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COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: CR162Oct15/SA098May18

In the matter between:

The Competition Commission **Applicant**

And

Group Five Construction (Pty) Ltd **Respondent**

Panel	:	AW Wessels (Presiding Member) M Mokuena (Tribunal Member) F Tregenna (Tribunal Member)
Heard on	:	27 June 2018
Addendum submitted on	:	31 July 2018
Decided on	:	01 August 2018

Consent Agreement

The Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Group Five Construction (Pty) Ltd annexed hereto marked "A" together with the addendum marked "A1".

Presiding Member
Mr AW Wessels

01 August 2018
Date

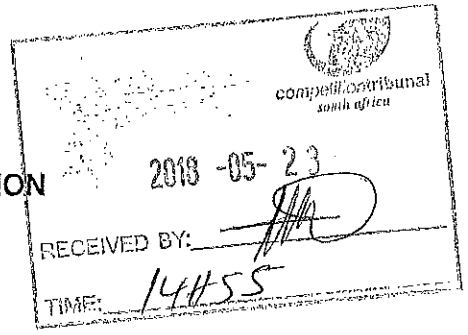
Concurring: Mrs M Mokuena and Prof. F Tregenna

ANNEXURE 'A'

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: CR162Oct15/SA093May18

CC CASE NO: 2009Feb4279/2009Sep4641



In the matter between:

THE COMPETITION COMMISSION Applicant

and

GROUP FIVE 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 GROUP FIVE CONSTRUCTION (PTY) LIMITED, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT

The Competition Commission ("Commission") and Group Five Construction (Pty) Limited ("Group Five") 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, 89 of 1998, as amended ("the Act"), in respect of contraventions of section 4(1)(b)(iii) of the Act.

1 DEFINITIONS

For the purposes of this consent agreement the following definitions shall apply

1.1 **"Act"** means the Competition Act, 89 of 1998, as amended;

1.2 **"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);

1.3 **"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 1st Floor, Mulayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.4 **"Complaints"** means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case numbers 2009Feb4279 and 2009Sep4641;

1.5 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Group Five;

1.6 **"Group Five"** means Group Five Construction (Pty) Limited, a company incorporated under the laws of the Republic of South Africa with its principal place of business at No. 9 Country Estate Drive, Waterfall Business Estate, Jukskei View, Johannesburg, Gauteng Province.

1.7 **"Non-prescribed prohibited practices"** refers to prohibited restrictive horizontal practices relating to the construction industry that are

contemplated in section 4(1)(b) of the Act and that are ongoing or had not ceased three years before the complaints were initiated, as contemplated in section 67 of the Act;

1.8 "**Parties**" means the Commission and Group Five;

1.9 "**Prescribed prohibited practices**" refers to prohibited restrictive horizontal practices relating to the construction industry that are contemplated in section 4(1)(b) of the Act and that ceased more than three years before the complaints were initiated;

1.10 "**Respondent**" means Group Five;

1.11 "**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;

2 BACKGROUND

2.1 On 10 February 2009, the Commission initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in the construction of the stadiums for the 2010 FIFA Soccer World Cup against Group Five, Grinaker-LTA (the construction operating business unit of Aveng), Basil Read (Pty) Ltd, WBHO Construction (Pty) Ltd, Murray & Roberts Limited, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv llc and Bouygues Construction SA.

2.2 In addition, 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 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, 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.

2.3 The Commission's investigation of the above complaints, 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 apply to engage in settlement 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.

2.4 In response to the Invitation and in terms of the Commission's CLP, Group Five was first to apply for leniency in respect of two non-prescribed prohibited practices.

3 CONDITIONAL IMMUNITY

3.1 The Commission granted Group Five conditional immunity from prosecution before the Tribunal for its involvement in cartel conduct described in paragraph 4 below.

3.2 Group Five 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.

4 CONDUCT IN CONTRAVENTION OF THE ACT

In its CLP application, Group Five disclosed its participation in the following prohibited practices or contraventions of section 4(1)(b)(iii) of the Act:

4.1. Durban International Convention Centre

In or around October 2004 Group Five reached an agreement with its competitors, Involving the Wozani Joint Venture ("JV") comprising Grinaker-LTA (Ply) Ltd; the Masinya Consortium Group JV comprising WBHO Construction (Pty) Ltd and MEG Construction Ltd; and the Stocks, Fikile, C & R

JV comprising Stocks Limited, Fikile Construction (Pty) Ltd and C & R Construction in terms of which these parties agreed on the submission of a cover price and loser's fee in relation to the tender for the renovation and extension of the Durban International Convention Centre.

The Commission submits that the ICC contract included all subsequent renovations and extensions. The client for the project is unknown. The tender was awarded to Masinya Consortium Group JV. The project was completed on or about October 2007.

4.2. N17 Link Road to Soweto

In or around July 2006 Group Five was approached by WBHO to arrange a loser's fee on the N17 Link Road Contract. Group Five discussed with WBHO and agreed to add on a loser's fee to its tender. It subsequently decided against proceeding with the arrangement as agreed with WBHO. Group Five submitted its tender without incorporating the loser's fee as agreed. Group Five admits that the discussion and agreement with its competitor, WBHO Construction (Pty) Ltd regarding the potential inclusion of the loser's fees in relation to the tender for the construction of the N17 Link Road to Soweto in South Africa, is in contravention of section 4(1)(b)(iii) of the Act.

