RECENT DEVELOPMENTS

BID SHOPPING RESTRICTIONS HELD IN RESTRAINT OF TRADE

People v. Inland Bid Depository
233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (Dist. Ct. App. 1965)

The State of California brought this action to enjoin alleged violations of California's antitrust laws. The defendant Inland Bid Depository, hereinafter referred to as IBD, processed and delivered subcontractors' bids to general contractors in the building-trades industry. This bid depository scheme was designed to protect subcontractors from bid shopping: the technique of disclosing one subcontractor's bid to another subcontractor before the award of the prime contract in an attempt by a general contractor to get a still lower bid. About 90 per cent of the projects processed through IBD were public projects. IBD's members comprised a majority of the subcontractors in sixteen trades in Riverside and San Bernardino counties, and during the years 1959-60 processed a majority of the total volume of public projects. Under the revised rules of IBD as approved by the trial court, any general contractor who agreed to receive two or more bids submitted through IBD in any trade on any project was bound to accept the lowest bid so received.[1] Any general contractor was permitted to use IBD if it agreed to follow the rules, and a nonmember subcontractor was permitted to use IBD if it agreed to follow the rules applicable to member subcontractors. Member subcontractors and nonmember subcontractors using IBD could not submit bids to general contractors not using IBD on a particular project. General contractors using IBD could not receive bids from subcontractors not using IBD on a particular project. Bids had to be submitted no later than three business hours before the prime bid opening time. Under the original IBD rules any bid could be rejected if the subcontractor would not furnish a bond upon request. Bids could be withdrawn only from all general contractors

[1] Section 8(B) of the approved revised rules provided in part:

> If the general contractor elects to receive none of the bids or only one bid on any particular craft or trade, he is free to obtain or receive bids from any member or nonmember subcontractor, whether or not they deposited a bid for him with IBD. . . . If a general contractor elects to receive delivery through IBD of two or more bids for a trade or craft, he shall be obligated, and he hereby agrees, that if he is the successful prime bidder and receives an award of the general contract, he will award the contract for this particular trade or craft to the lowest bidder whose bid he received through IBD. As used in these rules, "received through IBD" shall include, for this purpose, bids delivered by a subcontractor direct to the general contractor when executed duplicate originals thereof were deposited with IBD by the subcontractor . . . , regardless of whether the general contractor received the same from IBD. . . .

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using IBD and upon payment of a fine. The rules of IBD[2] were enforced by fining, suspending or expelling its members.[3]

The trial court found that the operations of IBD brought about only de minimis increases in building costs, and did not adversely affect or coerce the construction industry. The trial court also found that IBD operated in good faith and never engaged in collusion or unfair practices.[4] Nevertheless, the trial court held in a memorandum opinion that those rules of IBD which prevented those subcontractors and general contractors using IBD from dealing with subcontractors and general contractors not using IBD on a given project constituted a group boycott and a tampering with pricing practices in violation of the California antitrust statutes.[5] An injunction was issued which restrained IBD from preventing subcontractors and general contractors from dealing with one another *four hours or more* prior to the time set by the awarding authority for the receipt of bids.[6] The effect of the

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[2] Although such would certainly seem to be the case, the opinion does not clearly indicate whether the bonding of subcontractors, withdrawing of bids, and fining-of-member clauses of earlier rules of IBD were retained in the approved revised rules of IBD.

[3] Presumably nonmember subcontractors using IBD also agreed to be bound by the fining provisions applicable to members. Possibly the only difference between nonmember and member subcontractors was that membership extended over many projects. However, such a distinction would have been of little significance, since apparently member subcontractors were allowed to withdraw from membership and act as nonmembers on future projects.

[4] The findings of the trial court are summarized in the appellate court's opinion. People v. Inland Bid Depository, *supra* note 1, at 854-55, 44 Cal. Rptr. at 208-09.

[5] The specific portions of the California Business and Professions Code held violated read as follows:

> § 16720. Trusts. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
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> (a) To create or carry out restrictions in trade or commerce. . . .
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> (e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all of any or any combination of any of the following:
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> . . . .
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> (4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.
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> § 16726. Trusts against public policy. Except as provided in this chapter, every trust is unlawful, against public policy and void.

