



September 2009

### **OFT investigation of the construction industry**

On 22 September the Office of Fair Trading (OFT) imposed fines on a number of construction companies for the practice of “cover pricing”. This note provides some background to this investigation and explains what the construction industry has been doing to ensure that it does not breach competition law in the future.

The OFT investigation was concerned with the practice of cover pricing. Cover pricing occurred when a bid was entered for a job that a contractor did not wish to win. In essence, the contractor would try to price the job too high to avoid being awarded the work. This, in itself, is not an infringement of competition law. Covers were submitted to avoid upsetting a client and avoid the risk of not being invited to bid for future contracts.

However, if this artificially high tender was then discussed with another contractor who was also bidding for the work – for example, to confirm it was high enough not to win – it would breach competition law.

It is fair to say that a decade or so ago the practice of cover pricing appears to have been widespread in the construction industry. This was at a time when the vast majority of business was undertaken through single stage competitive tendering where contracts were awarded at the lowest price. Over the past 10 years or so there have been significant changes in the way construction is procured, including the advent of ‘best value’, more collaborative forms of working and longer term relationships developing between contractors and clients. Thus the opportunity for cover pricing has significantly diminished and the practice is largely historic.

As a consequence of the OFT investigation, which has been ongoing for the past five years, construction companies now have a clearer understanding of the fact that cover pricing is deemed to infringe competition law and have put in place strict competition law compliance policies and procedures to ensure that they do not become involved in this practice or any other similar practices in the future.

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With the encouragement of the OFT, the UKCG has also launched a Competition Law Code of Conduct which has been widely supported throughout the industry. A copy of the Code is attached below.

Individual companies fined by the OFT's are in direct contact with clients explaining their position and the steps that they are individually taking to ensure that 'cover pricing' has been eradicated from their business.

It is understandable that public sector clients will want to be sure that such practices do not occur in the future. The Office of Government Commerce has published guidance covering the ways Public Sector Authorities can help ensure that they mitigate these risks of bid-rigging taking place amongst suppliers. This guidance 'Making Competition Work for You' is available on the OGC's website at the following link:

[www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf](http://www.ogc.gov.uk/documents/CP0144MakingCompetitionWorkForYou.pdf)

The OFT has also issued guidance advising public sector clients not to discriminate against contractors who have been fined. This is available at [www.ofg.gov.uk/constructionadvice](http://www.ofg.gov.uk/constructionadvice) The OFT has made it clear that the penalties for the infringements are the fines it has imposed and that it is not their intention that companies should also lose access to public sector contracts. This would actually have the effect of reducing competition and so potentially have an adverse affect on both client and contractor.

If you would like any further advice or information please contact us at [enquiries@ukcg.org.uk](mailto:enquiries@ukcg.org.uk)



## **UK CONSTRUCTION INDUSTRY COMPETITION LAW CODE OF CONDUCT**

1. The UK construction industry is committed to compliance with UK and EU competition law.
2. The industry understands that the purpose of competition law is to preserve free, fair and efficient competition for the benefit of all companies operating in the industry and their clients.
3. The industry agrees at all times to commit to ensuring the highest standards of competition law compliance within the sector by adhering in all of its business practices to the principle of fair competition and to ensure that construction companies do not engage in conduct which is anti-competitive.
4. Construction companies must:
  - 4.1 not restrain competition amongst themselves through agreements, arrangements or understandings that restrict competition;
  - 4.2 bid for contracts and tenders independently from and without any agreement or arrangement with their competitors; or
  - 4.3 not exchange competitively sensitive information or engage in discussions that may lead to the co-ordination of competitive behaviour and, in particular, must not share information about current or future pricing intentions for tenders, or any element that might affect prices or pricing practices, including the exchange of cover prices.
5. Construction companies understand that co-operation with a competitor is justified only under the exceptions permitted by the competition rules or where they have been expressly required to enter into such arrangements by the client, for example, certain joint ventures and framework agreements, in which case such arrangements will be fully disclosed to the client.
6. The industry understands that each individual construction company is responsible for its own compliance with competition law and that the consequences of breaching competition law are severe including possible penalties, director disqualification, criminal sanctions and damages actions.
  - 6.1 Construction companies will therefore endeavour to:

- 6.1.1 ensure that competition law compliance will be achieved through implementing effective competition compliance policies and guidelines throughout their businesses; and
- 6.1.2 promote an understanding of and compliance with competition law throughout their supply chains, including with their sub-contractors.