

UPDATE - OFFICE OF FAIR TRADING FINES CONSTRUCTION INDUSTRY FOR COVER-PRICING

Headline compliance points

This note looks at the recent OFT decision to impose fines on a large number of construction firms for bid-rigging and cover pricing. When available the full text of the decision will provide detail of the precise compliance issues - in the meantime the headline points can be distilled as follows.

- Do not discuss details of tenders, or exchange commercial information, with competitors.
- Take great care when entering into arrangements such as joint ventures or consortium bids with competitors.
- Implement a clear and effective competition law compliance programme.

The fines

The OFT has concluded its investigation into cover pricing in the construction industry and imposed fines totalling £129.5 million on 103 firms. The investigation has now been running for over four years. This final stage in the process follows the issuing of statements of objections in April 2008 against 112 construction companies alleging participation in bid-rigging mostly, and more specifically, in the form of cover pricing.

The level of the fines, although high in aggregate, is not actually that large. The OFT has the power to impose fines of up to 10 per cent of the annual turnover of a firm including the corporate group to which it belongs. However, the average level of the fine per company is £1.26 million which amounts to an average of only 1.14 per cent of turnover and therefore is well below the 10 per cent threshold. There is speculation that the OFT may have been persuaded to reduce fines given the current economic climate and its disproportionate impact on the construction industry but, on a strict interpretation of the legal rules governing the setting of fines, the OFT would have only limited scope to factor in this consideration. The core evidence used by the OFT was an analysis of 199 tenders for a variety of projects in both the public and the private sectors between 2000 and 2006. In relation to nine of the recipients of statements of

objection the OFT imposed no fine as, on further investigation, it found that it had insufficient evidence to proceed.

Leniency

The OFT's leniency programme was used extensively during this process and so a large number of the construction firms involved received reductions on the level of the fine that would otherwise have been imposed to reflect differing levels of cooperation. 33 entities benefited from reductions of between 35 and 65 per cent, a further 41 received reductions of up to 25 per cent, and 12 others received small reductions. Without the reductions the total level of the fines would have been £64.9 million higher (giving a total figure of £194.4 million).



Cover pricing and competition code of conduct

Cover pricing occurs where contractors enter a bid but submit a price they know is too high and consequently they are very unlikely to win the contract. The effect of cover pricing can be to restrict the number of genuine tenders and therefore to reduce competition. The full text of the decision is yet to be published but it is clear that the OFT has concluded, whatever the arguments put in defence, that cover-pricing is a clear infringement of the competition rules.

The decision will, and already has had, wide ranging repercussions within the construction industry. The nature of the infringements should cause all senior construction executives pause for thought as bid-rigging and some other anti-competitive behaviour with and between competitors can attract criminal sanctions under the Enterprise Act 2002. It is notable that the UK Contractors Group and National Federation of Builders has already responded to the investigation by introducing a new code of conduct to help ensure future compliance with the competition rules. In particular the code of conduct will help firms implement competition compliance programmes.

Public procurement

A great number of the tenders investigated in relation to this fining decision were public tenders and therefore subject to the EC procurement rules as implemented in the UK as the Public Procurement Regulations 2006. There has been great concern within the industry that the OFT's infringement decision could be used as a ground for exclusion from future public tenders. It is indeed the case that Regulation 23 of the

regulations could be interpreted to allow the exclusion of those involved in an illegal anti-competitive practice and evidenced by a decision from the competition authorities.

To mitigate the potential impact that use of the decision as a ground for exclusion would have on a large swathe of the UK construction industry the OFT, in conjunction with the Office of Government Commerce, has issued a note for public bodies. The main thrust of this note is that although the investigation covered many firms it by no means covered the whole industry and therefore does not cover all the infringements that are no doubt out there. On this basis the note concludes by recommending that firms named in the decision should not be excluded from future tenders.

This is an interesting approach and there must be some doubt as to whether of itself this note can have any real effect. More likely the practical reality will be that, to have a full and competitive tender process, any public authority in the UK will want to invite the widest possible range of tenderers and therefore would not wish to use the decision as a ground for exclusion. As the note goes on to point out public bodies themselves can take steps to ensure that they are not subject to bid-rigging and cover-pricing.

Martineau's competition law, public procurement and state aid team

Martineau provides a full range of competition law advice including cartel advice both to alleged participants and to those damaged by such activities. We have extensive experience of dealing with the competition authorities during the investigative procedures leading to a decision, ensuring that clients' rights of

defence are respected, advising on the possible mitigation of fines and leniency applications. We also advise on the associated legal issues raised by cartels such as compliance audits, compliance training and assisting individuals implicated in cartel behaviour. In relation to public procurement Martineau advises a wide range of public bodies on the operation of public tender processes and private suppliers on participation in such tenders.



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