

Antitrust Summary

Membership in the American Public Works Association (APWA) facilitates interaction among members of the public works industry. While considerable information in the public works industry ultimately is disclosed to the public, many persons active in the APWA, also have access to non-public information. Because some APWA members may have non-public information that may impact on competition, it is important that APWA members understand and comply with federal and state antitrust laws. This guide summarizes the antitrust laws and the APWA's efforts to assure compliance with those laws. By following this guide, APWA members should be able personally to avoid problems with the antitrust laws.

Application of Antitrust Laws

Associations are particularly vulnerable to antitrust scrutiny because an educational Association, by its nature, brings together a group of actual or potential competitors. Antitrust violations may result in stiff fines for the Association and its members and jail sentences for individuals who participated in the violation. An antitrust violation also may result in civil litigation potentially seeking millions of dollars in damages from individuals or the Association.

Overview of Antitrust Laws

The Federal Antitrust Laws are for the most part very general, and do not identify all potential unlawful conduct. There are four basic federal laws governing the antitrust area.

- a. The Sherman Act contains the broad general rules and policies governing the antitrust field. In general, it prohibits "every contract, combination or conspiracy" that unreasonably restrains trade and it also prohibits monopolizing (or attempting or conspiring to monopolize) any part of trade or commerce.
- b. The Clayton Act prohibits conduct which may be anti-competitive and may unreasonably restrain trade: (1) exclusive dealing arrangements, "requirements" contracts and "tying" arrangements with distributors, retailers or customers; (2) corporate mergers; and (3) individuals serving at the same time as directors of two or more competing corporations.
- c. The Robinson-Patman Act generally prohibits discrimination in prices or terms of sale between competing purchasers, the effect of which is to injure competition, including purchasers who induce discrimination in favor of themselves.

- d. The Federal Trade Commission Act prohibits “unfair methods of competition in or affecting interstate commerce and unfair or deceptive acts or practices in or affecting interstate commerce.” The Act also authorizes the Federal Trade Commission to issue rules of competitive conduct which may be more restrictive in some respects than the other acts.

In addition to the federal laws, many states have their own antitrust laws, frequently patterned after the federal statutes, which apply to local activity not involving or affecting interstate commerce. The antitrust laws have worldwide impact. Conduct outside of the United States that has a material impact on commerce within the United States is subject to these antitrust laws. Many countries, specifically including Canada where the APWA has affiliated chapters, have similar antitrust laws. The United States and Canada have an agreement to cooperate and assist in the enforcement of antitrust laws.

Applying Antitrust Laws to APWA Members

APWA members should exercise particular concern in handling non-public information. In most circumstances, the disclosure of publicly available information -- as long as it is not intended to lead to an agreement between potential competitors -- complies with the antitrust laws.

APWA members should keep in mind three particular points:

- The antitrust laws apply equally to buyers and sellers;
- The antitrust laws apply to public agencies and officials; and
- The antitrust laws provide no immunity for educational Association activities.

Potential Problems

In general, APWA members should avoid entering into any “agreements” with competitors or potential competitors which may impact on fair competition. The antitrust laws apply whether the agreement stems from a formal meeting or at an “unofficial” meeting.

Hypothetical Antitrust Example: During an official APWA meeting in a hotel conference room, two APWA members leave the meeting and go to another room to discuss fixing prices which their two agencies will pay for certain services. Result: though the discussion in the other room is an “unofficial” meeting, it likely is an antitrust violation.

A. Price Fixing

There is no area in antitrust law where the law is more well-settled or where the penalties may be more severe than price-fixing. Any agreement between competitors that has the purpose of raising, depressing, fixing, pegging, or stabilizing the price of goods or services is prohibited. In addition, an agreement between a seller and a buyer

that restricts the price at which the buyer may resell the seller's product also may violate the antitrust laws, particularly where such agreements materially reduce competition.

