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Resources, Community, and
Economic Development Division

B-256917

May 13, 1994

The Honorable Tom Harkin
Chairman, Subcommittee on Nutrition
and Investigations
Committee on Agriculture, Nutrition
and Forestry
United States Senate

Dear Mr. Chairman:

In response to your December 1, 1993, request, this correspondence examines the actions taken by the U.S. Department of Agriculture's (USDA) Food and Nutrition Service to address the problem of bid-rigging¹ on contracts to supply milk for federal child nutrition programs. It updates our October 1992 report and July 1993 testimony in which we recommended steps to protect the government and other consumers against bid-rigging.²

You asked that we follow up on our previous recommendations that (1) USDA be more aggressive in investigating those indicted for or convicted of bid-rigging, (2) USDA and the Department of Justice (Justice) develop a more systematic process for sharing information on indictments and convictions for illegal contracting practices, and (3) USDA expand its training efforts to help local procurement officials identify bid-rigging practices. In addition, you also asked our views on whether additional legislation might be needed to generate more aggressive action by USDA against school milk contract bid-riggers. Finally, you asked that we determine the extent to which USDA and

¹An agreement between two or more persons to eliminate, reduce, or interfere with competition for a contract that is to be awarded on the basis of bids.

²Food Assistance: School Milk Contract Bid-Rigging (GAO/RCED-93-5, Oct. 16, 1992) and related testimony entitled Food Assistance: School Milk Contract Bid-Rigging (GAO/T-RCED-93-63, July 21, 1993).

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Justice had identified bid-rigging in commodities other than dairy products.

RESULTS IN BRIEF

Since our October 1992 report, USDA has stepped up its efforts to determine whether corporations or individuals indicted for or convicted of bid-rigging on contracts to supply milk for the federal child nutrition programs should be allowed to do business with the agencies administering USDA programs. As of April 15, 1994, USDA had not debarred any of those corporations or individuals but had initiated debarment or other related actions in 14 cases. A USDA task force is investigating 83 other cases involving corporations and individuals found guilty of bid-rigging to determine whether they should be debarred. The task force's investigation of 65 of these cases is in process and 18 cases are awaiting review. The task force set a July 31, 1994, goal for completing its work. As long as USDA continues its current level of effort, we do not believe additional legislation aimed at encouraging more aggressive USDA action against school milk contract bid-riggers is needed at this time.

USDA and Justice have improved their coordination and information-sharing to ensure that USDA is promptly aware of those indicted or convicted under federal law for bid-rigging on contracts to supply milk for the federal child nutrition programs. However, at the start of our review, USDA was not obtaining information on indictments and convictions for bid-rigging initiated at the state level. At our suggestion, USDA's Office of the General Counsel contacted the National Association of Attorneys General to establish a systematic exchange of information similar to USDA's exchanges with Justice.

Justice developed a training module on bid-rigging awareness that USDA has included in six procurement seminars conducted in several regions of the United States since October 1992. This training was provided to 900 state and local officials responsible for school nutrition programs.

Most bid-rigging cases involve dairy products. Since 1988, Justice has reported 112 criminal bid-rigging cases involving dairy products and only 6 cases involving nondairy products.

BACKGROUND

State governments and local school districts purchase milk from dairies for several child nutrition programs, including the National School Lunch Program, the School Breakfast Program, and the Special Milk Program for Children. The National School Lunch Act and the Child Nutrition Act of 1966 authorize USDA to reimburse state and local school authorities--under grant agreements--for some or all of the costs of these three programs. In fiscal year 1993, these programs cost the federal government over \$5.5 billion, which is 60 percent of the total cost of providing all of the food, including the milk products, used under the three programs. The remaining 40 percent, or about \$3.7 billion, was paid by state governments and private sources.

In the late 1980s, Florida's Attorney General discovered a pattern of bid-rigging by dairies involving school milk contracts throughout the state. Such bid-rigging was also identified in other states and at military installations. Justice's Antitrust Division became active in pursuing criminal investigations and prosecutions.

