

Information note to procuring entities in the public and private sectors regarding the OFT's decision on bid rigging in the construction industry

22 September 2009

This information note has been prepared in conjunction with the OFT's press release of 22 September 2009 announcing its decision (the Decision) that 103 construction companies (the Parties) have infringed competition law through their involvement in bid rigging activities, in particular cover pricing.

Introduction

This note sets out the OFT's views on steps that procurers may be considering as a consequence of the OFT's Decision: specifically, the exclusion of the Parties from future tenders. This note has been prepared following consultation with the Office of Government Commerce (OGC).

It is, however, a matter for individual procurers to decide what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

Background

The findings in the OFT's Decision relate to the conduct of the 103 Parties named in the OFT's press release. However, the OFT's investigation suggests that cover pricing was a widespread and endemic practice in the construction industry. Indeed, the OFT uncovered evidence of cover pricing in over 4000 tenders involving over 1000 companies but had to focus its investigation on a limited number of companies and instances where the available evidence was strongest, in order to make best use of its resources and conclude its investigation within a reasonable timeframe. The OFT could not, therefore, pursue every firm suspected of involvement in cover pricing. Moreover, the endemic nature of the practice within the industry suggests that many other companies are likely to have been involved in bid rigging, even though such activity remained undetected. For this reason, it cannot be assumed that the Parties are the only companies that may have engaged in cover pricing.

Exclusion of the Parties from bidding for future tenders

In light of the above, it is the recommendation of both the OFT and the OGC, that **the Parties should not be excluded automatically from future tenders on the grounds that they are Parties to the Decision, or be the subject of similar adverse measures making it more difficult for them to qualify for such tenders.** Public

authorities are advised to consider the specifics of their procurement, as well as the points outlined below, in deciding the most appropriate course of action on a case by case basis.

The OFT considers that the following factors are relevant to the above:

- The Parties have received significant financial penalties appropriate to the infringement findings in the Decision;
- It would be wrong automatically to assume that construction companies that are not named in the Decision have not also been involved in bid rigging;
- As a result of the OFT's investigation, the Parties can be expected to be particularly aware of the competition rules and the need for compliance and, if anything, are more likely to be compliant; and
- Many of the Parties have cooperated fully with the OFT's investigation and a significant proportion have taken measures to introduce or reinforce formal compliance programmes and to ensure that their staff are aware of their competition law obligations.

For the avoidance of doubt, this recommendation is only intended to apply to this case. It should not be assumed that the OFT would take a similar view in future cases.

Avoidance and detection of bid rigging

Through this Decision, and previous decisions involving the roofing sector, the OFT has sent a clear message to firms both in the construction industry and more generally that bid rigging, including cover pricing, is a serious breach of competition law attracting serious penalties. However, procurers can also take steps to limit the risk of bid rigging occurring in the first place, and to increase the likelihood of detection should it occur.

To that end, the attention of procurers is drawn to the following guidelines:

- *'Making competition work for you'*, a general guide for public sector procurers prepared by the OFT and OGC, which includes guidance on the mitigation of the risks of anti-competitive behaviour and can be found at www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf,
- *'Guidelines for Fighting Bid Rigging in Public Procurement'*, *'Designing tenders to reduce bid rigging'* and *'Detecting bid rigging in public procurement'*, three 'best practice' guidelines prepared by the Organisation for Economic Cooperation and Development (OECD) with input from the OFT which can be found at www.oecd.org/dataoecd/27/19/42851044.pdf,

www.oecd.org/dataoecd/36/40/42594504.pdf and
www.oecd.org/dataoecd/36/38/42594486.pdf.

Although these guidelines were designed with public procurers in mind, the principles apply equally to private procurers.

The OFT will continue to work with the construction industry, government and others to ensure effective competition. Should you have any queries regarding this notice, these should be directed to the construction case team at the following e-mail address: construction@oft.gsi.gov.uk.