

# The Office of Fair Trading objects

**John Pheasant** and **Marceline Tournier** of **Hogan & Hartson** examine the Office of Fair Trading's (OFT) cartel investigation and advise on how to avoid falling foul of ever tightening rules. Those not named by the OFT so far should not relax yet.

## KEY POINTS

- **The Office of Fair Trading's (OFT) investigation into bid rigging in the construction industry is one of the largest ever cartel inquiries**
- **Bid rigging is illegal under the *Competition Act 1998*, and the Office of Fair Trading views cover-pricing as one of the more serious forms of bid rigging**
- **The OFT has described bid-rigging as 'endemic'**
- **Firms involved in cartel behaviour may be fined up to 10 per cent of their worldwide turnover and may be subject to claims for damages in the High Court and/or in the Competition Appeal Tribunal**
- **Parties should not assume that firms who are not named so far are innocent of cartel behaviour**
- **The OFT has published guidance for local authorities on suspicious bidding behaviour**

**T**he construction industry is under intense scrutiny as a result of the high profile UK Office of Fair Trading (OFT) investigation into alleged bid rigging. This investigation follows five OFT decisions concerning bid rigging in England and Scotland between 2004 and 2006.

The OFT has progressed one of the UK's largest ever cartel investigations by issuing a Statement of Objections (SO) on 17 March 2008 against 112 con-

struction firms in England, including large construction groups such as Balfour Beatty, Carillion and Kier Group. All of the 112 undertakings were named in the press release. The SO alleges that the 112 companies engaged in bid rigging, which is illegal under the *Competition Act 1998*.

The alleged bid-rigging includes 'cover pricing', a term which describes the practice of bidders colluding with one another during the tender procedure to submit one or more bids which are too high to win the tender.

The intention of agreeing on the submission of 'unrealistic' bids is to create the false impression that the winning bid won the tender by competing successfully against the 'unrealistic' bids. The inference is that the winning bid would have been lower had all competing bidders engaged in genuine competition and submitted realistic bids.

The SO also alleges that a smaller number of these companies winning tenders agreed to pay losing bidders 'compensation' payments, usually by issuing false invoices. The OFT has characterised these practices as 'more serious forms of bid rigging'.

The OFT's investigation has attracted significant media coverage. The companies under investigation are not only active in the private housing, commercial and industrial sectors, but also the headline grabbing public sectors including schools, hospitals and universities.

The OFT's current investigation originated from a particular complaint submitted to the OFT in 2004 concerning the East Midlands.

The emerging evidence indicated that cover pricing was endemic and the investigation was extended to Yorkshire, Humberside and elsewhere in England.

The OFT has stated that it has evidence of cover pricing affecting ‘thousands of tender processes’, but has focussed on around 240 alleged infringements committed by the 112 construction companies addressed in the SO.

The OFT has received 37 leniency applications in connection with its investigation. Leniency applicants will have approached the OFT in a bid for total immunity from fines or significant reductions in fines. Immunity from fines is generally available to the first cartel member who provides evidence of a cartel to the OFT. In this case the OFT will have discretion as to whether or not it grants any party full immunity, if at the time of the immunity application it already had sufficient evidence to initiate the investigation. Given that the OFT’s ‘investigation originated from a specific complaint’, this is likely to be the case. Leniency applicants who are not eligible for full immunity may still qualify for a reduction in fines of up to 50 per cent.

In addition, 40 other companies admitted to bid rigging activities after the OFT offered a reduced financial penalty on 22 May 2007 to those companies implicated in its investigation who had not yet applied for leniency. In light of ‘the extent and quality of evidence obtained by the OFT’ at that stage, the OFT would not accept any further leniency applications.

Regardless of individual construction companies’ individual cooperation with the OFT, they will remain equally vulnerable to claims for damages. Any application for leniency or admission to the OFT does not confer any protection from claims for damages.

The OFT’s press release is silent on whether or not it is considering any criminal offences under the *Enterprise Act 2002*. The OFT can prosecute individuals for dishonestly entering into a seriously anti-competitive agreement, including bid rigging. This is known as the ‘cartel offence’ and prosecution could lead to a prison sentence of up to five years and/or an unlimited personal fine.

Directors of construction companies found guilty of anti-competitive activity may also face a court disqualification order of up to 15 years.

### The OFT’s powers

During the investigation, the OFT conducted on-site visits at the premises of 57 construction companies. Under the *Competition Act 1998 (CA 1998)*, the OFT has powers to: require the production of specified information and documents; enter premises without a

warrant; and enter and search premises with a warrant.

OFT visits can be made without any notice, and this is common procedure to prevent the removal or destruction of evidence which might take place if the business in question were to receive prior notice. The OFT may also enter and search domestic premises with a warrant. In order to do so, the OFT need not actually suspect the individual of participating in cartel activities.

