



Office of Fair Trading investigation into the construction industry in England

On Thursday 17 April 2008 the Office of Fair Trading (OFT) issued a press release in relation to its ongoing investigation of 'bid rigging' in the construction industry in England.

OFT announcement

The OFT announced that it had issued a Statement of Objections (SO) to 112 firms in the construction sector in England, alleging that they have engaged in 'bid rigging', and in particular 'cover pricing'.

The OFT described cover pricing as **"a situation where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract. The tendering authority [...] is not made aware of the contacts between bidders, leaving it with a false impression of the level of competition and this may result in it paying inflated prices"**.

The OFT also commented that: **"Cover pricing arrangements have previously been found by the OFT and the Competition Appeal Tribunal to be illegal and in breach of the Competition Act 1998 due to the restrictions on competition that arise"**.

Finally, the OFT added: **"the SO formally alleges that a minority of the construction companies have variously entered into one or more arrangements whereby it was agreed that the successful tenderer would pay an agreed sum of money to the unsuccessful tenderer (known as a 'compensation payment'). These more serious forms of bid rigging are usually facilitated by false invoices"**.

Comment – legal implications

'Collusive tendering' is a form of anti-competitive agreement, prohibited by section 2 of the Competition Act 1998 (the Act). Under section 36 of the Act, the OFT has power to fine businesses that infringe this law up to 10% of annual turnover.

The issue by the OFT of an SO is an important milestone in its investigation process. It is **not** a decision that finds there has been an infringement, but a detailed document that sets out the OFT's case for making such a decision. The "SO" is issued once the OFT has collated and reviewed evidence that allows it to allege that an infringement has occurred. It must contain (a) the facts on which the OFT relies, (b) the objections raised by the OFT, (c) the action that the OFT proposes, and (d) its reasons for the proposed action.

The OFT stresses in its press release that: **“No assumption should be made at this stage that there has been an infringement of competition law by any of the companies named in the SO”**. This is because parties that receive an SO have an opportunity to make written and oral representations to the OFT on the matters it sets out, before the OFT can finalise any infringement decision. Nevertheless, the OFT can only issue an SO where it proposes to make an infringement decision, and - unless there are clear and strong grounds - it may be difficult to persuade it to do otherwise.

Nevertheless, if the OFT does issue an infringement decision in this case, the recipients will in normal circumstances be able to appeal it to the Competition Appeal Tribunal (CAT).

If the OFT issues an infringement decision, then under section 47A of the Act third parties that suffered loss as a result of the infringement may be able to claim damages before the CAT – relying on the OFT’s decision as proof of the infringement. However, no such claim can be brought until any appeal against the OFT’s decision has been determined.

Although there is no suggestion that it is relevant in the context of the OFT’s investigation, it is a crime under section 188 Enterprise Act 2002 for individuals dishonestly to engage in certain “bid-rigging arrangements” between at least two enterprises. The maximum penalty on conviction of an individual is five years’ imprisonment and/or an unlimited fine.

For advice on these issues please contact the Morgan Cole competition law team:

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Comment – leniency

In order to encourage businesses to come forward with information about possible cartel infringements of competition law, the OFT operates a ‘leniency policy’. The policy enables businesses that co-operate with the OFT to benefit from immunity to, or a significant reduction in, the fine that the OFT may impose for the infringement. In this case, the OFT received 37 applications for leniency.

To obtain lenient treatment, an applicant must satisfy several conditions, including providing the OFT with information, documents and evidence regarding the cartel activity. This can give the OFT sufficient information to start new investigations into separate arrangements that involve different parties. This occurred in the OFT’s series of flat roofing cases, where an investigation in the West Midlands was followed by separate investigations in the North East and in Scotland.

It is possible that the OFT’s current investigation could lead to others, in the same way. Indeed, the OFT said that it **“received evidence of cover pricing implicating many more companies on thousands of tender processes, but has focused its investigation on approximately 240 alleged infringements which are being pursued in the SO”**.