

## **Office of Fair Trading Investigation into Bid Rigging**

### **RECOMMENDATION**

- 1.1 To note the report.

### **SUPPORTING INFORMATION**

- 2.1 At its meeting on 24 September 2009, Committee asked for a report to be brought to the December meeting which provided a briefing to Members on the Office of Fair Trading (OFT) guidance and assessed whether any improvements to the Council's current tendering procedures would be required.
- 2.2 On 22 September 2009, the OFT issued a statement advising they have imposed fines totalling £129.5m on 103 construction firms in England which it had found had colluded with competitors on building contracts in what is termed 'cover pricing'. Cover pricing is where one or more bidders in a tender process obtains an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which gives a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender. Cover pricing is used when a contractor does not have the capacity to tender for or carry out a project. Fearful of not being invited for future tenders, rather than decline to tender he would put in cover price, often in collusion with a contractor that is submitting a bona-fide tender.
- 2.3 The OFT says cover pricing distorts competition and keeps costs artificially high. It happens when Company A contacts Company B, which is also bidding for the job, and asks for a 'cover price'. Company B then supplies Company A with a figure of up to 10% higher than its own bid. Company A supplies this price to the client as its own, safe in the knowledge it will not win. Company B is happy with the arrangement as it has got a valuable contract but has not given away knowledge of its actual bid to somebody who could be a real rival another time.
- 2.4 The OFT also found six instances where successful bidders had paid an agreed sum of money to the unsuccessful bidder (known as a 'compensation payment'). These

payments of between £2,500 and £60,000 were facilitated by the raising of false invoices.

- 2.5 Under the Competition Act 1998 and Article 81 of the EC Treaty bid-rigging is prohibited. Businesses found to have been involved in such conduct can be fined up to 10 per cent of their worldwide turnover. In calculating financial penalties, the OFT takes into account a number of factors including seriousness of the infringement(s), turnover in the relevant market and any mitigating and/or aggravating factors. A list of firms and the amount of the penalty applied is available.
- 2.6 The decision followed an OFT investigation in April 2008 about construction practices on projects that took place between 2000 and 2006. The OFT were to investigate over 4,000 tenders and 1,000 companies where there was some evidence of irregularities. However, because of the limits of the OFT budget, only a very limited number of those cases were investigated.
- 2.7 A number of the 103 companies listed are currently on the Council's List of Approved Contractors and carried out work for the Council during the investigation period and since. Some of the companies are also on regional frameworks procured recently by the East Midlands Property Alliance. In addition, Interserve, party to the joint venture company for the development of the waste treatment plant at Sinfin was penalised. Two companies, currently involved in bidding for the Building Schools for the Future contract, Balfour Beatty and Galliford Try have also been penalised.
- 2.8 The Council's position in relation to the investigation findings is as follows:
- Of the 199 tenders investigated by the OFT none were Derby City Council tenders. During their investigations the OFT called for two Derby City tenders, Chesapeake Family Resource Centre refurbishments / alterations (4 Aug 2004) and Chellaston School Extension to 6th Form Block (29 May 2002) but there was no feedback from OFT on these.
  - An internal investigation was carried out at the time the OFT investigation became known of all capital projects carried out by Property Services for the period 2000 to 2008 and no evidence of cover pricing was found.
  - taking action against the contractors may not only limit the Council's ability to obtain economic tenders but may also provoke action against the Council
- 2.9 The OFT and Office of Government Commerce (OGC) recommend that the named contractors should not be automatically excluded from future tenders or be the subject of similar adverse measures that makes it more difficult for them to qualify for such tenders and consider the following to be relevant to any actions authorities may consider taking:
- The Parties have received significant financial penalties appropriate to the infringement findings in the Decision;
  - It would be wrong to automatically assume that construction companies that are not named in the Decision have not also been involved in bid rigging;
  - As a result of the OFT's investigation, the Parties can be expected to be particularly aware of the competition rules and the need for compliance and, if anything, are more likely to be compliant; and
  - Many of the Parties have cooperated fully with the OFT's investigation and a significant proportion have taken measures to introduce or reinforce formal compliance programmes and to ensure that their staff are aware of their

competition law obligations.

- 2.10 The Council's procurement practices comply with good practice guidelines, a number of which are included in the OFT report, and will ensure as far as possible that cover pricing won't take place. Contract Procedure Rules require each contractor to be asked if they are able to provide a quote/tender before any documents are issued and that it is made clear that a contractor's inability to submit a tender will not limit their future opportunities. In addition each project will have an estimate set prior to the issuing of tenders which provides a benchmark to the bidder prices.
- 2.11 Given the Council's robust procurement procedures and the recommendations of the OFT and OGC, officers are not proposing to take any further action on this matter other than to closely monitor future tenders received for any indication of cover pricing.

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<b>Background papers:</b>	
<b>List of appendices:</b>	Appendix 1 – Implications

<b>IMPLICATIONS</b>
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**Financial**

1. None directly arising

**Legal**

2. None directly arising

**Personnel**

3. None directly arising

**Equalities impact**

4. None directly arising.

**Corporate objectives and priorities for change**

5. None directly arising.