Id. at 852, 44 Cal. Rptr. at 207.

[6] The injunction specifically restrained IBD from operating a bid depository which in any manner did any of the following *four hours or more* prior to the time set by the awarding authority for receipt of bids on any construction project: (1) limit any subcontractor from submitting a bid to a general contractor or awarding authority, (2) restrict the amount of a bid submitted by a subcontractor, (3) prevent a general contractor or awarding authority from receiving or considering any bid. These provisions of the injunction of the trial court are reprinted in the appellate court's opinion. *Id.* at 857, 44 Cal. Rptr. at 210.

injunction was to permit an opportunity for bid shopping before the four hour period, but to allow the full operation of the approved revised rules of IBD which ended bid shopping during the last hours[7] before the award of the contract. On the appeal, only the remedy was attacked; the findings of fact and conclusions of law were not questioned. The appellate court ordered that the *four-hours-or-more* clause be deleted from the injunction and that IBD be permitted to submit new rules in conformity with the injunction, "to the end that open competition is available to all bidders, whether a member or not of IBD."[8]

Although this action was based upon the California antitrust statutes, the state appellate court's analysis was based upon federal cases interpreting the Sherman Act.[9] This was a proper approach in view of the prior California cases, the similar language of the acts, and the broader federal experience.[10] Just as in trade association cases under the Sherman Act,[11] no special rules have been established to determine the legality of bid depositories. Both California's antitrust act and the Sherman Act purport on their faces to be absolute prohibitions. Yet, as demonstrated by Holmes' atomization theory, a rule against all trade restraints is even a theoretical impossibility, since even ordinary contracts in effect restrict trade.[12] Therefore a rule of reason was adopted to determine which restraints were illegal.[13] Just as in the

[7] The approved revised rules set the time for submission of bids by subcontractors at least three hours before the contract awarding time. Thus, subcontractors had one hour in which they could submit bids to IBD without the bids being shopped under cover of the injunction. Earlier rules of IBD had provided for a four hour period, but the reduction to three hours allowed any subcontractor to avoid the effect of the injunction if he desired.

[8] People v. Inland Bid Depository, *supra* note 1, at 864, 44 Cal. Rptr. at 215.

[9] 26 Stat. 209-10 (1890), 15 U.S.C. §§ 1-8 (1964). Section 1 thereof provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

[10] See von Kalinowski & Hanson, "The California Antitrust Laws: A Comparison with the Federal Antitrust Laws," 6 U.C.L.A.L. Rev. 533 (1959). (von Kalinowski was an attorney for IBD in the instant case.)

[11] Oppenheim, Cases on Federal Antitrust Laws 180 (2d ed. 1959), states:

> [The principles governing the antitrust significance of trade association activities] are: first, that normal trade association activities are not illegal in themselves, but they become so only when used to accomplish an end that violates the antitrust laws; and, second, that it is frequently not one activity, but a combination which leads to antitrust difficulties.

[12] Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division," 74 Yale L.J. 775, 813-14 (1965).

[13] Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Court stated:

> Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law in this country in dealing with subjects of the character embraced by the [Sherman Act] . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had

Sherman Act, there is an implied exemption in the California antitrust act for reasonable restraints.[14] However, there are certain areas of antitrust activity which are so flagrant as to be characterized as per se unreasonable and thus illegal. Price fixing[15] and group boycotts[16] have been held per se violations. Since bid depository schemes have not been held inherently violative of the antitrust laws,[17] it is necessary to examine the purpose and effect of each bid depository plan to discover the possible presence of price fixing or group boycott.

A purpose to restrain trade may lead to a violation of the Sherman Act.[18] Further, any effective restraint must be directed toward a legitimate purpose to be held permissible.[19] Applying this test to a bid depository plan in *United*

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not brought about the wrong against which the statute provided. *Id.* at 60.

