



Briefing 08/23 April 2008

# OFT publish statement of objections detailing alleged collusion by construction companies

## Key issues

OFT have published a 'statement of objections' report as part of investigation  
Formal allegations made of bid rigging activities  
Around 150 construction firms have now been involved in investigations over contracts worth an estimated £3billion.  
Industry officials looking to minimise impact of report

## 1. Introduction

The investigation by the Office of Fair Trading (OFT) into alleged collusion by construction companies has been ongoing since 2005. A 'Statement of Objections' has been issued formally alleging that construction firms have been engaged in bid rigging.

## 2. Firms identified

112 construction companies have been named with details of over 240 alleged infringements to competition. The OFT has said that the work involved includes housing, commercial and industrial construction in the private and public sector, including tenders for schools, universities and hospitals.

Some of the countries largest construction firms have been named such as Balfour Beatty Plc., Carillion Plc., Connaught Plc., Interserve Plc., Kier Group Plc., Rok Plc., Morgan Sindall Plc., Galliford Try Plc and Henry Boot Plc. A full list of all those named in the Statement of Objections is given in Appendix 1 below.

The scale of the investigation is one of the widest ever undertaken by the OFT but they were still unable to investigate every company against whom they have received allegations or evidence of collusion.

The OFT has received 37 leniency applications as the investigation has unfolded with another 40 firms admitting participation in some form of bid rigging following the offer of reduced penalties.

### **3. What form have the activities taken?**

Cover pricing arrangements have previously been found by the OFT and the Competition Appeal Tribunal to be illegal and in breach of the Competition Act 1998 due to the restrictions on competition that arise.

The OFT stated that a minority of the construction companies also entered into arrangements which involved an agreement where the successful tenderer would pay an agreed sum to an unsuccessful tenderer, a more serious form of bid rigging and known as a 'compensation payment'. These more serious forms of bid rigging are usually facilitated by false invoices noted the statement.

### **4. Next steps**

The 112 companies named would now have the chance to make written and oral representations to the OFT prior to it making a final decision concerning whether there have been infringements to competition law. They will also take a decision on the amount of any penalties which may be imposed on firms.

The statement of objections has been sent to the companies named and they must respond within 10 weeks. Under competition law, they could be fined up to 10% of their global turnover, although those that cooperate will receive a lower penalty.

The OFT stated that the maximum fines were unlikely to be imposed, but that penalties were likely to be large because of the size of many of the companies involved. They claim that anti-competitive practices could result in an increase in prices of around 10%. The evidence received by the OFT in the course of its investigation indicates that cover pricing was a widespread and endemic practice in the construction industry as a whole.

The OFT have also advised that their final decision on whether there has been a breach of competition law is not expected until next year.

The statement makes clear that no assumption should be made at this stage that there has been an infringement of competition law by any of the companies named.

John Fingleton, OFT Chief Executive, said: "Cartel activity of the type alleged today harms the economy by distorting competition and keeping prices artificially high.

"This investigation, together with the OFT's previous decisions in the roofing sector, will hopefully send out a strong message to the construction industry about the seriousness with which we view suspected anti-competitive behaviour. Businesses have no excuses for not knowing and abiding by the law."

## **5. Investigation**

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.

Although evidence of such activities exists it is expected that the OFT will not give rise to criminal prosecutions based on any evidence found in the investigation.

## **6. Industry approach**

There has been a call from some in the construction industry that the OFT and Office of Government Commerce (OGC) should put pressure on public sector clients to continue to work with companies implicated in the investigation without taking into consideration evidence from the investigation.

There is concern within the industry that with public sector work keeping some companies in the industry afloat at a time of commercial downturn, losing public sector contracts could lead to tough times for some leading companies.

Furthermore an argument is being made that if some companies were excluded from bidding for public sector work, the result would be a reduction in competition to the detriment of those commissioning work.

## **7. Comments**

APSE wishes to highlight some issues from the point of view of public sector clients to ensure a balanced view is put forward prior to the report being released.

