



COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 018549

In the matter between:

The Competition Commission

Applicant

and

WBHO Construction (Pty) Ltd

Respondent

Panel : N Manoim (Presiding Member)
Y Carrim (Tribunal Member)
M Mokuena (Tribunal Member)

Heard on : 09 April 2014

Decided on : 09 April 2014

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A" and Addendum.



Presiding Member
N Manoim

09 April 2014
Date

Concurring: Y Carrim and M Mokuena

018549 - ANNEXURE A



competitiontribunal south africa

Form CT1(1)

About this Form

This form is issued in terms of section 50 of the Competition Act and Rules.

This form is to be used only for a referral by the Competition Commission.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served with this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any other answer must be in affidavit form, setting out in numbered paragraphs:

- (a) a concise statement of the grounds on which the Complaint is opposed;
- (b) the material facts or points on which the respondent relies;
- (c) an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Form continues on Page 2.

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Commission

Date: 21 February 2014

To: the Registrar of the Competition Tribunal, and:

(Name of respondent and [if applicable] other participants :)

WBHD CONSTRUCTION (PTY) LTD

Concerning:

(Complaint name and Commission file number:)

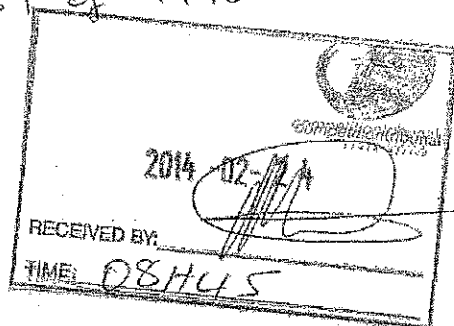
Competition Commission v Concord & others
Case No: 2009 MTA 446

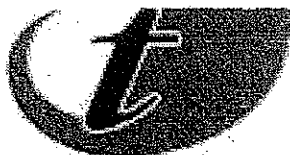
From: the Competition Commission

The Competition Commission alleges that the Respondent contravened the provisions of the Competition Act, section _____ by engaging in the following prohibited conduct:

(Concise statement of the alleged prohibited practice:)

The respondents engaged in collusive tendering in respect of the Soshen Saldanha project in contravention of Section 4(1)(b)(iii) of the Competition Act, 89 of 1998.





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Form CT1(1)

Page 2

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Contacting the Tribunal

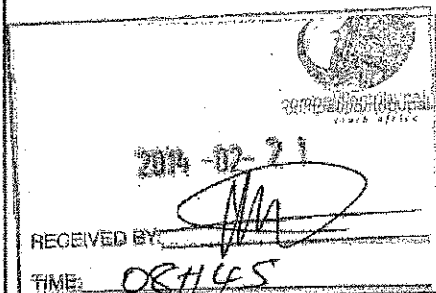
The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 012 3943300
fax: 27 012 3940169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Commission

The Competition Commission seeks an order granting the following relief:

(Concise statement of the order or relief sought:)

Confirmation of the attached settlement agreement concluded between the Applicant and the Respondent as a consent order of the Competition Tribunal in terms of section 49D read with section 58(1)(a)(iii) and section 59(1)(a) of the Competition Act 89 of 1998, as amended



☒ This referral is to proceed as a consent proceeding.

☐ This referral is to proceed as a contested proceeding. Attached is an affidavit setting out the grounds of this complaint, and a statement of the material facts and the points of law relevant to it, as required by Competition Tribunal Rule 15(2).

Name and Title of person authorised to sign on behalf of the Competition Commission:

Ms Wendy Mkwanzani : *Chief Legal Counsel*

Authorised Signature:

[Signature]

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT CASE NO: 24/CR/Mar11

CC CASE NO: 2009May4446

In the matter between:

