

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Quality People. Quality Projects.



MODEL ANTITRUST COMPLIANCE MANUAL

1999

EXECUTIVE SUMMARY

This manual describes the major antitrust laws and how they apply to AGC chapter activities. It is intended to emphasize that AGC of America remains committed to full compliance with all such laws and to provide general guidance for AGC chapters, including their directors, officers, members and staff.

Chapters can turn to this manual for a basic education on the antitrust laws. This manual includes an overview of these laws. In addition, it generally describes the types of situations in which chapters may want to take antitrust concerns into account.

The key antitrust laws are the Sherman Act and the Federal Trade Commission Act. They prohibit *joint action* between or among competitors in unreasonable restraint of competition. Among the activities that *always* have an unlawful effect are (1) price fixing (in any of its many forms), (2) allocations of territory, customers or products and (3) boycotts. Whether other forms of joint action violate the antitrust laws will depend on several factors, such as the business reasons for the joint action, the degree to which it reduces competition and any “pro-competitive” effects it may have, including any efficiencies that it may yield. The laws authorize potentially severe criminal and civil penalties for violations.

Trade associations provide unique opportunities for interaction and cooperation among competitors, and for that reason, antitrust enforcers and the courts have focused particular attention on trade associations and their compliance with the antitrust laws. Among the questions that the typical chapter may find useful to ask are the following:

- How does the chapter admit and expel members?

- Does the chapter make its benefits available to non-members?
- What activities are undertaken under the auspices of the chapter?
- How does the chapter address specific construction contracts?
- Has the chapter set any industry standards or encouraged any other self-regulation – by, for example, taking positions on the “auctioning” of work, or establishing a code of ethics, or sponsoring educational programs?

Competitors’ joint or common efforts to influence or petition legislative bodies, administrative officials and/or the courts (including lobbying and litigation) *cannot* normally form the basis for antitrust liability, regardless of the competitive purpose or effect, so long as these efforts are genuine.

In the first appendix to this manual is a summary of antitrust considerations that pertain to standards for membership in an AGC chapter, including some ways that chapters may want to approach some of their more subjective standards. In the second appendix is a one-page summary of antitrust rules that chapters may find useful to distribute. It lists several “do’s” and “don’ts.” In the third appendix is a model resolution that chapters may want to consider.

While it provides much information, this manual cannot address all of the antitrust issues that a chapter may encounter. Nor can it anticipate every situation to which the antitrust laws may apply. When facing any specific situation that may have significant antitrust implications, it will remain important for chapters to seek further guidance from their legal counsel.

MODEL ANTITRUST COMPLIANCE MANUAL FOR CHAPTERS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

INTRODUCTION

This manual describes the major antitrust laws and how they apply to AGC chapter activities. AGC of America has always required all of its activities to comply with federal and state antitrust laws. This manual is intended to emphasize the national organization's commitment to full compliance and to serve as a reference for AGC chapters, including their directors, officers, members and staff.

The antitrust laws protect and promote competition and enhance consumer welfare. Consistent with these laws, AGC of America has always been an ardent supporter of full and open competition.

The construction industry's health and integrity depend on everyone having an equal opportunity to compete, and AGC of America remains firmly committed to that end. It is the policy and intent of AGC of America to fully comply with the antitrust laws at all times and in all activities.

Chapters can turn to this manual for a basic education on the antitrust laws. This manual includes an overview of these laws. In addition, it generally describes the types of situations in which chapters may want to take antitrust concerns into account.

This manual is not intended to address all of the antitrust issues that a chapter may encounter. Nor can it anticipate every situation to which the antitrust laws may apply. When facing any specific situation that may have significant antitrust implications, it will remain important for chapters to seek further guidance from their legal counsel.

PART I

OVERVIEW OF THE ANTITRUST LAWS

A. Key Statutes And Legal Tests

The "antitrust laws" include a number of federal and state laws that foster competition and the free play of market forces. A trade association has to be primarily concerned with the following federal statutes:

- **The Sherman Act.** Section 1 makes unlawful every contract, combination or conspiracy in unreasonable restraint of trade or commerce.
- **The Federal Trade Commission Act.** Section 5 makes unlawful unfair methods of competition in, or affecting, commerce.

