



Firms identified in OFT investigation

Key issues

Interserve, Keir, ROK, Galliford Try, Balfour Beatty and Connaught declare OFT investigations.

More than 150 construction firms have now been involved in investigations.

Specific division established within OFT

1. Introduction

The Office of Fair Trading (OFT) have published further details of the ongoing investigations into cartels in construction and have made organisational changes to aid the investigation.

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. More firms identified

The latest firms admitting they have been in discussions with the OFT as part of the bid-rigging investigation include Interserve, Keir, ROK, Galliford Try, Balfour Beatty and Connaught. It is expected that more large firms will announce they are under investigation over the coming weeks as the number of firms now contacted by the OFT has increased to 150 and 50 offices raided.

Interserve declared that 16 tenders made by the project services division are being looked at by the OFT relating to the period 2000 to 2005.

Keir also admitted being investigated. It admitted that 20 tenders, which it won 4, were being investigated. They were all submitted by its regional contracting business between 2000 and 2005.

ROK said that two of its recently acquired subsidiaries are under investigation, one of which was under investigation at the time of acquisition.

Galliford Try said that 17 tenders were under scrutiny. Again these were made between 2000 and 2005.

Balfour Beatty revealed that they had been contacted by OFT in February 2006 when they provided information and have continued to offer their full co-operation since.

In a statement, Connaught claimed they had been contacted by OFT in relation to a small number of tenders in one of its subsidiary companies dating back to 2000.

A number of high profile companies have already been identified as being under investigation. The OFT have noted previously that it had now ceased opening new investigations and that no new investigations are expected to start up. The breadth of the investigation is becoming more apparent as details emerge of which companies have been contacted by the OFT.

The OFT will write to those firms it believes have a case to answer by the end of the summer.

4. OFT organisational changes

OFT has established a division committed to looking at price-fixing amongst construction firms. Four investigators have moved from the cartel unit to work with legal teams who are already dedicated to the investigation so adding further resource to cope with the volume of work involved.

5. 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.

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 suggests that all members remain vigilant when embarking on contract talks asking appropriate question and keeping abreast of developments in this investigation.

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 recent announcements by the firms noted above and the fact that the number of firms involved in the investigations is increasing, appears to signal that there is more to be unearthed than was originally expected by OFT. They have allocated a lot of resource to this ongoing investigation

Previous APSE briefings 07/22 'OFT investigations', 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.

Two OFT press releases also provide information on the investigation - "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).

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