



Handbook of Procurement

EDITED BY
NICOLA DIMITRI,
GUSTAVO PIGA
AND
GIANCARLO SPAGNOLO

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15 Bidding rings and the design of anti-collusive measures for auctions and procurements

William E. Kovacic*, Robert C. Marshall,
Leslie M. Marx* and Matthew E. Raiff

15.1. Introduction

Since the mid-1990s, the enforcement of competition laws against cartels has drawn considerable attention to the means by which buyers or sellers establish and manage collusive schemes.¹ High-profile lawsuits against cartels in the food additives and vitamins sectors have made public an unprecedented wealth of information about how cartels operate.² Complementing this stream of data is a modern body of scholarship that,

* William E. Kovacic is a commissioner with the US Federal Trade Commission. The views expressed here are his alone and not necessarily those of the Federal Trade Commission or its individual members.

* This chapter was completed while Marx was visiting the US Federal Communications Commission, but the views expressed do not necessarily reflect those of the FCC, its staff, or Commissioners.

¹ See Grossman (2004) (collection of essays examining operation of collusive agreements); Marshall and Meurer (2004) (discussing how competition policy toward cartels should account for the form of auctions and procurements and for the means used by firms to coordinate behavior).

² See Evenett et al. (2002). Considerable information appears in court opinions and publicly available court records dealing with the prosecution of individual and corporate cartel participants. See e.g., *United States vs. Andreas*, 216 F.3d 645 (7th Cir. 2000) (affirming conviction of Archer Daniels Midland executives who helped orchestrate food additives cartel; describing cartel's operation); Gavil et al. (2002, 1017–21) (statement presented by the Department of Justice in connection with the sentencing of Hoffmann-La Roche for its participation in the vitamins cartel). Public statements by government prosecutors (e.g., Guersant 2002; Kolasky 2002) also supply informative accounts of these and other cartels. Further insight is provided by publicly available statements prepared by witnesses who testified in private treble damage cases against the vitamins cartel participants (e.g., Bernheim 2002). The recent secondary literature on the food additives and vitamins prosecutions is varied and voluminous. See e.g., Connor (2001) and Eichenwald (2000) (discussing food additives cartel); First (2001) (reviewing public prosecution of food additives and vitamins cartels).

working extensively with reported judicial decisions and other materials, has provided informative perspectives on the methods of cartel coordination.³

For the most part, discussions inspired by modern enforcement developments and scholarly contributions have addressed the optimal design of *public* policies against cartels.⁴ Key focal points for debate have included the formulation of strategies for improving the detection of cartels (e.g., providing inducements for cartel members or employees of cartel members to inform public authorities about the existence of the cartel);⁵ the establishment or enhancement of private rights of action to supplement anti-cartel enforcement by public agencies;⁶ and the choice of remedies (e.g., civil damages and criminal punishment, including imprisonment for individuals).⁷

In this chapter, we explore the implications of the modern data and literature on cartel coordination with a different orientation. Rather than assess refinements in public enforcement policy, we analyze possibilities for precautions that contracting parties can take independently, without necessarily invoking public laws that condemn cartels, to defeat or discourage collusion by bidders. The strong tendency to emphasize public policy responses to collusion obscures the degree to which a successful anti-cartel campaign might engage the efforts of potential cartel victims to forestall or inhibit successful coordination.⁸ The context in which we examine possible anti-cartel precaution-taking by purchasers and sellers is the event that is integral to the implementation of a collusive scheme: the individual auction or procurement. Cartel agreements ultimately are executed through the behavior of the cartel's participants in the day-to-day episodes of

³ See e.g., Genesove and Mullin (2001) (discussing how participants in Sugar Institute collusive scheme detected cheating); Marshall and Meurer (2004; 96–99) (describing operation of bidding rings for used industrial machinery). The more recent literature adds to an older collection of popular and scholarly accounts dealing with the organization and operation of cartels, such as the electrical equipment price-fixing conspiracies of the 1950s. See Fuller (1962); Herling (1962).

⁴ See Marshall and Meurer (2005); 101–09.

⁵ On the development and application of leniency and bounty systems for detecting cartels, see Auloy et al. (2005), Chen and Harrington (2005), Kovacic (2001), Motta and Polo (2003), Spagnolo (2004), Spratling (2001).

⁶ Calkins (1997b); Wils (2003).

⁷ On the strengths and weaknesses of various types of civil and criminal sanctions, see Baker (2004), Breit and Elzinga (1986); Calkins (1997a); Connor (2005); OECD (2005); Wils (2005).

⁸ Our approach is roughly analogous to the perspective embodied in the law and economics literature (Cooter 1985) that considers how the frequency and total cost of accidents and failed contract episodes might be reduced by adopting tort and contract rules, respectively, to give both parties—the tortfeasor and the tort victim, the promisor and the promisee—incentives to take appropriate precautions. On the contributions of auction design as a supplement to antitrust enforcement in deterring collusion, see Klemperer (2002); Marshall and Meurer (2004; 110–117).

buying and selling through which parties routinely transact business. These individual auction and procurement transactions supply the settings in which the cartel members must translate their ambitions for coordination into practical, operational techniques for curbing rivalry. The capacity of a cartel's members to manipulate and orchestrate the outcome of auctions and procurements determines the success of the entire collusive venture.

In studying the operation of auctions and procurements, we describe some common structures used by bidding rings to support collusion with an eye toward providing recommendations for auction designers to combat collusion. By understanding the types of mechanisms that bidding rings commonly use to suppress rivalry and increase their profits, the designers of auctions and procurements may be able to make choices that deter collusion. Some choices may make it more difficult for bidding rings to operate effectively in the first place, and other choices may make it easier to detect and prosecute collusion after the fact.

We begin this chapter by providing some background on bidding rings that have been prosecuted in the past and the different type of cartel organization used in those cases. For ease of exposition our discussion will focus on auctions, although when appropriate, procurements will be explicitly discussed.⁹

In general, our concern is with allocation schemes where offers are considered simultaneously. Housing transactions do not fit within this context since offers are usually considered sequentially, and without recall. Posted price markets do not fit either. However, many transactions do fit within this context.

15.2. The role of procurements in collusion

It is natural for bidders to attempt to suppress rivalry and thus capture some of the rents that otherwise would be transferred to the seller (or to the buyer in a procurement). The uniquely large body of US case law is replete with examples of Sherman Act violations for bid rigging (American Bar Association 2002, 89–91), and recent enforcement experience in other jurisdictions underscores the extent and apparent universality of the

⁹ It is simply cumbersome and distracting each time the word auction is used to say, 'or a procurement in the case of a single buyer with multiple sellers'. This being said, there often are significant differences between auctions and procurements, especially when the commodity being procured is multi-dimensional in nature and bids are scored over the many dimensions.

Table 15.1. US penalties for cartel offenders – 1970 and 2005 compared

Sanction	1970	2005
Status of offense	Misdemeanor	Felony
Maximum prison term	One year	Ten years
Maximum corporate fine	\$50,000	\$100 million, twice the loss to victims, or twice the gain to the violator

phenomenon.¹⁰ The record of reported judicial decisions and public enforcement matters cases does not capture the full dimensions of the problem, as these sources only involve episodes of collusion in which the bidders were detected and prosecuted.¹¹

In addition, many industrial cartels are characterized by activities that appear to be unrelated to bid rigging, such as market share allocations. But, for many of these cartels, the buyers obtain the commodity from cartel firms through 'competitive' procurements where the cartel members have rigged bids. In other words, cartels are often characterized by how members divide the collusive gain (market share allocations, geographic divisions, customer allocations, etc.), but at the transaction level, cartel members will benefit from preventing competition among themselves when interacting with buyers. When buyers use competitive procurements, the cartel firms are likely to rig bids.

Since 1940, the US courts have made clear that cartels would be treated as *per se* offenses under Section 1 of the Sherman Act.¹² Yet it is only in recent decades that the antitrust hazards for cartel participants have become genuinely severe. In that period, among other measures, the United States has boosted sanctions and strengthened leniency mechanisms that

¹⁰ See e.g., Scott (2004) (reviewing experience in Canada and other jurisdictions with enforcement of competition law provisions against cartels).

¹¹ The actual frequency of cartel activity defies accurate calculation, although estimates of frequency often figure into the establishment of penalties.