These statutes prohibit *joint action* between or among competitors in unreasonable restraint of competition. Moreover they presume that certain joint actions *always* have an unlawful effect. The joint actions presumed to restrain trade to an unreasonable degree are unlawful *per se*.

Other joint actions are subject to the so-called *rule of reason*. While not unlawful *per se*, they may still attract antitrust scrutiny. The rule of reason requires a balancing of several factors, such as the business reasons for the joint action, the degree to which it reduces competition and any "pro-competitive" effects it may have, including any efficiencies that it may yield (*e.g.*, better quality, lower prices).

Like all other trade associations, AGC chapters have to be attentive to both prongs of the law. Antitrust enforcement authorities and the courts normally assume that all of the members of a trade association are competitors.

B. The *Per Se* Violations: Activities Critical For Chapters To Avoid

It is critical for chapters to avoid the following activities because the antitrust laws presume that these activities *always* restrain competition to an unreasonable degree. The list of *per se* violations includes:

- ❑ **Price Fixing.** It is always unlawful for competitors to reach an agreement or understanding about prices, whether it is to raise, lower or stabilize prices. The same restriction applies to agreements and understandings regarding certain other terms and conditions of sale that affect price, such as discounts, payment terms, credit and allowances. In addition, it is unlawful for competitors to reach any agreement or understanding regarding bidding or refraining from bidding. Competitors should never discuss prices, profit margins, cost factors, discounts or credit terms for any particular company or project. Nor should they discuss their future intention regarding any of these, or non-public price schedules or notices of price changes.
- ❑ **Allocations of Territory, Customers Or Products.** It is always unlawful for competitors to reach an agreement or understanding about:
 - Any division or allocation of markets or territories;
 - Any division or allocation of the customers for whom competitors will work; or
 - Any competitor's volume of work or any restrictions on the volume of work anyone intends to perform.

In addition, competitors should never discuss or exchange information regarding any of these subjects.

- ❑ **Boycotts.** A boycott is an agreement by any two or more parties (not necessarily at the same level of competition) to deny business,

supplies or other competitive advantages to a third party. Boycotts frequently involve agreements between or among competitors to coerce their customers not to deal with a another competitor, or to deny it access to crucial competitive resources. Boycotts are also *per se* violations of the antitrust laws. Among competitors, there should be no discussions of refusing to deal with either suppliers or customers, or of agreements with either suppliers or customers not to deal with a competitor.

C. Liability: The Potential Consequences Of Antitrust Violations

Violations of the antitrust laws carry potentially severe penalties. The criminal penalties may include:

- For an individual, fines of up to \$350,000 per violation and/or jail sentences of not more than three years; and
- For a corporation, fines of up to \$10,000,000 per violation.

The civil remedies for antitrust violations may include treble damages, attorneys' fees and injunctive relief.

Trade associations are normally liable for the antitrust violations of their agents – whether employees or others – if those agents are acting within the scope of at least their apparent authority (i.e. the individual appears to be acting in the ordinary course of the association's business). In addition, trade associations are normally liable for any actions taken by their volunteer members – including but not limited to board and committee members – if those actions are taken under the auspices of the association, and *whether or not the association has authorized those actions, or later ratifies them*. No ratification is required for a finding of liability.

The courts may infer that a firm was involved in anti-competitive behavior from little more than its membership trade association found guilty of such behavior. If

a court finds that a member knew or should have known that its association was involved in such behavior, the court may treat that member as a co-conspirator.

In this regard, it is also important to note that director and officer liability insurance normally does not cover antitrust violations.

PART II HOW THE ANTITRUST LAWS APPLY TO TYPICAL CHAPTER ACTIVITIES

Most AGC chapter activities do not carry any risk of antitrust liability. There is, however, some potential for antitrust concern anytime competitors join in any activity. Trade associations provide unique opportunities for interaction and cooperation among competitors, and for that reason, antitrust enforcers and the courts have focused particular attention on trade associations and their compliance with the antitrust laws.

