

Aerospace & Defense Series: Leading Antitrust Considerations for M&A Transactions

Article By:

Jon B. Dubrow

Aerospace and defense contractors engage in a wide range of mergers, acquisitions and joint venture transactions. Like all companies, **aerospace and defense contractors need to be sensitive to antitrust considerations** that might limit their **ability to complete certain transactions**. Transactions in the defense sector are often subject to even greater antitrust scrutiny, and the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have challenged numerous mergers and acquisitions in this industry. This article highlights some of the leading factors contractors should consider when contemplating M&A transactions in their unique industry.

Government contract procedures do not eliminate competition concerns.

Government purchasers have procurement tools that are unavailable to private parties, including requiring certified cost and pricing data for certain contracts. However, these regulatory provisions and tools do not substitute for competition and do not insulate otherwise problematic transactions from antitrust scrutiny and potential challenge.

The affected customer is a full participant in the antitrust review process.

The U.S. Department of Defense (DoD) will be an active participant in the antitrust review of transactions involving products or services sold to the DoD or the military services. Representatives from the DoD general counsel's office and the Office of Industrial Policy will work closely with the DOJ or FTC in evaluating the competitive impacts of a transaction. Customer views are always important in the antitrust review of a transaction, and even more so in aerospace and defense, because that customer is not only providing facts to the antitrust agency but also participating closely alongside the DOJ or FTC in the antitrust review, including obtaining access to confidential business information of the merging parties and third parties.

Product markets are often defined very narrowly.

In general, the antitrust agency will try to determine whether there are any individual procurements for which the merging firms are likely to compete. The "markets" that a business uses in its documents are likely to be broader than the "markets" on which the agency will focus—a situation that provides opportunities to show that merging firms that operate in the same general space do not

compete for the same programs. On the other hand, if the merging firms are two of only a few firms that bid on certain types of programs, the transaction cannot be defended by showing other firms in the same general “market” that do not bid for those programs.

Market shares and concentration levels are not particularly relevant.

As a corollary to the previous point, market shares are less relevant in aerospace and defense merger reviews than they are in many other industries. Transactions are generally reviewed based on their potential to have adverse competitive effects in bid/auction markets, where shares based on prior sales are not highly relevant. The antitrust inquiry typically focuses on whether the proposed transactions will result in an unacceptably low number of bidders, or combine the best-positioned bidders, for upcoming procurements.

Services contracts tend to have many suppliers, but mergers of two firms holding Indefinite Delivery Indefinite Quantity (IDIQ) contracts could raise issues in a market defined around those contracts.

Product areas involving military technologies and hardware often have only a few suppliers. Product areas in which the government purchases services, rather than hardware, generally have many providers. For that reason, mergers affecting services contracts generally are unlikely to raise significant antitrust questions in a merger review. There are some exceptions, however. For example, some services are extremely specialized, such that there are only a few providers capable of providing those services. Another problematic situation could involve a merger of two contractors holding the same IDIQ contract. In an extreme scenario, the only two firms holding IDIQ contracts allowing them to bid on task orders might choose to combine. Even if many firms have the technical capability of providing the services required, under this hypothetical the only two that can bid under a contract vehicle are combining, which could be of interest to the government.

Combinations in the aerospace and defense industry often raise vertical issues.

Most mergers focus on horizontal combinations of competitors. The aerospace and defense industry is interwoven with many supply, teaming and similar relationships between different contractors. Those relationships can create significant vertical concerns in the context of an antitrust investigation. The agencies have required merchant supply/non-discrimination and firewall procedures to resolve vertical foreclosure concerns. It is important to identify and manage the antitrust risks around vertical relationships.

Efficiencies can be important, but the customer must benefit.

Synergies are important to most deals. For those synergies to assist in the antitrust defense, they must have some benefit to customers. For example, the benefit of facilities consolidation that reduces costs may flow through to customers that purchase under cost-plus contracts, but may not flow through fixed-price contracts. Parties should demonstrate that their synergies and savings will benefit customers through lower pricing or increased competition.

National security can trump competition concerns in limited circumstances.

From time to time, the FTC or DOJ may evaluate a transaction that they believe creates competitive concerns, but which the DoD believes is important for preserving national security. An affirmative

statement by the DoD in support of the transaction can allow it to proceed over competition law concerns.

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