

**Key issues:**

- On 17 April the OFT issued a statement of objections against 112 companies in the construction sector in England (<http://www.ofg.gov.uk/news/press/2008/52-08>).
- The OFT formally alleges that the companies have engaged in bid rigging activities, and in particular cover pricing. Cover pricing describes a situation where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract.
- Spend reports have shown that of the 112 companies names, nine have been used in the last two years by the Council and/or Ealing Homes; Allenbuild Ltd, Apollo Property Services Group Ltd, Balfour Beatty Construction Limited, Connaught Partnership Ltd, Galliford Try Partnerships Limited, JJ McGinley Ltd, Kier Building Maintenance, Kier Building Services Engineers and Willmott Dixon Construction Ltd.
- This briefing note has been prepared following a meeting between Head of Legal Contracts and Head of Strategic Procurement to outline the specific actions related to the nine suppliers, and more generic actions which are proposed in response to the OFT statement.

**Background:**

Cover pricing arrangements have previously been found by the OFT and the Competition Appeal Tribunal to be illegal and in breach of the Competition Act 1998 due to the restrictions on competition that arise. Under the Competition Act 1998 and Article 81 of the EC Treaty, cartels are prohibited. Any business found to be a member of a cartel could be fined up to 10 per cent of its worldwide turnover.

**Specific recommended actions:**

There are nine organisations which the Council has used in the last two years that appear on the list of companies in the OFT statement of objections. This section provides a range of recommended actions for each of these suppliers:

- **Willmott Dixon Construction Ltd**

As Willmott Dixon are one of the Councils' Education Property Services main contractors, and have also recently been successful in a tender for a major Cultural Services contract, it is recommended that along with senior officers from the two service areas, the Head of Legal Contracts and Head of Strategic Procurement invite senior representatives of Willmott Dixon to give an update and provide evidence of the steps that have been taken to ensure that the practices outlined in the OFT statement are not applicable to their organisation. It is worth noting the statement issued by Willmott Dixon in response to the OFT:

<http://www.willmott Dixon.co.uk/content/news/story.asp?nid=1&sid=146>

- **Allenbuild Ltd**

Of all the nine suppliers, the Council has spent the least with this supplier, approx £50,000, in relation to a project which took place in May 2006. Therefore no further action is proposed other than that described under 'general actions' for suppliers on the Council's Approved List in section 4 below.

- **Apollo Property Services Group Ltd**

The Council has spent in the region of £2m with this supplier since April 2006, the majority within Housing and Environmental Health. It is recommended that along with senior officers from the service area, that the Head of Legal Contracts and Head of Strategic Procurement invite senior representatives of Apollo Property Services to give an update and provide evidence of the steps that have been taken to ensure that the practices outlined in the OFT statement are not applicable to their organisation. It is worth noting the statement issued by

Apollo in response to the OFT in which they have declared that they have not accepted any leniency offer from OFT:

[http://www.theapollogroup.co.uk/news/January%2008/OFT\\_Investigation.html](http://www.theapollogroup.co.uk/news/January%2008/OFT_Investigation.html)

- **Balfour Beatty Construction Limited**
- **Kier Building Maintenance,**
- **Kier Building Services Engineers**
- **Connaught Partnership Ltd**

Spend with all these organisations related to Ealing Homes contracts, and are therefore dealt with separately later on in this document.

- **Galliford Try Partnerships Limited**

The spend on Galliford Try relates specifically to the contract which was tendered and awarded for the refurbishment of Perceval House. No further contracts have been awarded to this company, and therefore no specific recommendations are made. However the supplier is on the Council's Approved List so please see section 4 below.

- **JJ McGinley Ltd**

The Council has spent in the region of £650k with this supplier since April 2006, the majority from Active Ealing. It is recommended that JJ McGinley Ltd are invited, in writing, to give an update and provide evidence of the steps that have been taken to ensure that the practices outlined in the OFT statement are not applicable to their organisation. It is worth noting that JJ McGinley Ltd is no longer on the Council's Approved List, having withdrawn from Constructionline.

## **General recommended actions:**

This section provides information on a range of recommended actions that should be taken following the OFT statement.

