

PROVING THE EXISTENCE OF CARTELS WITH DIRECT & INDIRECT EVIDENCE



Regional Training Workshop for Commissioners of Competition Authorities in the Caribbean

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INTRODUCTION

- Same problems that make detection and investigation difficult make proving a cartel case difficult
 - Cartels conducted in secret
 - Explanations for suspicious conduct
 - Competitor meetings
 - Advance price announcements
 - Inherent ambiguity of identical prices
 - Victim knowledge limited

What to Prove

ELEMENTS OF ANTITRUST CRIME

ELEMENTS OF ANTITRUST CRIME

1. The charged conspiracy was knowingly formed and was in existence at or about the time alleged;
2. The defendant knowingly joined the charged conspiracy; and
3. The charged conspiracy either substantially affected interstate commerce or occurred within the flow of interstate commerce.

MAIN ELEMENT: AGREEMENT

- **Mutual understanding that the parties will combine their efforts for a common, unlawful purpose**
- **Tacit agreement or understanding**

NOT ELEMENTS

- **DO NOT NEED**
 - Formal agreement
 - Legally enforceable promise
 - Specific intent
 - Coercion
 - Or even express verbal agreement or understanding

STANDARD OF PROOF IN CRIMINAL CASES

- **Proof Beyond Reasonable Doubt**
- **Unanimous Verdict of 12 Jurors**

How to Prove

TYPES OF EVIDENCE

TYPES OF EVIDENCE

- **Direct Evidence**
- **Indirect or Circumstantial Evidence**

DIRECT EVIDENCE

- **Witness testimony: “We agreed.”**
- **Document recording an agreement**
- **Document reporting an agreement**
- **Audio / video tapes**



It's good having this meeting. If we hadn't met today, we were going to decrease our prices. This meeting keeps us competitive.