It follows that AGC chapters should be sensitive to antitrust concerns as they plan and conduct their affairs. *Like other trade associations, chapters should take affirmative steps to ensure that none of their public pronouncements or other activities could be misconstrued as facilitating, condoning or calling for any joint action that may violate the antitrust laws.*

The following material addresses some of the typical or common chapter activities, explaining whether and to what extent these activities may raise antitrust concerns.

A. Admission To And Expulsion From Chapter Membership

To the extent that membership gives a competitive advantage to member firms, denying membership to a firm may have the effect of denying a competitive advantage to that firm.

Chapters can reduce the resulting risk of an antitrust violation by ensuring that their membership standards are appropriate.

Membership standards should reasonably relate to the purposes of the chapter as set forth in its charter. Membership decisions should not be unreasonable or arbitrary. To the extent feasible, they should rest on objective written standards. If carefully applied, such standards can reduce the risk of an antitrust violation.

In the Fall of 1998, AGC of America conducted a survey of chapter membership standards. Appendix I discusses the types of standards that are typical to most chapters and the antitrust considerations that pertain to each.

On rare occasions, chapters may find it necessary to expel a member. If and when that may occur, chapters should proceed with deliberation and care. Chapters can expel members for failing to pay dues or to follow chapter rules. The chapter's procedures must, however, meet the basic requirements for due process. Before expelling a member, the chapter should give the firm notice of the reasons why it may be expelled and an appropriate opportunity to be heard on the reasons why it should not.

Before either denying membership to a firm or expelling a firm for anything other than objective reasons that a chapter can readily justify (such as the non-payment of dues), chapters should consult legal counsel.

B. Whether Chapter Benefits Are Available To Non-Members

Chapters can also reduce antitrust concerns by making some of their benefits available to non-members.

A chapter has to make a particular benefit (whether a product or a service) available to non-members if – and only if – the benefit is so valuable and essential to everyone in the business that denying the benefit to non-members would have a significant adverse impact on their ability to compete (imposing an unreasonable restraint on trade).

The chapter does not necessarily have to promote its benefits among non-members, or to solicit their participation. It does, however, have to find a way to make a particular benefit available to non-members if they request the benefit and it appears that denying access would put the non-members at such a disadvantage that competition would be adversely affected.

If the chapter uses its dues to provide a particular benefit to its members (or to make it less expensive), the chapter may, however, charge non-members a fee (or a higher fee) for the same benefit. Under such circumstances, the chapter is free to treat non-members differently, so long as the fees requested from non-members are reasonable.

Some typical chapter benefits at least arguably affect competition so greatly that chapters should find a way to make the benefits available to any non-members requesting them. Depending on the circumstances, such chapter benefits could include the following:

- Access to traditional plan rooms;
- Access to electronic plan rooms; and
- Bulk buying arrangements.

Workers compensation programs are a special case. State regulators typically require the sponsoring organizations to limit participation to the members of those organizations. If a non-member seeks the benefits of a chapter's self-insured workers compensation program, the chapter should ask counsel to examine the implications of the particular regulatory requirement.

Before denying a non-member request for access to any of its other major business benefits, the chapter should also consult legal counsel. The same would be true of any chapter in any doubt about the fee(s) that would be reasonable to charge a non-member.

C. Conduct Of Meetings.

At all times, it should be clear whether members are acting under the auspices of the chapter. All

association business should be limited to meetings of the chapter and its committees, task forces and the like, where agendas have been established in advance. Those meetings should have a defined beginning and ending. There should be no sessions outside of such meetings at which there are actions or discussions that are not reflected in agendas and minutes.

- ❑ **Agendas.** An approved agenda should be prepared for each meeting sponsored by the chapter. There should be no discussion of subjects that are not on the agenda except when absolutely necessary. Agenda items should be specific and concrete.
- ❑ **Minutes.** Accurate minutes of board, committee and other meetings should be kept.

Trade association meetings are not shielded from antitrust scrutiny. Quite to the contrary, all discussions or actions taken under the auspices of a trade association are subject to the antitrust laws. Members must avoid all topics that would not be proper for competitors to discuss outside of a trade association meeting.

