

# **Cover pricing in the construction industry: understanding the practice within a competition context.**

Junior Khumalo, Pamela Nqojela & Yongama Njisane

## **ABSTRACT**

Bid rigging or collusive tendering is a form of prohibited restrictive horizontal practice in which rivals effectively inflate prices in markets where the customer acquires goods or services through soliciting tenders. It can take many forms including cover pricing, the focus of this paper. As with any collusive arrangement, competitors will *agree* on who will place the winning bid and the others submit non-competitive bids as a way of giving the customer a false impression of competition in the bidding process. Whilst there is no South African precedent on cover pricing, evidence from current Commission investigations and international case experience reveal that the practise is prevalent in the construction industry though there is vast literature on bid rigging, cover pricing is not directly addressed.

This paper aims to deal with the subject of cover pricing, giving insights into the practice and using case studies to show how this practice has been dealt with internationally. The paper explores the concept of cover pricing and its various facets in which it can be characterised in competition law. We find that cover pricing can be characterised as a form of price fixing, anti-competitive information exchange, and collusive tendering. The paper also establishes the anti-competitive object of cover pricing and why, contrary to perceptions by industry players, it is viewed as a serious infringement by competition authorities.

## **1. Introduction**

In the recent past the Competition Commission has had to deal with an increasing number of cartel cases which involved cover pricing. Given that there is no South African precedent in this area, this paper largely relies on international cases and academic literature. International case law and the bulk of cartel cases involving this conduct show that cover pricing is prevalent in the construction industry and is largely viewed as a standard practice by participants in this market.

The concept of cover pricing and its various facets is explored in section two of the paper and section three provides statistics gleaned from academic literature that indicates the prevalence of this conduct in the construction industry. Section four explores the anti-competitive object of cover pricing and section five looks at the reasons generally given by market participants on why they engage in this conduct. Section six focuses on international and local case studies of cover pricing and section seven concludes on the lessons derived from both academic literature and the case law.

## **2. Bid rigging and cover pricing**

It is generally accepted that tendering procedures are designed to provide competition in areas where it might otherwise be absent. A crucial feature of this system is that potential suppliers prepare and submit bids independently. Bid rigging or collusive tendering, however, is the manner in which competitors conspire to effectively raise prices where customers buy goods and/or services through soliciting competing bids. The common objective of any bid rigging scheme is to raise the amount of the winning bid and thereby the amount that the winning bidders will gain (OECD, 2009). This involves competitors agreeing in advance on who will submit the winning bid on a particular contract.

The implementation of a bid rigging scheme may involve a number of strategies including bid suppression, bid rotation and cover pricing, among others. The most common of these strategies in the construction industry is cover pricing. It appears that even though cover pricing is a common practice in the construction industry, the practice and its anticompetitive effects are not well understood by not only the participants in this market but by the public in general. This is evidenced by the lack of academic literature or research interest in this area. As such this paper aims to bring an understanding of this conduct and the reasons why competition authorities consider it an egregious offence under competition law. We discuss the conduct in detail below.

Cover pricing takes place when bidder A submits a price that is not intended to win the contract they are bidding for. This price is a price that would have been agreed upon between bidder A and bidder B who wishes to win the contract. According to the OECD (2009) a cover pricing arrangement includes at least one of the following:

- A competitor agrees that they will submit a bid that is higher than the bid of the designated winner; or
- A competitor agrees to submitting a bid that is known to be too high to be accepted; or
- A competitor submits a bid that contains special terms and conditions that are known to be unacceptable to the customer.

In effect, a cover pricing scheme is designed to give a false impression of a competitive bidding process when in actual fact the price level at which bidder A submitted its bid was derived taking into account commercially and competitive sensitive information obtained from bidder B. A cover pricing arrangement can take two forms; a simple cover price with no

form of compensation and a cover price scheme with some form of a compensation payment as discussed below.

### *2.1. Forms of cover pricing*

Cover pricing arrangements with no compensation are generally once-off agreements relating to a particular contract that competitors, for various reasons, may not be interested in tendering for. As such these competitors will seek a cover price from their rivals as a means of ensuring that they do not win the said contract.

