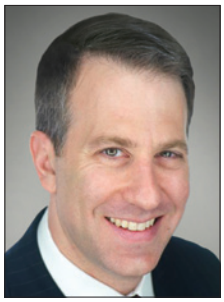
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# The One-Point Bid-Rigging Sentencing Enhancement in Antitrust Cases



By **Evan T. Barr**

According to recent statistics published by the Department of Justice, the average prison sentence imposed on individuals convicted of antitrust crimes is 20 months. Although the sentencing guidelines are now merely advisory, they still carry enormous weight. The major factor leading to draconian sentences in these cases has been the "volume of commerce" associated with the offense, a numerical score based on the dollar value of the affected business at issue that can ratchet up a defendant's Sentencing Guidelines range.

To make matters worse, in almost every case, Department of Justice Antitrust Division prosecutors also routinely invoke the so-called "bid rigging enhancement," which tacks on one additional point to a defendant's guidelines offense level in cases involving the submission of "non-competitive" bids. The department relies on a broad interpretation of "non-competitive bids" to encompass just about any form of collusive market activity. Most probation officers and judges go along with the department's approach. Depending on the overall offense level and criminal history, this seemingly small enhancement can result in several months, and even as much as one year, of additional jail time under the guidelines range.

A renewed focus on the original purpose behind the enhancement, however, may provide defense counsel with a plausible basis for contesting this otherwise reflexive penalty. Based on the intent of the guidelines, and the weight of available legal authority on the subject, the one point enhancement should only be included in cases involving bid rotation or "complementary" bidding schemes.

### The Antitrust Guidelines

Sentencing Guideline Section 2R1.1 assigns a base offense level of 12 to antitrust crimes. Specific offense characteristics under Section 2R1.1(b)(1) provide for a one-level increase "if the conduct involved participation in an agreement to submit non-competitive bids." The guideline then provides further enhancements based on the dollar amount of the "volume of commerce" affected by the scheme.

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As set forth in Application Note 6 of the Guideline Commentary (part of the original guidelines issued in

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1987), the Sentencing Commission was concerned that "volume of commerce" would not account for conduct involving "complementary bids." The commentary notes that if "the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not, in fact, win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial."

### Judge Posner's View

Only two circuit courts and one district court have directly addressed the application of the bid-rigging enhancement. First, in *United States v. Heffernan*, 43 F.3d 1144 (7th Cir. 1994), the vice president of a company that made steel drums conspired with executives of competing companies to sell the most common type of drum at identical prices to two large buyers. He was convicted of violating the Sherman Act and sentenced to 24 months in prison.

Heffernan argued that the district court erred in finding that his offense was "bid-rigging" rather than price fixing, leading to the one-level increase under section 2R1.1(b). Heffernan asserted that the term "noncompetitive bid" or its equivalent "bid rigging" should be confined to bid rotation schemes, described in application note 6 as the submission of "complementary bids" in which for each job, the competitors agree which of them shall be the low bidder and the others submit higher bids to make sure the designated bidder wins. The government argued that bid rigging occurred with the "submission of any 'subverted ' or 'collusive,' i.e. 'noncompetitive' bid;" thus, "the identical bids submitted by Heffernan and his cohorts were surely non-competitive; indeed, they were plainly rigged."

As summarized by Judge Richard Posner, the question was whether Heffernan was a "bid rigger" or, equivalently, a "noncompetitive bidder"; the answer, the court reasoned, would turn on what the term "bid rigging" or the less common term "noncompetitive bids" meant. In rejecting the government's sweeping interpretation, the court found that the guidelines commentary, especially the concern that certain complementary bid activity would not be taken into account in calculating the volume of commerce, strongly supported the defendant's argument that bid rigging meant bid rotation and nothing more.