The client for the project was Johannesburg Roads Agency for the construction of the N17 Link Road to Soweto. The tender was awarded to Group Five. The project was completed in or about 2010.

4.3 Northern Waste Water Treatment Works

In or around May 2006 Group Five reached an agreement with its competitor, Grinaker-LTA in terms of which these parties agreed on the submission of a cover price in relation to the tender for the construction of Northern Waste Water Treatment Works in South Africa, in contravention of section 4(1)(b)(iii) of the Act.

The client for the project was Johannesburg Water Department for the extension and upgrading of Northern Waste Water Treatment Works. The tender was awarded to Group Five. The project was completed in 2009.

4.4 R102 to New Airport

In or around 2008 Group Five participated in discussions whereby SAFCEC advised members to qualify their tenders by way of a specific communication regarding the use of emerging contractors. Group Five did not qualify its tender as suggested by SAFCEC but admits that its participation in the discussion with SAFCEC members regarding the bid for the R102 to New Airport project in South Africa, was contravention of sections 4(1)(a) and 4(1)(b)(iii) of the Act.

The client for the construction of R102 to New Airport project was KwaZulu Natal Department of Transport. The tender was awarded to Ilembe Consortium. The Commission has established that the project was completed in May 2010.

4.5 Main Road 577

In or around November 2007 Group Five attended a meeting with members of SAFCEC at which meeting it participated in discussions whereby SAFCEC advised members to qualify their bids for the Main Road 577 project by utilising an escalation formula. Group Five KZN exchanged confidential information however, there was no consensus to qualify the tenders. Group Five admits that its participation in the discussion at the SAFCEC KZN meeting was in contravention of sections 4(1)(a) and 4(1)(b)(iii) of the Act.

The client for the project was Department of Transport for the construction of Main Road 577.

4.6 Renault Motor Company

In or around November 2005 Group Five gave a cover price to a company by the name of Harding Allison. Harding Allison approached Group Five for the cover price and the parties reached an agreement on the submission of a cover price in relation to the tender for the construction of the Renault Motor Company in South Africa, in contravention of section 4(1)(b)(iii) of the Act.

The client for the project was Renault. The tender was awarded to Harding Allison. The project was completed on 31 October 2007.

4.7 Dwaalboom Cement Works Pre-Heated Tower

In or around July 2006 Group Five reached an agreement with its competitor, Concor in terms of which these parties agreed on the submission of cover price

in relation to the tender for the construction of the Dwaalboom Cement Works Pre-Heated Tower in South Africa, in contravention of section 4(1)(b)(iii) of the Act.

The client for the project was PPC for the construction of the Dwaalboom Cement Works Pre-Heated Tower. The tender was awarded to Concor. The Commission submits that the project was completed on 07 January 2008.

4.8 Green Point Stadium in Cape Town

In or around December 2006 Group Five reached an agreement with its competitor, WBHO Construction (Pty) in terms of which the parties agreed on the submission of a cover price in relation to the tender for the construction of Green Point Stadium in Cape Town, South Africa, in contravention of sections 4(1)(b)(ii) and 4(1)(b)(iii) of the Competition Act 89 of 1998, as amended ("the Act").

The client for the project was City of Cape Town for the construction of Green Point Stadium in Cape Town. The tender was awarded to Murray & Roberts/WBHO joint venture. The project was completed in December 2009.

4.9 Olifantspoort Water (Reticulation) Treatment project for Lepelle Northern Water Board

In or around February 2008 Group Five reached an agreement with its competitor, Stefanutti Stocks Holdings Limited in terms of which these parties agreed on the submission of a cover price in relation to the tender for the

construction of Olifantspoort Water (Reticulation) Treatment project for Lepelle Northern Water Board, South Africa, in contravention of section 4(1)(b)(iii) of the Act.

The project was for the construction of Olifantspoort Water (Reticulation) Treatment project. The client for the project was Lepelle Northern Water. The tender was awarded to Group Five. The project was completed during October 2009.

4.10 Anglo Platinum Housing Project

In or around 2007 Group Five reached an agreement with its competitor, Stefanutti Stocks Holdings Limited in terms of which these parties agreed on the submission of a cover price and shared contracts in relation to the tender for the construction of Anglo Platinum Housing Project[1] which had two packages called the Thabazimbi and Burgersfort packages, South Africa, in contravention of sections 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.

The client for the project was Anglo Platinum for the construction of the Anglo Platinum Housing Project (Thabazimbi and Burgersfort packages). The tender for the Thabazimbi package was awarded to Group Five and the Burgersfort was awarded to Stefanutti. The project was estimated to be completed on or around 2007 to 2008.

[1] The tenderers priced their tenders separately and agreed on the instructions of the Consultant appointed by the client, Anglo Platinum Housing to share the work between themselves by working together in a Joint Venture.

