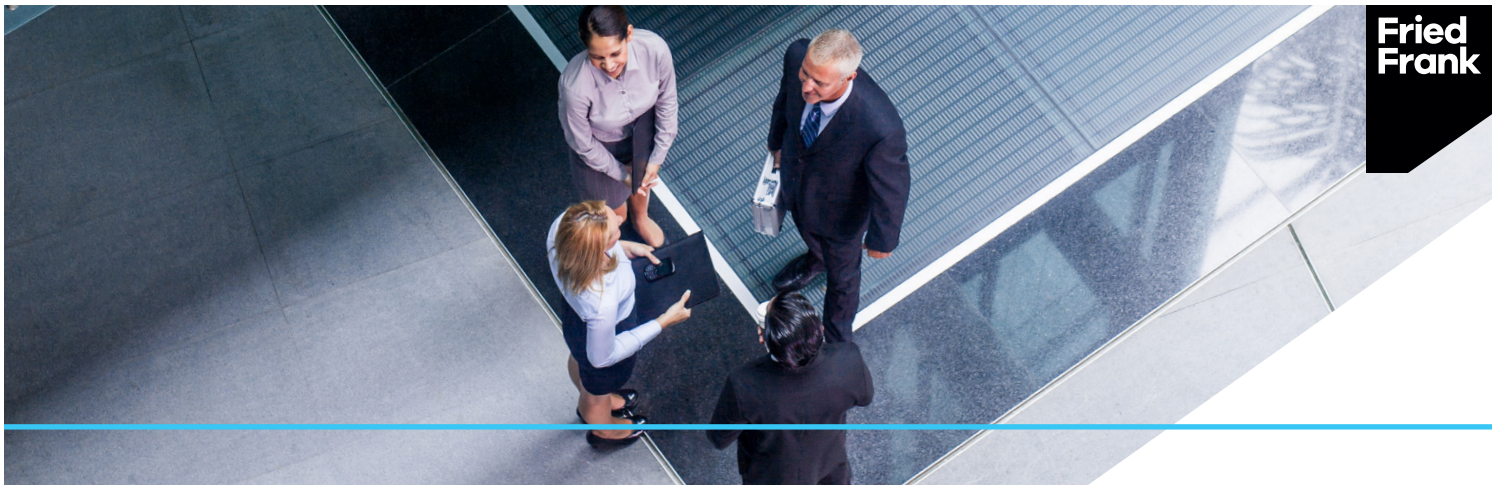


The Top Three Antitrust Issues in Government Contracting Today

In 2019, the Department of Justice announced the formation of a Procurement Collusion Strike Force tasked specifically with investigating potential antitrust crimes in connection with public contracting. The Strike Force's creation forecasted DOJ's intent to increase its enforcement efforts related to anti-competitive conduct in Government procurement. Similarly, in 2021, the Biden Administration issued an Executive Order on Promoting Competition in the American Economy which, inter alia, directed the Defense Department to consider where the absence of competition may be impacting the defense industrial base. Against this backdrop, here are the Top 3 Antitrust Issues impacting the Government Contracting industry this year.

#1: Claims of "Price Gouging" and "Monopoly" in Defense Contracting

- On May 21, 2023, *60 Minutes* aired a report in which certain retired Defense Department officials accused some of the largest contractors in the world of "price gouging" – or charging defense agencies exorbitant and monopolistic prices for products and services. According to the report, such alleged price gouging is result of years of mergers and acquisitions among contractors beginning in the 1990s, leading to decreased competition, combined with a significant reduction in the number of federal employees overseeing defense contracts.
- On May 24, 2023, a bipartisan group of U.S. Senators transmitted a letter to Secretary of Defense Lloyd Austin, asking him to open an investigation in light of the *60 Minutes* report.
- The impact of the 60 Minutes report, and any investigation that the Defense Department conducts as a result of it, will not be known for months. It is reasonable to assume that defense contractors will face increased scrutiny over their pricing practices and expected profit percentages in the near future.

#2: Increased Government Scrutiny of Government Contractor M&A

- Consistent with the Government's increased focus on antitrust issues across the Government Contracting industry, DOJ has signaled its intent to place new scrutiny on proposed mergers and acquisitions within the industry.
- Most notable thus far, in June of 2022, DOJ filed a civil antitrust lawsuit in federal court in Maryland to block Booz Allen Hamilton's proposed acquisition of EverWatch Corp. The lawsuit alleged that the proposed acquisition would eliminate all competition for a key contract with the National Security Agency under which the NSA procures modeling and simulation services. DOJ alleged that the transaction would effectively create a monopoly for this contract.
- The Maryland federal district court described DOJ's theory of the case as "novel" and ultimately declined to issue an injunction blocking the transaction, after which DOJ ultimately withdrew its lawsuit. Yet DOJ's willingness to pursue such novel theories in litigation impacting the defense industrial base foretells the agency's active review of M&A activity in the months to come, particularly in light of the concerns raised in the *60 Minutes* report.

#3: Evolution of the Government's Major Antitrust Initiatives: The Strike Force and the Executive Order on Promoting Competition

- As prefaced above, the Government's two major antitrust initiative in the Government Contracting industry will continue to evolve and expand in 2023. Prudent contractors must remain informed of significant developments with respect to these initiatives and ensure that their current compliance programs are adequate in light of the new reality in antitrust enforcement.
- First, the Strike Force continues to grow, adding four new agency partners at the end of 2022, for a total of 34 participating agencies and prosecutor offices. The Strike Force announced that, as of late 2022, it had initiated more than 60 criminal investigations and prosecuted more than 30 companies and individuals in connection with antitrust crimes involving more than $350 million in public contracts. These numbers undoubtedly will rise in 2023.
- Second, the Executive Order on Promoting Competition in the American Economy directed a number of federal agencies and the Defense Department to analyze specific competition issues unique to each agency. For example, the Executive Order directed the Secretary of Defense to review the "state of competition within the defense industrial base, including areas where a lack of competition may be of concern." The Department's response to this charge – particularly in light of the 60 Minutes report – will be a hot topic in 2023.

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