Chapters should not attempt to mandate attendance at any particular meeting. Any form of coercion, regardless of subtlety, may be considered indicative of conspiratorial behavior. Of course, this does not absolve those appointed to positions of responsibility (e.g., directors) of their obligations to attend meetings and responsibly perform the duties associated with such appointment. Chapters have a legitimate interest in ensuring that their policymakers are actively engaged in necessary decision making — and may, for example, take into account directors' attendance records (over a period of time).

D. Activities Relating to Specific Contracts

Chapters frequently seek to improve the procedures for soliciting, awarding and administering construction contracts and

subcontracts. This is a proper and acceptable role for a trade association.

Chapters should, however, be careful not to go beyond promoting sound procedures. Chapters should not attempt to skew the competition for any particular contract or type of contract in favor of any particular firm or class of firms. Antitrust concerns should be considered in connection with any activity that reasonably may be anticipated to affect the outcome of a competition for, or the award of, a specific contract.

Particular attention should be paid to avoiding any activities that relate to the following:

- ❑ **Bids Or Proposals For Specific Projects.** Chapters should not provide the opportunity or otherwise become involved in any discussions of the bids or proposals for specific projects — either among the bidders or with source selection officials. As a general rule, chapters should also avoid any discussion of prevailing, standard or acceptable prices in the industry.
- ❑ **Qualification Or Disqualification Of Bidders.** As discussed below, discussions that are part of a properly conducted effort to establish industry standards (and are not focused on a specific solicitation or award) generally are appropriate. Chapters should not, however, become involved in any discussion of the qualifications of the bidders for any particular contract or type of contract. Any discussion of the qualifications of specific bidders can raise questions about exclusionary conduct that could adversely affect competition.

E. Government Advocacy

Competitors' joint or common efforts to influence or petition legislative bodies, administrative officials and/or the courts (including lobbying and litigation) *cannot* form the basis for antitrust liability, regardless of the competitive purpose or effect, so long as these efforts are genuine.

There are exceptions to this rule where the activity is designed to deny competitors access to governmental (including judicial) functions, or the competitors use improper means (such as misrepresentation in judicial or administrative processes).

F. Industry Standards And Other Industry Self-Regulation

Trade association efforts to establish industry standards and/or codes of conduct are lawful if the effect is to promote rather than restrain competition. Such efforts can have many benefits relating to improved performance and processes. These efforts, however, can also interfere with the way a competitive market functions. To the degree that standards are non-binding and compliance is voluntary, there is less risk of an antitrust problem.

- ❑ **Procedures For Establishing Standards.** Absent procedural safeguards, industry standards may violate the antitrust laws. For that reason:
 - Notice should be given to all parties affected by the proposed standard.
 - The standard should be reasonably related to the achievement of a goal that is acceptable under the antitrust laws (such as quality or safety).
 - The competitive benefits of the standard must outweigh the competitive harms.
 - The parties affected by the standard should be afforded an opportunity to comment on the standard before it becomes final.
 - The chapter should develop a record sufficient for judicial review.

Chapter activities that are not designed to yield industry standards but may still foster industry self-regulation or improvement can also raise antitrust concerns. A few examples follow:

- ❑ **Guidance on the “Auctioning” Of Work.** Two areas where chapters may be involved in industry self-regulation are in the auctioning of work through bid shopping

(disclosing a bid amount in order to secure a lower bid from a subcontractor's competitor) and bid peddling (requesting information from a selection authority regarding a competitor's bid in order to submit a lower proposal). AGC of America has indicated that it disfavors auctions for the following reasons: (i) in instances where auctioning is anticipated, pricing strategies often lead to multiple rounds of negotiations and bidding inefficiencies that ultimately can harm the project and (ii) auctioning often involves the unauthorized disclosure of information that was provided in confidence — which demeans the integrity of the competitive bidding system and reflects adversely on the industry. If there is a need for a sequential round of bidding, AGC of America has provided guidance to the effect that best and final offers should be solicited and submitted in accord with established procedures that ensure fairness and protection of the confidentiality of competitors' bids. Because of the sensitive nature of this issue and the potential effect on competition, legal counsel should be consulted before taking any action that goes beyond this guidance.

