

Rebuilding trust

Amid alleged anti-competitive practices among construction firms, APSE Chief Executive Paul O'Brien looks at what local authorities can do to ensure public purse protection...

The investigation of alleged 'construction cartels' has sent shockwaves through the industry and left those responsible for letting public building sector contracts anxious about the potential abuse of taxpayers' money it entails.

The Office of Fair Trading (OFT) is investigating 112 construction companies – including some of the largest in the UK – that are suspected of participating in anti-competitive practices known as 'bid-rigging' and 'cover pricing' that artificially inflate the price of contracts. OFT describes the scale of the problem in the industry as 'endemic' and says its published list of potential participants is not 'exhaustive'.

In some cases, the investigation is looking into firms colluding when bidding for contracts and striking deals whereby the successful tenderer pays an agreed sum to an unsuccessful tenderer. OFT has not put a figure on possible price inflation due to cartels, but the government watchdog has suggested that alleged breaches of the Competition Act 1998 and Article 81 of the EU Treaty may have added an estimated 10% to the costs of £4bn worth of contracts to build schools, housing, hospitals and universities. When OFT launched its formal Statement of Objections in April, Chief Executive John Fingleton commented: "Cartel activity of the type alleged today harms the economy by distorting competition and keeping prices artificially high."

The scale of the investigation is such that it has taken OFT three years to get to this stage and its final findings are not expected until next year. The companies being investigated had until the end of June to respond to OFT's claims. It must be stressed that no-one has been definitively found to be breaking competition law as yet; but the situation does not appear promising for many of the companies involved. The OFT has almost 2,000 pages of evidence and it seems likely that the final report will be highly critical. Penalties could involve fines of up to 10% of a firm's global profits.

Such is the evidence amassed by the OFT that 37 companies have applied for leniency and over 40 have admitted participation in some bid-rigging activities. Companies that have applied to the OFT for leniency are under an obligation to put their house in order as part of their agreement OFT, which says they are therefore

'unlikely to be now engaging in cover pricing or other forms of bid rigging'.

This wide-scale investigation of construction cartels is a serious situation that local authorities and other public sector bodies that have let multi-million pound contracts are monitoring closely. OFT produced an 'Information Note to Local Authorities and Other Procuring Bodies' setting out how they should approach the situation back in April. According to the OFT: 'It is a matter for individual procurers to consider what action, if any, they should take.' Council procurement professionals and lawyers will be looking at what can be done now and in the future to protect the public purse. There are a number of complex issues to examine.

In the immediate aftermath of the OFT's announcement of the investigation, each council will have had to ascertain its own position to see if any of their contracts were involved. Local authorities who suspected they had been subject to cartel activity will obviously have sought legal advice and contacted the OFT.

Most local authority contracts include breach of corruption type clauses, the wording of which varies, and this indicates what action might be possible. Councils should regularly review their procurement criteria and list of 'approved contractors' as a matter of course, and this investigation will be another issue to consider when doing so.

Once the results of the investigation are available, local authorities will have to consider whether civil proceedings are appropriate to recover any possible losses that they have incurred as a result of the unlawful activity. Whilst it might be considered that there is nothing else to do until the final pronouncement by the OFT, local government should give this matter thought in the meantime and consider the potential consequences. If there is action to be taken, then it will need to be taken swiftly, making it important for the views of members and others to have been canvassed in advance.

Councils will be understandably wary when letting contracts and need be careful in the design of procurement processes to ensure sufficient credibility of bidders. The Office of Government Commerce publication 'Making Competition Work for You' outlines action to be considered by local authorities in their efforts to protect the public purse. This includes making sure non-collusion clauses



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are used and reviewing their tender evaluation criteria regularly. They can also: avoid obligatory bids as a criterion of staying on approved lists but seek justification of failure to bid, benchmark costs against other procurers, and keep notes of discussions with bidders and systematically scrutinise them for suspicious patterns.

The publication also highlights 10 signs to look out for in suspicious bidding patterns. These signs are: bids received at the same time or containing similar working, less detail than expected, identical prices, likely bidder failing to submit a bid, lowest bidder not taking the contract, bids that are dropped when a new bidder enters the competition, successful bidder later subcontracting to a supplier that also bid, last minute changes, suspiciously high bids, and a bidder betraying knowledge of discussions with others.

The entire public sector will be looking at what can be done by the OFT, councils and the industry itself to protect public funds in future.

While the names of the firms have been released in the OFT report, the scale of their alleged involvement has not. APSE believes that in the future comprehensive information should be made available. We suggest the OFT should investigate a number of tenders/contracts each year as part of a programme to ensure companies do their best to act lawfully.

If companies submitting tenders to public sector clients signed agreements stating that they have not been investigated by OFT, this would eliminate unnecessary anxiety among council procurers. It would also be helpful if companies that are subject to allegations of cartel activity stated the extent to which they have been

investigated and any company named in the report made a public statement declaring what actions they are taking to tackle points made in the OFT document.

Local councils will continue to work in partnership with construction companies and the trust between them must remain if relations are to be fruitful. APSE welcomes the industry's own 'Rebuilding Trust' campaign as a reflection of positive action by construction firms to maintain good working relations between companies and their clients. The campaign, designed to restore faith in the construction sector, aims to show that the whole of the industry is taking action against anti-competitive practices and many of the firms under investigation have signed up.

It is essential that steps are taken collectively to stop abuses of the public purse. Only by industry bodies working closely with the OFT and public bodies can procedures be established to make sure practices are watertight and council taxpayers' money is spent wisely and well.



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