competitiontribunal
south africa

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CR234Feb16/SA049Jun16

In the matter between:

The Competition Commission **Applicant**

and

WBHO Construction (Pty) Ltd **Respondent**

Panel	:	N Manoim (Presiding Member) Y Carrim (Tribunal Member) I Valodia (Tribunal Member)
Heard on	:	13 July 2016
Decided on	:	13 July 2016

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and WBHO Construction (Pty) Ltd annexed hereto marked "A".

Presiding Member
Mr N Manoim

13 July 2016
Date

Concurring: Ms Y Carrim and Prof. I Valodia

ANNEXURE "A"

2

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: _____

CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION Applicant

competitiontribunal south africa
2010 07 17
RECEIVED BY:
TIME: 08:50

and

WBHO CONSTRUCTION (PTY) LIMITED Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(b) OF THE COMPETITION 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

The Competition Commission ("**Commission**") and WBHO Construction (Pty) Limited ("**WBHO**") hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D read with section 58(1)(b) of the Competition Act no. 89 of 1998, as amended ("**the Act**"), in respect of contraventions of section 4(1)(b)(iii) of the Act.

1 DEFINITIONS

For purposes of this consent agreement the following definitions shall apply

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

1.2 "**Aveng**" means Aveng (Africa) Limited;

1.3 "**Basil Read**" means Basil Read (Pty) Ltd;

1.4 "**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);

1.5 "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its offices at 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.6 "**Complaint Referral**" means the referral of complaint by the Commission against WBHO on 17 February 2016 under Competition Commission case number 2009Sep4641;

1.7 "**Concor**" means Concor Limited;

1.8 "**Consent Agreement**" means this agreement duly signed and concluded between the Commission and WBHO;

1.9 "**Cover Price**" means, generally, a price that is provided by a firm that wishes to win a tender to a firm that does not wish to do so, but may

wish to remain on the tender list, in order that the firm that does not wish to win the tender may submit a higher price; or alternatively a price that is provided by a firm that does not wish to win a tender, but may wish to remain on the tender list, to a firm that does wish to win that tender in order that the firm that wishes to win the tender may submit a lower price;

1.10 "**Grinaker-LTA**" means an operating business unit of Aveng;

1.11 "**Group Five**" means Group Five Ltd;

1.12 "**Haw & Inglis**" means Haw & Inglis Civil Engineering (Pty) Ltd;

1.13 "**Murray & Roberts**" means Murray & Roberts Limited;

1.14 **"Invitation"** means the 'Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act' dated 1 February 2011;

1.15 "**Parties**" means the Commission and WBHO;

1.16 "**Raubex**" means Raubex Group Limited;

1.17 "**Stefanutti**" means Stefanutti Stocks Limited;

1.18 "**Trencon**" means Trencon Construction (Pty) Ltd

1.19 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its offices at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; and

1.20 "**WBHO**" means WBHO Construction (Pty) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at 53 Andries Street, Wynberg, Sandton.

2 BACKGROUND

2.1 On 1 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated a complaint in terms of section 49B(1) of the Act into particular prohibited practices relating to conduct in respect of numerous construction projects, by the firms listed below. The complaint concerned alleged contraventions of section 4(1)(b) of the Act with regard to price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Stefanutti Stocks Holdings Limited, Aveng (Africa) Limited, Group Five Ltd, Murray & Roberts, Concor Ltd, G. Liviero & Son Building (Pty) Ltd, Giuricich Coastal Projects (Pty) Ltd, Hochtief Construction AG, Dura Soletanche-Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Pilings CC, Rodio Geotecnics (Pty) Ltd, Diabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC, Wilson Bayly Holmes-Ovcon Ltd and other construction firms, including joint ventures.

2.2 The Commission's investigation of the above complaint, as well as several other of the Commission's investigations in the construction industry, led the Commission to believe that there was widespread collusion in contravention of section 4(1)(b)(iii) of the Act in the construction industry. Accordingly, in line with the purpose of the Act as

well as the Commission's functions, the Commission decided to invite construction firms that were involved in collusive conduct to settle on favourable terms. The Invitation was published on the Commission's website on 1 February 2011. This was also done in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices, as well as in order to expedite finalisation of the investigations, under a fast track process. The Invitation specifically provided that it was open to firms to also apply for leniency in terms of the CLP.

2.3 In response to the Invitation and in terms of the Commission's CLP, WBHO was first to apply for leniency in respect of the conduct described in paragraph 4 below.

3 CONDITIONAL IMMUNITY

3.1 The Commission granted WBHO conditional immunity from an administrative penalty before the Tribunal for its involvement in the prohibited practices described in paragraph 4 below.