Applied to Heffernan's conduct, Judge Posner held that "[t]here was no agreement on who would bid, only on what the bid would be" In distinguishing that activity from bid rotation schemes, Judge Posner observed that the purchasers "were not government agencies, but large private firms presumably well able to take care of themselves. They were not asking for bids on a fixed quantity of drums – they asked for bids on a number of different quantities." The court found that this form of bid rigging was "indistinguishable from ordinary price fixing…which is all that happened here." Accordingly, Heffernan should not have received the additional one-point enhancement. Judge Posner concluded:

To punish Heffernan more heavily than an ordinary price fixer merely because his customers asked for 'bids' rather than 'offers' would be irrational. This irrational result is avoided by interpreting 'bid rigging' (equivalently 'noncompetitive bids) consistently with the cases and the pre-guidelines sentencing practice, as meaning bid rotation.

### Fourth Circuit Case

In *United States v. Romer*, 198 F.3d 359 (4th Cir. 1998), real estate speculators participated in a scheme to limit competition at foreclosure auctions. The purpose of the conspiracy was to suppress the price of auctioned properties by participants agreeing not to bid against one another at auctions. During an auction, most members of the conspiracy would refrain from bidding, while one designated member would bid on and receive the property at a greatly reduced price. Afterward, conspirators would hold a private auction where they would discuss the price each would have bid for the property. The highest bidder would get the deed, and the conspirators would divide among

themselves the money saved by artificially holding down prices.

Romer was convicted of Sherman Act violations. At sentencing, the district court granted the one-level enhancement for submitting non-competitive bids and sentenced her to 18 months in prison. On appeal, Romer challenged the one-point enhancement, arguing that it was intended to apply only to bid rotation cases. In support of her argument, Romer relied exclusively on the Seventh Circuit's decision in *Heffernan*.

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The Fourth Circuit declined to follow this reasoning stating that it was not persuaded that section 2R1.1(b)(1) should be limited to bid-rotation cases. According to the court, "the language of the guideline is broad and non-exclusive. It authorizes a one-level enhancement for all cases involving the submission of 'non-competitive bids.' If the Sentencing Commission intended the enhancement to apply only to bid-rotation cases, it is reasonable to believe that the general term 'non-competitive bids' would have been replaced by a more particular term, like 'bid–rotation' or 'complementary bids.'" In a separate part of the antitrust Sentencing Guideline dealing with organizational fines, moreover, the term "complementary bid" is used, suggesting it was a subcategory, rather than a synonym, of bid-rigging in general. The Fourth Circuit noted that "[t]he lack of similar specificity in § 2R1.1(b)(1) would appear to indicate that the commission intended the enhancement to apply generally to all forms of bid-rigging."

While *Romer* expressed skepticism about *Heffernan* in dicta, the Fourth Circuit was able to decide the case without formally splitting with its sister circuit. According to the court, even assuming, *arguendo* section 2R1.1(b)(1) only applied to bid-rotation, the auction-rigging scheme at issue would qualify as such. Thus, the court found, "prior to each auction, members of the conspiracy discussed which of them would submit the lowest bid, and others agreed to abstain from bidding or at the very least not to outbid the chosen bidder. Bidding of that nature is complementary in the sense that the bids submitted and withheld are designed to assist the chosen bidder in obtaining the property at the lowest possible price, with the understanding that, over time, each conspirator will receive the appropriate payoff."

Finally, in *United States v. Joseph Giraudo,* 2018 U.S. Dist. LEXIS 81019 (N.D. Cal.), a defendant who pled guilty to participating in a conspiracy to rig foreclosure auctions challenged the imposition of the one-point enhancement, arguing that under *Heffernan*, it only should apply when defendants agree to rotate bids *without* making payoffs to each other. Rejecting that argument, and carefully following the guidance offered by Judge Posner's opinion (without any reference to *Romer*) Judge Charles Breyer noted that *Heffernan* made no such distinction between cases with or without an accompanying payoff, and that in any event such a distinction would make no sense since "[i]n either case, the party on the other side of the transaction is harmed because the winning bid is artificially high or law; but the volume of commerce calculation does not account for this fact with regard to the party who does not bid."

## Conclusion

In recent years, the Department of Justice has sought longer sentences for individuals convicted of Sherman Act violations. Especially in cases where a substantial punishment is already imposed because of millions of dollars of affected "volume of commerce," it is incumbent on defense counsel to invoke Judge Posner's well-reasoned opinion in *Heffernan* and vigorously oppose the additional one-point bid-rigging enhancement except in those cases involving an explicit bid rotation scheme.

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