



## OFT ALLEGES BID-RIGGING CARTEL IN THE CONSTRUCTION INDUSTRY

The Office of Fair Trading has today (Thursday, 17 April 2008) issued statements of objection against 112 construction companies alleging participation in a bid-rigging cartel. The OFT's statement of objections follows a three year industry investigation and will have wide-ranging consequences for the industry. For the 112 alleged participants the immediate concern will be to defend against these allegations and they will now be given the opportunity to respond to the OFT. More generally any industry practices which may have led, or contributed, to the OFT's allegations will need to be analysed with a tooth-comb by all industry participants to ensure that there are no more skeletons waiting to be unearthed and that all future behaviour is unambiguously compliant with competition law.

### **Bid-rigging - an infringement of UK Competition Law**

Bid-rigging, if proven, is clearly caught by the Chapter I prohibition on restrictive agreements contained in the UK Competition Act 1998. In this case the OFT is alleging a variety of bid-rigging scenarios

including what they term "cover pricing" which occurs where contractors agree that one of them will submit the lowest bid, that the others will enter higher bids and, in some cases, are then paid an amount as compensation. Bid-rigging is engaged in by competitors and is seen as having serious anti-competitive effects and consequently competition authorities will generally view it as a serious



offence akin to price fixing or market sharing. The actual effect of the conduct may be taken into account when setting the level of any fines and arguments may be made that the effect is minimal for various reasons. However, the simple fact of engaging in a bid-rigging cartel is of itself likely to be sufficient for an infringement finding.

### **Fines of up to 10 per cent of turnover**

The Competition Act 1998 provides that fines of up to 10 per cent of the annual worldwide turnover of each participant may be imposed for a breach of the Chapter I prohibition. Technically this 10 per cent ceiling is calculated not just on the basis of the turnover of the individual

business or company that is involved in the cartel but the turnover of the entire corporate group to which that business or company belongs. Whilst it is true that the OFT is generally tending to increase fines for cartel behaviour a large number of the alleged participants have provided information in return for leniency and admitted participation. It appears therefore that the conduct



of leniency and settlement procedures is likely to have a large impact on the level of any fines imposed in this matter.

## **The possibility of damages actions**

Infringements of competition law may also lead on to damages actions by those affected by the anti-competitive behaviour. In this case those who commissioned buildings and works from the alleged participants may be in a position to bring claims. Historically such damages actions have been rare, however, given the high value of construction projects, the increasing awareness that damages may be available and the rapid progress that competition authorities are making in encouraging private enforcement of competition law it seems likely that actions will be seriously considered in this case.

## **Possible criminal sanctions**

In cases such as this the UK Enterprise Act 2002 also provides for a criminal cartel offence which can be committed by individuals involved in cartel infringements. If convicted the individual may be imprisoned for up to 5 years and subject to a potentially unlimited fine. The offence only covers a limited number of the most serious forms of cartel activity although one

of those covered is bid-rigging. This offence can only be committed if dishonesty is proved. Individuals who are or may be in this position would need to review their directors' and officers' liability insurance policy carefully to check what financial cover is in place. In addition directors who are shown to have participated in a cartel may be subject to a disqualification order which would prevent them acting as a director of any company.

## **PR issues**

Increasingly, cartel infringements have serious public relations implications. Participants found to have been in a cartel will need to work hard to resuscitate their market reputations both during and after an investigation by the competition authorities. Further, if large fines are imposed there could be a significant impact on share prices. One notable characteristic of the construction industry is that there are a large number of public sector buyers which will be subject to the European Union public procurement rules when selecting firms. Under these rules public bodies have the ability to exclude tenders on good grounds and it is conceivable that some may try to apply these provisions to cartel participants. In any event, whether or not such an approach were successful, it is likely that

public bodies may well request evidence of compliance with competition laws in the future.

## **How we can help**

Martineau Johnson provides a full range of competition law advice including cartel advice both to alleged participants and to those damaged by such activities. We have extensive experience of dealing with the competition authorities during the investigative procedures leading to a decision, ensuring that clients' rights of defence are respected, advising on the possible mitigation of fines and leniency applications. We also provide advice on the associated legal issues raised by cartels such as compliance audits, compliance training and assisting individuals implicated in cartel behaviour.

This bulletin contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

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