CARTEL MEETING | MAUI, HAWAII
MAR. 10, 1994

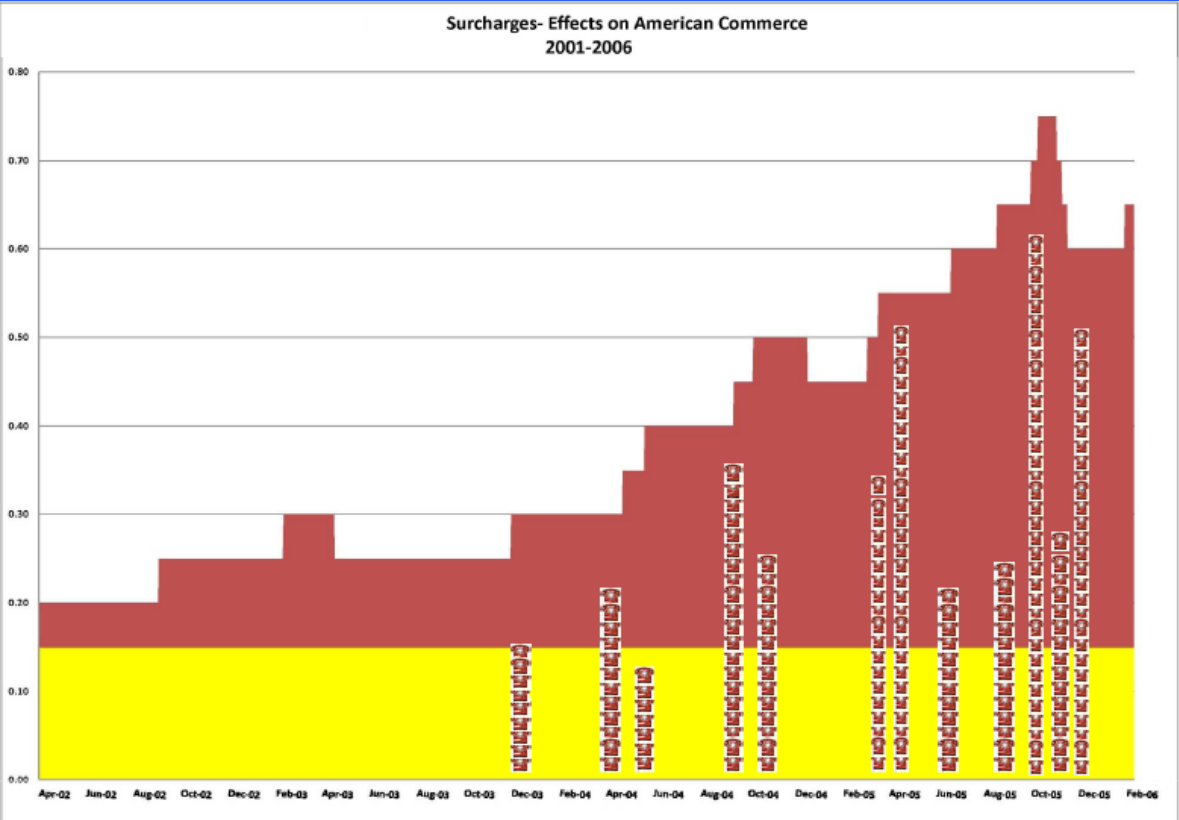
INDIRECT /CIRCUMSTANTIAL EVIDENCE

- Evidence that relies on an inference to connect it to a conclusion of fact

INDIRECT /CIRCUMSTANTIAL EVIDENCE

- **Examples:**
 - Simultaneous price increases by competitors
 - Competitor meetings and phone calls
 - Similar mistakes in bids
 - Firms act in seemingly non-rational ways
 - Acts of concealment

TIMING OF MEETINGS AND PHONE CALLS



Use timelines to show relationships between events

DETECTING ANTITRUST CRIMES: SIMILARITIES IN BID PROPOSALS

Look for:

- Similar handwriting, typeface, stationery, email address
- Last-minute changes – white-outs, physical alterations to prices
- Vendor picks up an extra bid package for another vendor
OR submits a competing vendor's bid

DETECTING ANTITRUST CRIMES: SIMILAR ERRORS SUBMITTED BY “COMPETITORS”

Bid:
\$145,850.00

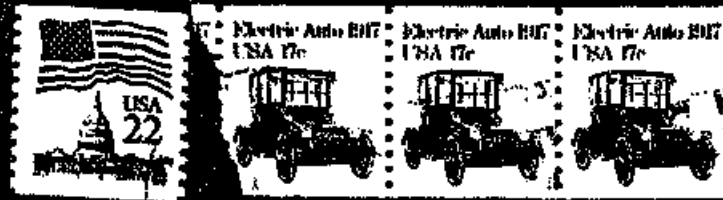
December 31, 1997
[Redacted]
Department of Parks and Recreation
Tiyon, Guam.
Subject: Repair of Pasco Stadium Light Tower
[Redacted]
Please find our estimate for the Restoration of one lighting tower at the Pasco Stadium damaged by Typhoon Paka. The total amount of our estimate is "One Hundred Forty Five Thousand Eight Hundred Fifty Dollars and 00/100 (\$ 145,850.00)". Including the supply and installation of Lighting fixtures and power hook up.
We sincerely hope that this is according to your requirements. Please give us a call us if you have any question. Thank you very much.
Sincerely,
[Redacted]

“Please give us a call us if you have any questions.”

Bid:
\$145,350.00

December 31, 1997
[Redacted]
Department of Parks and Recreation
Tiyon, Guam.
Subject: Repair of one Pasco Stadium Light Tower
[Redacted]
We submit here with our estimate for Repair and Restoration of one Lighting Tower at the Pasco Stadium that was damaged by Typhoon Paka. The total amount of our estimate is "One Hundred Forty Eight Thousand Three Hundred Fifty Dollars and 00/100 (\$ 148,350.00)". Including Labor, Materials and Equipment.
We hope that the above quotation is satisfactory. Please give us a call us if you have any question. Thank you very much.
Sincerely,
[Redacted]

“Please give us a call us if you have any questions.”



