



CONSTRUCTION CONFEDERATION

Confederation calls for sensible response to OFT investigation

The Construction Confederation has called on the Office of Fair Trading (OFT) to ensure a sensible and proportionate response to the findings of their four-year investigation into industry practices.

The bulk of the alleged infringements listed in the published Statement of Objections are examples of cover pricing, where busy companies who did not want to win the work submitted an artificially high bid.

While acknowledging that cover pricing may in some circumstances constitute a technical breach of competition law, the Confederation believes these historic infringements need to be viewed in context - there would usually have been no financial cost to the client or gain to the contractor and therefore did not have any effect on competition.

The Confederation says that any fines levied by the OFT should be proportionate and those who are found to have contravened regulations in this way certainly should not face double jeopardy by being omitted from future public sector tendering lists.

The only motive in these cases was to avoid winning the work without upsetting the client and so stay on future tender lists.

The simple act of putting in a high bid to avoid winning the work is not an infringement of competition law.

However, if this artificially high tender is then discussed with another contractor who is also bidding for the work - for example, to confirm it was high enough not to win - it would breach competition law, even if the eventual price paid by the winning contractor was not affected.

There has been widespread concern at the possibility that the OFT might take disproportionate action to deal with the widespread practice of cover pricing by imposing excessive penalties on contractors. Fines could amount to a maximum of 10% of turnover which, in a sector where profit margins are traditionally 2.5%-3.5%, would threaten the viability of companies, the work programmes they deliver and the jobs they provide.

In addition, the possible removal of those companies from future public sector tender lists would hit the contractor with a second, wholly disproportionate censure. Ironically, it would also reduce the pool of contractors able to tender for this work, so decreasing competitiveness and impacting adversely on the client.

Construction Confederation Stephen Ratcliffe said: “Let’s be clear what we are dealing with in cover pricing - there was no intention to make a single penny at the tax payers’ expense, just an attempt by busy contractors not to win work without upsetting the client.

“Cover pricing was symptomatic of a time when work was won on lowest price and short term relationships were the norm. Culture in the industry has since shifted significantly and single stage competitive tendering based on lowest price is declining.

“In recent years, the industry has gone to great lengths to stamp out the practice. For example, companies are already ensuring that employees understand requirements for compliance and have written to all staff establishing protocols.”

“We are concerned that, because the OFT fines system is based on turnovers, there is a risk that fines will be disproportionate in an industry which has high turnovers and relatively small profit margins.

“Another concern is that we have already heard suggestions that public sector procurers may exclude firms accused of cover pricing from future tender lists. Not only would this be an additional and disproportionate punishment, it would actually reduce competition and so potentially have an adverse effect on both client and contractor.

“We would like to see guidance drawn up by the OGC and the Department of Communities and Local Government (DCLG) so that public sector clients have the security of clear guidelines that contractors should not be omitted from tender lists because of these past infringements.

“It would also be helpful if the OFT could make it clear that contractors should not be dropped from tender lists as a result of their investigation.”

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