¹² The watershed in this development is *United States vs. Socony-Vacuum Oil Co.*, 310 US 150 (1940). The historical development of the strict prohibition in US law and policy against cartels is reviewed by Kovacic and Shapiro (2000). By speaking of 'cartels', we refer to arrangements that are unsupported by valid efficiency rationales. The trend in modern competition policy analysis has been to make careful distinctions between 'naked' agreements to restrict output and agreements for which participants advance cognizable, plausible efficiency rationales. For a recent synthesis of the relevant US jurisprudence on this subject, see *Polygram Holding, Inc. vs. FTC*, 416 F.3d 29 (D.C. Cir. 2006).

give cartel members incentives to report their misconduct.¹³ Table 15.1 above compares key features of the US regime of sanctions in 1970 and 2005. These reforms have coincided with significant improvements in the effectiveness of the private plaintiffs' bar in obtaining treble damages from cartel offenders.¹⁴ Noteworthy achievements in recent years have included nine-figure recoveries against large auction houses and vitamins cartels.¹⁵

In the past decade, numerous other jurisdictions have embraced a policy norm that favors aggressive measures to police cartels. With the encouragement of the United States and various multinational organizations, a growing number of competition systems today treat cartels as an extremely serious offense.¹⁶ The US experience with the enhanced leniency regime introduced in the 1990s has inspired many jurisdictions – among them, Australia, Brazil, Canada, the Competition Directorate of the European Union, and many of the EU member states – to adopt or bolster their own leniency measures.¹⁷ One major jurisdiction (the United Kingdom) has revised its laws to treat cartels as crimes, and many nations are experimenting with measures to increase the power of private rights of action to recover damages on behalf of cartel victims (Global Competition Review 2004).

Despite these developments, many bidders may still tend to regard the possibility of prosecution under the antitrust laws of the United States or other jurisdictions as simply an acceptable cost of doing business. Whenever new auction mechanisms are proposed or designed, there seems to be remarkably little attention paid to the issue of bidder collusion. Yet, in terms of foregone revenue, bidder collusion is probably the most serious practical threat to revenue.¹⁸

¹³ The modern sequence of enhancements in methods for detecting cartels and punishments for cartel offenders is reviewed in Kovacic (2003).

¹⁴ The US antitrust laws permit private rights of action and allow private plaintiffs to recover three times their actual damages. See Gavil et al. (2002: 999–1000) (describing US legal framework governing private enforcement). The victorious plaintiff also is entitled to recover its attorneys' fees and costs from the defendant.

¹⁵ See First (2001) (documenting success of private litigants in vitamins cartel cases); Anderson (2001) (reporting on agreement by Christie's and Sotheby's auction houses to pay total of \$512 million to settle private class action antitrust claims).

¹⁶ See ICPAC (2000); OECD (2005).

¹⁷ Vann and Litwin (2004) (reporting that, since enhancement of antitrust leniency programs by United States in 1990s, at least twelve jurisdictions have adopted similar policies).

¹⁸ The theoretical auction literature addresses revenue differentials that can arise between schemes due to risk aversion or affiliated values, to name two prominent emphases. The revenue issue typically concerns whether the second-highest valuation, or something bigger than it (up to the highest

At first glance, the extent and apparent success of cartel activity in the United States – even in the face of strong legal prohibitions – and in other jurisdictions over the past half-century might seem surprising in light of the literature that has catalogued the obstacles to effective coordination among buyers or sellers. It is the rare competition attorney or economist who has not studied Stigler's (1964) article on the tasks of cartel formation and operation. Stigler pointed out that in order to succeed, cartels had to reach a consensus on the terms of their cooperation, detect deviations from their agreement, and punish defectors. To this list could be added the challenge of co-opting or forestalling entrants who might be attracted to the market by the high prices fostered by the cartel.¹⁹ As Stigler observed, the accomplishment of these tasks in many settings could be difficult. Thus, many cartels eventually – perhaps quickly – would disintegrate as the centrifugal forces generated by efforts to form and sustain a consensus flung the participants apart.

One possible implication of this literature was that the typical cartel was too unstable and short-lived, even in the absence of antitrust laws that condemned such coordination by rivals, to be a serious concern for contracting parties or for public policy generally. By focusing on the problems of cartel formation and operation, commentators and policy makers may have overlooked a separate body of learning that, at least indirectly, suggested that the obstacles in question were not as formidable as believed. In many episodes of contracting, the parties may face strong temptations to renege on their initial commitments. For various reasons, recourse to enforcement in the courts may provide an ineffective means to ensure performance. Thus, parties have experimented with a variety of mechanisms to improve the monitoring of performance and to improve incentives to fulfill the originally specified terms of agreements.²⁰

One might expect that, in facing the obstacles identified by Stigler, the same creativity that firms brought to bear in solving contracting problems in legitimate transactions could be applied to promoting the success of illegitimate ventures.²¹ Such expectations would be appropriate. The revelation in recent years of detailed information about conspiracies such as the

valuation), is what gets paid to the seller. Effective collusion can drop the price paid down to the seller's reserve price, or to the highest value of a non-colluding bidder, which could be quite low.

¹⁹ See Marshall and Meurer (2004), 92–93.

²⁰ This is a central insight of the transaction costs literature associated with the work of Ronald Coase (1937) and elaborated by scholars such as Williamson (1975). See Chapter 4 for a detailed discussion on contracting strategies to ensure performance in procurement.

²¹ See also Baker (2002, 160–162) (reviewing means by which rivals tacitly coordinate conduct).

vitamins cartel indicates the ingenuity and perseverance of the participants in finding ways to overcome coordination problems. The durability and success of these illicit collaborations underscore the effectiveness of the chosen methods for covert coordination.²²

In what follows, we will distinguish between two types of competitive mechanisms: dynamic auctions and first-price sealed bidding.²³ At a dynamic auction for selling a good, the bidders gather at the time of the auction, typically together in a room, but also possibly online. Each bidder can submit multiple bids, and the current price continues to rise (to fall in case of procurement) until no bidder is willing to raise it further. Bidders are able to observe the current high price. The bidder submitting the final bid wins the object and pays the amount of its bid. With first-price sealed bidding, each bidder submits only one bid, typically in writing, and typically in secret from the other bidders. Once all bids are submitted, they are evaluated by the auctioneer, and the high bidder wins and pays the amount of its bid.²⁴

Intuitively, dynamic auctions are more susceptible to collusion than first-price sealed bidding. At a dynamic auction, the cartel can use a very simple rule – if a cartel member is actively bidding, then no one else from the cartel can bid. If a cartel member withdraws from the bidding, then another cartel member can bid, but no cartel member can bid against it. In this way the cartel suppresses all intra-cartel competition at the auction. Furthermore, there is no need for ex-ante communication among the cartel members about their values and thus no concern about misrepresentation of information. Note that the cartel member with highest value is prepared to bid up to its value, which is exactly what it is prepared to do acting

²² The vitamins cartel took shape in the early to mid-1980s and functioned successfully until the late 1990s. Reported decisions involving the prosecution of numerous other cartels highlight the longevity of the challenged collusive scheme – a result that confidently can be attributed at least in part to the success of the participants in devising solutions to coordination problems that threaten to unravel efforts to formulate and execute a common plan. See e.g., *United States vs. Hal Brown, Jr.*, 936 F.2d 1042 (9th Cir. 1991) (collusive arrangement to suppress competition for billboard sites began in 1964 and operated until attacked by Justice Department in 1988); *United States vs. Pippin*, 903 F.2d 1478 (11th Cir. 1990) (conspiracy by dairies to rig bids on school milk contracts in Florida operated from the early 1970s until 1988); *United States vs. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982) (road paving conspiracy began in mid-1960s and ran effectively until challenged in early 1980s).

²³ Our focus is on single-object auctions or procurements. Additional issues arise when considering multiple-object auctions or procurements, and different auction designs may be appropriate. For example, on the use of a 'clock-proxy' auction for auctioning many related items, see Ausubel, Cramton, and Milgrom (2004).

²⁴ This is first-price sealed bidding. There are other sealed-bid competitive mechanisms, such as second-price sealed-bidding, where the high bidder wins and pays the amount of the second-highest bid.

non-cooperatively. Most importantly, note that there is no incentive for ring members to cheat on this collusive arrangement. Even if a ring member employs a shill bidder²⁵ to act on its behalf, it cannot profitably beat the highest-valuing ring member.²⁶

In contrast, with first-price sealed bidding, in order to secure a collusive gain the cartel must drop the bid of its highest-valuing member below what it would have bid acting non-cooperatively. The reduction in this bid opens the door for deviant behavior and misrepresentations by bid members. After all, by slightly outbidding this reduced bid, a ring member may realize a gain that it never could have realized when the highest-valuing bidder acted non-cooperatively. Collusion is therefore more difficult with first-price sealed bidding than dynamic auctions. It almost surely requires ex-ante communication that is not needed with collusion at a dynamic auction, and there is the possibility of profitable deviant behavior that may not be easily traced to the deviator.