Cover pricing with compensation payments, on the other hand, are arrangements whereby the parties agree that the party giving the cover will pay the party receiving the cover an agreed amount of money. The money paid could be to compensate the party receiving the cover for tender costs incurred or it could simply be to compensate the party receiving cover for not competing on that tender, in other words payment to stand down. In other instances, the form of compensation may involve the winning bidder compensating the losers by offering them subcontracts or supply contracts as a means of dividing the proceeds obtained from the higher priced bid.

It is generally accepted that the cost of tendering represents a large proportion of general overhead costs and the recovery of these costs could be the motivation for bidders engaging in cover pricing with compensation payments. The anticompetitive object of this form of cover pricing, however, is enhanced by the fact that the party giving the cover is then incentivized to recover the cost of the payment by further inflating the price in addition to any inflation due to reduced competition from the provision of the cover price. Often times the parties engaging in these compensation payments will process the payments using false invoices, showing that they are fully aware that an agreement to make compensation payments is illegal.

### *2.2. Characterisation of cover pricing in the context of the Act:*

The South African Competition Commission has had an increasing number of collusion cases which specifically involve cover pricing. While South African legislation makes no specific reference to cover pricing, provisions for this conduct to be prosecuted are encapsulated under section 4(1) of the Act. The discussion below focuses on how cover pricing can be used in restrictive practices such as price fixing, market allocation, information exchange and collusive tendering.

Cover pricing as a form of bid rigging or collusive tendering is well established in case law given that the practice has been widely used as a means of rigging bids by market participants. It is prevalent in once-off construction projects wherein non-interested competitors seek a cover price from the interested bidder in order to submit their bids and thereby create a false sense of competition in the market.

It is also important to note that the conduct of cover pricing is not mutually exclusive but may be used to achieve other forms of restrictive horizontal practices such as price fixing, market allocation and information exchange as will be shown below.

#### *2.2.1. Cover pricing in price fixing*

Cover pricing as a form of price fixing is based on the fact that the parties involved in the conduct agree on a particular threshold price level above which non-interested competitors must price in order to ensure that the allocated winner does get the contract.

Cover pricing as a form of price fixing distorts price competition in two ways. First, bidder A submitting the cover price is effectively submitting a price that has been directly or indirectly determined by bidder B, the bidder giving the cover price. Second, bidder A in determining its bidding price does so with the knowledge that the price set by bidder B is structured such that it will not win the tender anyway.

It is important to note that although it is possible that other bidders may not be party to the agreement to fix prices i.e. cover bidding, this does not make the conduct less egregious just because the party giving the cover price will still have to compete to win the contract. The essence of the cover pricing agreement is to stifle price competition for that particular contract and therefore the understanding between the giver and receiver of the cover price that the receiver will submit a price that is at or above the level discussed does amount to price fixing. This is despite the fact that there may be other competitors who may not be party to the agreement.

It is important to emphasise that cover pricing as a form of price fixing is based on the fact that it distorts price competition between players in the market and creates a false perception in the view of the customer that there is price competition in the market when in actual fact there is none.

#### *2.2.2. Cover pricing in information exchange*

Similarly, cover pricing can also be said to be an example of anti-competitive information exchange in that the exchange of competitively sensitive pricing information between competitors constitutes prohibited information exchange. This exchange of pricing information lessens or prevents competition in the market in that the disclosure by one party that it does not intend to compete for a tender greatly reduces the uncertainty faced by the interested competitor in the market. Moreover pricing information is communicated between competitors with the intension that one party will bid at or above this price.

#### *2.2.3. Cover pricing in market allocation*

Cover pricing can also facilitate market allocation particularly in continuous arrangements where the pricing arrangement reached enables the parties to allocate customers or projects. Such instances may include continuous arrangements in which members of a cartel may use cover pricing to devise pricing structures that allow them to price different types of customers i.e. customer allocation. The parties to such arrangements are generally subsidiaries of vertically-integrated groups of companies or are active in markets characterised by so-called 'traditional customers'.