3.2 In exchange for conditional immunity, WBHO, inter alia, agreed to co-operate with the Commission in respect of any steps that the Commission may deem necessary to obtain an order from the Tribunal declaring the conduct set out in paragraph 4 below to be a contravention of section 4(1)(b)(iii) of the Act.

3.3 The firms that had been implicated by WBHO, through the Invitation, have settled the projects set out in paragraph 4 of this Consent

Agreement.

3.4 In order to discharge its mandate of ensuring that findings are obtained against all participants to a cartel, the Commission sought to conclude consent agreements with the leniency applicants at the conclusion of the fast track settlement process. This was done in order to safeguard and preserve the rights of affected third parties to bring civil damages claims against the leniency applicants.

3.5 In line with the above, the Commission engaged in settlement negotiations with WBHO. However, the parties were not able to conclude a consent agreement relating to these projects. As a result, the Commission referred WBHO's conduct set out in paragraph 4 below to the Tribunal on 17 February 2016.

3.6 Following the Commission's Complaint Referral, WBHO approached the Commission with a view to engage in negotiations in order to settle the matter. This Consent Agreement is the result of the resumed negotiations between the Commission and WBHO.

4 CONDUCT IN CONTRAVENTION OF THE ACT

WBHO disclosed its participation in the following prohibited practices in contravention of section 4(1)(b)(iii) of the Act:

4.1 2006 Road Constructors Meetings

WBHO reached a collusive agreement with Aveng, Concor, Raubex, Haw & Inglis and Basil Read at a meeting of the Roads Contractors in or about 2006.

In terms of the agreement, firms which were not interested in particular road contracts or in winning the relevant tenders, would submit Cover Prices to enable those firms that were interested in winning the particular bid to win the relevant tender.

4.2 **Upgrading of district road DR0815 Mount Frere to R56 T-junction tender (Contract SCMU 10 – 06/07 – 0043)**

On or about 14 August 2006 WBHO reached a collusive agreement with Grinaker-LTA and Haw & Inglis. In terms of this agreement Grinaker-LTA and Haw & Inglis submitted a Cover Price in relation to the Mount Frere tender.

In terms of the agreement, Grinaker-LTA and Haw & Inglis submitted Cover Prices at WBHO's request to enable WBHO to win the tender.

The tender was awarded to WBHO.

4.3 **Rehabilitation of Trunk Road 57/3 from Alice to Middeldrift tender (Tender Ref No. NRA P002-030-2006/1)**

In or about August 2006, WBHO reached a collusive agreement with Haw & Inglis. In terms of this agreement, WBHO agreed to submit a Cover Price in relation to the Rehabilitation of Trunk Road 57/3 from Alice to Middeldrift tender.

In terms of the agreement, Haw & Inglis provided a Cover Price to WBHO to ensure that WBHO would not win the tender.

The tender was awarded to Haw & Inglis.

4.4 **N1 Sections 15 and 16 Glen Lyon/ Zandkraal I (Tender No.**

NRAN001- 156-2006/1)

In or about 2006/2007, WBHO reached a collusive agreement with Basil Read. In terms of this agreement, WBHO agreed to submit a Cover Price in relation to the N1 Section 15 & 16 Glen Lyon/ Zandkraal tender.

In terms of the agreement, WBHO would submit a Cover Price to ensure that it would not win the tender.

The tender was awarded to Basil Read.

4.5 **N1 Sections 15 and 16 Glen Lyon/ Zandkraal II (Tender No.N001-156- 2007/1)**

In or about 2006/2007, WBHO reached a collusive agreement with Raubex. In terms of the agreement, WBHO agreed to submit a Cover Price in relation to the N1 Section 15 & 16 Glen Lyon/ Zandkraal II tender.

In terms of the agreement WBHO agreed to submit a cover price, to ensure that it would not win the tender.

The tender was awarded to Raubex.

4.6 **Upgrading of national road R40 from Hilltop to Barberton in Mpumalanga (Tender Ref No. NRA R040-02-2006/1)**

In or about 2006/2007, WBHO reached a collusive agreement with Basil Read and Raubex. In terms of this agreement, Basil Read and Raubex agreed to submit a Cover Price in relation to the R40 Barberton Reconstruction tender.

In terms of the agreement Basil Read and Raubex agreed to submit Cover

Prices to ensure that each would not to win the tender.

The tender was awarded to WBHO.

4.7 **Construction of Green Point Stadium (Tender Ref No: 124Q/2006/07)**

In or about December 2006, WBHO reached a collusive agreement with Stefanutti. In terms of this agreement, Stefanutti agreed to submit a Cover Price in relation to the tender for the Construction of the Green Point Stadium.