Practical conclusion 1

When bidder collusion is a potential concern, use first-price sealed-bidding.

There is another issue of significance pertaining to enforcement. For many cartels, the people who take actions to implement the conspiracy are the owners of the firms. However, when the conspiracies involve large corporate entities, and those companies are engaged in bidding in hundreds of procurements around the world, the high-level managers who are running the conspiracy cannot submit all bids for all procurements. They must leave this to their sales forces which of course, have usually not been informed that there is an explicit cartel in operation. Prior to the existence of an explicit cartel, the sales force is likely to have incentive schemes that reward expansion of market share.

Once the cartel is in place, these incentives are likely to change, emphasizing price elevation subject to maintaining market share. There may be explicit directions to the sales force not to bid certain accounts if their bid is being solicited because a competitor has tried to raise a price. Although these are not direct statements by management that an explicit

²⁵ A shill bidder is an agent of a given bidder who is not recognizable as such by the auctioneer/procurer and the other bidders.

²⁶ There are environments where consideration of a shill bidder is sensible and others where it is not. It is not reasonable to think of a major aircraft manufacturer using a shill bidder in a defense procurement, but it is certainly reasonable to think of an antique dealer using a shill bidder at an estate auction.

cartel is functioning, these statements should be viewed as a strong indication by the sales force that the nature of interfirm rivalry has changed substantially and that explicit collusion is likely. It may be that if the sales force unexpectedly wins a large account, management does not react positively but, rather, treats the event as a mistake. This is also an indication that an explicit cartel is at work.²⁷

Practical conclusion 2

For those conducting a private or public antitrust investigation, check whether the incentive scheme of the sales force of suspected firms has changed to emphasize price over market share (sometimes referred to as 'price before tonnage' or 'price before volume').

In practice, prior to the submission of collusive bids, a cartel often finds it necessary to make price announcements so as to prepare buyers for higher bids and reduce buyer resistance to the ensuing increases.²⁸ Of course, price increase announcements are also made when factor costs, or demand shifts, warrant it. The key to understanding whether a communication is non-collusive or collusive is to see if the price announcement is explained by market-relevant events. If non-market factors, such as the time between price announcements, are more relevant, perhaps reflecting regular cartel meetings, then collusion looms as a potential explanation.

Practical conclusion 3

For those conducting a private or public antitrust investigation, analyze the communications by suppliers used to implement price increases. Investigate if cost and demand factors can explain the observed price increases or, if instead, the time elapsed between price announcements better explains the observed price increases.

15.3. Prosecuted bidding rings

We begin by considering bidding rings that operated at dynamic auctions and then consider rings that operated with first-price sealed bidding. We

²⁷ The sales force will recognize the regime shift, and there is a way for enforcement authorities to take advantage of their information for enforcement of antitrust laws. As noted earlier, a growing modern literature has explored the possibility of creating incentives for those engaged in collusion, and employees of colluding firms, to reveal the collusion to antitrust authorities.

²⁸ See Marshall, Marx, and Raiff (2005) (showing how public price announcements by the vitamins cartel facilitated collusive price increases).

focus on a selection of bidding rings that were prosecuted in the United States and for which the legal record provides a description of the organization of the ring. Then we discuss the extent to which cartels, such as market share cartels, must also rig bids.

15.3.1. Bidding rings at dynamic auctions

One way to operate a bidding ring at a dynamic auction is for the ring members to meet prior to the auction and designate one of the bidders as the one who will win. Bidders who are not designated as winners do not bid at the auction (or they may submit very low bids in an attempt to disguise the presence of the bidding ring). Bidders can also agree on payments or other arrangements to compensate losing bidders for their participation.

One case in which this type of arrangement was used is *Finnegan vs. Campeau Corp.*²⁹ In 1988, R. H. Macy & Co., Inc. and Campeau Corp. were engaged in a bidding war to buy Federated Department Stores, Inc. According to the reported decision in the case, 'Macy and Campeau agreed that Macy would cease bidding and let Campeau be the buyer, thereafter dividing the benefits of their conduct between themselves.'³⁰ This is an example of a bid suppression scheme, which the US Department of Justice (DoJ) defines as a scheme in which one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.³¹

Another way to operate a bidding ring at a dynamic auction is for the ring members to designate one ring member to bid on behalf of the ring at the auction, and then, assuming the designated ring member wins the object, the ring can meet after the auction to decide which ring member should receive the object and how much should be paid to each ring member as compensation for their participation in the ring.

We now provide three examples in which the collusive mechanism used by the bidding ring involved no communication prior to the auction, except

²⁹ *Finnegan vs. Campeau Corp.*, 722 F.Supp. 1114 (S.D.N.Y. 1989) (dismissing antitrust complaint filed by shareholders; dismissal granted on ground that US securities laws permitted challenged conduct); affirmed, 915 F.2d 824 (2nd Cir. 1990).

³⁰ 722 F. Supp. at 1115.

³¹ US Department of Justice, 'Price Fixing & Bid Rigging – They Happen: What They Are and What to Look For, An Antitrust Primer for Procurement Professionals,' available at <http://www.usdoj.gov/antitrust/public/guidelines/pfbrprimer.pdf>.

possibly to establish the identity of the cartel members or, in the case of *District of Columbia vs. George Basliko* (described below), to designate a cartel member who would then bid on behalf of the cartel. Then the ring members met after the auction to finalize details of the allocation and transfer payments.

The first example is the case of *US vs. Pook*,³² in which a bidding ring operated at antique auctions. As stated in the 1988 decision in the case,

When a dealer pool was in operation at a public auction of consigned antiques, those dealers who wished to participate in the pool would agree not to bid against the other members of the pool. If a pool member succeeded in purchasing an item at the public auction, pool members interested in that item could bid on it by secret ballot at a subsequent private auction ('knock out') The pool member bidding the highest at the private auction claimed the item by paying each pool member bidding a share of the difference between the public auction price and the successful private bid. The amount paid to each pool member ('pool split') was calculated according to the amount the pool member bid in the knock out.³³

This is an illustration of another type of bid suppression scheme. In the scheme used by the antique dealers, the dealers would not compete against one another at the auction, and then, if a dealer in the ring won the object, it would be offered for sale at a secondary auction, the knock out, to the ring members. If a ring member bid more at the knock out than was paid at the initial auction, then the difference between the two prices was divided up among the ring members. In the absence of collusion, the difference between the two prices is money that would have been received by the auctioneer.

Our second example of a bidding ring that did not communicate prior to the auction is the case of an industrial machinery purchasing cartel in *US vs. Seville Industrial Machinery*.³⁴ The mechanism used by the cartel in *Seville* resembled the scheme used in *Pook*. The ring members agreed not to bid against one another at the auction and then used a knock out to allocate objects won and determine payments between ring members. Prior to 1970, members of the industrial machinery cartel did meet prior to the auction, but in this meeting the ring members only made vague indications of interest in the various objects being offered for sale. Then only the cartel organizer would submit bids at the auction based on its educated guess about the likely high value for the object from among the ring members.

³² *United States vs. Pook*, No. 87-274, 1988 US Dist. LEXIS 3398 (E.D. Pa., 18 April 1988).

³³ 1988 US Dist. LEXIS 3398 at 2.

³⁴ *United States vs. Seville Industrial Machinery Corp.*, 696 F.Supp. 986 (D.N.J. 1988).

The final allocation of the object and transfers among ring members were again determined by a knock out.

The third example is the case of *District of Columbia vs. George Basiliko*,³⁵ which involved a real estate cartel. There are many similarities between this cartel and the previous two examples. The reported decision in *Basiliko* states that:

The defendants and the co-conspirators discussed and agreed . . . not to compete with one another to win the bid; selected a designated bidder to act for the conspirators . . . ; discussed and agreed on specific payoffs that conspirators present would receive for not bidding, or discussed and agreed to hold a private, secret auction among themselves after the designated bidder won the public real estate auction . . . ; in many instances, held a secret auction in which the conspirators bid solely among themselves to acquire the property for a price higher than the price paid by the designated bidder at the public real estate auction and agreed to divide the difference between the public real estate auction price and the secret auction price by making payoffs among the conspirators; arranged by contract or other means for the secret auction winner to take title or ownership of the property; and made the payoffs that they had agreed to make.³⁶

These examples show that at dynamic auctions, some bidding rings choose to use collusive mechanisms that operate prior to the auction, and others choose to use mechanisms that involve meetings after the auction is over. There are advantages and disadvantages (from the perspective of the bidding ring) associated with each of these types of mechanism. One goal of a bidding ring would be to win the object whenever there is some ring member who values it more than the non-ring members, and to allocate the object to the ring member who values it most highly.