### **1 Exclusion from tender lists**

The OFT have issued a specific note for Local Authorities and have stressed "that no assumption should be made by procuring entities at this stage that there has been an infringement of competition law" by those firms named, and that we should seek our own legal advice as to the "potential for exclusion of the companies under investigation from future tender lists". Given that the formal findings are not expected to be released until 2009, it is recommended that at this stage that suppliers can not be excluded from current or future tender lists.

### **2 Tender Documentations**

The recommended actions here are:

- 2.1. The instructions in pre-qualification questionnaires will be strengthened, along with the inclusion of a new additional question in relation to findings under the Prevention of Corruption Acts 1916 and section 117 Local Government Act 1972. See short listing in section 5 below.
- 2.2. The undertaking in relation to collusion currently included in the form of tender will be strengthened in light of the most recent OFT statement.
- 2.3. The instructions to tenderers will be updated to refer specifically to the OFT statement and to strengthen further the Council's stance on anti-competitive behaviour.
- 2.4. An additional anti-collusion clause will be drafted and included into the Council's standard terms and conditions, entitling the Council to terminate the contract if bid-rigging is discovered.

The above will take effect from 1<sup>st</sup> May 2008.

### **3 Tender Evaluation Process**

One of the ways that the Council can prevent price collusion amongst suppliers is to evaluate tenders on criteria other than price. The recommended actions here are:

- 3.1. All tenders must be evaluated on Most Economically Advantageous Tender criteria, not lowest price. The full tender evaluation criteria and methodology should always be agreed prior to tenders being invited, and approved by the Head of Strategic Procurement. This will also support the recent case from the European Court of Justice (ECJ), Lianakis v Dimos Alexandroupolis, which highlighted the importance of transparent award criteria used in evaluating bids.
- 3.2. This is likely to have an impact on Education Property Services, where a large proportion of works contracts are currently evaluation on price alone. The Strategic Procurement team will work with Education Property Services to develop a standardised set of evaluation criteria that can be used for their works projects.

It is recommended that this begins immediately.

#### **4 Approved List**

Following a report to Corporate Board in May 2007, the Council uses Constructionline as the provider of its approved list. The recommended action here is:

- 4.1. Suppliers applying to join Constructionline are already required to make a declaration in respect of the Prevention of Corruption Acts. The Council will work with Constructionline and other users to review these processes and strengthen where necessary.
- 4.2. In response to the OFT statement, letters will be sent to all suppliers currently on the Council's approved list, reminding them of the severity of the accusations and the steps that the Council will take if collusion is suspected.

The above process will begin immediately and updates will be provided as necessary.

#### **5 Shortlisting and joining the Approved List**

The recommended actions here are:

- 5.1. Following an investigation under the Competition Act, the OFT may make a decision establishing that one or more infringements have occurred. All new suppliers seeking to join the Councils approved list will be checked against the OFT Public Register of decisions.
- 5.2. Similarly any suppliers who complete the Council's Pre-Qualification Questionnaire will also be checked against the OFT Public Register of decisions to ensure that the information provided is accurate.

Decisions on whether to exclude suppliers from either the Council's Approved List or shortlist for a tender will be made on a case-by-case basis. This will take effect for all advertisements for new tenders from 1<sup>st</sup> May onwards and for the Approved List as soon as is practicable.

#### **6 Procurement Toolkit**

A number of activities have been ongoing to strengthen the project management approach to managing major tender activities. This includes the introduction of 'gateways' at key points in the process and the use of Departmental Contracts Boards and where appropriate the Contracts Review Board to review the project. The recommended actions here are:

- 6.1. Introduce the Procurement Toolkit and approach to Corporate Board in report scheduled for 21<sup>st</sup> May.
- 6.2. Strengthen the existing gateway process in place in Education Property Services to ensure that tender reports are reviewed by both Head of Legal Contracts and Head of Strategic Procurement. This will allow better identification of any suspicious tenders, and appropriate steps to be taken.

#### **Ealing Homes:**

Some of the suppliers on the Ealing Homes Contractors' framework have appeared in the OFT statement of objections. Work has already commenced to review the major contracts which were to be awarded as part of the 2007/8 programme, and this is subject to further investigation by officers at the Council. Updates will be provided as appropriate.

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