In terms of the agreement WBHO would provide a Cover Price to Stefanutti on the basis that Stefanutti would not win the tender. WBHO was at the time in a joint venture with Murray & Roberts when bidding for the tender ("**WBHO - Murray & Roberts JV**"). Murray & Roberts was the lead contractor in the joint venture and was not aware of the Cover Price arrangement between WBHO and Stefanutti.

The WBHO - Murray &Roberts JV was awarded the tender.

4.8 **Coega Development Corporation (Tender no. 03754)**

In or about July 2005, WBHO reached a collusive agreement with Grinaker LTA. In terms of this agreement, WBHO and Grinaker LTA agreed to disclose their respective tender prices to one another in relation to the Coega Office Block Development project in advance, to ensure that Grinaker LTA would win the tender.

It was further agreed that Grinaker LTA would pay a loser's fee to WBHO which amounted to 0,75% of the tender amount.

Grinaker LTA was awarded the tender and paid the loser's fee to WBHO in two instalments, on 07 March 2007 and 31 October 2007.

4.9 **New Board Factory at Ugie for PG Bison (Tender no. E05/586)**

On or about 28 April 2006, WBHO reached a collusive agreement with Grinaker LTA, which was in a joint venture with Concor and Trencon ("**Concor/GLTA/Trencon JV**"). In terms of this agreement, Grinaker LTA agreed to submit a Cover Price in relation to the Ugie PG Bison project.

In terms of the agreement WBHO requested a Cover Price from Grinaker LTA to ensure that WBHO would not win the tender.

The tender was awarded to the Concor/GLTA/Trencon JV.

4.10 **Berg River Dam (Tender No : TCTAB020)**

In or about 2004, WBHO was a junior partner in a joint venture with Grinaker LTA, Group Five, and the Western Cape Empowerment Joint Venture ("The BRP Joint Venture"). WBHO subsequently learned that the lead member of the BRP JV had reached an agreement with the Hochtief-Concor Joint Venture and Basil Read, which was in joint Venture with Ceccon and Oderbrecht, in terms of which it was agreed that the winning bidder would pay the losing bidders a losers' fee.

The tender was awarded to the BRP Joint Venture. According to WBHO, it did not pay any loser's fee and is not aware of any loser's fee having been paid.

4.11 **Z-Mill Civils and Structural Works (Tender Ref No: CEP3244)**

In or about July 2007, WBHO reached a collusive agreement with Stefanutti. In terms of this agreement, Stefanutti agreed to submit a Cover Price in relation to the Z-Mill Civils and Structural Works project.

In terms of the agreement, Stefanutti would provide a Cover Price to WBHO to ensure that WBHO would not win the tender.

The tender was awarded to Stefanutti.

5 ADMISSION

WBHO admits that the conduct set out in paragraph 4 above is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

6 CO-OPERATION

6.1 As far as the Commission is aware, and in compliance with the requirements as set out in the CLP, WBHO:

6.1.1 has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its control, relating to the prohibited practices which are the subject of this agreement;

6.1.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practices which are the subject of this agreement;

6.1.3 has provided a written undertaking that it has immediately ceased to engage in, and will not in future engage in, any form of prohibited practice;

6.1.4 has confirmed that it has not wilfully destroyed or falsified or concealed information, evidence and documents relating to the prohibited practices which are the subject of this agreement;

6.1.5 has confirmed that it has not wilfully or negligently made any misrepresentation concerning the material facts of any of the prohibited practices which are the subject of this agreement or otherwise acted dishonestly.

7 FUTURE CONDUCT

7.1 WBHO confirms that it no longer engages in the conduct set out in paragraph 4 above.

7.2 In compliance with the requirements set out in the CLP, WBHO agrees and undertakes to provide the Commission with full and expeditious co-operation from the time that this Consent Agreement is concluded until the subsequent proceedings, if any, in the Competition Tribunal or the Competition Appeal Court are completed. This includes, but is not limited to:

7.2.1 to the extent that it is in existence and has not yet been provided, providing (further) evidence, written or otherwise,

which is in its possession or under its control, concerning the contraventions contained in this Consent Agreement;

7.2.2 availing its existing employees and former employees (to the extent that it is able to do so) to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement.

7.3 WBHO has developed, implemented and is monitoring a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme will include mechanisms for the monitoring and detection of any contravention of the Act.

7.4 WBHO shall submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement as an order by the Competition Tribunal.

7.5 WBHO shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at WBHO within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

7.6 WBHO will not in the future engage in any form of prohibited conduct and will not engage in collusive tendering which will distort the outcome of tender processes but undertakes henceforth to engage in competitive bidding.

For the Commission

Dated and signed at Pretoria on the 14th day of June 2016

TEMBINKOSI BONAKELE

Commissioner

For WBHO

Dated and signed at SANDTON on the 31 day of MAY 2016

Name: ELIA LOUW NEL

Chief Executive Officer