In general it is not possible to achieve this goal using a post-auction mechanism.³⁷ To see why, note that when a ring operates a post-auction mechanism, it must provide two sets of incentives to ring members. First, it must provide incentives for ring members to bid appropriately at the auction. Typically, this means not bidding against fellow ring members, but bidding against non-ring members if a ring member values the object more than those non-ring members. Second, the ring must provide incentives for ring members to truthfully reveal their values for the object at the post-auction mechanism. In general, one cannot construct a mechanism that provides both types of incentives. So a post-auction mechanism will result

³⁵ *District of Columbia vs. Basiliko*, 1992 US Dist. LEXIS 1260 (D.D.C. 10 Feb. 1992).

³⁶ 1992 US Dist. LEXIS 1260 at 6-7.

³⁷ See Lopomo, Marshall, and Marx (2005).

in some type of inefficiency – either non-ring members sometimes win the object when there is a ring member who values the object more, or the ring wins the object but awards it to a ring member who is not the highest-valuing ring member, or some combination of the two.

In contrast, a ring can avoid the problem of inefficiency by using a pre-auction mechanism, but this approach has distinct drawbacks, as well. A pre-auction mechanism requires a meeting and transfers prior to every auction, and so it may be easier to detect. In contrast, a bidding ring using a post-auction mechanism need only meet if a cartel member wins the object, and transfers may not be necessary under all circumstances. In addition, a bidding ring using a pre-auction mechanism either needs to be able to control the bids of its members, for example by explicitly preventing some bidders from participating in the auction, or the ring needs to have someone willing to act as a ‘banker’ to hold and pay out money for the ring members,³⁸ and finding a person willing to play the role of a banker for an illegal bidding ring might be difficult.

Another choice for a ring is to avoid using transfer payments completely, but in this case the ring has few options other than to agree to a bid rotation scheme. The DoJ defines a bid rotation scheme to be one in which conspirators take turns being the winning bidder.³⁹ According to the DoJ, “The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.” But as one might expect, a rigid bid rotation scheme produces a pattern of bidding that could not arise by chance and so may be relatively easy to detect and prosecute.

15.3.2. Bidding rings with first-price sealed bidding

In the absence of a pre-arranged bid rotation scheme, bidding rings with first-price sealed bidding have no choice but to meet prior to bidding since

³⁸ More formally, in the language of Marshall and Marx (2006), there exist efficient pre-auction mechanisms if either (i) the ring operates a bid-submission mechanism under ex-post budget balance (Mailath and Zemsky, 1991), or (ii) the ring operates a bid-coordination mechanism under ex-ante budget balance.

³⁹ The DoJ describes a bid rotation scheme for a procurement as one in which ‘all conspirators submit bids, but take turns being the low bidder’. But at an ascending-bid auction (or descending-bid auction for a procurement), all conspirators need not submit bids. They need only agree on the rotation. US Department of Justice, ‘Price Fixing & Bid Rigging—They Happen: What They Are and What to Look For, An Antitrust Primer for Procurement Professionals,’ available at <http://www.usdoj.gov/atr/public/guidelines/pfbrprimer.pdf>.

the ring must decide what bids each ring member should submit. This typically involves figuring out which bidder has the highest value for the object, deciding how much that bidder should bid, and then assigning losing bids to all the other ring members.

In this section, we provide six examples of bidding rings with first-price sealed bidding. Three of the examples, *US vs. Addyston Pipe*, *US vs. Lyons*, and *US vs. Inryco*, involved repeated interaction among the colluding firms, but the illegal behavior described in the other three, *US vs. A-A-A Electrical*, *US vs. Brinkley & Son*, and *US vs. Metropolitan*, involved only a single sale or purchase.

In *US vs. Addyston Pipe & Steel Co.*,⁴⁰ colluding cast-iron pipe manufacturers met prior to the procurement, determined which one of the colluding firms would participate, and agreed on transfer payments:

When bids are advertised for by any municipal corporation, water company, and gas company, the executive committee determines the price at which the bid is to be put in by some company in the association, and the question to which company this bid shall go is settled by the highest bonus which any one of the companies, as among themselves, will agree to pay or bid for the order. When the amount is thus settled the company to whom the right to bid upon the work is assigned sends in its estimate or bid to the city or company desiring pipe, and the amount thus bid is 'protected' by bids from such of the other members of the association as are invited to bid, and by the bidding in all instances being slightly above the one put in by the company to whom the contract is to go. . . . Settlements are made at stated times of the bonus account debited against each company, where these largely offset each other, so that small sums are in fact paid by any company in balancing accounts.⁴¹

The protecting bids described above are also sometimes referred to as complementary bids or cover or courtesy bids.⁴² They are not intended to win, but are designed to create the appearance of competition. With regard to procurements, according to the DoJ, "Complementary bidding schemes are the most frequently occurring forms of bid rigging and they defraud

⁴⁰ *United States vs. Addyston Pipe & Steel Co.*, 78 F. 712 (E.D. Tenn. 1897). See also, *Addyston Pipe & Steel Co. vs. United States*, 171 US 211 (1899).

⁴¹ *United States vs Addyston Pipe & Steel Co.*, 78 F. 712 (E.D. Tenn 1897) at 713-14.

⁴² See *United States vs. Mobile Materials, Inc.*, 881 F.2d 866, 869-74 (10th Cir. 1989) (describing arrangements made by road paving conspirators across a number of procurements to orchestrate presentation of complimentary bids to government purchasing authorities); *United States vs. Portsmouth Paving Corp.*, 694 F.2d 312, 320-21 (4th Cir. 1982) (discussing use of complimentary bids by road paving conspirators).

purchasers by creating the appearance of competition to conceal secretly inflated prices.”⁴³

Another issue facing the bidding ring in *US vs. Addyston Pipe* is the issue of how to arrange transfer payments among the ring members without creating a detailed paper trail of the ring’s activities. In this case, the bidding ring was active for a long period of time and participated in many procurements, so the participants were able to solve the problem by maintaining records of what payments were owed and then only occasionally clearing the accounts. As mentioned above, many of the required payments offset each other, so that the payments actually made were small.⁴⁴

In the bidding ring of the next example, all payments were made to a single ring organizer. In *US vs. Lyons*,⁴⁵ when a sheet metal project came up for bid, Lyons would arrange for a meeting with the other contractors. “The group chose the low bidder and determined the amount of its bid. This was calculated by averaging the cost estimates of interested contractors, then adding a mark-up and an additional amount known as the ‘burden’ which was a cash payment to [Lyons]. The system provided a financial incentive for contractors to refrain from truly competitive bids on a particular job because of the assurance that conformity to the conspiratorial procedure would keep them eligible to benefit from future allocations.” The *Lyons* participants were willing to share part of the profit associated with participating in the ring with the organizer (Lyons) in order to ensure that they would be allowed to participate in the bidding ring in the future. So the ongoing nature of the interaction among the ring members was an important aspect in this case.

In contrast, the next case relates to a single interaction among electrical contractors. (Of course, it may be that the parties involved had other illegal interaction that was not prosecuted.) In *US vs. A-A-A Elec. Co.*,⁴⁶ contractors bidding for work at the Raleigh-Durham Airport discussed their bids before submitting them and designated A-A-A as the one who would submit the lowest bid. After receiving final payment for the work, A-A-A

⁴³ US Department of Justice, ‘Price Fixing & Bid Rigging—They Happen: What They Are and What to Look For, An Antitrust Primer for Procurement Professionals,’ <http://www.usdoj.gov/atr/public/guidelines/pfbrprimer.pdf>.

⁴⁴ See also *United States vs. MMR Corp.*, 907 F.2d 489 (5th Cir. 1990), which provides a fact-intensive narrative of steps that electrical contractors took to track and account for amounts owing among themselves from their participation in past episodes of collusion.

⁴⁵ *United States vs. Lyons*, No. 81-1287, 1982 US App. LEXIS 22194 (7th Cir. 1 Feb. 1982).

⁴⁶ *United States vs. A-A-A Elec. Co., Inc.*, 788 F.2d 242 (4th Cir., 1986).

made payments to its co-conspirators. In this example, the cartel met prior to bidding to discuss bids, but the transfer payments made by the designated winner to the bidders who agreed to suppress their bids were not finalized until later. The willingness of bidders to wait for their transfer payments may suggest that there was repeated interaction among the firms since otherwise one might expect firms would be concerned that A-A-A would renege on its promise to pay them.