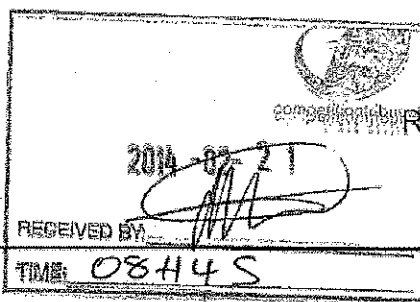
THE COMPETITION COMMISSION

Applicant

and

WBHO CONSTRUCTION (PTY) LTD

Respondent



FILING NOTICE

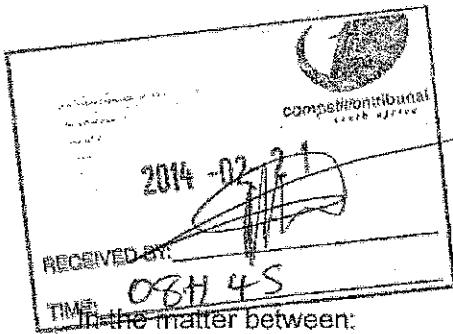
BE PLEASED TO TAKE NOTICE that the Applicant herewith files the following documents:

1. CT 1(2) Notice of Motion; and
2. Settlement Agreement between the Competition Commission and WBHO Construction (Pty) Ltd.

DATED AT PRETORIA ON THIS 21st DAY OF FEBRUARY 2014

COMPETITION COMMISSION
DTI Campus

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA



CT Case No: 24/CR/Mar11

CC Case No: 2009May4446

THE COMPETITION COMMISSION

Applicant

and

WBHO CONSTRUCTION (PTY) LIMITED

Respondent

SETTLEMENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 59(1)(a) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND WBHO CONSTRUCTION (PTY) LIMITED IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998

Preamble

The Competition Commission ("the Commission") and WBHO Construction (Pty) Ltd ("WBHO") hereby agree that application be made to the Competition Tribunal ("Tribunal") for the confirmation of this settlement agreement as an order of the Tribunal in terms of section 49D read with section 58(1)(a)(iii) and 59 (1)(a) of the Competition Act No. 89 of 1998, as amended ("the Act"), in respect of a contravention of section 4(1)(b)(iii) of the Act, on the terms below:

1. Definitions

For the purposes of this Settlement Agreement the following definitions shall apply:

1.1 "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as

amended;

- 1.2 "CIDB" means the Construction Industry Development Board;
- 1.3 "CLP" means the Commission's Corporate Leniency Policy (Government Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 2008);
- 1.4 "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.5 "Commissioner" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.6 "Complaint" means the complaint initiated by the Commissioner in terms of section 49B of the Act against WBHO, Concor (Pty) Ltd and Lennings DEC Rail Services (Pty) Ltd, under case number 2009May4446;
- 1.7 "Concor" means Concor (Pty) Ltd, a company registered in accordance with the company laws of the Republic of South Africa with its principal place of business at Concor House, 13 Church Street Extension, Gauteng.
- 1.8 "Lennings" means Lennings DEC Rail Services (Pty) Ltd, a company registered in accordance with the company laws of the Republic of South Africa with its principal place of business situated at 1 Lily Van Niekerk Road Boksburg East, Gauteng.
- 1.9 "Parties" means the Commission and WBHO;
- 1.10 "Respondents" means WBHO, Concor and Lennings;
- 1.11 "Settlement Agreement" means this agreement duly signed and concluded between the Commission and WBHO;

- 1.12 "Transnet" means Transnet Ltd;
- 1.13 "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.
- 1.14 "WBHO" means WBHO Construction (Pty) Ltd, a company registered in accordance with the company laws of the Republic of South Africa with its principle place of business situated at 53 Andries Street, Wynberg, Gauteng. WBHO is a multi-disciplinary construction and engineering group with a focus on building roads, earth platforms, railway lines, bridges, mining infrastructure, water purification works, dams, pipelines, airports, sewage works and other infrastructural works.

2. The Commission's investigation and findings

- 2.1 On 16 July 2009 the Commissioner initiated a complaint against WBHO, Concor and Lennings ("the Respondents") in terms of section 49B(1) of the Act for alleged collusive tendering conduct in contravention of section 4 (1)(b)(iii) of the Act.
- 2.2 The complaint was initiated pursuant to a leniency application filed by Lennings on 7 April 2009 in terms of the Commission's CLP. In terms of the complaint it was alleged that the Respondents entered into a collusive tendering agreement in respect of the tender for the Upgrade of the Even loops on the Sishen-Saldanha Railway Ore-line ("the Sishen Saldanha project").
- 2.3 The Commission conducted an investigation and found that on 23 August 2006, Transnet invited eight companies to submit an Expression of Interest ("EOI") for the Sishen-Saldanha project which involved civil earthworks, track laying and overhead traction equipment work ("the works") at the Sishen Saldanha Railway Ore-line. The Respondents responded to the invitation by submitting EOIs, and were advised by Transnet on 20 October 2006 that they had pre-qualified for the tender.