Therefore cartel members agree that when pricing particular customers such as in-house or companies of vertically-integrated groups, the relevant subsidiary will have a pricing advantage while its competitors submit cover prices that will ensure that the subsidiary wins the contract. The cover pricing arrangement then allows these firms to ensure that they maintain their traditional customers or subsidiaries of their parent companies by devising a pricing structure that dictates how competitors are to price each of these customers. Also, in an agreement that involves submitting bids to various types of customers, as the example above shows, cover pricing is generally used by the parties to ensure that each competitor attains work or projects allocated to them.

### **3. Prevalence of cover pricing**

Bowen *et al* (2007) in their study of ethical behaviour in the South African construction industry provide some useful insights into the prevalence of bid rigging, particularly cover

pricing, in the construction industry. This is in line with findings in other jurisdictions across the world, including the United Kingdom, Holland, Australia and the United States.

Bowen *et al* (2007), using responses from a sample of construction professionals spanning contractors, architects, quantity surveyors, and engineers, found that cover pricing was the leading form of collusion witnessed by these respondents in the industry. This was followed by bid cutting<sup>1</sup>, hidden fees and commissions and compensation tendering costs to unsuccessful bidders. Further, the study found that 32% of the respondents believed that there had been an increase in collusive tendering over the past 10 years and 64% believed that it had remained constant. Only 4% were of the view that it had declined.

Internationally, the same conduct has been found to be quite prevalent in the construction industry and this is attested to, not only by academic studies, but by major investments into the construction industry that have resulted in a number of firms being prosecuted. In Australia, a survey by Ray *et al* (1999) found that 46% of contractors admitted to having submitted a cover price in tenders and that 64% of the total respondents reported that they knew of other firms who used cover prices. Recently there have been two high profile investigations into bid rigging in the construction industry in the United Kingdom and Holland which resulted in 103 and 1374 firms being fined respectively. In the United Kingdom, the investigation revealed that the practice of cover pricing was widespread and somewhat almost a standard business practice.

#### **4. *The anti-competitive object of cover pricing***

According to The OFT (2009) the object of an agreement/ concerted practise is assessed by an objective analysis of its aims rather than the parties' subjective intentions when they enter into it. Where the analysis shows that the consequences of the agreement/concerted practise is the lessening of competition then that will be its object, regardless of other objectives of the parties to the agreement. In *Apex Asphalt and Paving Co Limited v OFT* it was found to be irrelevant whether the parties to the agreement had considered the anti-competitive nature of the conduct, the only test is whether the object or effect of the conduct is in fact to prevent or distort competition.

The anticompetitive object of cover pricing is well established and accepted for the simple reason that this conduct results in the substantial lessening or prevention of competition and thus a *per se* prohibition. In the *Apex v. OFT* matter the CAT outlined a number of ways in which the practice of cover pricing distorts competition and these include that:

- It reduces the number of competitive bids submitted in respect of that particular tender;
- It deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;
- It prevents other contractors wishing to place competitive bids in respect of that tender from doing so; and
- It gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.

#### **5. *The view from the industry: reasons for cover pricing***

---

<sup>1</sup> Bid cutting is the process by which the main contractor may try to lower their costs or prices through merely requesting prices or negotiating from the basis of either an original quote or competitor's quotes or a potential supplier's budget figure. This is generally done once the main contractor has been awarded the contract and they then engage their suppliers as a means of lowering their costs even more than what is reflected in the bid document.

Sheldon (1982), in his study of collusion in the United Kingdom, found that collusive agreements are an attractive means of ensuring that there is a steady flow of work and achieving joint, risk-adjusted, discounted profits. Zarkada-Fraser and Skitmore (2000) identified the internal and external (environment and situational) factors that influence the moral decision-making process that determines participation in cartels. The three most important factors were external factors such as whether the individual would be held legally liable for the conduct; the conduct itself was considered illegal, and whether there is a legal issue involved. This study indicated that the legal implications of participating in cartel conduct were of more importance than other reasons.

There are a number of arguments that market participants raise to try and explain why they engage in cover pricing. Ray *et al* (1999) cite a number of reasons that were provided by market players for this conduct in their study and these include:

- Little interest in the contract offered;
- Lack of resources to complete the work competently;
- Lack of sufficient time to complete a detailed tender document;
- A desire to remain on the customer's list and thereby be considered for future contracts; and
- Little chance of winning due to the large number of firms competing for the same contract.

