

PRICE FIXING, BID-RIGGING AND CONSTRUCTION: April 2008



The Office of Fair Trading (OFT) has conducted a survey into the construction industry. In April 2008 they named 112 companies, ranging from small businesses to major contractors, which they believe have been involved in bid-rigging activities. Most of these incidents are related to cover pricing and a minority are related to compensation payments to other companies.

Evidence received by the OFT indicates that anti-competitive practices are widespread in the construction industry.

This information sheet explains the practices under investigation. All companies, including small businesses, must comply with competition law and ensure that they do not participate in any illegal activity.

1. What is cover pricing?

A contractor may be invited to tender by a client, but for various reasons may not want to take on this particular job. The contractor may still wish to submit a tender in order to stay in favour with the client and remain on their tender list.

The contractor contacts another company which is bidding for the job and asks for a 'cover price'. The second company tells them a price roughly 5-10% higher than its own bid. The original contractor supplies this price to the client in its own tender, knowing that they will not win the job.

It is not illegal to submit an uncompetitive bid but the law forbids the practice of contacting a rival bidder, in order to get an estimate of a plausible bid level that would be too high to win the tender.

2. What are compensation payments?

This is a more serious form of bid-rigging where the successful bidder was decided in advance by contractors acting in collusion and with the winner paying an agreed sum of money as 'compensation' to the losing bidders.

3. Why is cover pricing illegal?

Cover pricing is regarded as collusive tendering. The OFT and the Competition Appeal Tribunal have previously found cover pricing activities to be illegal and in breach of the Competition Act 1998.

4. What must you do to ensure that your company does not infringe competition law?

You must not

- Agree to fix bids for contracts
- Agree to fix prices or terms of trade, eg. agree price rises with your competitors or agree what purchase price you will offer your suppliers
- Share out markets, agreeing with a competitor that you'll bid for one contract and they'll take another

You have a duty to

- Report any anti-competitive behaviour, even if you are not actively involved

5. What happens when illegal activity is suspected?

The OFT issues a Statement of Objections (SO) to the companies involved which gives notice of a proposed infringement decision under the Competition Act 1998. A list of the companies issued with the SO is available publicly.

No assumption should be made that there has been an infringement of competition law by any of the named companies at this stage. The SO sets out formal allegations and evidence to which companies have an opportunity to respond.

The OFT's final decision will conclude whether there has been a breach of competition law in each particular instance.

A company may be granted immunity from penalties or a significant reduction in penalty in return for assisting the OFT with its investigation.

5. If found guilty companies may face penalties including:

- A fine of up to 10% of annual turnover
- Clients may exclude companies from future tenders
- Clients could launch court claims for damages for previous overcharging
- The OFT may disqualify directors
- The OFT could use powers under the 2002 Enterprise Act to launch criminal investigations against executives involved in serious cases

7. Where can I find further help and guidance?

See the section on Price fixing, cartels and monopolies on the BusinessLink website, under Sales and Marketing - Pricing at www.businesslink.gov.uk

The Office of Fair Trading has produced a booklet which can be downloaded from their website under Publications – Guidance on Legislation at www.offt.gov.uk

- How your business can achieve compliance: a guide to achieving compliance with competition law. Office of Fair Trading, 2005

This Information Sheet has been produced for general guidance. It does not constitute specific legal advice, which should be sought if any of the above issues arise. Except as required by law, we accept no liability for your reliance on the information provided here.