14 Associated Plumbing Contractors v. F. W. Spencer & Son, Inc., 213 Cal. App. 2d 1, 8, 28 Cal. Rptr. 425, 429 (1963); People v. Building Maintenance Contractors' Ass'n, 41 Cal. 2d 719, 725, 264 P.2d 31, 36 (1953); von Kalinowski & Hanson, *supra* note 10, at 541.

15 In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Court stated at 218: "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which these agreements were designed to eliminate or alleviate may be interposed as a defense."

16 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12 (1959).

17 *But see* Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964), wherein the district court suggested that the enforcement of a rule which prevented general contractors from using subbids which were not received from the defendant bid depository may constitute a per se violation. On appeal, however, the court expressly stated that it did not need to determine whether this provision alone was a per se violation, since it affirmed the district court's holding that the combined effect of this rule with the defendant's rules regulating bid splitting and rebidding violated section 1 and section 2 (attempt to monopolize) of the Sherman Act. Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817, 819 n.5 (10th Cir. 1965). The rule prohibiting bid splitting, later rescinded, virtually eliminated specializing subcontractors from the bid depository system by requiring subcontractors to submit a single bid for work in many trades. *Id.* at 819. The rebidding rule prevented subcontractors who had not originally submitted bids on a particular project through the bid depository from participating in any rebidding on that project during the 90-day period following the original bidding, although those subcontractors who had used the bid depository on that project were not so restricted. *Ibid.* The court pointed out that the bid depository questioned in *Christiansen* was not only used to eliminate harmful bidding practices, but was also used to obtain control over bidding practices and general contractor-mechanical contractor relations in Utah. *Ibid.* The per se aspect of the district court's opinion was cited in the instant case. However, the appellate court's decision in *Christiansen* was not reported until after the decision in the instant case.

18 American Tobacco Co. v. United States, 221 U.S. 106, 181-82 (1911).

19 This theory of ancillarity, pronounced by Judge Taft (later Chief Justice of the United States) in one of the first actions brought under the Sherman Act, holds that "the main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which validity of such restraints may be judicially determined." United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282 (6th Cir. 1898).

States v. San Francisco Electrical Contractors Ass'n,[20] it was held that the purpose of maintaining compliance with certain bidding standards was not in itself a violation of the Sherman Act. Protecting subcontractors from the disclosure of their bids to other subcontractors in an attempt to get a still lower bid would seem to be a permissible objective in California, since this solicitation of a lower bid is specifically prohibited at any time *after* the award of the prime contract on a public project.[21] However, an analysis of the federal bid depository cases revealed that bid depository schemes often have been utilized illegally for the purpose of achieving these goals which constitute specific antitrust violations: restraint of free price competition, illegal coercion or boycott, market allocation, and improper participation of third parties in business decisions.[22] But these illegal purposes were not specifically found to exist in the instant case.[23]

Another purpose constitutes a restraint of trade: the purpose to restrict

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[20] 57 F. Supp. 57 (N.D. Cal. 1944).

[21] This seems to represent the proper interpretation of California's Subletting and Subcontracting Fair Practices Act, Cal. Gov't Code Ann. §§ 4100-13 (Supp. 1965). While it does not appear from the language of this act that the California Legislature actually did anything about shopping of subcontractors' bids *before* award of the prime contract, a legislative declaration at § 4101 of the act states:

> The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

Although bid shopping is not defined in the act in question, if the legislature used the term in its usual sense (see People v. Inland Bid Depository, *supra* note 1, at 863-64, 44 Cal. Rptr. at 214), the quoted section definitely controverts any possibility of a finding of legislative intent in favor of bid shopping by negative implication. Further, the section could be viewed as a legislative direction that the purpose of preventing bid shopping is a legal and salutary one. It is interesting to note that the court did not seem to know about the quoted section of the act, which was a 1963 amendment. See People v. Inland Bid Depository, *supra* note 1, at 863, 44 Cal. Rptr. at 214, from which it is apparent that the court cited the act as it appeared before amendment, since of the cited sections after amendment, one is nonexistent and the other irrelevant to the point for which it is cited. Thus, it appears that the court's determination that the result of bid shopping is lower prices and a general benefit to the awarding authority is contrary to the legislative declaration and to be given little weight. *Ibid.*

[22] Schueller, "Bid Depositories," 58 Mich. L. Rev. 497, 506-12 (1960). A table at 528-30 lists the federal bid depository cases with cross references to the improper practices found therein.

