



Construction Companies Accused of Anti-Competitive Behaviour

On 17 April 2008 the Office of Fair Trading (“OFT”) announced that it had issued a Statement of Objections to 112 construction companies alleged to have engaged in bid rigging activities.

The construction companies involved carry out commercial and industrial construction in the public and private sectors as well as general building work such as housing. A full list of the relevant companies is set out in the OFT’s press release (see link below).

The investigations carried out by the OFT have, for reasons of practicality, focused on 240 alleged infringements despite apparently having received evidence of cover pricing implicating many more companies on thousands of tender processes.

It has been estimated that this anti-competitive behaviour has pushed up public sector costs by 10 per cent across a public sector construction budget of £40 billion a year.

Bid rigging activities

The two main allegations of anti-competitive behaviour are that the companies engaged in cover pricing and compensation payments.

- Cover pricing is where the bidders in a tender process collude with each other so that one or more of them submit an unrealistically expensive bid that they know has no chance of winning. This gives the impression of genuine competition where none exists and can result in the winning bid being unreasonably high.
- Compensation payments are where the bidders agree that whichever company is successful will make payments to the other unsuccessful bidders. These payments are usually facilitated by false invoices being passed to the client.

Potential consequences

The OFT can impose fines of up to 10% of worldwide turnover and individuals can be prosecuted and imprisoned for up to five years for bid rigging and other forms of anti-competitive behaviour.

In addition to the OFT’s possible actions, any construction company that has entered into contract with a public sector body is almost certainly going to be subject to various terms within that contract which deal with anti-competitive behaviour. The local authorities involved will undoubtedly be considering their legal options.

Another effect of this news is that the construction companies listed in the Statement of Objections may find themselves disqualified from bidding for future public sector work. At the very least, it is likely to make it more difficult for them to win contracts. This will depend on the approach taken by the individual procuring body.

In relation to future procurement exercises, the OFT have referred local authorities to the guide for public sector procurers of construction which it published in conjunction with the Office of Government Commerce and which includes a section on mitigating the risks of anti-competitive behaviour (see link below).

Construction companies' response

Following the OFT's press release several of the named construction companies have issued statements. Balfour Beatty and Carillion have both stated that they are cooperating fully with the OFT, and in return they have been granted leniency over any possible future fines.

In a twist to the story, counter allegations have been made that local authorities colluded with the construction companies. In an article published in The Times on 18 April 2008, T. Denman & Sons (Melton Mowbray) Limited is reported to have claimed that "clients (including those in the public sector) have been known to specifically request a cover price where their initial inquiries had produced insufficient response, in their own attempt to show competition".

It has also been pointed out that cover pricing was fully legal, and a standard feature of the market place, until 2000 when it was made illegal.

Moving forward

The OFT have been at pains to make clear that no assumptions should be made at this stage as to whether any infringements have occurred and that all the construction companies involved now have the opportunity to respond to the formal allegations and evidence set out in the Statement of Objections. The OFT will then make a final decision as to whether competition law has been breached, and if so the appropriate level of penalties to be applied.

However it should be noted that 37 of the named companies made leniency applications to the OFT, and following an offer of a reduced financial penalty over forty further companies admitted participating in some bid rigging activities.

Despite all of the comments above and the undoubted strength of feeling generated by the OFT's press release, many commentators have noted that with so many projects in the pipeline that are fundamental to the Government's programme, such as schools, hospitals and railways, it would be impractical to blacklist 112 of the leading construction companies in the UK. In addition, of course, we have the backdrop of the London Olympics and the estimated £5.2 billion of development work needed over the next few years.

Many of our local authority clients have expressed concern over the OFT's announcements and have wanted to discuss their position and what the possible future consequences could be for them, their on-going projects and their future procurement exercises. If you would like to discuss your situation further with one of our lawyers, please do not hesitate to call us.

Links

The OFT press release can be viewed at:
<http://www.of.gov.uk/news/press/2008/52-08>

An OFT information note to Local Authorities can be viewed at:
http://www.of.gov.uk/shared_of/business_leaflets/general/Information-Note.pdf

The guide for public sector procurers of construction can be viewed at:
<http://www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf>

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