Between 1988 and March 1994, Justice filed 112 criminal cases in 17 states against 132 corporations and individuals (63 corporations, 69 individuals) in the milk/dairy products industry for bid-rigging on contracts to supply milk for federal child nutrition programs. (Some cases were filed against both corporations and individuals.) Of the 132 corporations and individuals, to date a total of 97 have been found guilty and sentenced. With the exception of one national company, the cases have involved local or regional companies and their employees.

An indictment or conviction for bid-rigging does not, however, automatically result in USDA's suspending or debarring an entity or individual from doing business with the state governments and local school districts administering school lunch programs. Federal regulations provide that suspension and debarment actions are to be taken only when they are in the public's interest and serve to protect the federal government. These actions are not to be taken for the purpose of punishment. Suspension is an immediate but temporary exclusion (generally, for no more than 1 year) pending further investigation and legal proceedings. Debarment is an exclusion for a specified period of time (up to 3 years).

Following an administrative review, if the Administrator of USDA's Food and Nutrition Service (the debarring official for the federal child nutrition programs) concludes that debarment is warranted, this official must notify the entity or individual involved about the proposal for debarment and provide an opportunity for the party to present arguments as to why debarment should not occur. After considering such arguments, the debarring official must consider any mitigating factors in determining whether and under what circumstances the government should continue to do business with the entity or individual.

After the USDA debarring official has reviewed all of the facts, the official may settle a proposed debarment case by debarring the entity or individual or entering into a compliance agreement. Under such an agreement, an entity or individual may still participate in bidding on school lunch contracts. However, the entity or individual would be required to comply with certain conditions, including maintaining all records of sales, conducting ethics and antitrust training for its employees, reporting instances of potential and actual misconduct, cooperating with the government in any further investigations, and taking appropriate action against all employees found guilty of illegal contracting practices.

Federal regulations require USDA to promptly investigate and, if warranted, refer to the debarring official for action, information on the existence of a cause for debarment, regardless of its source. In our previous work, we reported that (1) USDA had not been aggressive in investigating and taking appropriate action against those indicted for or convicted of bid-rigging on milk contracts; (2) USDA and Justice had no formal, systematic structure in place for sharing information on their respective efforts in investigating bid-rigging; and (3) USDA had provided little training to help state and local procurement officials detect bid-rigging.

In response to our report, on July 20, 1993, a Senate bill was introduced aimed at protecting USDA and local school districts against anticompetitive activities in the conduct of child nutrition programs. This legislation has been reintroduced but had not been enacted as of May 1, 1994.

USDA'S ADMINISTRATIVE ACTIONS AGAINST BID-RIGGERS

Since our October 1992 report, USDA has stepped up its investigations of those convicted of bid-rigging on school milk contracts. In the spring of 1993, USDA initiated

investigations of four dairies that had previously been convicted. In July and August of 1993, USDA proposed that two of those dairies be debarred. For the other two dairies, USDA concluded that an administrative agreement incorporating various compliance provisions was appropriate.

In October 1993, in response to public criticism asserting that USDA was not following its debarment requirements, the Secretary of Agriculture directed that USDA's suspension and debarment processes and procedures be vigorously followed. In December 1993, USDA's Office of the General Counsel implemented procedures to ensure that the suspension and debarment policies are fairly and firmly enforced. In addition, USDA established a reporting system to provide its officials with weekly information on the entities and individuals indicted for or convicted of bid-rigging.

In January 1994, USDA created a task force to work exclusively on USDA's backlog of 93 potential suspension and debarment cases. This task force established a goal of July 31, 1994, for completing USDA's determination of whether the corporations or individuals found guilty of bid-rigging should be suspended or debarred from contracting with state and local agencies. As of April 15, 1994, USDA had not debarred anyone but had initiated debarment action or entered into compliance agreements in 10 of these cases.

Of the remaining 83 cases, the task force has initiated action on 65. In 10 cases, it has recommended that the debarring official suspend or debar the corporations and individuals involved. In 11 other cases, it has developed initial recommendations regarding suspension/debarment that have been forwarded to USDA's Office of the General Counsel for legal clearance before final recommendations are made to the debarring official. The team is currently discussing what action it plans to recommend in 25 additional cases and is awaiting documentation on 19 cases. It has not started its review on the final 18 cases. In view of the progress being made on the case backlog, USDA officials do not believe that additional legislation is needed at this time to mandate a more aggressive USDA posture on the bid-rigging issue. We agree with this assessment, provided that USDA continues to act aggressively on these cases.