Another concern of a bidding ring is whether bidders who agree to submit non-winning bids will actually do so. In *US vs. W. F. Brinkley & Son Construction Company, Inc.*,⁴⁷ Brinkley's competitors for a pumping station and pipeline contract discussed their bids prior to the procurement, agreeing that Brinkley would submit the winning bid. The ring solved the problem of monitoring the bids of Brinkley's competitors by, in at least one case, having the competitor fill out his bid and give it to Brinkley to turn in for him. The threat that ring members who agree prior to bidding to submit a non-winning bid might not do so when they actually bid plays an important role in how economists think about the differences between collusion at a dynamic auction and collusion with first-price sealed bidding. However, in *Brinkley*, it seems the bidding ring was able to overcome this problem.

Finally, the DoJ describes subcontracting arrangements as potentially an important part of bid-rigging schemes (see also Chapter 14). In particular, bidders who agree not to bid or to submit a losing bid might be compensated by being awarded a subcontract by the winning bidder. In *US vs. Metropolitan Enterprises, Inc.*,⁴⁸ Broce Construction Company met with a group of other highway paving companies prior to bidding for a number of Oklahoma repaving contracts. These companies agreed not to bid against Broce, which then outbid the remaining bidders for the contracts. In compensation, Broce subcontracted with one of the companies agreeing not to bid against Broce. A subcontracting arrangement is also described in *US vs. Inryco, Inc.*,⁴⁹ where concrete construction firm Inryco subcontracted with its competitor Western in compensation for Western's submitting artificially high bids at certain procurements.⁵⁰

⁴⁷ *United States vs. W. F. Brinkley & Son Construction Company, Inc.*, 783 F.2d 1157 (4th Cir. 1986).

⁴⁸ *United States vs. Metropolitan Enterprises, Inc.*, 728 F.2d 444 (1984).

⁴⁹ *United States vs. Inryco, Inc.*, 642 F.2d 290 (1981).

⁵⁰ See also *State of New York vs. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1069-72 (2nd Cir. 1988) (discussing use of subcontract awards as means for cartel members to sustain the commitment of all participants to the collusive scheme).

Practical conclusion 4

Subcontracting can be pro-collusive. If possible, bids should be absent of subcontracting arrangements.

In summary, bidding rings with first-price sealed bidding typically meet prior to each auction to discuss the bids each ring member will submit. The ring may have to take steps to ensure that ring members who are supposed to submit losing bids actually do so. And, payments among ring members (to compensate ring members who agree to submit losing bids) may be arranged prior to the auction, or after the auction, or may be consummated through subcontracting arrangements.

15.3.3. Bid rigging by 'standard' cartels

The bidding rings discussed above had no overarching agreement other than the agreements related to collusion at individual auctions. In contrast, some cartels do have broader agreements, such as market share agreements or customer allocations, even though buyers procure the product through competitive procurements.

For example, the recent vitamins cartel⁵¹ was centered upon a market share agreement, under which each cartel firm received a fixed relative percentage of the within-cartel global market. Output of each cartel firm was carefully monitored by the cartel. If firms wavered from their agreed market shares, then within-cartel redistributions occurred to 'true-up' shares to the cartel agreement.⁵² But despite this level of organization and coordination, cartel members still had to elevate bids at competitive procurements in order to realize a collusive gain.

Although bidder collusion may not seem to be a big part of cartels using market share agreements or customer allocations, it is still the case that most buyers run competitive procurements to buy product. No matter what the cartel does in terms of organization and coordination as a preamble to interaction with individual buyers, the conspirators must elevate bids in order to realize a collusive gain. But this raises the question: If each and every bid is elevated then why bother with market share agreements, output monitoring, and redistributions?

⁵¹ The European Commission (2003) decision provides an excellent detailed description of the cartel and its inner workings.

⁵² European Commission (2003) paragraph 196.

In the case of the vitamins cartel, the market for the commodity was global and the buyers were numerous. On occasion, some buyers would elect to extend contracts with incumbent suppliers rather than conduct competitive procurements, and there were third party vendors in the market, brokers, who could supply product on a regular basis. These features of the market imply that each firm participating in the cartel would be uncertain as to whether their co-conspirators were secretly selling product to brokers at discount prices, secretly offering discounts to customers in order to secure contract extensions, or secretly chiseling on the terms of their nominal bids at procurements so that, even though they had bid a high amount, they were still awarded the contract under the guise of some superior non-price attribute. In other words, secret price cutting behavior would be a constant suspicion by the conspirators of one another.⁵³

One way for that suspicion to be removed is to have a global market share agreement among co-conspirators, monitor the output of all conspirators, and conduct interfirm redistributions as needed. With a market share agreement and output monitoring in place, if a given conspirator attempted to cheat on the agreement (oversell their assigned market share), its behavior would be detected and appropriate redistributions would occur. In this context, once the firms have agreed on the collusive price then collusion at the procurements is a relatively straightforward matter. The firms simply try to get the quantities won at each procurement to aggregate in a way that each cartel firm receives its assigned market share.

In the vitamins industry, procurements were repeated regularly. Any given procurement was tiny relative to the market. There was no reasonable possibility of a shill bidder. Deviations would all be addressed at year's end through redistributions that brought all cartel members to their appropriate market share. Thus, even though the procurements were sealed-bid procurements, where collusion might be more difficult, the repetition, monitoring, market share agreement, and redistributions made bidder collusion feasible, profitable, and stable.

15.4. How auction formats affect bidding rings

In this section, we discuss a number of dimensions for which auction or procurement formats affect bidding rings. We begin by noting that it may

⁵³ In addition, in the absence of a market share agreement, collusion at any given procurement would entail significant bargaining costs as firms tried to argue that it was their turn to win.

be easier to prosecute collusion at sealed-bid tendering versus dynamic auctions. We then continue by discussing how different formats, sealed bid versus dynamic, affect the ability of a ring to induce its members to comply with the instructions of the ring on how they should bid. We then discuss the role of information provided by the auctioneer in facilitating collusion and how the auction format affects the incentives for bidders to participate in a ring in the first place. And we discuss the effects of shill bidders on bidding rings and the effects of having more or less frequent auctions on bidding rings.

15.4.1. Prosecution of collusion

With first-price sealed bidding, typically all participating bidders submit bids, and the auctioneer should have a written (or electronic) record of all of these bids. Having fewer than the normal number of competitors submit bids suggests the possibility of collusion, so colluding bidders with first-price sealed bidding can be expected to arrange for ring members, who are not designated as the winning bidders, to submit complementary bids to disguise the presence of the cartel. Thus, with first-price sealed bidding, the auctioneer will have a record of the participants and all of their bids. This paper trail may facilitate the prosecution of collusion with first-price sealed bidding.

At a dynamic auction, such a paper trail typically does not exist. First, the bids themselves may be submitted orally, and so it may be that no formal record of submitted bids exists. Second, depending on the auction format, many bidders may not submit bids at all; even in a non-collusive environment, if the price rises (falls in case of procurements) to a level above their willingness to pay before they have an opportunity to enter a bid.⁵⁴ So the observation that only a small number of bidders actually submit bids at a dynamic auction may not be suggestive of collusive activity the way it is with first-price sealed bidding. One may not even be able to identify all the participants in a dynamic auction, since one may only know about those who actually submitted bids. These issues mean that it may be more difficult to prosecute collusion at a dynamic auction than with first-price sealed bidding.

15.4.2. Susceptibility of auction formats to collusion

It is commonly thought that dynamic auctions are more susceptible to collusion than first-price sealed bidding. For example, the US Forest Service

⁵⁴ Some auction formats include participation rules that require bidders to participate in early rounds of the auction in order to be eligible to participate in later rounds.

held this view and mandated a move towards more first-price sealed bidding in an attempt to deter collusion among bidders at its timber auctions.⁵⁵ Theoretical models in the academic literature have formalized the result that in many environments bidding rings can more easily organize and can be more profitable at dynamic auctions than with first-price sealed bidding.⁵⁶

The reasoning behind a dynamic auction being more susceptible to collusion than a first-price sealed bidding is explained with a simple example. Suppose there are four bidders – A, B, C and D – who have the following privately known values for the one item being sold:⁵⁷

A:80, B:60, C:40, and D:20.

Acting non-cooperatively at an oral ascending bid auction, D will bid up to 20 before dropping out, C will bid up to 40, B to 60, and A to 80. Thus, A will win the item for a price of 60. With first-price sealed bidding, the bidders need to shade their bids below their values in order to have any positive expected payoff. Suppose they bid as follows.

$b_A = 60, b_B = 45, b_C = 30, b_D = 15$

Bidder A wins the item for a price of 60.