[23] Apparently the court did not find the purpose to eliminate bid shopping illegal, since the court indicated it would approve other bid depository plans with that purpose. People v. Inland Bid Depository, *supra* note 1, at 858, 863, 44 Cal. Rptr. at 211, 214. Although there was found a group boycott and a tampering with pricing practices, it is not indicated whether these violations resulted from the effect of IBD or from the illegal purpose to bring about these violations.

competition in the general market (all buyers and sellers of the same type of product or service).[24] Aside from its probable effect on competition and production, the purpose to affect the general market is inconsistent with that social and political goal of antitrust which attempts to prevent the concentration in private hands of economic power.[25] Nevertheless, in *Anderson v. United States*,[26] the Court permitted a cattlemen's association to refrain from dealing with nonmembers where the goal of the association was to improve business integrity in the cattle exchange. In *Fashion Originators' Guild of America, Inc. v. FTC*,[27] however, the Supreme Court struck down an eloborate system to boycott garment manufacturers who used textiles with copied designs. Each of these cases may be reconciled in that the defendant in *Fashion Guild* intended the destruction of a type of economic production,[28] thereby narrowing the market,[29] while in both the instant case and *Anderson* the defendants attempted to improve the moral climate without affecting the market. Thus, if an attempt to eliminate bid shopping is a legal purpose, and if the court in the instant case did not find a purpose to violate the antitrust statutes, then the decision must rest upon a finding of an effect of either a restraint on the economy as a whole or a restraint on competition in the industry.

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[24] United States v. Joint Traffic Ass'n, 171 U.S. 505, 569 (1898). Bork, *supra* note 12, at 794.

[25] Att'y Gen. Nat'l Comm. Antitrust Rep. 1-2, 6 (1955). See United States v. Columbia Steel Co., 334 U.S. 495 (1948), where Mr. Justice Douglas states in dissent at 536:

> For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. . . .

See also Berghoff, "The Size Barrier in Merger Law—Or Antitrust by the Numbers," 27 Ohio St. L.J. 76 (1966), wherein the author finds that the Supreme Court has increasingly emphasized concentration in invalidating mergers.

[26] 171 U.S. 604 (1898).

[27] 312 U.S. 457 (1941).

[28] The Court found that "the aim of petitioners' combination was the intentional destruction of one type of manufacturer and sale which competed with Guild members." *Id.* at 467. The rules also prohibited manufacturers from selling at retail and selling at regulated discounts. A trial-like system was adopted to enforce these provisions.

[29] See Klor's, Inc. v. Broadway-Hale Stores, Inc., *supra* note 16. In this case the Court struck down a manufacturer's concerted refusal to deal with Klor's that was induced by one of Klor's competitors. The Court stated at 213:

> This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce.

In addition to any political objective or the desire to increase competition within an industry, one of the primary purposes of the antitrust acts is the prevention of restraint on the operation of the economy as a whole.[30] The study of the effect of a transaction upon the economy as a whole is called "macroeconomics"; it is to be distinguished from an analysis of the effect upon participants or upon a single industry. Chief Justice White's belief that "furthering trade"[31] provided the test of legality under the Sherman Act, has been viewed as requiring the application of economic standards to determine if there is macroeconomic restraint.[32] One authority carries this analysis further to suggest that macroeconomic "wealth maximization" should be the applicable test of restraint of trade.[33] Economists generally suggest that the promotion of competition, at which the antitrust laws are aimed,[34] has these macroeconomic values: guiding the flow of capital by supply and demand to the most productive use, incentive for innovation and long run cost reduction, equitable diffusion of real income among consumers and factors of production, and aid to the government's anticyclical program through flexible prices.[35]

