

OFT Investigation of Construction Companies: What it could mean for you

As you may have read in the press, the Office of Fair Trading (OFT) has recently alleged publicly that 112 construction companies are under investigation for illegal cartel activity.

If your organisation is reviewing or inviting tenders from construction companies, it is quite possible that one of those tenderers may be the subject of the OFT's investigation. In this article, we outline the nature of the OFT's investigation and what it could mean for you.

What is the investigation about?

The OFT has alleged that the construction companies engaged in anti-competitive bid rigging activities, and in particular cover pricing, in relation to tenders for work in the public and private sectors, such as building schools, universities and hospitals.

What is cover pricing?

Cover pricing is where, as part of a tender process, a bidder illegally colludes with a competitor to offer a tender price which is intended to be too high to win the contract. The person requiring the work, for example a local council or residential social landlord or other customer, knows nothing of the conversations between bidders and continues to believe the tender is a fair competition, so creating the possibility of having to pay excessive prices for the work.

Part of the OFT's case is that some of the construction companies have agreed that an unsuccessful tenderer could, using false invoices, claim agreed compensation from the successful tenderer. If the OFT finds the construction companies have acted in breach of competition law, they are likely to face substantial fines of up to 10% of their worldwide group turnover.

What does all this mean for your tender competitions?

The nature of the OFT's investigation means that it focuses on specific (and historic) tenders. The investigation that triggered the current announcement was sparked by a complaint to the OFT made in 2004.

Past tenders:- If one of your past tenders is the subject of the OFT's investigation and the OFT proceeds to find that it has been tainted by the bid-rigging, you will be entitled to treat the tender as null and void and claim damages from the offending construction company for the excess amount you paid. The best course of action is to wait for the outcome of the OFT investigation. You could also ask the OFT to investigate your past tenders if you suspect collusion may have occurred.

Current and future tenders:- All the companies that are the subject of the current investigation will have been advised to cease all anti-competitive conduct in relation to future tenders.

Thirty seven companies have made leniency application and a further 40 have admitted participation as part of a plea bargaining exercise. All of those companies will have given express commitments to the OFT to refrain from cover pricing in the future, in exchange for a reduction in their fines. In that respect, a tender from a company under investigation is perhaps safer than one which is not! Any company under investigation which flouts the law now would be foolhardy indeed, since that would be an aggravating factor that would further increase any fine imposed by the OFT.

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Is there anything you should do now?

Since the Competition Act was introduced in 1998, it has been common practice for tenderers to be required to make a declaration that their bids have not been made in collusion with competitors.

If your tender includes a requirement for such a declaration, as it probably does, you will have a good level of protection against the outcome of any breach of those rules by one of your tenderers. You would be able to claim back the excess you paid in damages.

If, however, you are concerned about the possibility of collusion and wish to obtain an even greater level of comfort from the construction companies in question, you may like to have the wording of the declaration you have received checked to ensure its adequacy and ask for a further confirmation or declaration confirming, in the light of the OFT's announcement, that the bid submitted is compliant with the law.

In addition, you could ask the tendering company to provide you with an indemnity against any loss you may incur arising from a breach of the declaration. For the sake of fairness under procurement law, you would have to ask for a similar further declaration and indemnity from all participating tenderers.

If you would like advice on documents you have received as part of your tender process or further information in relation to bid rigging activity, please do not hesitate to contact Jenny Scott-Russell or Neil Morgan. We advise our clients in relation to all aspects procurement law, so if you require assistance on that part of your process, please contact Richard Tinham or Andrea Squires. All contact details on these partners can be found at the end of this document.

April 2008

This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.