



THE WATER DESIGN-BUILD COUNCIL ANTITRUST COMPLIANCE POLICY

I. Trade Associations & General Antitrust

Trade associations perform important and pro-competitive functions, including gathering technical and trade information and representing the industry before the government and the public. At the same time, trade associations may create antitrust risks because they bring competitors together for meetings and discussions. Under the antitrust laws, many business decisions are legal when made independently but unlawful when made in agreement with competitors. Government antitrust authorities may view trade associations as opportunities for unlawful agreements between competitors. If behavior such as similar price increases or, a common competitive response to market place developments follow association gatherings, antitrust authorities may infer from the behavior the existence of an unlawful conspiracy or agreement.

An agreement need not be express or written to violate the antitrust laws. Courts often infer illegal agreements from circumstantial evidence, such as an off-hand remark that “prices are too low” made in a trade association meetings, on the golf course, or at dinner. In such cases, criminal or civil juries are often left to decide whether an agreement among competitors was reached. Thus, if authorities find evidence of an illegal agreement, even sound business and marketing justifications may not prevent antitrust liability. Accordingly, the Water Design-Build Council and its members avoid practices that, directly or inferentially, could suggest an agreement or conspiracy prohibited by the antitrust laws.

The antitrust laws impose serious criminal and civil penalties including jail sentences of up to three years for individuals and fines of up to \$10,000,000 for corporations and \$350,000 for individuals. The U.S. Department of Justice aggressively seeks jail terms for individuals. In addition, the Justice Department may also seek larger fines against the corporations of up to twice the gains from the illegal conduct or twice the loss to victims -- one recent fine was \$500 million in a cartel investigation that netted fines from all targets well in excess of \$1 billion. Further, most states have antitrust laws and state attorneys general have recently pursued antitrust cases more vigorously.

The costs of antitrust violations do not end with government action, civil and criminal penalties. Private parties often sue for treble damages, plus court costs and reasonable attorneys’ fees. Such private actions often follow on the heels of criminal investigations. Even a successful defense against private plaintiffs may cost millions of dollars.

II. Examples of Areas Raising Potential Antitrust Issues

The Council and its members must recognize and avoid basic potential antitrust issues. This statement is general in nature and is not nor cannot address all of the possible antitrust issues that may arise in connection with association activities. This statement is not intended to be a substitute for proper legal advice. If any member has antitrust questions or concerns about certain conduct or activities, such conduct shall be avoided and legal advice shall be sought immediately from the retained antitrust counsel. If antitrust questions arise with individual member firm's activities, such issues shall be reviewed with the individual member firm's legal counsel. Should such concerns arise, each member's legal counsel should consult with the Council's legal counsel.

- A. Price. Agreements among competitors to fix prices are per se illegal, meaning there is no legal justification for such an agreement. Price fixing includes any agreement or understanding among competitors to raise, lower, stabilize, maintain or otherwise affect prices. It does not matter that prices are decreased rather than increased, that prices are stabilized, or that the agreed upon prices are reasonable. An agreement need not be formal or written to be illegal; an informal or "gentlemen's agreement" also violates the antitrust laws. Accordingly, members should never discuss prices with a competitor.
- B. Standardization of Terms and Conditions. WDBC members should not discuss or agree to terms and conditions of bidding or sale. Such agreements are just as illegal as agreements upon price. Members should not discuss or agree to discounts, credit, promotions or advertising, services, delivery or other terms or conditions of competition.
- C. Product Standardization. Associations generally may create minimum performance and safety standards. However, such standards must be properly developed and administered. If they are arbitrary, exclude competitors from a market or unreasonably limit customer choices and raise prices, the standards may be illegal.
- D. Bid Rigging; Allocation of Markets and Customers. It is also per se illegal for competitors to agree to agree to bid or not bid, divide or to allocate bids, territories or customers. WDBC members should never discuss or agree to allocate bids, geographic areas, or customers. In addition, WDBC members should not agree to bid only certain prices to competitors' customers or not to solicit those customers.
- E. Group Boycotts. It is unlawful for competitors to agree to refuse to deal with certain customers or suppliers. Although each member has a legal right to deal with (or refuse to deal with) whomever it chooses, this right must be exercised independently. Members should never suggest to competitors that they should not sell to or buy from another entity. Certain practices, such as circulating credit information among competitors may be permissible. However, members must not expressly or implicitly agree not to deal with firms with adverse reports or to

impose certain credit terms or conditions. Before developing or implementing “policy statements” that call upon customers or suppliers to deal with members in a uniform or specified way, members should consult with legal counsel. Such agreements may raise antitrust concerns.