Now we consider collusion under each scheme. At a dynamic auction, a ring must suppress the bids of all members except the bidder with highest value. The ring member with highest value goes to the auction and bids as if it were acting non-cooperatively. In the example above, if A, B, and C collude, but D does not, then B and C suppress their bids while A remains ready to bid up to 80. The ring wins the item for a price of 20. Any ring member who thinks of breaking ranks and competing at the auction faces the highest ring bidder and the highest non-ring bidder, each submitting bids that are the same as if all were acting non-cooperatively. Thus, there is no gain to deviant behavior. In our example, potential deviant behavior by bidder B will not result in B winning the item – A stands ready to bid up to 80 which exceeds B's value for the item.

⁵⁵ US Senate. Timber Sales Bidding Procedures: Hearings before the Senate Subcommittee on Public Lands and Resources. 95th Congress, 1st Sess. 1077.

⁵⁶ Robinson (1985) provides this formalization for the case in which there is perfect communication among ring members (ring members' values are common knowledge within the ring). Marshall and Marx (2006) provide this formalization for the case in which ring members' values are private information.

⁵⁷ Each bidder knows their own value but not the value of any other bidder, although they will each know the distribution from which bidders draw their values. In the example considered here, the distribution is uniform on the interval from 0 to 100.

First-price sealed bidding is quite different. In order to secure a collusive gain, the ring member with the highest value must lower its bid below what it would have bid acting non-cooperatively, and other ring members must suppress their bids. In our example where A, B, and C collude but D does not, suppose that B and C again suppress their bids and that A submits a bid of 20. This bid will prevail against D.⁵⁸ But when the highest-valuing ring member lowers its bid, the opportunity is created for a non-highest-valuing ring member to secure the item by entering a bid at the auction, either on its own or through a shell (for example, it may be possible for a ring member to have another person or firm submit a bid on its behalf, thereby disguising its identity and potentially avoiding any penalties that the ring would impose on it if the ring discovered it had not followed the instructions of the ring). This possibility jeopardizes the feasibility of a cartel with first-price sealed bidding. In other words, if B were to deviate from the agreement and bid 30, they would win the item and secure a relatively large surplus. For the ring to guard against such deviant behavior requires bidding behavior that mitigates the collusive gain. This a fundamental difference between the oral ascending and first-price sealed bidding.⁵⁹

At this point, we emphasize our previous recommendation that first-price sealed bidding should be used instead of a dynamic auction if collusion is a potential concern.

In addition, the auctioneer or procurement official can oppose the collusion through some strategic actions. A reserve price, more aggressive than would be used were bidders not suspected of collusion, can be employed in many circumstances.⁶⁰ Their threat of using such a reserve will deter collusion. This leads to the following additional recommendation.

Practical conclusion 5

The auctioneer or procurement official can use an aggressive reserve price policy to increase their payoff and simultaneously help deter collusion.

⁵⁸ We have not specified how D bids when confronting a cartel but it will never be as much as 20 since bidding 20 or more leaves D without the hope of any positive surplus.

⁵⁹ The issue described here has nothing to do with an oral auction being 'open outcry'. The same contrast in susceptibility discussed here is present if the oral ascending bid auction is replaced with a second-price sealed-bid auction.

⁶⁰ In a procurement context, there are circumstances where an aggressive reserve price is not possible because it is not credible that the procurement official will not procure. Alternative strategies can be employed in these cases, such as securing a supply agreement from a seller who acts as a producer of last resort and thus makes credible the threat not to buy from others.

15.4.3. Role of information

Another aspect of auction formats that affects the ability of bidders to collude is the amount of information provided by the auctioneer on auction outcomes. For example, if the auctioneer reveals the identity of the winner and the price paid at the auction, then a bidding ring might be able to operate with greater efficiency, or with less risk of detection, by utilizing that information.⁶¹ If an auctioneer with first-price sealed bidding reveals the amounts of the bids of all the bidders, then the problem that a bidding ring faces in policing the bids of its members is made much easier. In general, the less information provided on auction outcomes, the more difficult it is for a bidding ring to operate. Unfortunately, in many settings it will be impossible to hide the identity of the winner, but certainly the full range of bids with first-price sealed bidding need not be revealed.

Practical conclusion 6

Losing bids made with first-price sealed bidding should not be revealed

Although it may be possible to deter collusion by not revealing information from auctions, from the standpoint of detecting and prosecuting collusion, it is important that auctioneers retain all available information from the auctions held. In particular, complete information on all bids submitted should be retained. This is particularly true when a bidding ring does not include all the bidders since the bids of the ring members may not be the highest bids submitted, but those bids may still be used to identify the presence of the ring and reveal the identity of its members.⁶²

Practical conclusion 7

Whenever possible, every aspect of the auction/procurement should be documented, and the records should be retained for a long period. The recording and documentation should include, but not be limited to, announcement of the auction/procurement, who was invited to bid, who actually bid, all discussions and conversations, and all bids. All bidders should be notified *ex ante* that the entire record of all auctions/procurements will be made available to public enforcement authorities and/or private litigants should an investigation of collusive bidding occur.

⁶¹ For a mechanism that uses the identity of the winner and the price paid at the auction, see Graham and Marshall (1987).

⁶² See Marshall and Marx (2006) for a characterization of ring members' bids at a sealed-bid auction when the ring is not all inclusive.

Losing bids with first-price sealed bidding can contain information of relevance for inferring collusion. Although a bidding ring always attempts to suppress bids, for collusion to be effective with first-price sealed bidding a ring must prevent its own ring members from cheating on the collusive agreement. The incentive for ring members to cheat is mitigated if bidders elevate their bids somewhat, but to enforce these elevated bids the cartel may need to have a ring bidder submit a bid that is just underneath the highest ring bidder's bid. This implies that sequential bids may be very close to one another, even when they are losing bids. Bids of this nature are an indication of potential collusion.⁶³

In a procurement setting, it is often the case that the incumbent supplier is given a right of last refusal. In other words, before the close of the procurement, the incumbent is notified of the leading competitive bid and offered the opportunity to meet the bid to retain the business. Notifying an incumbent of the bids of others before the procurement is over provides the incumbent with a way to monitor the bidding behavior of potential co-conspirators and react in real time to deviations from agreed collusive bidding. It deters deviations by ring members.

Practical conclusion 8

If the costs of switching suppliers are not very high, the practice of offering 'right of last refusal' should be avoided since it is pro-collusive.

Finally, there are auction/procurement environments in which bidders have considerable expertise relevant to the evaluation of the item or project. For example, antique dealers have expertise in assessing the authenticity of a period piece or timber mills have expertise in assessing the quality of standing timber in a particular drainage area. In such cases, bidders will have an extra incentive to collude since their competitive bidding will transfer all expertise rents to the seller/buyer. The auction or procurement official can mitigate this incentive by providing detailed and high quality information to the entire bidding public prior to the auction/procurement. Providing this information has the added benefit of reducing the "winner's curse".⁶⁴ Reductions in

⁶³ This bidding behavior is discussed in Marshall and Marx (2006).

⁶⁴ See Chapter 5 for an introduction and Hirschleifer and Riley (1993, p. 395) for a discussion of the winner's curse.

the winner's curse lead to more aggressive bidding, especially by less well-informed bidders, which might typically be the non-cartel bidders.⁶⁵

Practical conclusion 9

All information of relevance known to the auctioneer/procurer about the item for sale/procurement should be revealed *ex ante* to the entire bidding public.

15.4.4. Participation

With first-price sealed bidding, in order for there to be any gains from collusion, the ring member designated as the winner must submit a lower bid (higher bid at a procurement) than it otherwise would. If the ring member submits the same bid as it would in the absence of collusion, then there is no benefit from the collusion. But, if there are bidders who are not included in the ring, then the selected ring member must be careful not to distort its bid too much since the bid must still be competitive relative to the bids of the non-ring bidders.

This problem is not faced by a bidding ring at a dynamic auction since in that case the designated ring member can respond in real time to any bids made by bidders not in the ring. With first-price sealed bidding, the designated ring member must commit to a bid without knowing the bids of the non-ring bidders. This potentially reduces the gains from collusion with first-price sealed bidding relative to a dynamic auction. And this reduction in the gains from collusion may mean that with first-price sealed bidding, some bidders would prefer not to participate in the ring – they might prefer to bid on their own rather than participate in the ring, and potentially have to make transfer payments to the other ring members in exchange for the suppression of competition. This is particularly true for bidders with first-price sealed bidding with very high values for the object being sold (very low cost suppliers of the object being procured). It is these high-value bidders who are most likely to decline to participate in a bidding ring with first-price sealed bidding.⁶⁶ In contrast, even high-value bidders would be expected to be willing to participate in a bidding ring at a dynamic auction.

