



Briefing 07/22 April 2007

OFT details investigations into construction cartel

Key issues

Office of Fair Trading investigate 57 construction firms.

Evidence of bid rigging in thousands of tenders has been found with a combined estimated value approaching £3billion.

Offer of leniency made to companies involved.

There are likely to be further raids

1. Introduction

The Office of Fair Trading (OFT) have published two press releases, "OFT closes door on cartel leniency in construction bid rigging cases in England" (50/07) and "OFT makes 'fast track' offer in biggest ever UK cartel investigation" (49/07).

These press releases detail the investigations that have been ongoing for 2 years into possible bid rigging and collusion in the construction industry. This briefing draws on discussions with the OFT as well as the press releases noted above.

2. OFT investigations

The investigation has uncovered evidence of bid rigging activities which include cover pricing, where companies obtain a price from a competitor in the tender process which is not designed to win the contract but is intended to give the appearance of competition. The Competition Appeal Tribunal has fully endorsed the OFT's decision in its investigations and confirmed that cover pricing is anti-competitive and contravenes legislation. In some instances the OFT has also found evidence in the current investigation of compensation payments or 'bungs' being passed between competitors in exchange for a cover price. Evidence of bid rigging in thousands of tenders has been found with a combined estimated value approaching £3billion.

The investigation has focused in particular on the East Midlands, Yorkshire and Humberside areas and surrounding areas, although some bid rigging activities have also been found in other parts of England. The investigation focuses only on activities up to 31 December, 2006 and has not looked at any other potential anti-competitive practices within the construction industry. The term 'construction companies' used in this case refers to those companies that engage in general building work including construction of housing together with commercial and industrial construction, both in the public and the private sector. It includes new build work as well as repair, maintenance and improvement but does not include highway maintenance, civil engineering or other large infrastructure projects.

The OFT have previously stated that cartels in construction were a widespread problem and that they would be taking a hard line. They are willing to target and take action against companies that are defrauding the public sector and local authorities have a duty to help where possible.

There are likely to be further raids to add to the 57 companies investigated so far. Another 45 companies will receive notification shortly from the OFT stating that they too have been implicated in the probe. Some of these are expected to be well known names in the construction industry.

3. OFT offer of leniency

The OFT have made an offer of a reduced penalty to all those companies implicated in its current bid rigging cartel investigation that have not so far applied for leniency. Construction companies have been informed that, in view of the extent and the quality of the evidence obtained so far, no further applications for leniency in this investigation are being considered following this offer. Of the 57 companies that have been investigated, 37 have so far applied for leniency.

The OFT has emphasised that applications for leniency are still possible for any matters outside the scope of its current investigation, be they bid rigging activities outside England or in construction-related industries such as civil

engineering or highway maintenance. Leniency may also still be available in relation to particularly serious forms of bid rigging that may be subject to criminal enquiry or in relation to activities other than bid rigging.

Any business found to be part of a cartel can be fined up to 10% of its worldwide turnover.

4. Cartels and the Enterprise Act 2003

Domestic UK competition law is based on a regime, which came into force in March 2000. The Enterprise Act, which came into force in 2003, amended and strengthened that regime. This prohibits agreements between companies which restrict competition and secret arrangements (or cartels) which “fix” the market e.g. by collectively raising prices charged to consumers. The Enterprise Act criminalised anti-competitive activity in itself and, whereas the Competition Act regime is aimed primarily at companies (though it will catch sole traders), the cartel offence may be committed by any individual employee. Cartels are also prohibited under the Competition Act 1988 and Article 81 of the EC Treaty.

5. Organisations involved

The OFT declared at the time of the first news of possible cartel activity that the investigation was likely to last a full 12 months due to the scale and complexity of the work involved and this has proved the case. The original press releases by The OFT refer to investigations into Mowlem and Bluestone in March 2006. Fines have been issued to double glazing firms EWS, Thermoseal, Double Quick Supplyline and Ulmke Metals totalling £1.4 million. 13 roofing firms were also fined a total of £2.3 million – Anglo Asphalt, Asphaltic Contracts, Briggs Roofing & Cladding, Cambridge Asphalt, Coverite, Durable Contracts, Holme Asphalt, Makers UK, Pirie Group, Prater, Rio Asphalt & Paving, Rock Asphalt and WG Walker & Company.

The OFT remained tight lipped whilst the investigations were ongoing. In line with their policy, they are refusing to name any further organisations that have been investigated but do say that any organisations against whom they take action will be named. Such action could take the form of fines or court action. The OFT have said that the timescales for making such information public will depend on any action taken but it could potentially be up to a year if court proceedings are involved.

The investigation has now ceased and no new investigations are expected to start up.

The OFT regularly review the arrangements in place to stop those companies attempting to act against the law.

6. What Action Should The Local Authority Take?

Competition laws help local authority procurement teams to secure better deals and fairer treatment from suppliers of goods and services to the public sector. First the local authority needs to determine a strategy for dealing with the cartel - the best strategy will vary from matter to matter. Where the authority has not yet suffered loss, the issue of infringement could be raised in negotiations to put pressure on the company to offer a better deal. This might entail simply raising the issue of infringement or go so far as to threaten to involve the competition authorities or to go to Court. Of course, there must be genuine grounds for the argument, but used properly this can prove a flexible tool, which leaves intact the relationship between the parties.

The authority's procurement team - or legal department - should consider competition law on each occasion when signing or reviewing contracts and tenders. Consider any suspicions which colleagues may harbour as to the behaviour of certain companies and collate evidence of their activities (for instance by reviewing previous bids). Then assess the potential for bringing an action or complaint.

Authorities need to regularly review their lists of approved contractors and keep up to date with action taken by the OFT in terms of the organisation they take action against.

Finally, authorities may need to consider revising tender procedures and documentation e.g. ask for bids to be broken down into as much detail as possible so that it is possible to see where a bid departs from any rational estimate, and obtain a signed declaration of non-collusion by each bidder and make that declaration a term of the contract.

7. Comments

APSE would encourage all those who are, or think they are, victims of anti-competitive behaviour to take appropriate action, contacting the OFT where necessary. It is important that they do not let the perpetrators get away with criminal actions which deprive the public sector of resources.

The OFT press releases refer to the public sector but does not specifically note whether they have acquired evidence against firms with public sector contracts.

As noted above, local authority officers must remain vigilant when tendering, drawing up contracts and appointing contractors. They must be convinced of the credentials of those organisations they are working with and with the information they have based any decisions on when choosing who they are paying to complete works on their behalf.

The role of procurement in making efficiency savings has been highlighted by central government in a number of recent documents and the point has been made that local and central government should improve the capacity and capability of officers involved in procurement and contract management. Such action including reviewing relevant policies and procedures and investing in training will not rid the sector of malpractice but it will go some way to combat the likelihood of local authorities falling victim to it.

Previous APSE briefings 03/59 'Action against cartels prepared by Eversheds', 06-18 'OFT cartel busters unit investigation into Mowlem' and 06-41 'OFT report on waste competition' provide further information.

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