



WATER DESIGN-BUILD COUNCIL ANTITRUST COMPLIANCE STATEMENT

I. The General Antitrust Problem

Trade associations perform important and procompetitive functions, including gathering technical and trade information and representing the industry before Congress and the public. At the same time, trade associations create substantial 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 view trade associations as prime opportunities for unlawful agreements between competitors. If suspicious behavior, such as similar price increases or a common competitive response to market place developments, follow association gatherings, antitrust authorities may infer the existence of an unlawful conspiracy or agreement.

Moreover, 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 as simple as an announcement that “prices are too low” made in a trade association meetings, on the golf course or at the bar. 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 must 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 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 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 and liability in private class actions could be catastrophic for the Council and its members.

II. Specific Antitrust Problem Areas

Given the potential costs, the Council and its members must be able to recognize and avoid basic antitrust problem areas. This Statement is necessarily general and cannot address all of the possible antitrust problems that may arise in connection with association activities. They are not intended to be, nor should they be used as, a substitute for proper legal advice. If you have antitrust concerns about certain conduct or activities, avoid them and immediately seek legal advice. If antitrust problems arise with your individual firm's activities, review those problems with your legal counsel. In addition, each member's legal counsel should consult with the Council's legal counsel on any matters of concern.

- 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. Association 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 significant market or unreasonably limit consumer 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 no bid, divide or allocate bids, territories or customers. Association members should never discuss or agree to allocate bids, geographic areas or customers. In addition, 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. Such practices 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 serious 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 does not intend to exclude qualified parties from membership. 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. Trade Association Activities

Trade associations, while a vital and essential part of our free enterprise economy, create antitrust concerns simply because they bring competitors together. It is the responsibility of each and every member 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 the Council Manager) and legal counsel. They should be kept them informed of association activities. Management and counsel should review agendas,

minutes and significant correspondence before they are sent out to members or the public.

3. The Council 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 at each meeting 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 always follow these important rules:

1. Members should never discuss prices or other conditions of bidding or sale with competitors or other Council members.
2. Members should avoid informal meetings, particularly where legal counsel is not present.
3. Generally, members should communicate with each other on association matters through the Council Manager or legal counsel, not through direct contact.
4. Members should 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. When writing memoranda or correspondence for trade association purposes, members should take special care to be accurate and avoid using language that could later be misinterpreted. Every document a member writes may someday be used against him, his company and the Council by a government prosecutor or plaintiffs' lawyer.

IV. Informal Gatherings

Generally, association members should avoid informal gatherings. However, these rules also apply to informal association activities such as golf outings, receptions and dinners. They also apply worldwide; antitrust authorities increasingly scrutinize all trade association activities in the United States and abroad.

V. Avoiding Antitrust Problems

Every member should be aware of potential antitrust concerns and take immediate action if problems arise. Several simple rules can help reduce the risk of an antitrust violation. First, if you are concerned about the propriety of certain actions or discussions, immediately consult competent legal counsel. Second, know the agenda of any meeting involving competitors in advance and do not participate in any meeting where prices, terms and conditions of sale, or other antitrust sensitive matters will be discussed. Whenever you believe a prohibited topic is being discussed, immediately and firmly object and stop the discussion. If the discussion continues, immediately and conspicuously withdraw from the group, even if this means leaving in the middle of a meeting or an event. Mere silence is not enough; anyone present at such a meeting may be found guilty of conspiring to violate the antitrust laws. You should immediately report any inappropriate conduct or discussions to legal counsel. Finally, members should always make independent business decisions on important issues such as price changes. Never base such a decision on information obtained from competitors. Moreover, members should carefully document their independent reasons for important business decisions. Such documentation may help defeat an inference that competitors acted in a similar way because of an illegal conspiracy or agreement.

VI. 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 Council's counsel whenever antitrust concerns covered by this Statement or other competitive problems arise.