APSE feel that there is a duty upon the OFT to put all relevant information into the public domain regarding this inquiry. We welcome the fact that those firms accused of collusion have been named but the scale of that collusion must also be published. Public sector clients have a duty to ensure they are spending council tax payer's money wisely and with reputable firms and they will be unable to do this without access to information from the investigation.

Whether the companies involved are guilty of serious misconduct or of a lesser misdemeanour, they should be exposed as being part of a process which resulted in clients making decisions based on evidence which did not reflect a true position when the tenders were received.

It is not the role of the OFT to tell public sector clients who they should and should not commission work from. Indeed The Information note to Local Authorities and other procuring entities regarding OFT Statement of Objections concerning alleged anti-competitive behaviour in the construction industry notes that 'the OFT must emphasise that it is a matter for individual procurers to consider what action, if any, they should take'. There have been calls from some quarters for the OFT to make it clear that contractors should not be dropped from tender lists as a result of this investigation. Such decisions are for councils alone to make and they will be making them on a number of factors - one of them being the bid submitted at tender which any client expects to be formulated free of collusion and inappropriate activity.

Those companies involved in illegal practices have broken the law of their own accord and should not rely on the OFT or anyone else to provide a helping hand.

This investigation has been going on since 2005, involves a large number of construction companies and has led the OFT to dedicate specific resources to the inquiry. It is unequivocal that evidence exists to throw doubt upon the practices of many companies working for the public sector. That such information will not be taken account of when public sector customers make decisions about spending significant amounts of public money for which they are accountable, is unrealistic.

Individual employees involved in collusion can not be allowed to hide behind the companies employing them. It is incumbent upon the companies to rid themselves of any individuals acting outside of established procedures and they should be seen to be taking action to ensure this type of activity does not happen again. Private sector construction companies do have a role to play in working with the public sector to build and maintain the infrastructure of the country but they must operate, and be seen to operate, by the rules.

The OFT and OGC should be under no illusion that this investigation has suddenly made some within the construction industry change their spots. Even though this investigation has been high profile and involved some of the biggest names in the industry, the OFT still had to threaten that it may launch criminal proceedings if directors of some firms did not co-operate with the OFT. Future activity by the OFT can not be based on an assumption that the industry will be a wholly law-abiding one as a result of this investigation. Any trust which has been lost between clients and companies must be built up again and that may take some time. APSE has previously stated some steps councils should take if they fear collusion has taken place in order to protect the public purse and it would encourage them to be contact the OFT at the merest hint of a doubt. It is only through vigilance by the authorities, clients and companies that these practices will be consigned to the past.

APSE recommends a series of points are addressed as a result of the investigation as follows:-

- the OFT to investigate a number of tenders/contracts each year as part of a programme of checks to ensure companies do their best to stick to the law
- all companies submitting tenders to public sector clients to sign an agreement stating they have not been investigated by the OFT as part of this or any other investigation or stating the extent to which they were investigated. This will ensure those responsible for spending public funds do so from an informed standpoint
- any company named in the report to make a public statement declaring the actions they are tackling to tackle the points made in the OFT report
- industry bodies to work with the OFT and public clients to establish procedures to bring inappropriate practices into the public domain

The outcomes of this investigation should be simply enough – where there is sufficient evidence the OFT must put in place a fine which is large enough to encourage companies to rid themselves of practices which lead to collusion or cover-bidding; the OFT must publish adequate information to ensure public sector clients are able to protect the public's money; and public sector

clients should bear in mind the outcomes of the investigation when appointing contractors without pressure to keep any company on a tender list.

It is incumbent upon the OFT to show where it stands both in terms of this investigation and as the enforcement body for competition law. Companies contemplating collusion should be in no doubt that the OFT will use their powers to the full if they uncover such activity and the example should be set at an appropriate time as part of this investigation.