THE LOGISTICS AGENCY
THE PERSONNEL SUPPORT CENTER
SOUTH 20TH STREET
OFFICE BOX 8059
ALPHIA, PA 18101-8059

ANTITRUST IN THE DIGITAL AGE

Same basic fraudulent conduct

- E-commerce: Recent case regarding agreement to fix prices using pricing algorithms

- **Social Media**

In electronic bids, look for:

- Metadata & IP addresses
- Copy-paste errors, identical misspellings, identical typos, identical math errors
- Cover e-mail header information that is incorrect

ANTITRUST IN THE DIGITAL AGE

From: [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Cc:
Bcc:
Subject: Update

[REDACTED]

When I spoke with [REDACTED] up at [REDACTED] this week she stated that she got some supplement funds this week, [REDACTED]. She needs three bids from you, [REDACTED] stated that you know the drill. [REDACTED] would like to keep it under one million this way she is sure she can get it approved with minimal effort.

[REDACTED]

There are a lot of million dollar opportunities at [REDACTED]. I am working up a template for the [REDACTED] operation. I will send it to you Sat.

[REDACTED]

(4)

SOLICITATION AND OFFER		1. CERTIFIED FOR NATIONAL DEFENSE UNDER BDSA REG 2 AND/OR DMS REG 1	NA	PAGE 1	OF 35
2. SOLICITATION NUMBER DLA13H-85-B-8852	3. SOLICITATION X SEALED BID (IFB) NEGOTIATED (RFP)	4. DATE ISSUED 14 MAY 1985	5. REQUISITION/PURCHASE REQ'NG SEE SCHEDULE		
6. ADDRESS MAILED OFFER TO: DEFENSE LOGISTICS AGENCY DEFENSE PERSONNEL SUPPORT CENTER 2800 SOUTH 20TH STREET POST OFFICE BOX 8069 PHILADELPHIA, PA 19101-8069		CODE SPO102	7. DELIVER HANDCARRIED OFFER, INCLUDING DELIVERY BY COMMERCIAL CARRIER TO: DEFENSE PERSONNEL SUPPORT CENTER OFFER DEPOSITORY BLDG. 9, 2ND FLOOR, WING E 2800 SOUTH 20TH STREET PHILADELPHIA, PA 19145		
6A. [REDACTED]	7A. ADDRESS ELECTRONIC TRANSMISSIONS TO: (When Authorized) Facsimile: [REDACTED]				
6B. [REDACTED]	TWX: [REDACTED] TELEX: [REDACTED]				
SOLICITATION					
8. Sealed offers will be received at the Defense Personnel Support Center, ATTN: DPSC-SPA, Bldg 9, 2-E, until (hour) <u>2:00 P.M.</u> local time (date) <u>19 JUN 1985</u> . To assure prompt delivery mailed offers should be addressed per block 6; electronic transmissions per block 7A; and handcarried offers delivered to the specific location set forth in block 7. If offering, your reply envelope must be plainly marked with the solicitation number, date, and time set forth for receipt of offers. CAUTION: FAILURE TO SUBMIT OFFER: See Section L, provision No. 52.214-9, or 52.215-15. When not responding to the solicitation with an offer complete the reverse side, fold, affix postage and mail. LATE SUBMISSIONS, MODIFICATIONS AND WITHDRAWALS: See Section 1, provision No. 52.214-7 or 52.215-10. All offers are subject to all terms and conditions contained in this solicitation.					

(5)

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Ostensibly two different ice cream companies
 "Blue Bonnet Ice Cream Company" and
 "Angela's Ice Cream Company"

9. THIS PROCUREMENT IS FOR MILK AND ICE CREAM

- Unrestricted
- Total Small Business set-aside with price differential for Labor Surplus Area Concerns.
- Partial Small business set-aside with price differential for Labor Surplus Area Concerns.
- Unrestricted with price differential for Labor Surplus Area Concerns.