⁶⁵ See Marshall and Meurer (2004) for the details of this argument, and see Hendricks and Porter (1988) for the role of the winner's curse in OCS auctions.

⁶⁶ See the results on individual rationality constraints in Marshall and Marx (2006).

15.4.5. Role of shill bidders

As mentioned above, if ring members with first-price sealed bidding have the ability to submit bids under disguised names, it may make it more difficult for a bidding ring with first-price sealed bidding to police the bids submitted by its members. In particular, ring members who have been instructed by the ring to submit losing bids may have an incentive to try to win the item under a disguised name, thereby avoiding any retaliation from the ring. For dynamic auctions, there exist collusive mechanisms that are not susceptible to the ability of ring members to use shill bidders.⁶⁷ Thus, the ability or inability to use shills need not affect bidding rings at dynamic auctions.

Because of the potentially destabilizing effect of shill bidders on bidding rings, particularly with first-price sealed bidding, the auctioneer may have an incentive to facilitate the use of shill bidders. For example, the auctioneer might keep private the identities of the bidders, perhaps referring only to bidder numbers. The auctioneer might allow bids to be telephoned in, or mailed in, rather than requiring that bidders turn in their bids in person at a designated time and place where all can observe. And, the auctioneer can allow a bidder to submit more than one bid under different bidder numbers, or under different identities.

15.4.6. Frequency of auctions

As discussed above, some bidding rings make transfer payments among themselves after the auctions at which they collude, or perhaps keep records of amounts owed and only infrequently make payments to clear the accounts. Such behavior is made easier if the bidding ring knows there will be a regular stream of auctions in which they can participate (for more on this see section 14.4). When there are auctions at regular intervals, a bidding ring can more easily implement a bid rotation scheme and can threaten to punish ring members at future auctions if they do not follow instructions. If the value of the items being sold at any individual auction is small, then ring members may have little incentive to disobey the instructions of the ring because the gains to doing so are small relative to the threat of future punishment.

⁶⁷ See Marshall and Marx (2006).

For these reasons, an auctioneer concerned about collusion may prefer to hold fewer auctions, each with a larger number of items being sold. Or the auctioneer may prefer to create higher-valued items by bundling a number of lower-valued items. And an auctioneer may prefer not to announce a fixed schedule for future auctions, instead bringing objects up for sale at irregular intervals. Longer time intervals between auctions may encourage ring members to defect from the ring since the potential for retaliation by the other ring members is pushed farther into the future.

15.5. Conclusion and discussion: auction design and countermeasures

Collusive schemes are typically executed through individual auctions and procurements. The manner in which sellers conduct auctions, and buyers conduct procurements, can increase or reduce their vulnerability to collusion, regardless of the availability of antitrust statutes or other legal commands that forbid such forms of coordination. Thus, the design of auctions and procurements provides an important opportunity for firms to supplement, by private means, safeguards against collusion embodied in public law.

As discussed in this chapter, modern experience in prosecuting cartels has generated a valuable body of information that can inform the design of collusion countermeasures in auctions. Among other steps, auctioneers can take the following measures to deter collusion. We summarize the main points below:

1. If collusion is a major concern for auction designers, then use first-price sealed bidding rather than a dynamic auction. Auctioneers and procurement officials should use an aggressive reserve price policy whenever possible.
2. Auctioneers and procurement agents should maintain a record of all bids, not just those of winners, as well as all other aspects of the auction/procurement. It should be made known *ex ante* that these records will be made available to public enforcement authorities and/or private litigants should an antitrust investigation occur.
3. To the extent possible, auctioneers and procurement agents should limit the amount of information provided to bidders regarding the auction outcomes or the bids of their competitors. In addition, in the absence of a compelling reason, the right of last refusal should not be granted to an incumbent supplier. However, auctioneers and procurement agents

should provide detailed information to the entire bidding public prior to the auction about the item being sold/procured.

4. To the extent possible, auctioneers should allow bidders to submit multiple bids, with some under disguised identities.
5. To the extent possible, auctioneers should hold auctions at long, irregular time intervals.

These steps have potential benefits for all categories of auctioneers and procurement bodies, but they have special significance for public purchasing authorities. A striking number of cartel cases prosecuted by antitrust agencies in recent decades have involved scenarios in which the victim of the collusive scheme is a public purchasing authority.⁶⁸ The apparent attractiveness of government auctions and procurements as targets for collusion suggests the gains to be had for public agencies by strengthening anti-cartel countermeasures, including the safeguards suggested here.

In addition to the points discussed above, there are a number of other ways in which an auctioneer or procurement official can attempt to mitigate collusion. Although a detailed discussion of these is beyond the scope of this article, we provide some general discussion below.

A number of tactics for mitigating collusion involve the use of market power and/or discretion by the auctioneer or procurement official. Examples include the use of an aggressive reserve price or the right not to sell. The latter could be invoked through an ambiguously defined scoring function, which then a judicious procurement official uses to assess the non-cooperative nature of the bids, penalizing apparent collusive bidding. Although good discretion is common, when discretion is retained in the hands of an auctioneer or procurer who is working as an agent of the owner or ultimate buyer, bad decisions can occur because of a breakdown in the agency relationship. Much of the US Federal Acquisition Regulations are about controlling discretion by government procurement officials. We recognize that the retention by public officials of discretion to oppose collusive bidding would conflict with some features of existing procurement regulations in the United States and in other countries.

One tactic used by auctioneers and procurers to mitigate potential collusion by bidders involves the use of protecting bidders. These bidders are available to the auctioneer or procurer on a favored basis. Firms who have demonstrated aggressivity in the past, sometimes referred to as 'maverick' bidders, are a good potential choice for this role.

⁶⁸ See Haberbusch (2000) (examining experience with cartel prosecutions involving government procurement in the United States).

It is often the case that procurers point to split awards and 'benchmarking' as safeguards of their buying process. In general, not only is neither robust to collusion, but each is inherently susceptible to manipulation by a cartel. Benchmarking, whereby a firm would obtain information from a third party about what others in the market are typically paying for the items being purchased, allows detection of inadequacies of a procurement official or some other idiosyncratic shortcoming of a firm's procurement practice, but it does not allow a procurer to detect collusion since a cartel will elevate bids for all buyers in the industry. In other words, benchmarking is particularly poor at providing information about highly correlated events that similarly impact procuring firms.

Split awards suffer from a significant deficiency as well. Namely, split awards or multi-sourcing in a procurement context can produce results that look like collusion, which is counter-intuitive.⁶⁹ Maintaining multiple sources of supply simultaneously seems to suggest that one supplier can be used to implicitly monitor another. But, initial bidding behavior can be dramatically distorted by split awards. Consider two firms, A and B, who can each produce three units. For each, the first two units can be produced at a marginal cost of 5, while the third unit can be produced at a marginal cost of 100. Suppose a buyer wants two items. If the buyer runs a sole-source procurement, then the bidders pay a total of 10 for two objects. A split award also results in the purchase price being 10 for two objects. The issue arises if each of the suppliers can produce one fewer object so that the marginal cost of producing the first item is 5, but the marginal cost of producing the second item is 100 for each. In this case, a sole-source procurement results in the buyer paying 105 for two objects. However, a split award results in the buyer paying 200 for two objects. This outcome is counter-intuitive and looks like collusion, but we arrive at it through wholly non-cooperative bidding. The collusion comes before the procurement through the restriction of supply to the market. Thus, two safeguards that are often used in practice, benchmarking and split awards, are not without significant limitations.

Bibliographical notes

The revenue equivalence theorem is the benchmark result of auction theory. The seminal papers in this area include Riley and Samuelson (1981)

⁶⁹ See Anton and Yao (1992).

and Myerson (1981). Deviations from the basic assumptions have been investigated for the last two and a half decades. One vein of investigation has been relaxation of the assumption of non-cooperative play. Initial work in this area includes Robinson (1985), Graham and Marshall (1987), McAfee and McMillan (1992), and Mailath and Zemsky (1991). Interest has also been partially fueled by the importance of bid-rigging and collusion for competition policy. The comparative robustness of different auction schemes to collusion garners attention from both those engaged in competition policy and those designing auctions and procurements. A paper that provides an overview of the main issues is Marshall and Meurer (2004). Recent theoretical work dedicated to the contrast, especially when collusion may not include all bidders, can be found in Marshall and Marx (2006).