## **8. Previous relevant briefings by APSE**

07/47 'Making competition work for you – a guide for public sector procurers of construction'

07/42 'Firms identified in OFT investigation'

07/22 'OFT details investigations into construction cartel'

06-41 'OFT report on waste competition'

06-18 'OFT cartel busters unit investigation into Mowlem'

03/59 'Action against cartels prepared by Eversheds'

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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## **Appendix 1**

The firms listed by the OFT are:

- A. H. Willis & Sons
- ARG (Mansfield)
- Ackroyd & Abbott together with its subsidiary Ackroyd & Abbott Construction
- Adam Eastwood & Sons together with its controlling party the Sir John Eastwood Foundation
- Admiral Construction together with (for alleged infringements from 31 October 2003) its ultimate parent company A C Holdings
- Adonis Construction
- Allenbuild and Bullock Construction together with their ultimate parent company Renew Holdings plc
- Apollo Property Services Group formerly known as Apollo London together with its former ultimate parent company Apollo Holdco formerly known as Apollo Group Holdings
- Arthur M. Griffiths & Sons
- B & A Construction (Leicester)

- Baggaley & Jenkins
- Balfour Beatty Construction, Balfour Beatty Refurbishment, and Balfour Beatty Group (for alleged infringements from 2000 onwards) and Mansell Construction Services (for alleged infringements from 19 December 2003), together with their current ultimate parent company Balfour Beatty plc. For alleged infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc
- Ballast Nedam N.V. as the ultimate parent company of its dissolved subsidiary Ballast plc
- Beaufort Construction (S-in-A) together with its ultimate parent company Beaufort Holdings U.K.
- Bodill & Sons (Contractors)
- Bowmer & Kirkland together with its subsidiaries B & K Building Services and B & K Property Services
- Bramall Construction and Frank Haslam Milan & Company together with their current ultimate parent company Keepmoat , formerly known as Keepmoat plc
- C. J. Ellmore & Company
- Caddick Construction together with its ultimate parent company Caddick Group plc
- Carillion
- Chase Norton Construction together with its ultimate parent company Chase Midland plc
- Clegg Construction together with its ultimate parent company Clegg Group formerly known as D E Clegg Holdings
- Connaught Partnerships together with its ultimate parent company Connaught plc
- Crown Point Maintenance Group as the ultimate parent company of its dissolved subsidiary Greenwood Building Contractors (Mansfield) , for Greenwood's alleged infringements after 11 June 2002
- Davlyn Construction
- Derwent Valley Construction together with its ultimate parent company Chevin Holdings
- Dukeries Building Company together with its ultimate parent company Gavco 159
- Durkan Pudelek together with its ultimate parent company Durkan Holdings
- E. G. Carter & Company
- E. Manton
- E. Taylor & Sons (Southwell) , trading as Carmalor Construction
- F. Parkinson together with its ultimate parent company Mowbray Holdings
- Francis Construction together with its ultimate parent company Barrett Estates Services
- Frank Galliers together with its former ultimate parent company Frank Galliers Holdings
- Frudd Construction
- GAJ Construction together with its current ultimate parent company GAJ (Holdings)
- G Carter Construction
- G. F. Tomlinson Building together with its ultimate parent company G. F. Tomlinson Group
- G G Middleton and Sons
- G. & J. Seddon together with its ultimate parent company Seddon Group