□ **Codes Of Ethics.** Many associations have voluntary or mandatory codes of ethics. These codes generally describe desirable or essential behaviors, or goals or aspirations, expected to improve business practices. Such codes implicate the antitrust laws because they represent the consensus of an association's members on appropriate and fair professional behavior, and violations may result in collective sanctions which, in some instances, may constitute an unlawful restraint of trade.

➤ To avoid antitrust problems, ethics codes should clearly define the desired standards of conduct in a way that makes them known to all members and that the chapter can readily justify in terms of well-recognized business purposes.

➤ If sanctions are contemplated, enforcement programs should be fairly administered with appropriate due process protections.

□ **“Peer Reviews.”** Peer reviews generally involve groups of similar but noncompeting organizations working together to improve their business performance. Because trade association members are often competitors (or presumed to be competitors), peer reviews involving members of a trade association can raise significant antitrust concerns.

➤ While AGC of America offers guidelines for companies wishing to undertake peer review, AGC of America will not organize, promote or encourage peer review groups in any way.

➤ AGC of America will not accept the results of any peer review of any member or take such results into account in any way. Nor will a member's participation or non-participation in a peer review affect in any way its standing within or dealings with AGC of America.

□ **Educational Programs.** One function of a trade association is to provide educational programs for its members. Such programs provide valuable information on different aspects of doing business in the industry. Generally, such educational programs will not give rise to antitrust concerns. However, programs that involve the sharing of information that may affect competition could carry antitrust risks. For example, a chapter program on construction risks may, under some circumstances, raise antitrust concerns – because construction risks may be taken into account in either bidding on or negotiating for construction contracts. The following guidelines should be followed with regard to educational programs:

➤ The purpose of all such programs must be purely educational. There must be no purpose to reach agreement on any

approach or value that could affect prices or competition. This should be clearly articulated as part of the program, and participants should be cautioned as to the antitrust implications of any such agreement.

- Course materials that raise potential antitrust concerns should be reviewed and approved by counsel in advance.
- Course attendance should be structured so as to avoid having direct competitors

involved in any discussion that could give rise to antitrust concerns.

CONCLUSION

This manual has summarized the antitrust laws and the way that they apply to typical chapter activities. Chapters should consult their legal counsel for advice and assistance with any specific situations that may have antitrust implications.

Appendix I

MEMBERSHIP CONSIDERATIONS

Common Interests Of Members — Chapter Purpose

Trade associations represent members having common interests in pursuing certain defined objectives. Standards for membership in a chapter should reasonably relate to the stated purposes of the chapter.

A typical chapter's charter may state that its purposes are to represent the interests of general contractors (and, perhaps, other industry related companies) and to improve the professional standards of the construction industry, including the skill, integrity and responsibility of member firms. Consistent with these purposes, a chapter reasonably may limit membership to:

- general contractors — normally defined to include construction firms capable of performing work as a prime contractor with overall project responsibility; and
- other companies involved in the construction industry.

Membership is typically limited to businesses, and denied to individuals and labor unions, because the latter's interests are not congruent with those of general contractors and other firms.

Classes Of Members

Many chapters choose to have several classes of membership (*e.g.*, regular membership, associate membership, honorary membership) with the different classes enjoying different rights and benefits. Such distinctions in membership are normally regarded as serving a valid purpose where, for example, they ensure that voting rights are vested in the companies whose interests are central to the chapter's purposes. Chapters should ensure that any distinctions between or among different classes

of membership have a basis that is reasonably related to chapter purposes.

Experience

It is common for chapters to require that members have a certain level of experience (*e.g.*, two years in the construction industry). Such requirements normally are deemed reasonable because they ensure that members have demonstrated *bona fides* in the area. Chapters should avoid any unduly onerous experience requirements.

Business Reputation

Chapters frequently require that members have a reputation for skill, integrity and responsibility. Some chapters require references.