An evaluation of the characteristics of bid shopping, the practice sought to be prevented by the bid depository plan, is necessary to determine whether use of a bid depository is consistent with the macroeconomic goals indicated. One commentator suggests these evils of bid shopping: it takes unfair advantage of those subcontractors who have prepared bids, it leads to delay in submitting bids in an attempt to avoid shopping, it discourages the submission of bids from fear, and it leads to early bid padding with a view to later restrction.[36] The economic effect of these evils is that it awards contracts fortuitously or on the basis of arbitrary bidding technique, while it does not select those subcontractors who possess the highest efficiency. A bid depository attempts to modify the consequences of bid shopping by the regulation of the selection system so as to help eliminate such deviations from the real economic factors which make up the supply curve. As the awarding of subcontracts more closely approximates real economic conditions, business stability is proportionately increased.[37] Stability tends to increase participa-

[30] See, *e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), where the Court says at 493: "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of good and services, all of which had come to be regarded as a special form of public injury."

[31] United States v. American Tobacco Co., *supra* note 18, at 179.

[32] Bork, *supra* note 12, at 803-05.

[33] *Id.* at 829-47.

[34] Att'y. Gen. Nat'l Comm. Antitrust Rep. 1 (1955).

[35] *Id.* at 317-18.

[36] Schueller, *supra* note 22, at 499-500.

[37] See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925), where the Court stated:

> It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. . . . But the natural effect of acquisition of wider and more scientific knowledge of business

tion in bidding, especially by the more efficient subcontractors, since there is a reduced risk of rejection from factors extraneous to production. The preparation of bids serves a useful purpose and represents a real cost worthy of inclusion in the pricing and income distribution system. When bid shopping is prevalent, a prospective bidder must consider the competitive advantage given a subcontractor who elects not to incur the cost of an independent analysis of the project. However, encouraging more subcontractors to undertake such a study and offering a greater opportunity of selection to those who have found a better production method would provide a strong incentive to innovation. Where a bid depository merely acts as a neutral agent for processing bids, it will not significantly affect the flexibility of the supply and demand curves, and thus will not interfere with government anticyclical policy.[38] In *Associated Plumbing Contractors v. F. W. Spencer & Sons, Inc.*,[39] it was found that the bid depository involved promoted and stabilized business,[40] and served the public interest.[41] If the effect of bid shopping is consistent with the macroeconomic goals of the antitrust laws, and if no purpose to restrain trade was discovered, then the finding of illegality in the instant case must be based upon a finding of an adverse effect upon competition in the particular industry involved or upon the participants.

The promotion of competition is the goal toward which the antitrust laws are directly aimed, and thus an adverse effect upon competition may lead to an illegal restraint of trade.[42] Where price fixing or a group boycott is present, the anticompetitive effect is presumed. However, if the conduct in question does not in fact amount to price fixing, although it may affect price formation, it is then necessary to evaluate the significance of the effect upon

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conditions, on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.

Id. at 582.

38 See Due, Government Finance 525-26 (3d ed. 1963).

39 *Supra* note 14, at 8, 28 Cal. Rptr. at 429.

40 See Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936), wherein the Court found this effect not necessarily improper, stating at 598: "Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade."

41 In Maple Flooring Mfrs. Ass'n v. United States, *supra* note 37, the Court said:

> It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise.

Id. at 582.

42 Att'y Gen. Nat'l Comm. Antitrust Rep. 1 (1955).

competition.[43] In determining whether a restraint actually promotes competition or adversely affects it, it is necessary to consider the nature of the restraint, the practice it seeks to modify, its probable effect, and any alternative remedies that would be less restrictive.[44]

In evaluating the nature of the restraint that IBD may have imposed, it must first be noted that any possible effect on prices was not direct; prices were independently determined by a competitive process. Similarly, in *Bd. of Trade v. United States*,[45] the regulation in question required that all sales of "grain-to-arrive" which occurred after the closing hours of the market be at that price which was set by a competitive process at the end of each market day. This rule was held to be reasonable because it established the business hours of the grain exchange[46] and also established a fair system for determining the price of after-hours sale. The Court felt that a price set by the competitive processes of the grain exchange would more likely be fair and more closely reflect actual market conditions than would a price set outside the grain exchange by private negotiations between dealers and farmers.[47] As pointed out by the dissent in the instant case, unequal bar-