OFFER (MUST BE FULLY COMPLETED)
 NOTE: ITEM 10 DOES NOT APPLY IF THE SOLICITATION INCLUDES SEVERAL ITEMS WHICH ARE OFFERED AT SEVERAL POINTS OF DELIVERY.

10. In compliance with the above, the undersigned agrees, if this offer is accepted, to deliver the items specified in the schedule at the price set opposite each item, delivered at the designated point(s), within the time specified in the schedule.	10 CALENDAR DAYS	20 CALENDAR DAYS	30 CALENDAR DAYS	45 CALENDAR DAYS
11. DISCOUNT FOR PROMPT PAYMENT (See Section L, Clause No. 52-232-6)	%	%	%	%
12. ACKNOWLEDGEMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offers and related documents numbered and dated.)	AMENDMENT	DATE	AMENDMENT NO.	DATE
13. OFFEROR	CODE	FACILITY CODE		

NAME AND ADDRESS (Street, City, State, and Zip Code)

Blue Bonnet Ice Cream Company
 123 First Street
 Arlington, TX

14. NAME AND ADDRESS (Street, City, State, and Zip Code)

Jeff Blue Bonnet, President of Blue Bonnet Ice Cream Company

16. OFFER DATE
June 19, 1985

10. MINIMUM BID ACCEPTANCE PERIOD

10 CALENDAR DAYS	20 CALENDAR DAYS	30 CALENDAR DAYS	45 CALENDAR DAYS
%	%	%	%

12. ACKNOWLEDGEMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offers and related documents numbered and dated.)

AMENDMENT NO.	DATE	AMENDMENT NO.	DATE

13. OFFEROR

CODE

FACILITY CODE

NAME AND ADDRESS (Street, City, State, and Zip Code)

Angela's Ice Cream Company
 456 Other Street
 Arlington, TX

14. NAME AND ADDRESS (Street, City, State, and Zip Code)

Angela Jones, President of Angela's Ice Cream Company

16. OFFER DATE
6/19/85

Metadata Can be Revealing:

The image shows a document titled "SOLICITATION AND OFFER" with a table of contents at the top. The table includes fields for "1. CERTIFIED FOR NATIONAL DEFENSE UNDER BDSA REG 2 AND/OR DMS REG 1", "PAGE 1", "OF 35", "2. SOLICITATION NUMBER", "3. SOLICITATION", "4. DATE ISSUED", and "5. REQUISITION/PURCHASE REGION".

Overlaid on this is a "Document1 Properties" dialog box with the following fields:

- Title: Solicitation and Offer
- Subject: [Empty]
- Author: Pres. of Other Ice Cream
- Manager: [Empty]
- Company: Other Ice Cream Co.
- Category: [Empty]
- Keywords: [Empty]
- Comments: [Empty]
- Hyperlink base: [Empty]
- Template: Normal.dot
- Save preview picture

At the bottom of the document, there is a signature line for "Norman E. Williams, President" with a handwritten signature and a date field "16. OFFER DATE June 19, 1985". The footer of the document includes "DPSC FORM 33 (TEST) (OVER)" and "APR 85".

DEFENSES

CARTEL “DEFENSES”

- Do not stand up to critical examination
- Are widely rejected in jurisdictions with antimonopoly laws
- Are not supported by real-world experience

NOT A DEFENSE: REASONABLE PRICES, NO EFFECT

- **Reasonable Pricing**

- “The price we set was not too high. It was merely to stabilize prices because otherwise, everyone would lose money.”
- Agreement to fix or stabilize prices at any level is unlawful
- Really an argument against the basic principle of competition and antimonopoly laws

- **Lack of Effect**

NOT A DEFENSE: “UNSAFE” COMPETITION

“If we compete on price, we will reduce the safety and quality of the product or service that we provide, and consumers will be hurt.”