If the chapter has a clearly-stated purpose of improving the standards in the industry, business reputation reasonably can be taken into account in determining membership. Such standards, may, however, be difficult to apply. Standards pertaining to business reputation should be applied as objectively as possible. For example, they might be based on a contracting officer's determination of non-responsibility, or on debarment, or perhaps on conviction for a business-related crime. Standards in this area should not be applied to exclude a firm without consulting counsel.

Procedural Safeguards

Most chapters have a member admission process that vests the board with responsibility for applying membership standards. Membership decisions are a serious matter and generally are regarded as meriting the judgment and discretion of the board. Normally, it is not a good idea to subject membership decisions to a vote of all members.

Expulsion of a member should be taken only in accord with established procedures that meet the standards of due process, and only after consulting legal counsel.

Appendix II

SUMMARY OF ANTITRUST POLICY AND REQUIREMENTS

POLICY

This AGC chapter will conduct its affairs in strict compliance with the antitrust laws. No AGC activities shall create even the appearance of a violation of the letter or spirit of the antitrust laws.

DO

1. Ensure that no chapter pronouncements or activities could be misconstrued as facilitating, condoning or calling for concerted action in violation of the antitrust laws.
2. Conduct all chapter business only at meetings of the association where agendas have been approved in advance.
3. Follow membership criteria carefully and consult counsel before expelling any member for anything other than a failure to pay dues.
4. Follow appropriate procedures for establishing industry standards.
5. Consult legal counsel regarding specific situations that may have antitrust implications – and, in particular, before:
 - Denying a non-member request for access to chapter benefits or establishing non-member fees; or
 - Undertaking industry self-regulation or improvement activities that raise potential antitrust concerns.

DON'T

1. Have any discussions or agreements regarding:
 - prices, discounts, or terms or conditions of sale;
 - profits, profit margins or cost data for individual firms or projects;
 - market shares, or sale territories or markets;
 - allocation of customers or territories;
 - selection, rejection or termination of customers or suppliers;
 - restricting the territory or markets in which a company may resell products;
 - restricting customers to whom a company may sell;
 - bidding or refraining from bidding;
 - qualification or disqualification of bidders for specific contracts; or any matter which is not consistent with the proposition that each AGC member must exercise its independent business judgment in pricing its services and products, in dealing with its customers and suppliers, and in choosing the markets in which it will compete.
2. Attempt to affect the outcome of any specific competition, award or type of award.

Appendix III
MODEL CHAPTER RESOLUTION ON
ANTITRUST COMPLIANCE AND TRAINING

RESOLVED, that _____ (hereinafter “AGC Chapter”) does and shall continue to promote full and open competition in the construction industry;

FURTHER RESOLVED, that this AGC Chapter hereby commits to conduct its affairs in strict compliance with the antitrust laws and to avoid even the appearance of a violation of the letter or spirit of the antitrust laws. Pursuant to this policy:

1. This AGC Chapter shall use its best efforts to promote full and open competition among qualified construction contractors and subcontractors.
2. This AGC Chapter shall use its best efforts to promote full and open competition among qualified suppliers and service providers to the construction industry.
3. This AGC Chapter shall provide its products and services to both members and non-members on a fair basis that reasonably reflects any difference in their contributions to the cost of providing such products and services.
4. This AGC Chapter shall not authorize, condone or provide opportunities for any activity that would unnecessarily inhibit, restrain or weaken competitive conditions in the construction industry.
5. This AGC Chapter shall not authorize, condone or provide opportunities for any anti-competitive activity that would violate federal or state antitrust laws.
6. This AGC Chapter shall not combine with any other entity or with any person in any effort to impose unreasonable restraints on trade in the construction industry.

FURTHER RESOLVED, that the professional manager of this AGC Chapter be, and hereby is, authorized and directed to provide for the following:

1. The distribution of an antitrust compliance manual to all officers, directors and committee members of this chapter, and to all staff; and
2. The periodic training of all officers, directors and committee members of this chapter, and of all staff, on this chapter’s policy of full compliance with all federal and state antitrust laws and the steps necessary to ensure such compliance.