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DOJ Sues to Block Merger Between Booz Allen Hamilton and EverWatch Based on Antitrust Concerns Relating to Single-Contract Market

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The Department of Justice recently filed a complaint to prevent Booz Allen Hamilton's $440 million acquisition of "agile and innovative" competitor EverWatch, Inc.[1] Among the notable aspects of the complaint is its definition of the relevant market as a single NSA contract and its assertion that the merger agreement itself constituted a violation of Section 1 of the Sherman Act.

Booz Allen and EverWatch are the only companies to indicate intent to bid as prime contractor on the NSA's upcoming RFP to provide operational modeling services in support of NSA's signals intelligence missions. The contract will have a five-year term. Booz Allen won the past three contracts, and its sole competitor on those contracts decided to stop competing.[2] But, in 2019, EverWatch, having hired former Booz Allen specialists, launched a significant competitive effort for the forthcoming RFP.[3]

The complaint alleges both present and impending harm: a Clayton Act Section 7 claim that, if completed, the merger will tend to create a monopoly, and a Sherman Act Section 1 claim that the merger agreement presently reduces the companies' incentives to bid competitively.

Merger to monopoly in a single-contract market

In most merger cases, the antitrust agencies do not consider a single RFP or contract to define the scope of a relevant market. However, in its complaint against Booz Allen, DOJ defines the relevant market as NSA's five-year contract for "operational modeling and simulation services." According to DOJ, this contract constitutes the relevant market because (i) the contract sets forth NSA's specific requirements, and simulation services that do not meet those requirements are not reasonably interchangeable substitutes, and (ii) other than Booz and EverWatch, which spent years developing

their ability to meet NSA's requirements, no company could develop a reasonable alternative in time to bid. As a result of the proposed acquisition, Booz would have the power to profitably increase prices to NSA if it decided to do so.

In contrast, in a statement released the day after the complaint, Booz Allen framed the relevant market as the broader intelligence and defense contracting industry, which it characterized as "highly competitive."[4]

Within the narrow market defined by DOJ, the only competitors are the two companies planning to submit bids—Booz Allen and EverWatch. The complaint alleges that current competition between them is intense and that the proposed merger would result in a monopoly. Citing internal documents of both companies, the complaint asserts that each company views the other as a credible threat. The five-year winner-take-all nature of the contract reinforces fierce competition at the bidding stage, which DOJ asserts would be eliminated if the merger is consummated.

Even before closing, the merger agreement is an immediate restraint of trade

The complaint asserts that entering into the merger agreement also constitutes a Sherman Act Section 1 violation on the theory that even before the merger is completed, the agreement reduces the incentive for bidders to compete. In a post-merger world, Booz Allen will own the winning bidder no matter which bid NSA selects, so both companies are immediately incentivized to stop competing. Notably, DOJ's analysis focuses on incentives, as opposed to an actual agreement not to compete prior to closing (bid rigging) or actual pre-closing coordination of conduct between the parties (gun-jumping), which would be the traditional lens through which potentially anticompetitive pre-closing conduct is analyzed.

Disfavor of nonlitigation remedies

In an attempt to address the alleged anticompetitive effects of the proposed merger, EverWatch transferred its prime contractor title to a subcontractor on its team. The government described the switch as a "shell game" in which EverWatch would continue to fulfill the prime duties, since the much smaller subcontractor lacks the necessary capabilities. As "puppet master," EverWatch has no incentive to help its bid meaningfully compete against its future parent company's bid.

DOJ's unwillingness to accept this proposed remedy may stem from more than the particular dynamics of this case. According to Assistant Attorney General Jonathan Kanter, efforts to fix problematic mergers often do not adequately remedy their anticompetitive harms.[5] As a result, DOJ is pursuing a strategy of challenging more mergers in court. As Kanter has explained: "Bourgeoning scholarship demonstrates that flimsy settlements often fail. . . . In order to protect the public, the division must be able to go to court to block a deal."[6]

Defense contractor mergers

Mergers among defense contractors are likely to face DOJ's increased commitment to litigating challenges. In February, the Department of Defense released a report on competition within the industry, noting intense consolidation over the past several decades.[7] DOJ's complaint in this case evidences its increased concern about potential harm to taxpayers and national security caused by consolidation.

Takeaways

Government contractors evaluating a potential transaction should consider whether a single RFP or contract stream may constitute a relevant market under DOJ's analysis in its complaint against Booz Allen and EverWatch. If so, then only the particular bidders for that RFP would be considered competitors within the market. Defense contracts typically have a small pool of potential bidders due to specialized capability requirements (including, as is the case here, security clearance requirements) and the significant investments required to compete. Such narrow relevant markets could make antitrust obstacles more difficult to overcome in proposed M&A transactions among competing contractors because of the higher competitive concentration levels.

Furthermore, DOJ's focus on the immediate competitive incentives generated by a merger agreement creates additional pressure on government contractors seeking to navigate antitrust issues in a proposed transaction. The incentive to compete less aggressively before closing can exist in many deals, but parties typically avoid antitrust issues by continuing to compete and behaving as separate companies before closing, notwithstanding the incentives. If immediate incentives alone can create antitrust obstacles to a proposed transaction, regardless of actual conduct, then parties to a transaction must carefully consider those incentives, including ways to address or change those incentives, well before entering into an agreement.

FOOTNOTES

[1] Booz Allen EverWatch Complaint (justice.gov) at 5; DOJ alleges Booz Allen merger would harm NSA – Global Competition Review.

[2] Booz Allen EverWatch Complaint (justice.gov) at 5.

[3] Id.

[4] Booz Allen's statement touted synergies the deal would create that would allow for increased innovation and "accelerated technology development cycles." Booz Allen Response to Antitrust Suit

[5] FTC Enforcers Summit April 4, 2022 – Transcript at 3.

[6] Id.

[7] State-of-Competition-Within-the-Defense-Industrial-Base.

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