Daniels (1978) provided similar reasons why tenderers engaged in cover pricing. These included the cost of bidding, the high risk of losing, avoiding offending customers by not tendering and the short period allowed for tender preparation. Moyles (1973) suggests that tenderers generally give detailed attention only to 'desirable contracts' while the remainder is prepared in a more approximate manner with a risk allowance to cover for unforeseen circumstances and for the less accurate method of estimating.

Other reasons provided by industry participants relate to changes in the business cycle. During times of severe recession or economic downturn bid rigging, in whatever form including cover pricing, may be used as a means of spreading available work thereby averting financial disaster for market participants.

The construction industry participants do not view cover pricing as an infringement of the act as shown above. They state that the process of putting in an artificially high bid is not a breach of competition law. However, it must be recognized that the interaction and communication between competitors in reaching an agreement over the cover price is in itself an infringement of comp law. It shows that the decision to bid was not a unilateral one but a joint decision between competitors, it is indeed a concerted practice as defined in the act. Furthermore, this contact between parties has the effect of disclosure of competitively sensitive information and thus influences a tenderer's conduct in the market. The parties to the conduct have effectively substituted practical cooperation for the risks of competition and consequently distorted competition in the tender process. Such conduct undermines the benefits to the clients of receiving competitively priced bids.

## **6. The importance of the construction industry in the South African Economy**

According to the Council for Scientific and Industrial Research (2003), construction makes up more than half of total national capital investment in most countries and can amount to as much as 10 percent of gross domestic product (GDP). According to *Who Owns Whom* (2008), the construction industry accounts for 3.8 percent of GDP and has been the fastest

growing sector of the economy in the past five years. Statistics South Africa (2007) estimates that the total income for the construction industry in 2007 was R169.25 billion<sup>2</sup>.

Infrastructure and construction activity in South Africa has largely been underpinned by the government's infrastructure investment programme. The government's spending priorities over the past few years have included infrastructure investments to support industrial development through ensuring that adequate public infrastructure is in place and as a means of creating jobs. As such, the 2010/2011 budget speech tabled by the Minister of Finance indicated that government plans to spend approximately R864 billion on infrastructure over the next three years. About 85.3 percent of this spend will be on the provision of infrastructure for electricity generation, roads, pipelines, bulk infrastructure for water and sanitation and housing (Jurgens, 2010).

*Who Owns Whom (2010)* estimates that infrastructure construction as a percentage of the total construction industry in 2009 was approximately 56 percent. They further project that expenditure on public sector capital is expected to reach 9.8 percent of GDP by 2012/13.

According to research conducted by CSIR (2003) it is generally accepted that the construction industry has a multiplier effect on the economy as a whole because it is considered that one job in construction gives rise to two further jobs in the construction and other sectors of the economy. Therefore the anti-competitive effect of cover pricing (through the increased costs of infrastructure projects) in the construction industry not only hampers the development of the South African economy as a whole but also impedes on the employment creation imperatives of government in general.

## **7. Case studies**

### *7.1. Briggs Roofing and Cladding and others*

In 2005 the Office of Fair Trading (OFT) released its findings in the *Briggs Roofing and Cladding and others* case. The case dealt with collusive tendering for the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings contracts in the North East of England. The investigation involved a number of roofing contracts put out to tender by various customers. The parties involved in the conduct had individual agreements and therefore different parties were involved in different numbers of infringements. Certain infringements related to collusion on a single contract while others related to collusion on a number of different contracts for a single customer. The conduct concerned was mainly affected through cover pricing by the various players involved in bidding for these contracts.

In its analysis of evidence, the OFT took note of the effect of the procurement process on competition in the relevant market. First, the OFT recognized that roofing services in this market were procured through a tendering process which mainly involved local authorities and private managing agents. This meant that any firm with expertise in repairing flat roofs within a reasonable distance of the contract location could feasibly tender for a contract. However, the OFT found that local authorities generally short-list a number of firms already on their standing list of suitable contractors and that they usually did not look beyond this standing list even when they could not find suitable contractor on the short-list.

