider extraditing individuals. In the recent fuel supply case, while Delrahim did not go into detail about the extradition process, he did say that the DOJ is exploring “every option for bringing these [indicted] individuals to the US” and has been in communication with the Korean Ministry of Justice “about access” to the individuals. According to Delrahim, the DOJ anticipates “full cooperation” with the South Korean authorities. The United States and Japan have a bilateral extradition treaty, on which U.S. authorities could rely to pursue extradition of any Japanese nationals indicted for such conduct.

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