References

- American Bar Association, Section of Antitrust Law (2002). *Antitrust Law Developments* (5th Ed.).
- Anderson, Mark R. (Fall 2001). Settle or Roll the Dice?, *Litigation*, 28 (1), 37–41.
- Anton, James and Dennis Yao (1992), Coordination in Split Award Auctions, *Quarterly Journal of Economics*, 57, 681–707.
- Aubert, Cecile, Patrick Rey and William E. Kovacic (2005). The Effect of Leniency and Whistleblowing Programs on Cartels, *International Journal of Industrial Organization* (forthcoming).
- Ausubel, Lawrence M., Peter Cramton and Paul Milgrom (2004). The Clock-Proxy Auction: A Practical Combinatorial Auction Design, forthcoming in Peter Cramton, Yoav Shoham, and Richard Steinberg (Eds.), *Combinatorial Auctions*, MIT Press, 2006.
- Baker, Donald I. (2001). The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging, *George Washington Law Review*, 69, 663–720.
- Baker, Jonathan B. (2002). Mavericks, Mergers, and Exclusion: Proving Coordinated Effects Under the Antitrust Laws, *New York University Law Review*, 77, 135–203.
- Bernheim, Douglas (2002). Expert Report of B. Douglas Bernheim, M.D.L. No. 1285, in Re: Vitamins Antitrust Litigation, Misc. No. 99–0197 (TFH), 24 May 2002.
- Breit, William and Kenneth G. Elzinga (1986). *Antitrust Penalty Reform – An Economic Analysis*, Washington and London: American Enterprise Institute.
- Calkins, Stephen (1997a). Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties, *Law & Contemporary Problems*, 60 (3), 127–167.
- Calkins, Stephen (1997b). An Enforcement Official's Reflections on Antitrust Class Actions, *Arizona Law Review*, 39, 412.
- Chen, Joe and Joseph E. Harrington, Jr. (2005). The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path, in Vivek Ghosal and Johan Sennek, (Eds.), *Political Economy of Antitrust* forthcoming, North-Holland.

- Coase, R. H. (1937), The Nature of the Firm, *Economica*, 4, 386–405.
- Connor, John M. (2005). Price-Fixing Overcharges: Legal and Economic Evidence, Working Paper #04–05 American Antitrust Institute.
- Connor, John M. (2001). *Global Price Fixing: Our Customers Are the Enemy*. Series: Studies in Industrial Organization, vol. 24, Boston: Kluwer Academic Publishers.
- Cooter, Robert (1985). Unity in Tort, Contract, and Property: The Model of Precaution, *California Law Review*, 73, 1–51.
- Eichenwald, Kurt (2000). *The Informant: A True Story*, New York: Broadway Books.
- Evenett, Simon J., Margaret C. Levenstein and Valerie Y. Suslow (2002). International Cartel Enforcement: Lessons from the 1990s, OECD Global Forum on Competition.
- European Commission (2003). The Commission of the European Communities Decision of 21 November 2001, Case COMP/E-1/37.512-Vitamins, *Official Journal of the European Communities*, 1 October 2003.
- First, Harry (2001). The Vitamins Case: Cartel Prosecution and the Coming of International Competition Law, *Antitrust Law Journal*, 68, 711–734.
- Fuller, John G. (1962). *The Gentleman Conspirators: The Story of the Price-Fixers in the Electrical Industry*, New York: Grove Press.
- Gavil, Andrew I., William E. Kovacic and Jonathan B. Baker (2002). *Antitrust Law i Perspective: Cases, Concepts and Problems in Competition Policy*, St. Paul: West Group.
- Genesove, David and Wallace P. Mullin (2001). Rules, Communication and Collusion: Narrative Evidence from the Suger Institute Case, *American Economic Review*, 91, 379–9
- Global Competition Review (2004), Cartel Regulation, www.globalcompetitionreview.com
- Graham, Daniel A. and Robert C. Marshall (1987). Collusive Bidder Behavior at Single Object Second Price and English Auctions, *Journal of Political Economy*, 95, 1217–1239
- Grossman, Peter Z. (Ed.) (2004). *How Cartels Endure and How They Fail: Studies of Industrial Collusion*, Northampton, MA: Edward Elgar.
- Guersant, Olivier (2002). European Commission Adopted Ten Decisions Imposing Heavy Fines on Hard Core Cartels in 2001, Directorate for Competition, European Commission.
- Haberbush, Kara L. (2000). Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime, *Public Contract Law Journal*, 30, 97–122.
- Hendricks, Kenneth and Robert H. Porter (1988). An Empirical Study of an Auction with Asymmetric Information, *American Economic Review*, 78, 865–883.
- Herling, John (1962). *The Great Price Conspiracy: The Story of the Antitrust Violations in the Electrical Industry*, Washington: R. B. Luce.
- Hirshleifer, Jack, and John G. Riley (1993). *The Analytics of Uncertainty and Information*, Cambridge: Cambridge University Press.
- International Competition Policy Advisory Committee (ICPAC) to the Assistant Attorney General for Antitrust (2000), Final Report, US Department of Justice.
- Klemperer, Paul (Winter 2002). What Really Matters in Auction Design, *Journal of Economic Perspectives* 16, 169–189.
- Kolasky, William J. (2002). Antitrust Compliance Programs: The Government Perspective, Antitrust Division, US Department of Justice. Available at <http://www.usdoj.gov/public/speeches/11534.htm>.
- Kovacic, William E. and Carl Shapiro (2000). Antitrust Policy: A Century of Economic and Legal Thinking, *Journal of Economic Perspectives*, 14, 43–61.

- Kovacic, William E. (2001). Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels, *George Washington Law Review*, 69, 766–797.
- Kovacic, William E. (2003). The Modern Evolution of US Competition Policy Enforcement Norms, *Antitrust Law Journal*, 71, 377–478.
- Lopomo, Guiseppe, Robert C. Marshall and Leslie M. Marx (2005). Inefficiency of Collusion at English Auctions, *Contributions to Theoretical Economics* 5 (1), Article 4.
- Mailath, George, and Peter Zemsky (1991). Collusion in Second Price Auctions with Heterogeneous Bidders, *Games and Economic behavior*, 3, 467–486.
- Marshall, Robert C. and Leslie M. Marx (2006). Bidder Collusion, forthcoming in *Journal of Economic Theory*.
- Marshall, Robert C., Leslie M. Marx and Matthew E. Raiff (2005). Cartel Price Announcements: The Vitamins Industry, Working paper, Duke University.
- Marshall, Robert C. and Michael J. Meurer (2004). Bidder Collusion and Antitrust Law: Refining the Analysis of Price Fixing to Account for the Special Features of Auction Markets, *Antitrust Law Journal*, 72, 83–118.
- McAfee, R. Preston and John McMillan (1992), Bidding Rings, *American Economic Review*, 82, 579–599.
- Motta, Massimo, and Michele Polo (2003). Leniency Programs and Cartel Prosecution, *International Journal of Industrial Organization*, 21, 347–379.
- Myerson, Roger B. (1981). Optimal Auction Design, *Mathematics of Operations Research*, 6, 58–73.
- Organization for Economic Cooperation and Development (OECD) (2005). Cartels: Sanctions Against Individuals. Available at <http://www.oecd.org/dataoecd/61/46/34306028.pdf>.
- Riley, John G. and William F. Samuelson (1981). Optimal Auctions, *American Economic Review*, 71, 381–392.
- Robinson, Marc S. (1985). Collusion and the Choice of Auction, *RAND Journal of Economics*, 16, 141–145.
- Scott, Sheridan (2004). Cartel Enforcement: International and Canadian Developments, in B.Hawk, (Ed.), *International Antitrust Law and Policy*, Fordham Corporate Law Institute (2005), 33–56.
- Spagnolo, Giancarlo (2005). Leniency and Whistleblowers in Antitrust, forthcoming in P. Buccirossi, (Ed.), *Handbook of Antitrust Economics*, MIT Press.
- Spratling, Gary. R. (2001). Detection and Deterrence: Rewarding Informants for Reporting Violations, *George Washington Law Review*, 69, 798–823.
- Stigler, George J. (1964). A Theory of Oligopoly, *Journal of Political Economy*, 72, 44–61.
- Vann, David E., Jr. and Ethan E. Litwan (2004). Recent Developments in International Cartel Enforcement, in *Getting the Deal Through: Cartel Regulation* (Global Competition Review).
- Williamson, Oliver E. (1975), *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: The Free Press, 1975.
- Wils, Wouter P. J. (2005). Is Criminalization of EU Competition Law the Answer?, *World Competition*, 28 (2), 117–159
- Wils, Wouter P. J. (2003). Should Private Antitrust Enforcement Be Encouraged in Europe?, *World Competition*, 26, 473–488.