The effect of this practice was that, in the absence of collusion, the most effective competition in the market would be limited to those suppliers on the standing list, specifically those on the short-list.

Moreover, the OFT considered the evidence presented by the leniency applicant in the matter which showed that cover pricing was extensively used by the parties as a means of ensuring that those who were not interested in the affected contracts did not win and vice versa. The evidence comprised faxes between some of the implicated parties which exchanged cover prices, oral testimonies which explained the motives and intentions of the parties involved in the conduct.

The OFT resolved that:

*“The conduct of parties in providing, receiving and considering information as to (a) whether or not they intended to bid, (b) whether they were amenable to submitting a cover price and/or (c) the prices at or above which a cover bid should be set, amounts to a concerted practice which has as its object the prevention, restriction or distortion of competition.”*

Further, the OFT referred to the CAT ruling in the Apex case which stated that:

*“The concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender”.*

This provided the basis for the OFT’s finding that the parties involved in the conduct had contravened the Act despite the justifications put forward by these parties. Similar to reasons put forward in the Apex case, the parties argued that they only engaged in cover pricing in order to stay on the standing lists of the local authorities and therefore the desire to stay on standing lists was the primary consideration when submitting a cover bid.

The OFT, once again reverted to the CAT judgement in the Apex case where it was stated that

*“....Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.”*

This case study shows how cover pricing was used as a form of collusive tendering in various agreements and how the structuring of the tendering process also limited the scope of competition for these tenders and thus increased the chances of successful coordination by the respondents.

The South African case studies discussed below seek to demonstrate, respectively, how cover pricing with compensation has been used in a once-off contract situation and how cover pricing with no compensation was used in a continuous arrangement that is interlinked with customer allocation. We now turn to the once-off cover pricing arrangement relating to the Project A railway line extension project.

## 7.2. Project A

The Commission initiated an investigation against the firms involved in the bidding for the Project A after having received a leniency application which alleged that these players engaged in cover pricing for the above-mentioned project. Firm A, the CLP applicant alleged that it colluded with two competitors, all pre-qualified tenderers for the project, whereby Firm A would take a cover price on the main project and in turn be subcontracted on other aspects of the job.

In order to achieve this, Firm A obtained a cover price from both competitors a few days before the tender closed. Similar to the flat roof coverings case, the effect of the procurement process by the customer was such that it limited competition for this project to

only the pre-qualified tenderers and that despite not finding a suitable individual contractor the customer did not go beyond this list.

Firm A, in its reasons for engaging in the conduct, stated that due to unforeseen capacity constraints it could no longer undertake the project on its own. The arrangement, therefore, was that Firm A would take a cover price from both competitors so that it can lose the main project and be able to subcontract other aspects of the project.

The Commission in its evaluation of the evidence looked at the oral evidence presented by Firm A and the respondents in the matter. The Commission also looked at documentary evidence presented which included diary entries which confirmed the meeting where the agreement was reached. Further, the Commission considered copies of telephonic records which showed communication between Firm A and the respondents around the period when the cover price was said to have been telephonically exchanged. Lastly, the Commission was presented with evidence which showed the original bid price by Firm A and how this was re-priced in order to reach the cover price obtained from the respondents.

As stated above, this case shows how cover pricing with compensation is used in collusive tendering and how the tendering process designed by the customer aided the success of coordination by the respondents. The case has been referred to the Tribunal for adjudication and judgement on the matter is still pending.

### 7.3. *Firm Y*

The *Firm Y* case demonstrates how cover pricing can be used in an on-going collusive agreement and how this practice can assist in maintaining a combination of a price fixing and customer allocation agreement. This case is also a result of a leniency application by one of the participants in a cartel.

Firm Y, the applicant, alleged that it agreed with its competitors to allocate customers and projects based on market shares such that larger players were allocated bigger percentages than the smaller players. Intricately linked to this agreement was a price fixing arrangement which enabled these firms to carry out the customer/project allocation agreement. The crux of the arrangement was that large projects i.e. customers, would be shared among the firms in accordance with the agreed percentages and that firms would not compete against each other when it comes to their key customers. This arrangement was implemented by way of cover pricing where necessary.

