



CARTELS & COMPETITION

Introduction

The Construction industry is currently under the spot light for apparently fixing prices on jobs within certain sectors of the industry – roofing being the current sector. This is known as either cartels or anti-competitive practices.

What is a cartel?

The Enterprise Act 2002 introduced a new criminal offence into English law which is

“An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement or to cause to be made or implemented, arrangements of the following kind relating to at least 2 undertakings (A & B)”
Section 188 (1).

Section 188 (2) states

“The arrangements must be ones which, if operating as the parties to the agreement intend, would –

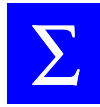
- a. directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service
- b. limit or prevent supply by A in the UK of a product or service
- c. limit or prevent production by A in the UK of a produce
- d. divide between A and B the supply in the UK of a product or service to a customer or customers
- e. divide between A & B customers for the supply in the UK of a product or service, or,
- f. bid-rigging arrangements.

The actions outlawed are:- price fixing, limiting production or supply of a good or service; sharing of markets and bid rigging.

Probably the most commonly recognised form of cartel is (a) above, but also consider (f) – price fixing and bid rigging.

By way of example – Tendering.

What is commercial practice and what is creating a cartel? If you as a subcontractor is asked to tender for work, are you entitled to know who the other bidders are before you put in your tender or will that information only be available after tenders have been submitted? What if you find out who the other tenderers are – are you prohibited from contacting them to discuss the tender? Once, talking to other companies in the same line of work was seen as a way to exchange commercial information and sensibly sort out who would be interested in bidding for jobs. Does this now mean that no-one can talk to each other?



What sort of arrangements would be caught? The offence only relates to products or services which are supplied at the same level in the supply chain – the supply can be to either consumers or commercial users. The supply can relate to agreements to lower prices, or where one party maintains a price and the other lowers its price, or even agreeing to set a range of prices. Even when tendering for a project, there is no requirement for the product or service to be identical – only that the goods/services are supplied at the same level in the chain.

What about the limitation of services? Market sharing? For there to be an infringement it must be a division of the market or customers between A & B which prevents the customers having a choice of supplier. However, what if there is only one supplier of a particular product? Does that supplier fall foul of the regulations if he charges a high price?

To be guilty of the offence there must be the intention to be “**dishonest**”. How is this to be proved? The construction industry is considered to be corrupt – but how much is taking a legitimate commercial advantage and how much is taking “someone for a ride”? To consider this we need to consider the “ethics” of the problem.

The activities of construction firms in Europe have been the subject of intense scrutiny from the European Commission, responsible for competition law enforcement in Europe, over the last quarter of a century. In all the Commission has detected and punished 17 construction cartels (over a quarter of all cartels) imposing 1.5 billion euros in fines on the participants.

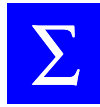
However, the punishment of construction cartels has not been the exclusive domain of the European Commission. The regulator responsible for competition law enforcement in the UK is the Office of Fair Trading (the OFT), which has had similar powers to those of the European Commission since March 2000.

In the time since then the OFT has made several high profile prosecutions. For example, in March 2004, nine roofing subcontractors in the West Midlands were found guilty of collaborative tender practices and were fined a total of nearly £380,000 in fines, and in March 2005, ten roofing contractors in the North East of England and in Scotland were found guilty of collusion and were fined a total of nearly £830,000 in fines (which was reduced by leniency to nearly £560,000).

In the OFT’s Annual Plan for 2005 to 2006, one of the key objectives was stated as being dealing with anti-competitive behaviour in the Construction Industry. The OFT has made it clear that it will investigate and will work closely with the Serious Fraud Office in respect of any potential criminal cartel offences.

On a practical note, what can you do to risk manage the situation?

- Management should have a training programme in place to ensure that its employees are aware of this and the potential risks.



- Management should make it clear that it is considered a disciplinary offence if it is discovered that its staff are found to be fixing prices with other companies for similar work.
- Management should carry out a risk assessment to identify the potential problems including :
 - The market in which it operates and its market position
 - Review its contracts, joint venture agreements, distribution agreements and any licences (especially if also involved in manufacture)
 - Check whether there have been any “informal” arrangements and what these comprise
 - Have a system that checks all contracts before they are signed
 - Make sure that everyone in the company from top to bottom understands the importance of the risk management strategy
 - Ensure that there is regular training for all staff attend

If there is a visit from the OFT then be co-operative but call for a lawyer. The OFT can search the premises and confiscate any papers they consider relevant. The OFT have wide powers and will use them. They can require attendance at a compulsory interview. A written request will be issued and it may include a notice for various documents to be supplied. At the interview the interviewee will be cautioned and advised of the right to have legal representation.

Any investigation by the OFT must be taken seriously – it could mean heavy financial penalties and a prison sentence if they are right and you are in the wrong.

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