- 2.4 The Commission found that in or about November 2006, WBHO reached agreement with Lennings and Concor in respect of the Sishen Saldanha project. The Respondents agreed, inter alia, that Lennings would submit a tender price for all the works that was higher than that of WBHO and Concor.
- 2.5 The Commission established that in line with the agreement, Lennings accepted a cover price from WBHO and Concor to ensure that WBHO and Concor would win the tender. The project was divided into the Southern and Northern section. It was further agreed that the track work would be subcontracted to Lennings, and that Lennings would quote identical prices for the track work to both WBHO and Concor.
- 2.6 The Commission found that Lennings submitted a tender to Transnet that was priced the highest, and WBHO submitted the lowest price in line with the collusive agreement. WBHO was ultimately awarded the Southern Section of the works, and the Northern Section was awarded to Concor.
- 2.7 The Commission found that this conduct amounts to collusive tendering in contravention of section 4(1)(b)(iii) of the Act.



3. Admission

WBHO admits that it engaged in collusive tendering in respect of the Sishen-Saldanha project in contravention of section 4(1)(b)(iii) of the Act, as set out in paragraphs 2.4 to 2.6 above.

4. Co-operation

WBHO agrees to fully cooperate with the Commission in its investigation and prosecution of the remaining respondent in the complaint. This cooperation includes, but is not limited to:

- 4.1 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged




contravention contained in this Consent Agreement; and

- 4.2 testify in the complaint referral in respect of the alleged contravention covered by this Consent Agreement.

5. Future Conduct

WBHO agrees to:

- 5.1 prepare and circulate a statement summarising the contents of this Consent Agreement to its employees, managers and directors within fourteen (14) days from the date of confirmation of this Consent Agreement as an order of the Tribunal;
- 5.2 refrain from engaging in collusive tendering in contravention of section 4(1)(b)(iii) of the Act, and from engaging in prohibited collusive conduct that is prohibited by the Act, in future;
- 5.3 continue to monitor a competition law compliance programme which it has developed and implemented as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;
- 5.5 undertakes henceforth to engage in competitive bidding.

Handwritten signature and initials, possibly 'TB'.

6. Administrative Penalty

- 6.1. Having regard to the provisions of section 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, WBHO agrees that it is liable to pay an administrative penalty in the sum of R10 244 135 50 (ten million two hundred and forty four thousand, one hundred and thirty five hundred and fifty rand), which penalty represents 0.3% of WBHO's annual turnover for the civil engineering subsector for the financial year ended 2010.
- 6.2. WBHO will pay the amount set out in paragraph 6.1 above to the Commission within 30 days from the date of confirmation of this Consent Agreement by the Tribunal.
- 6.3. The penalty must be paid into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

Reference: 2009May4446 (WBHO)

- 6.4 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.



7. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and WBHO relating to the contravention of section 4(1)(b)(iii) of the Act that is the subject of the Commission's investigation under Commission case number 2009May4446.

Dated and signed at JOHANNESBURG on the 11th day of FEBRUARY 2014.

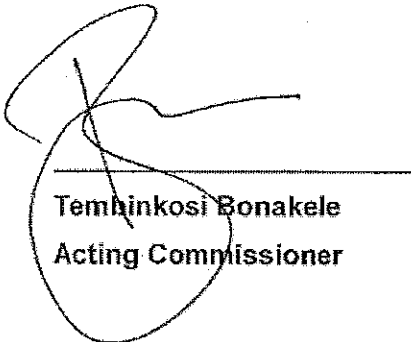
For WBHO



Terrence Armstrong
Director

Dated and signed at PRETORIA on the 18th day of FEBRUARY 2014.

For the Commission



Tembinkosi Bonakele
Acting Commissioner

ADDEDUM TO SETTLEMENT AGREEMENT

In the course of the hearing the Commission corrected a typo in the Administrative penalty amount imposed in paragraph 6.1 line 5. It indicated that the actual amount is R10 244 135.50 (ten million two hundred and forty four thousand, one hundred and thirty five rand and **fifty cents**) and not **rand** as indicated in the settlement agreement.