The operation of the cartel was that members of the cartel would meet on a weekly basis after tenders closed<sup>3</sup> and the allocation sheet which was kept for record purposes would be reviewed to determine which firms would be allocated which contracts. Since all firms had 'allocated' customers and what they called 'in-house' customers, the price fixing agreement was then used to ensure that competitors priced in a particular way when dealing with another firm's 'allocated' or in-house customer.

In-house customers were the subsidiaries of the vertically-integrated groups to whom each of the competing suppliers belonged. For example if Group A, which owns both Firm X (a subsidiary in a related downstream market) and Firm Y (the input supplier) was offering the contract, then Firm Y was expected to win that contract as the customer was part of the same group of companies. Therefore, the arrangement was that in-house contracts were automatically allocated to the in-house company or subsidiary. Competitors of the subsidiary input supplier, having regard to the pricing arrangement knew how to price such that they would come in higher and thus allow the subsidiary to win that contract.

---

<sup>3</sup> This was generally on Tuesdays or Fridays.

This pricing arrangement also applied to 'allocated' customers of these firms. Each firm was allocated independent customers, those not affiliated to vertically-integrated groups. The arrangement was that each firm was allocated customers that they would price competitively and thereby win contracts from those customers. Competitors had to use the pricing agreement to ensure that they price higher when bidding on the contracts offered by these customers. This conduct continued for a significant period of time over a number of projects taking place in the relevant geographic market.

This case illustrates how cover pricing without compensation can be used to aid other forms of collusive conduct such as customer allocation.

## **8. Way forward**

It has been established that cover pricing is without question anti-competitive and that it has significant effects on the South African economy. As such firms should refrain from engaging in this conduct. It is also important to recognise that the structure of the tendering processes adopted by customers in such markets, especially public institutions, may also have an effect in aiding these suppliers to engage in collusive conduct such as cover pricing. This therefore requires that there be a review of such tendering processes and active steps are taken by public institutions to minimise the risk of collusive tendering in their procurement processes.

The OECD (2009) proposes a number of measures that can be taken by procurement agencies to minimise the risk of collusive tendering and promote more effective competition in public procurement. These are discussed below.

First, it is important that public procurement agencies are aware of the range of products and/or services available in the market that suit their requirements and that they have information on potential suppliers. This includes collecting information on potential suppliers, their products, their prices and costs, determination of whether the market in which they will purchase from has the characteristics conducive to collusion, or recent activities or trends that may affect competition in that market.

Second, it is recommended that public procurement agencies design their tender processes in such a way that they maximise the potential participation of genuinely competing bidders. This can be achieved by ensuring that procurement officials reduce the cost of bidding; avoid unnecessary participation requirements that limit competition unreasonably; allow firms from other regions or countries to participate; or find ways of incentivising smaller firms to take part even if they are not bidding for the whole contract.

Third, the terms of reference (TOR) for contracts must be drafted such that they are clear, avoid bias and most importantly focus on functional performance i.e. what is to be achieved rather than how it is to be done. This encourages innovative solutions and value for money. The manner in which the TOR are written affects the number and type of suppliers that will respond to the invitation to tender and thereby affects the success of the selection process. It is also important to note that higher value and less frequent procurement opportunities will increase the bidders' incentive to compete.

Fourth, the tendering process must be designed such that it reduces the potential for communication among bidders. This can be achieved by avoiding to bring potential suppliers together through regularly scheduled pre-bid meetings; use of electronic bidding to avoid last minute communication by firms if tenders are submitted in person or through open tender. Careful consideration must be given to what information is disclosed to bidders at the time of public opening of tenders.

Fifth, the evaluation criteria and awarding of the tender must be carefully considered as they may affect the intensity and effectiveness of competition in the tender process. The selection criteria adopted is not only important for the current project but also in maintaining a pool of credible potential suppliers with a continuing interest in bidding for future projects. This effectively means that the selection criteria and awarding criteria must be designed such that credible bidders, including small and medium enterprises, are not discouraged unnecessarily.