USDA'S AND JUSTICE'S EFFORTS TO IMPROVE
COORDINATION AND INFORMATION-SHARING

Since 1992, USDA and Justice have improved their coordination and information-sharing in connection with those indicted for and convicted of bid-rigging on contracts to supply milk.

USDA's improved coordination with Justice started when both departments designated specific individuals to serve as permanent liaisons to ensure a more systematic coordination effort. To further the sharing of information, Justice is providing USDA with (1) a monthly report on the status of Justice's investigative activities and advance notice of any settlement agreements, (2) all documents concerning both federal criminal and civil antitrust bid-rigging actions, and (3) instructors for a training module on bid-rigging awareness that is included in USDA's procurement seminars. According to USDA staff, Justice is providing USDA with everything it needs to deal with those indicted for or convicted of bid-rigging, and the members of the staff are very satisfied with their working relationship with Justice.

In addition, USDA has implemented a suggestion we made during the course of our audit work. We had found that although Justice was reporting bid-rigging cases to USDA when the federal government was involved, it was not reporting indictments or convictions to USDA when only state attorneys general were involved. In response to our discussions, USDA's Office of the General Counsel contacted the National Association of Attorneys General to establish a relationship similar to the liaison relationship currently in place with Justice.³

BID-RIGGING AWARENESS TRAINING

In response to our work in 1992, USDA has included a Justice-developed training module on bid-rigging in its procurement workshops. This 1-hour module has been presented in six procurement workshops that have trained

³The Association's members are the attorneys general of the 50 states and the chief legal officers of the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands; one of the organization's purposes is to facilitate communications between these attorneys general and chief legal officers and the other levels of government.

approximately 900 state and local personnel affiliated with school nutrition programs in several regions throughout the United States. Justice also provided written materials on antitrust provisions and conducted sessions emphasizing practical advice on recognizing bid-rigging. According to USDA officials, after attending these sessions, state officials conducted similar workshops at the local level.

USDA plans to continue these training initiatives. The feedback from critiques by workshop participants indicates that they believe the bid-rigging awareness sessions were informative; most rated them good to excellent. In addition, USDA recently developed a letter that it sent to all state agencies and local school districts explaining the suspension and debarment processes.

BID-RIGGING ON FOOD COMMODITY CONTRACTS OTHER THAN DAIRY PRODUCTS

According to Justice and USDA officials, most of their bid-rigging cases to date have involved dairy products. Cases involving suppliers of food products other than dairy products have not been widespread. Since 1988, only 6 bid-rigging cases have involved nondairy products; during this same period, Justice reported 112 cases involving dairy products. USDA officials said that they are following up on the six nondairy cases to determine whether the participants should be debarred.

SCOPE AND METHODOLOGY

We discussed the facts in this correspondence with Food and Nutrition Service officials. These officials generally concurred with the information presented, and we have incorporated their comments, where appropriate. As agreed, we did not request written agency comments on a draft of this correspondence.

In performing this follow-up work on bid-rigging issues, we interviewed USDA and Justice officials and reviewed their records on bid-rigging cases. We reviewed laws and regulations applicable to suspension and debarment. We also interviewed a representative of the National Association of Attorneys General to obtain the Association's views on the availability of information on state-initiated bid-rigging cases. We conducted our review from January 1994 through April 1994, in accordance with generally accepted government auditing standards.

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As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this correspondence until 7 days from today. At that time, we will send copies of this correspondence to the Secretary of Agriculture and the Attorney General and will make copies available to others on request.

If you have questions, I can be reached at (202) 512-5138. Major contributors to this correspondence included Carl Lee Aubrey, Dale A. Wolden, and Olin S. Thummel at our Kansas City Regional Office and John F. Mitchell, Office of General Counsel.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "John W. Harman".

John W. Harman
Director, Food and
Agriculture Issues

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