



**Briefing14-51**

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## **Bid rigging and the public sector**

**To: All Chief Executives, Main Contacts and APSE Contacts**

### **Key Issues**

- This briefing was kindly prepared with Walker Morris LLP
- It contains details about a list of 'warning signs' which public sector procurement managers should be alert to in order to avoid falling victim to bid rigging situations.
- APSE briefings have previously alerted APSE members to this issue exploring enforcement action undertaken by the Competition and Markets Authority predecessor organisation The Office of Fair Trading

### **1. Introduction**

The Competition & Markets Authority (CMA) has published a list of warning signs to encourage the public sector to be alert to bid rigging when buying in works, goods and services.

#### **What is bid rigging?**

Bid rigging, or collusive tendering, is when a supplier agrees with another to limit competition in the procurement process. The agreement need not be formal or in writing; it could be an unwritten understanding.

The CMA guidance gives the following examples:

- Bid rotation – suppliers agree to take it in turns to submit the lowest bid
- Bid suppression – suppliers agree not to bid, or to withdraw a bid
- Cover pricing – where suppliers arrange for one or more of them to submit an artificially high bid, distorting the procurer's impression of the competitive process.

### **Warning signs**

The Guidance lists the following warning signs for procurers to be aware of:

- Bids received at the same time which contain the same or unusual wording
- Identically priced bids
- Bids containing less detail than would ordinarily be expected
- The likely bidder does not submit a tender
- The lowest bidder refuses the contract
- Bids that drop on the entry of a new or infrequent bidder
- The successful bidder subsequently subcontracts the work to a supplier that submitted a higher bid
- Expected discounts subsequently vanish or other last minute changes
- Suspiciously high bids without logical costs differences
- A bidder reveals that it has had discussions with others or knows of other bids.

It is not long since the CMA's predecessor, the Office of Fair Trading (the OFT), took enforcement action against construction companies for bid rigging. In 2009, following its largest ever investigation, the OFT fined 103 companies a total of £129.2 million for cover pricing including in respect of public sector tenders, in contravention of Chapter I of the Competition Act 1998 (although some fines were reduced on appeal).

The CMA's Guidance suggests that the issue has not gone away. The consequence for the public sector is that it does not get the best deal and the taxpayer loses money. Public bodies that are the victim of bid rigging may be able to bring a damages claim or use concerns to strengthen their negotiating hand and secure a better deal. In a bid rigging case, the loss will be the difference between the price actually paid to the contractor (in a market distorted by the illegal bid rigging cartel) and the hypothetical lower price that would have been paid if the cartel participants had been competing against each other as they should have been. It is often said that cartels result in a 10 per cent to 20 per cent over-charge.

Procurement law and practice and the need to ensure a fair, transparent and competitive environment are key facets of confidence in the public sector as well as the securing of best value. As well as training staff on how to be alert to the risks of bid rigging, it may be worth conducting a sample review of contracts awarded in the last few years to see if there is any cause for concern or any patterns in bid submissions between similar groups of bidders.

For suppliers, regular and effective training of staff engaged in all aspects of tendering is business critical as failure to adhere to the rules can impact both future business opportunities and in the worst cases may lead to criminal sanctions.

### **Further advice and assistance**

Walker Morris are able to provide advice and assistance on all aspects of procurement and competition compliance, including delivering focused training to key staff and conducting compliance audits. This will be equally valuable to buyers and suppliers alike.

Should you wish to receive further information or advice, please contact the authors of this briefing Trudy Feaster-Gee, Partner (Barrister)

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***This briefing was prepared with the kind assistance of Walker Morris LLP***

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