October 24, 2022

Court Holds That a Single NSA Contract Is Not an Antitrust Market and "Quick Look" Analysis Does Not Apply to Merger Agreement

- A court has rejected the request of the U.S. Department of Justice (DOJ) to enjoin Booz Allen's acquisition of EverWatch. This is the DOJ's third consecutive loss in a merger challenge in court.
- The circumstances of the case are unique, but it is notable that the court rejected using a "quick look" analysis of the competitive effects of the merger agreement and declined to accept the DOJ's proposed relevant market, which was limited to one NSA contract.

Recently, a federal court denied the DOJ's motion for a preliminary injunction "abrogating" the merger agreement between Booz Allen Hamilton and EverWatch Corp. and enjoining the defendants "from taking any action to proceed with their planned merger." In doing so, the court found that the market asserted by the DOJ, which is limited to a single National Security Agency (NSA) contract, is not a proper antitrust market. The court also rejected the DOJ's argument that it use a simple "quick look" to analyze the competitive effects of the merger agreement. On October 14, Booz Allen announced that it completed the acquisition. This marks the DOJ's third consecutive loss in a merger challenge in court.

In its motion, the DOJ claimed that the merger agreement violated Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade. According to the DOJ, Booz Allen and EverWatch are the only two bidders for an NSA contract for OPTIMAL DECISION, a program to provide modeling and simulation for signals intelligence data. The DOJ argued that the parties' merger agreement itself harmed competition because it "sharply reduced" the defendants' incentives to submit competitive proposals to the NSA given that, because of the merger, "Booz Allen will ultimately reap the profits no matter which company 'wins' the contract."

The court, however, held that the DOJ failed to establish that it was likely to succeed on the merits of its Section 1 claim and also failed to establish the other elements necessary for a preliminary injunction. The court first held that the merger agreement was not an "intuitively obvious restraint on trade" and therefore it could not use a "quick look" analysis. Instead, the court analyzed the agreement under the rule of reason standard, requiring the DOJ to first "prove that the challenged restraint has a substantial anticompetitive effect." According to the court, the DOJ could show such an effect either through direct evidence – i.e., "proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market" – or indirectly through "proof of market power plus some evidence that the challenged restraint harms competition."

The court found that the DOJ failed to introduce evidence showing actual detrimental effects on competition. The court discounted statements from "lower-level" employees reflecting that they thought there would not be competition for the

© 2022 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

OPTIMAL DECISION contract after the acquisition was announced, and instead credited statements from company leadership that competition for the contract would be "full steam ahead" and "business as usual." The court concluded that "[l]ittle evidence suggests the companies, or their capture-team employees, intend to give the NSA anything less than their best proposal" and "[c]ompetition exists now."

The court went on to find that the proposed acquisition "does not pose a likely or significant risk of anticompetitive harm because several countervailing incentives prevent unwarranted price hikes." Here, the court cited Booz Allen's incentive to protect its "reputation with the NSA, its desire to win other contracts, and regulatory constraints" and faulted the government's expert for not taking these sufficiently into account. The court also cited "recent history" of Booz Allen's conduct on similar contracts showing that "price increases are not inevitable even when Booz Allen has no other bidding competition" and explained actual recent price increases as attributable to increasing costs and competition for labor.

Finally, the court determined that, on the record before it, "signals intelligence modeling and simulation services under OPTIMAL DECISION" is not a relevant product market in which to measure competitive effects. In rejecting the government's proposed market, the court found that "modeling and simulation services are not unique to the NSA" and that just because "the NSA *uses* modeling and simulation services in a specific environment (signals intelligence) does not mean the NSA's *application* of these services constitutes a unique market." The court wrote that a "*type* of service, such as modeling and simulation, is distinct from an *application* of that service to different contexts like 'signals intelligence' data." The court also noted that that "the NSA identified over a *hundred* companies as potential contractors for OPTIMAL DECISION and fourteen expressed an interest in being the prime contractor."

Significance. The circumstances of this case are not typical. Merger challenges are brought under Section 7 of the Clayton Act, which prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly," and here the DOJ argued that the merger would harm competition by eliminating the only other bidder for the OPTIMAL DECISION contract. However, the DOJ also asserted a Section 1 restraint of trade claim aimed at the merger agreement, arguing that the agreement harmed competition because of its alleged effect on the bidding for the OPTIMAL DECISION contract.

Section 1 claims are not typically found in merger complaints. By including this claim, the DOJ was able to argue (albeit unsuccessfully) that the court should use a "quick look" standard of analysis. It is significant that the DOJ did not succeed on this point. If the court had adopted this standard rather than the rule of reason standard it used, it may have been easier for the DOJ to enjoin the merger because it can be easier to show competitive harm using a "quick look" analysis as opposed to using the rule of reason or Clayton Act.

The court's finding that the market at issue is not limited to a single NSA contract is also significant. Here, the DOJ alleged that the relevant market is "signals intelligence modeling and simulation services under OPTIMAL DECISION." In doing so, according to the court, the DOJ "attempts to gerrymander its way to victory without due regard for market realities." Indeed, the DOJ alleged that in such a market, the transaction would be a "merger-to-monopoly" and proving competitive harm in such a market would have been easier. To be sure, "the court does not suggest a single contract can never be a relevant market," but the facts in this case did not support such a finding.

The DOJ may get another chance to attack the merger. The court left open the possibility that the DOJ could pursue its Clayton Act Section 7 claim at trial even though "the market definition inquiry under Section 1 of the Sherman Act overlaps with the Government's Section 7 claim to some extent." The court did not enter final judgment in light of "the expedited nature of these proceedings, the abbreviated record, and the condensed procedural format of the [preliminary injunction] hearing."

*   *   *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andrew C. Finch
+1 212-373-3417
afinch@paulweiss.com

Jessica E. Phillips
+1 202-223-7338
jphillips@paulweiss.com

Jacqueline P. Rubin
+1 212-373-3056
jrubin@paulweiss.com

Joshua H. Soven
+1 202-223-7482
jsoven@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

Marta P. Kelly
+1 212-373-3625
mkelly@paulweiss.com

Jared P. Nagley
+1 212-373-3114
jnagley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this Client Memorandum.