The OFT has the following powers when entering business premises without a warrant. To: require the production of documents; take copies or extracts of documents; ask for the reproduction of information on a computer; ask for explanations of documents; ask for the location of documents; and take steps to preserve documents.

Where the OFT carries out an inspection with a warrant, in addition to the powers listed above, the OFT can: search for documents; and take away original documents. Individuals who refuse to comply with OFT requests exercised pursuant to OFT powers may be guilty of a criminal offence.

The 112 addressees of the SO have the opportunity to respond to the allegations in writing and orally by the deadline set by the OFT, which typically will be approximately two months after the OFT issues the SO.

The SO is not a published document. Interested third parties, such as complainants, had the opportunity to request a non-confidential version of the SO by 30 May 2008. The OFT may grant third parties access to a non-confidential version of the SO where the third party is able to materially assist the OFT to test its factual, legal and/or economic arguments. Typically, the OFT will provide the non-confidential version to those third parties who were extensively involved in the OFT investigation and provided the OFT with significant information before the issue of the SO.

### Decision

The OFT will issue its decision after considering the responses to the SO and third party comments and has indicated this is likely to take place next year.

Pursuant to the *CA 1998*, the OFT can fine members of a cartel up to 10 per cent of worldwide turnover, subject to any fine reduction for leniency or admission.

Those construction companies which are ultimately identified to have participated in cartel activities in the OFT’s final decision, including the leniency applicants, are likely to be targeted by parties who believe they have

suffered loss as a result of the bid rigging behaviour.

In the UK, where the OFT has issued a decision finding an infringement of the *CA 1998* (or EC competition law), claimants may bring an action for damages (or an action for relief) in front of the Competition Appeal Tribunal (CAT) in connection with the offending behaviour established in the OFT decision. This is known as a 'follow-on' action.

The attractiveness of this type of action is that the claimant need not prove that the cartel activity took place, as it has already been established in the OFT decision. The claimant need only prove it has suffered loss as a result of that cartel activity.

However, the CAT may stay actions for damages where the OFT decision in question is under appeal, significantly delaying such actions.

Claimants need not wait for the OFT decision (or the outcome of any appeal) to bring a High Court claim against construction companies. This litigation route is less attractive as the claimant will first need to prove the illegal cartel behaviour before demonstrating loss.

Claimants could include competitors who were excluded from bids and private companies and local authorities who paid more as a result of bid-rigging. Consumer representative bodies may also bring a claim on behalf of a group of named consumers, for example a group of specified home owners who paid inflated prices for construction or repair work as a result of bid rigging.

#### How to minimise competition law risks when participating in a bid

Following the high profile reporting of the OFT investigation, the construction sector should expect to remain under legal scrutiny in the foreseeable future.

On 17 March 2008, the OFT published *A guide for public sector procurers of construction – Making competition work for you*, and listed the following bidding behaviour which should raise warning signals (at page 18):

1. Bids received at the same time or containing similar or unusual wording.
2. Identical prices.
3. Bids containing less detail than expected.
4. The likely bidder failing to submit a bid.
5. The lowest bidder not taking the contract.
6. Bids that drop on the entry of a new or infrequent bidder.
7. The successful bidder later subcontracting work to a supplier that submitted a higher bid.
8. Expected discounts suddenly vanishing or other last minute changes.
9. Suspiciously high bids without logistical cost differences (eg delivery distances).
10. A bidder betraying discussions with others or with knowledge of previous bids.

In order to stay above board of suspected bid rigging activities it is imperative to: clearly set out internal bidding procedures to guide your employees on the types of behaviour which may and may not be legal when participating in bids. If possible, avoid contact with other bidders during the bidding procedure. If contact with particular bidders is necessary, document the purpose and nature of such contact in case your behaviour ever falls under suspicion. Do not enter into any agreement or understanding with any competitor which may be viewed as cartel behaviour. Agreements and understandings which are likely to be viewed as cartel activities include: market sharing agreement, ie agreeing to only bid in specified areas; bid rotations, ie taking turns to submit realistic bids; bid suppressions, ie agreements not to bid or agreements to withdraw bids; cover pricing, ie agreeing to submit a bid which has an unrealistically high price or attached unrealistic conditions.

#### Heightened public awareness

A lasting outcome of OFT investigations into the building sector will be a greater awareness on the part of private companies, customers and public authorities of not only competition law rules, but also the possibility of seeking damages from companies who have engaged in cartel activity. Bid rigging will expose companies not only to potential financial loss but also reputational damage which could affect the chances of being invited to tender in future bids.

On the same day of issuing the press release on the current investigation, the OFT published an 'Information note to Local Authorities and other procuring entities'. The OFT explains that its investigation '*could not pursue every firm against which [the OFT] received allegations or evidence of cover pricing*' and that '*it is not safe to assume that the addressees of the SO (or ultimately, of the final decision) are the only companies that may have engaged in cover pricing*'. This is a clear warning that construction companies which are not listed in the OFT's SO are far from safe from future competition investigations and/or claims. **CL**