



COMPETITION APPEAL TRIBUNAL

**NOTICE OF APPEAL UNDER SECTION 46 OF
THE COMPETITION ACT 1998**

CASE NO 1118/1/1/09

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No 1372) (“the Rules”), the Registrar gives notice of the receipt of an appeal dated 20 November 2009, under section 46 of the Competition Act 1998 (“the Act”), by GMI Construction Holdings plc and GMI Construction Group plc (together, “GMI”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

The OFT found that GMI was involved in two infringements (referred to in the Decision as Infringements 14 and 228) of collusive tendering by cover pricing contrary to the Chapter I prohibition contained in the Competition Act 1998 and imposed a penalty of £1,752,584. GMI submits that the OFT erred in fact in finding that GMI had engaged in bid rigging through cover pricing contrary to the Chapter I prohibition. Alternatively, GMI submits that the penalty has been calculated arbitrarily, is excessive, disproportionate and unjust and should be revoked or reduced.

In relation to the findings of infringement, GMI submits that it had a consistent record of declining to tender and returning invitations to tender where it was not willing or able to submit a tender. It is submitted that the OFT has not made out its case against GMI in relation to Infringements 14 and 228 to the requisite standard of proof and that the finding of infringement of the Chapter I prohibition in this regard should accordingly be set aside.

In relation to the penalty imposed by the Decision, GMI submits that it has been calculated arbitrarily, is excessive, disproportionate and unjust and should be reduced.

GMI submits further that the OFT’s penalty calculation is flawed for the following reasons:

- (a) The OFT incorrectly rejected GMI’s submission that cover pricing only affected single stage tendered work and therefore turnover in non-tendered work should have been excluded.
- (b) The penalty is excessive because the OFT failed to take into account the low margins but relatively high turnover prevalent in the construction industry generally. As a result, turnover is not an indication of and is in fact unrelated to financial strength.
- (c) The OFT found that there is no evidence in relation to GMI that either of the Infringements had any actual effect on prices. A penalty should be lower where the actual impact on the market cannot be demonstrated.
- (d) The OFT has unjustifiably doubled the penalty by imposing a penalty for two infringements. In addition, the choice of two infringements by the OFT is arbitrary.
- (e) The OFT’s approach to the definition of the geographic market discriminates against small and medium sized firms and by comparison with undertakings involved in the more serious practice of making compensation payments.
- (f) GMI had a right to have received a penalty calculated in accordance with the guidance in force at the time the infringements occurred by using turnover in the year of infringement not the last business year approach. Moreover, the rejection by the OFT of GMI’s claim for a reduction on grounds of financial hardship is in breach of the principles of non-discrimination and equal treatment.

GMI seeks the following relief from the Tribunal:

- (a) to set aside the Decision in part as it relates to the findings of infringement of the Chapter I prohibition by GMI in respect of Infringements 14 and 228;
- (b) to revoke, alternatively to reduce, the penalty imposed on GMI by the Decision;
- (c) an order that the OFT pays GMI's costs of and incidental to this appeal; and
- (d) such other or further relief as the Tribunal may consider appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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