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[43] In discussing conduct which may affect price formation, Att'y Gen. Nat'l Comm. Antitrust Rep. (1955) stated at 14:

> Two difficult questions arise in these cases. First, does defendant's conduct constitute price fixing in purpose or effect? Sometimes, as in simple price fixing cases, the answer is easy. Often, however, where the character or effect of the conduct is equivocal, a broader view of the way the market functions is required before a court can decide whether given behavior in fact amounts to price fixing. The second question arises where price fixing is not found, but the practices reviewed may affect price formation. Then its reasonableness or unreasonableness turns on the relative significance of the competition eliminated as compared with their other purposes or effects. A court's task is to determine (1) whether defendants have enough market power to make the restriction on price an "undue restraint" and (2) whether they currently exercise the power or intend to do so.

See United States v. Columbia Steel Co., *supra* note 25, where in holding that a merger did not violate the Sherman Act, the Court looked at the strength of the remaining competition and other characteristics of the market.

[44] Bd. of Trade v. United States, 246 U.S. 231 (1918). The Court established this test:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

[45] 246 U.S. 231 (1918).

[46] *Id.* at 239.

[47] *Id.* at 240-41. See also United States v. Socony-Vacuum Oil Co., *supra* note

gaining power is inherent in the subcontractor-general contractor relation in which many parties must deal with one individual who may obtain a given prime contract.[48] This competitive situation differs from the ordinary business transaction in that here, on any project, there will be only one buyer of the services that many could provide. This case may be compared with *Chicago Board of Trade* in that a reasonable organization of a market prevented a competitive abuse and the award of a contract on the basis of non-economic factors.

From congressional hearings on the use of bid shopping, one writer has collected the possible advantages of allowing this practice to continue.[49] They include the possibility of subsequent clarification of the bid, additional time to investigate particular subcontractors, negotiation in light of price alternatives shown in the bids, and ability to modify the padded bids first submitted. However, the facts in the instant case may reduce the significance of these factors. As to price alternatives, the rules of IBD required that each project be divided into many separate trades, and permitted only the lowest bid in each trade to be accepted. This reduced the likelihood that a subcontractor might be asked to perform only that part of his total estimate on which his bid was lowest, since each subcontractor would be bidding on a smaller quantity of work. However, the price alternative argument has some validity since this provision of the rules affected neither price differences on subdivisions within a trade, nor the offering to perform in one of various ways at alternative prices. The ability to demand a bond and to a limited extent the availability of standard contract remedies affords protection from nonperforming subcontractors. Further, the knowledge that their bids would not be shopped would reduce the likelihood of subcontractors submitting padded bids at first, with a view to later modification.

With regard to the probable anticompetitive effect of IBD, the appellate court feared that requiring general contractors to accept the lowest bid at a time when they may have seen no others, would lead to collusion through submission of equally overpriced bids by understanding or agreement among the subcontractors.[50] However, by virtue of the trial court's injunction, no subcontractor or contractor could be prevented from submitting or considering any bid four hours or more before the prime bid was due.[51] The provision of this earlier period of unrestrained competition would permit bid shopping

15. This case indicated that price fixing was per se illegal at the time of the *Board of Trade* case. However, it did not find that the rule in *Board of Trade* constituted price fixing. The Court said that in *Board of Trade*, "No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. And among its effects was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly." *Id.* at 217.

48 People v. Inland Bid Depository, *supra* note 1, at 864-65, 44 Cal. Rptr. at 215.

49 Schueller, *supra* note 22, at 504-05. See congressional hearings cited, *ibid.*

50 People v. Inland Bid Depository, *supra* note 1, at 859-60, 44 Cal. Rptr. at 212.

51 *Id.* at 857, 44 Cal. Rptr. at 210.

during that time and might allow a general contractor to see other bids before he was required to accept any bid. At least the knowledge of the possibility of the receipt of such early bids would reduce the likelihood of collusion by subcontractors. Yet, there would be no advantage for a subcontractor to submit a bid to IBD during the injunction period; it would only be shopped. Subcontractors know this, and thus would not significantly fear receipt of earlier bids, making this a relatively ineffective sanction. In fact, no history of collusion or unfair practices was found in the activities of IBD,[52] but the court's fear has some validity, although collusion was perhaps over-emphasized.