Hypothetical Antitrust Example: An APWA member with one governmental agency calls another APWA member with a different governmental agency to ask about the prices paid for concrete. The APWA member replies by identifying the price paid last year and by revealing the publicly disclosed bids for the upcoming year. Result: NOT an antitrust violation.

Hypothetical Antitrust Example: Same as previous example, but the APWA member also says, "And your agency likewise should not agree to pay more than this amount for the upcoming year." Result: likely antitrust violation.

B. Allocation of Products

It is illegal for APWA members to agree on quantities or types of products each will undertake to purchase or sell. It similarly is illegal for APWA members to agree on service providers from whom each will undertake to purchase or sell. Therefore, any discussion by, under, or outside of an educational Association activity with respect to such matters must be avoided. APWA members, however, may join to form a purchasing cooperative that seeks to increase competition by making bulk purchases on behalf of the members.

C. Competitive Advantage By Product Approval

The APWA does not endorse products. Some local chapters of the APWA publish or edit manuals for public works projects. Such efforts serve the laudable purpose of educating those interested in the public works industry, disseminating information about the industry, and improving overall industry efficiency. The evaluation of products and services must be handled in a fair and impartial manner. Goods or services, which have similar engineering qualities, may not be distinguished in such a way as to provide one manufacturer or supplier with a competitive advantage over another.

Hypothetical Antitrust Example: A manual provides that a pipe must have specified technical properties (e.g., durability, flexibility, and expected life) to be appropriate for a specific purpose. Result: NOT an antitrust violation.

Hypothetical Antitrust Example: A manual requires a particular company's pipe, and similar pipes with equivalent technical properties are not approved by the manual. Result: likely antitrust violation.

D. Allocation of Customers or Markets (Bid-Rigging)

Educational associations are particularly susceptible to antitrust scrutiny and allegations of wrongdoing for customer or market allocation. Agreements or understandings, formal or informal, among competitive bidders with the purpose or effect of allocating customers, suppliers, markets, or products are illegal. APWA members may not induce, support, or engage in the practice of refraining from bidding nor refrain from soliciting.

E. Group Boycotts

Educational Association members may not enter into agreements or understandings, formal or informal, to avoid selling to, purchasing from, or doing business with another firm. Such group boycotts, or collective refusals to deal, violate the antitrust laws regardless of the reasons for or support given for such conduct. For example, it is illegal for members to agree, or urge others to agree, not to do business with a company or purchase the product or services of a company.

Hypothetical Antitrust Example: One APWA member calls an APWA member at a different agency, and asks, "Do you know anything about ABC Contracting?" The second APWA member replies, "ABC Contracting did a poor job on a recent project. Our agency has decided to no longer use ABC Contracting." Result: NOT an antitrust violation.

Hypothetical Antitrust Example: Same as above, but the member also says, "I think that your agency should not use ABC Contracting." Result: antitrust violation.

Contacts by Governmental Agencies or Non-Governmental Complaining Parties

In the event that any APWA member is contacted by any governmental agency or non-governmental complaining party concerning any alleged non-compliance with the antitrust laws, prompt action is critical. The contact may constitute:

- search warrant;
- a subpoena;
- a request for an interview; or
- a notice of deposition.

In the event of such contact, the APWA member should immediately contact the Executive Director of the APWA and send via facsimile a copy of any subpoena, written request or notice. The Executive Director shall contact legal counsel for the APWA. Do not produce any documents or answer any questions before obtaining advice of the APWA's legal counsel.

In the event that the official serving a search warrant refuses to wait until legal counsel arrives before completing the search, the APWA member should still immediately

contact the Executive Director of the APWA, and should still attempt for counsel to be present. If counsel cannot be present physically, then the APWA member should consult by telephone with counsel during the course of the search and keep counsel advised of its status. No APWA member should obstruct a legal search pursuant to a valid search warrant, but an APWA member is not required to and should not answer substantive questions during a search. If a search is conducted, the APWA member should make written notations of all places searched and all documents or materials seized, and should, if possible, obtain copies of seized documents.