Lastly, procurement officials must be trained about the risks of bid rigging in public procurement processes and must clearly indicate in the invitations to tender that collusive tendering is not acceptable. Procurement agencies can also collect historical information on bidding behaviour; constantly monitor bidding activities and analysing bid data in order to identify problematic situations.

## **9. Conclusion**

This paper has shown how cover pricing can take different facets and how it can be used in various arrangements depending on the structure of the agreement by the involved parties. The case studies used in the paper attest to this. Cover pricing can include some form of compensation payment, depending on the parties involved. Also it can be used in both once-off arrangements relating to a particular contract or in continuous arrangements relating to a number of contracts or customers.

This paper has also shown the different views held by competition authorities and market players on the practice of cover pricing. Contrary to the view held by competition agencies, various academic papers and case law show that market participants do not view cover pricing as a contravention of competition law but rather a standard industry practice that has no harmful effects in the market. Competition authorities, on the other hand, view this conduct as harmful given that its intention is to give a false sense of competition in the relevant market when in actual fact there is none. It is also important to note that in accordance to section 4(1)(b), under which this conduct is prosecuted, implicated firms are liable to a fine up to a maximum of 10% of their annual turnover.

## REFERENCES

1. Apex Asphalt and Paving Co Ltd v. OFT (2005) CAT 4.
2. Bowen P., Akintoye, A., Pearl, R., and Edwards, P.J., 2007. *Ethical behavior in the South African construction industry*, *Construction Management and Economics*, Vol 25, pp 631 -648.
3. Briggs Roofing and Cladding and others v. OFT, case no: CA98/02/2005.
4. Daniels, R., 1978. *Keeping tabs on tenders*, *Building*, 30 June, 49.
5. Who Owns Whom. 2008. *SA major sector summary-Construction (major division 5)*[online] Who Owns Whom (Published 2008) Available at: [http://www.whoownswhom.co.za/Major%20Sector%20Summaries/Major\\_Sector\\_Summary%20-%20Construction%20-%20Division%205%20-%20July%202008.htm](http://www.whoownswhom.co.za/Major%20Sector%20Summaries/Major_Sector_Summary%20-%20Construction%20-%20Division%205%20-%20July%202008.htm) [Accessed 15 July 2010]
6. Jurgens, A., 2010. *Research report on Construction of civil engineering structures and other buildings*, Who Owns Whom.
7. Moyles, B.F., 1973. *An analysis of the contractor's estimating process*, M.Sc. thesis, Loughborough University of Technology.
8. OECD, 2009. *Guidelines for fighting bid rigging in public procurement*. OECD. (Published 2009) Available at: [www.oecd.org/dataoecd/27/19/42851044.pdf](http://www.oecd.org/dataoecd/27/19/42851044.pdf) [Accessed 15 July 2010]
9. OFT decision, Bid rigging in the construction industry in England, case no: CA98/02/2009.
10. Ray, R.S., Hornibrook, J., Skitmore, M., and Zarkada-Fraser, A., 1999. *Ethics in tendering: a survey of Australian opinion and practice*. *Construction Management and Economics*, Vol 17, pp 139 – 153.
11. Sheldon, I.M., 1982. *Competitive bidding and the objectives of the firm*, unpublished PhD thesis, Institute of Science and Technology, University of Manchester, England.
12. Statistics South Africa, 2007. *Construction Industry 2007*, STATSSA (Published 2009) Available at: [www.statssa.gov.za/publications/Report-50-02.../Report-50-02-012007.pdf](http://www.statssa.gov.za/publications/Report-50-02.../Report-50-02-012007.pdf) [Accessed 15 July 2010]
13. Van Wyk, L, 2003. *A Review of the South African Construction Industry Part 1: Economic, Regulatory and Public Sector Capacity Influences on the Construction Industry*. CSIR, [Online] Available: [www.buildnet.co.za/akani/2004/mar/02.html](http://www.buildnet.co.za/akani/2004/mar/02.html) [Accessed 15 July 2010.]
14. Zarkada-Fraser, A. and Skitmore, R.M., 2000. *Decisions with moral content: collusion*, *Construction Management and Economics*, vol 18(1), pp 101 – 111.