There are other bid depository schemes available to subcontractors which reduce more effectively the possibility of collusion. The appellate court distinguished the instant case from *United States v. San Francisco Electrical Contractors Ass'n*[53] by the "limited and restricted" bidding which the bid depository in that case substituted for "unrestricted and unlimited bidding."[54] This indicates that the appellate court was not adverse to the adoption of an alternative bid depository plan. In that case the general contractors were permitted to seek new subbids 90 days after the original bidding. Although it was ordinarily not practical for this power to be used, it nonetheless provided a greater deterrent to subcontractor collusion than the bid depository scheme in the instant case, since the general contractors were not permanently bound to accept a bid submitted through the bid depository, but were free to reject all such bids that appeared to result from collusion. In *United States v. Bakersfield Associated Plumbing Contractors*,[55] the court required the opening of bids to the public six hours before the time set for the prime bid. This was unsatisfactory to IBD since it permitted bid shopping at least from six hours before the prime bid closing time till the closing time of the bid depository.

The appellate court emphasized that the public generally is the awarding authority when IBD is used. An assumption that the government would not engage in the competitive abuse of bid shopping mitigates the charge that a countervailing power is needed to prevent economic oppression by the awarding authority. However, it does not follow that the general contractors acting on public projects will likewise act with the same business integrity. Another view is that the public interest in securing the best terms for itself when it is the awarding authority is the paramount consideration, outweighing prejudices to subcontractors and the marginal effect upon macroeconomic policy and long-run cost reduction. Thus we may have a double standard, with the long-run public interest in permitting an adjustment of economic bargaining power considered only in non-governmental contracts.

A bid depository is not per se illegal. The utilization of this device as a means to eliminate bid shopping does not necessarily constitute price fixing

[52] *Id.* at 855, 44 Cal. Rptr. at 209.

[53] 57 F. Supp. 57 (N.D. Cal. 1944).

[54] *Id.* at 66.

[55] 1959 Trade Cas. ¶ 69,266 at 75,035 (S.D. Cal. 1958).

or a group boycott in purpose or effect. If properly used, it may bring about a reasonable organization of a given market to eliminate a competitive abuse of little value to the economy or to competition within the industry. However, by virtue of a bid depository's operation in the area of price formation and exclusion of nonconforming businessmen, it has a tendency to be abused, as, for example, by the prior agreement of subcontractors to submit uniformly overpriced bids. Perhaps it was this fear of abuse that prevented the California legislature from outlawing bid shopping at the same time that it outlawed the solicitation of lower bids from subcontractors *after* the award of the prime contract on public projects; however, another explanation might be the reduced likelihood of a general contractor's passing on any savings to the awarding authority after the prime contract was made. Nevertheless, in the long run the elimination of bid shopping would help effectuate macroeconomic goals by the awarding of subcontracts to the more efficient subcontractors through the elimination of noneconomic aspects of the selection system. It is not correct to say that the appellate court rejected all attempts to balance economic power by the limitation of bid shopping. This court merely rejected a specific plan which permitted bid shopping up till four hours before the award of the prime contract; a plan which allowed the operation of IBD's rules during the final hours to the effect of eliminating bid shopping during that period. In light of a finding that it was precisely during these last hours that most bidding took place, and in view of the availability of alternative bid depository systems which afford a reduced opportunity of subcontractor collusion, it would seem the decision of the appellate court is proper. In addition, the trial court's unchallenged conclusion that the rules of IBD constituted a group boycott and amounted to price fixing limited the appellate court's ability to permit use of these very same rules for any period, although they would be operating under changed circumstances brought about by the earlier injunctive period.