F. Petitioning National, State and Local Governments. Competitors have a constitutional right to jointly petition national, state and local government entities including legislatures, administrative agencies, courts and executive heads and their departments. However, this right has limits. Members must petition the government in good faith and should not lobby the government simply to intimidate competitors on frivolous grounds or to persuade public officials not to deal with certain competitors.

G. Membership and Exclusions. The Council has established reasonable membership requirements including a reasonable definition of the industry. The Council’s membership requirements are objective and are not intended to discriminate unfairly against any applicants. The Council intends to admit all qualified applicants on a non-discriminatory basis and to permit them to freely and equitably participate in all association activities. Moreover, the Council intends to allow both members and non-members to participate in programs that create a competitive advantage for participants. The Council may charge different fees for non-members, so long as the program’s costs reasonably justify those fees.

III. WDBC Principles & Practices

It is the responsibility of each and every member of the WDBC to ensure that the Council’s activities are conducted in full compliance with the antitrust laws. Accordingly, the following practices should be followed:

1. The Council has stated its legitimate purposes and goals in the articles of incorporation and by-laws. Each member should be familiar with the Council’s by-laws
2. The Council has retained competent management (in the form of its Operations Manager) and legal counsel. They should be kept informed of the organization’s activities. Management and counsel should review agendas, minutes, significant correspondence and publications before they are sent out to members or the public.
3. The Operations Manager and/or legal counsel should attend all association meetings.
4. Written agendas should be created for each meeting and distributed to attendees in advance. Approved agendas should be followed and minutes should be taken. Generally, subjects not reflected in the agenda should not be discussed unless they are clearly proper.

5. Membership should be available to all eligible parties under the Council's written membership definition.
6. Members should be made aware of their responsibilities under the antitrust laws.

Council members should avoid even the appearance of anticompetitive activity. In particular, members should:

1. Never discuss prices or other conditions of bidding or sale with competitors or other Council members with the intent to influence the competition.
2. Avoid informal meetings, particularly where legal counsel is not present. These rules also apply broadly to informal association activities such as golf outings, receptions, and dinners and to any activities outside of the United States.
3. Generally communicate with each other on association matters through the Operations Manager or legal counsel, not through direct contact.
4. Not discuss or take collective action against competitors, suppliers, or customers. If legitimate problems arise with such parties, members should direct those problems to legal counsel for appropriate action.
5. Take special care to be accurate when drafting memoranda or trade association correspondence and avoid using language that could later be misinterpreted.
6. Know the agenda of any meeting in advance and not participate in any meeting where prices, terms and conditions of sale or bidding, or other competitive and antitrust sensitive matters will be discussed.
7. Immediately and firmly object and stop the discussion if a prohibited topic is being discussed, and immediately and conspicuously withdraw from the group if discussion continues and report any inappropriate conduct or discussions to legal counsel. Mere silence is not enough.
8. Always make independent business decisions on important issues such as price changes, decision to bid or not bid and on what terms, or whether to deal with a particular supplier and never base such a decision on information obtained from competitors. Moreover, members should carefully document their independent reasons for such important business decisions.

IV. Conclusion

The antitrust laws and government enforcement policies may change from time to time based on new court decisions or other events. In addition, nearly every state has its own antitrust laws, which may differ from the federal antitrust laws. Accordingly, members should consult their legal counsel or the WDBC's counsel whenever potential antitrust concerns covered by this Statement or other competitive issues arise.

Enacted: December 6, 2011

WDBC Board of Directors