4.11 Khangela Bridge for e-Thekwini municipality in Durban

In or around September 2006 Group Five reached an agreement with its competitor, Stefanutti Stocks Holdings Limited and Basil Read (Pty) Ltd joint venture in terms of which these parties agreed on the submission of a cover price and arranged jobs in relation to the tender for the construction of Khangela Bridge for e-Thekwini municipality in Durban, South Africa, in contravention of sections 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.

The client for the project to construct the Khangela Bridge and Roadworks to extend Bayhead Road across the South Coast Road Durban was Ethekwini Municipality. The tender was awarded to Stefanutti and Basil Read joint venture. The project was completed in January 2010.

4.12 Bogoso Gold Mine

In or around November 2005 Group Five reached an agreement with its competitor, Transvaal Tubular in terms of which these parties agreed on the submission of loser's fees in relation to the tender for the construction of Bogoso Gold Mine in Ghana in contravention of sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.

The client for the project to construct the Bogoso Gold Mine in Ghana was an American company called Golden Star Resources. The firm who was awarded the tender is unknown. The project was completed on 18 September 2006.

4.13 Rio Tinto QMM Minerals in Madagascar

In or around August 2006 Group Five reached an agreement with its competitor, Kentz in terms of which these parties agreed on the submission of loser's fees in relation to the tender for the construction of a plant for Rio Tinto QMM Minerals in Madagascar, in contravention of sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.

The client for the project was Rio Tinto. The tender was awarded to Kentz. The project was completed on or about April 2008.

4.14 Sappi Amakhulu

In or around June 2006 Group Five reached an agreement with its competitors, Grinaker LTA and Stefanutti in terms of which the parties agreed on a submission of a cover price in relation to the tender of Sappi Amakhulu, in contraventions of sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.

The Sappi Amakhulu project was the extension of the Sappi Plant in Umkomaas. The client for the project was Sappi Saicor. The project was awarded to Stefanutti and Group Five joint venture. The project was completed in April 2008.

4.15 Gauteng Freeway Improvement Project (Reinforcing Qualification)

In relation to the above, in or around April 2008 Group Five attended a meeting with members of SAFCEC in which they discussed an agreement relating to a standard qualifications to be adopted by the members with regard to the pricing

of reinforcing steel and the use of the SARCEA formula, in contravention of sections 4(1)(a) and/or 4 (1)(b)(i) and 4(1)(b)(iii) of the Act. Group Five was not in agreement with such qualification and accordingly voiced strong objection to it. It was of the view that each bidder should tender independently of each other and should determine their own bid price and qualification.

5 ADMISSION

Group Five 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, Group Five:

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;

6.1.2. has provided full and expeditious co-operation to the Commission concerning the prohibited practices;

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 destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices;

6.1.5. has confirmed that it has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

7 FUTURE CONDUCT

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

7.2. In compliance with the requirements as set out in the CLP, Group Five 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 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 employees and former employees to testify as witnesses for the Commission in any cases regarding the contraventions referred to in this Consent Agreement.

7.3 Group Five shall develop, implement and monitor 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 Group Five 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 Group Five shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Group Five within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

7.6 Group Five 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** 21st **day of** MAY **2018**

TEMBINKOSI BONAKELE

Competition Commissioner

For Group Five Construction (Pty) Limited

Dated and signed at WATERFALL on the 15TH day of MAY 2018

Name: G. MOTTRAM

Capacity: DIRECTOR

ANNEXURE 'A1'

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO: CR229Mar15 / SA073May18

CC CASE NO: 2009Feb4279/2009Sep4641

In the matter between:

THE COMPETITION COMMISSION Applicant

and

GROUP FIVE CONSTRUCTION (PTY) LTD Respondent

ADDENDUM TO THE CONSENT AGREEMENT CONCLUDED BETWEEN THE COMPETITION COMMISSION AND GROUP FIVE CONSTRUCTION (PTY) LTD DATED 27 JUNE 2018

It is hereby recorded, by agreement between the parties, that the consent agreement concluded between the Competition Commission and Group Five Construction (Pty) on 27 June 2018 (the "**Consent** "), is amended as set out below.

1. **AD PARAGRAPH 2.4 (BACKGROUND)**

The parties wish to amend –

1.1 paragraph 2.4 by deleting the reference to *"In response to the Invitation and in terms of the Commission's CLP, Group Five was first to apply for leniency in respect of two non-prescribed prohibited practises"* and substituting it

with *"In 2009 Group Five applied for leniency in respect of sixty one (61) prescribed and non-prescribed prohibited practices".*

2. This addendum shall be deemed to be incorporated into and form part of the Consent Agreement and, unless otherwise stated, the words and phrases used in this addendum shall bear the meaning ascribed to them in the Consent Agreement.

For Group Five Construction (Pty) Ltd

Date and signed at Waterfall **on the** 20th **day of** July **2018.**

Name in full: Guy Mottram
Designation: Director

For the Commission

Date and signed at Pretoria **on the** 04 **day of** July **2018**

TEMBINKOSI BONAKELE
COMPETITION COMMISSIONER