- GMI Construction Group plc together with (for alleged infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings plc
- Geo Houlton & Sons together with its ultimate parent company Geo Houlton & Sons (Holdings)
- George Law together with its ultimate parent company Bosworth & Wakeford
- Greswolde Construction together with its ultimate parent company Mantisson
- Hall Construction Group
- Harlow & Milner
- Harold Adkin & Sons (Sutton-In-Ashfield)
- Harper Group Construction and J. Harper & Sons (Leominster) together with their ultimate parent company Harper Group plc
- Haymills (Contractors) together with (for alleged infringements prior to 26 May 2004) its former ultimate parent company Corringway Conclusions plc and (for alleged infringements after 26 May 2004) its current ultimate parent company Haymills Group
- Henry Boot Construction (UK) together with its ultimate parent company Henry Boot plc
- Herbert Baggaley Construction together with its ultimate parent company Baggaley Group
- Hill Bros. (Nottingham)
- Hobson & Porter
- Holroyd Construction together with (for alleged infringements prior to 30 March 2005) its former ultimate parent company Holderness Investments and (for alleged infringements after 30 March 2005) its current ultimate parent company Holroyd Construction Group
- Interclass Public Company together with its ultimate parent company Interclass Holdings
- Interserve Project Services together with its ultimate parent company Interserve plc
- Irwins and Jack Lunn (Construction) together with their ultimate parent company Jack Lunn (Holdings)
- J. Guest
- J H Hallam (Contracts) together with its ultimate parent company J H Hallam (R & J)
- J. J. & A. R. Jackson
- J. J. McGinley, together with its former ultimate parent company McGinley Holdings
- John Cawley
- John Sisk & Son together with its ultimate parent company Sicon
- K. J. Bryan (Builders)
- Kier Regional together with its ultimate parent company Kier Group plc
- Lemmeleg together with its ultimate parent company Rok plc
- Lindum Construction Co. and Lindum Homes together with their ultimate parent company Lindum Group
- Linford Group together with its ultimate parent company F. & E. V. Linford
- Loach Construction & Development
- Lotus Construction
- Milward Construction (Belper)
- Morgan Ashurt plc formerly known as Bluestone Plc together with its ultimate parent company Morgan Sindall plc
- North Midland Construction plc

- P D H Developments (formerly trading as G. Hurst & Sons (Contractors) ) together with its ultimate parent company G. Hurst & Sons
- P. Casey & Co. together with its current ultimate parent company The Casey Group
- P. Waller
- Pearce Construction (Midlands) together with its former ultimate parent company Crest Nicholson plc
- Peter Baines
- Phoenix Contracts (Leicester)
- Piper Construction Midlands together with its ultimate parent company Piper Securities Holdings
- Propensity Group together with its wholly owned subsidiary companies, ISG Jackson , ISG Regions formerly known as ISG Totty , ISG Totty Building and Propensity
- Quarmbly Construction Company together with its ultimate parent company St James Securities Holdings
- Quarmbly Construction (Special Projects) together with its ultimate parent company Justgrade
- R Durtnell & Sons together with its ultimate parent company R Durtnell & Sons (Holdings)
- R. G. Carter , R. G. Carter Building and R. G. Carter Construction together with their current ultimate parent company R. G. Carter Holdings
- Richardson Projects
- Robert Bruce Construction
- Robert Woodhead together with its ultimate parent company Robert Woodhead Holdings
- Robinson & Sawdon
- Shaylor Construction
- Simons Construction and Wrights Construction (Lincoln) together with their ultimate parent company Simons Group
- Sol Construction together with its ultimate parent company Barkbury
- Speller-Metcalf
- Spicers (Builders)
- Stainforth Construction
- Strata Construction (formerly trading as Weaver)
- T. & C. Williams (Builders)
- T. Denman & Sons (Melton Mowbray)
- Thomas Fish & Sons together with its ultimate parent company Fish Holdings
- Thomas Long & Sons together with its ultimate parent company Radford Holdings
- Thomas Vale Construction Plc together with its ultimate parent company Thomas Vale Holdings
- Thorndyke
- Try Accord and Galliford Try Construction together with their ultimate parent company Galliford Try plc
- W. R. Bloodworth & Sons
- Wiggett Bros & Co
- Wildgoose Construction
- William Sapcote and Sons together with its ultimate parent company Sapcote Holdings
- William Woodsend

- Willmott Dixon Construction together with its ultimate parent company Willmott Dixon
- Wright (Hull) together with its ultimate parent company T. Wright & Son (Holdings)
- Wygar Construction Co together with its ultimate parent company Wygar (Holdings)
- York House Construction