- In most markets, quality judgments are best left to the consumer
- When consumers are not qualified to judge quality (e.g., medicines):
 - governmental quality regulation
 - non-government institutions may provide information
 - cartel does not solve this problem & is not the solution

CARTEL “DEFENSE”: “SERVICE AND QUALITY COMPETITION”

“We compete on service and quality. It is better for consumers if we all agree on one uniform high price and then all compete to provide better service or better quality.”

- **If a cartel raises prices, members may try to compete (or ‘cheat’) with service or quality**
- **Not what consumers really want**
 - Competitive market provides them choice; cartel does not
 - If enough consumers want a certain price/quality alternative, and are willing to pay for it, a competitive market will make it available to them

CARTEL “DEFENSE”: “CONFUSING COMPETITION”

“Competition is too confusing. It is much easier for customers to understand things if all the prices are the same (or if they are assigned to one seller, etc.)”

- **Sometimes competition produces a complex set of prices or goods**
 - if customers are confused, some firms will find that it is profitable to simplify
- **Sometimes competition produces many firms**
 - customers do not have to contact all possible firms
 - competition can protect even lazy consumers

CARTEL “DEFENSE”: “UNFAIR COMPETITION”

“A cartel is necessary to stop unfair and unethical competition, such as secret discounts, rebates, and special deals.”

- **When a cartel makes this argument, it means that it wants to be able easily to detect ‘cheating’ on the cartel price**
 - Especially in oligopolistic industries with public price lists
 - Discounts are often the leading edge of serious price competition in a market
- **Different from legitimate consumer protection**

COMMON ACTUAL DEFENSES

- **No agreement**
 - Only information exchange
 - Market intelligence
 - Bluffing
- **Statute of limitations/withdrawal**

DIFFICULTIES OF PROOF

DIFFICULTIES OF PROOF AT TRIAL

- **Agreements reached in secret**
 - Often no documentation
- **Innocent explanations for suspicious conduct**
 - “Follow the leader” pricing
 - Inherent ambiguity of identical prices
- **Victims’ knowledge limited**
- **Conspirator Witnesses**

DIFFICULTIES OF PROOF AT TRIAL

- **Members cheat**
- **Members compete on non-agreed aspects of competition**
 - e.g., service, delivery, quality
- **Cartels can break down, get back together**

PROVING THE CARTEL

PROVING AGREEMENT

- Consider all types of evidence, direct and circumstantial
- Consider all the evidence together
- Circumstantial evidence can bolster direct evidence, and *vice versa*
 - “Some circumstantial evidence is very strong, as when you find a trout in the milk.” Henry David Thoreau

PAPER AND PEOPLE: BUILDING THE MOST EFFECTIVE PROSECUTION

- **Typically need both involved witnesses and compelling documents**
 - “Smoking gun” documents great, but need witnesses to authenticate and explain
 - Cooperating witnesses are impeachable but bolstered by documents
 - Documents that show suspicious patterns/similarities in bids/prices need sponsoring witnesses to explain and elaborate
 - Gov’t has the burden: prepare to counter all defenses and defense witnesses; impeach witnesses with their own documents
- **Bottom line: successful prosecution requires jury appeal and ability to blunt defense tactics.**

CORROBORATION IS KEY

- **In complicated cases, being able to corroborate key facts with several sources of evidence is important to:**
 - Show that statements of intention and agreement were acted upon
 - Demonstrate that actions had an impact
 - Test and support cooperator testimony
 - Make the evidentiary presentation compelling
- **Connect Statements and Actions**

CORROBORATION STEP: CONNECT STATEMENTS TO ACTION

- **Look for sources of evidence that will demonstrate whether the conspirators acted in conformity with their statements**
 - Witnesses
 - Note: even where a witness does not remember the particular incident in question, may be useful to hear from him what he would have done under the circumstances, based on longstanding practice
 - Communications
 - Look for conspirators remarking about whether a scheme worked. That may not often occur, but when it does, it can be extremely useful.

QUESTIONS?

