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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR162Oct15

In the matter between:

THE COMPETITION COMMISSION	Applicant
And	
GROUP FIVE CONSTRUCTION LIMITED	First Respondent
WBHO CONSTRUCTION LIMITED	Second Respondent

Panel	: E. Daniels (Presiding Member) : M. Mazwai (Tribunal Member) : M. Mokuena (Tribunal Member)
Heard on	: 20-21 June 2018
Order Issued on	: 11 April 2019
Reasons Issued on	: 11 April 2019

REASONS FOR DECISION

Introduction

[1] Four construction firms met and agreed to submit a letter to the South African National Roads Agency Limited ("SANRAL") suggesting changes to a tender the firms found unusual. The Commission submitted that this conduct constituted collusive tendering and an agreement or concerted practice to fix trading conditions. We found that it did not.

Background

[2] On 26 October 2015, the Commission filed a complaint referral with the Tribunal in which it alleged that WBHO Construction Limited ("WBHO") and Group Five Construction Limited ("Group Five"), being firms in a horizontal relationship in the market for the provision of general and specialised construction work services, entered into a collusive agreement to fix trading conditions in a tender relating to a portion of road along the N17 in contravention of s 4(1)(b)(i) and (iii) of the Competition Act 89 of 1998 ("the Act").

[3] The referral stemmed from an industry wide initiation by the Commission into the construction industry in 2006, and information obtained in a subsequent invitation to settle in 2009.

[4] The Commission sought an order finding the two parties guilty of contravening the Act and the imposition of an administrative penalty against WBHO equal to 10% of its annual turnover.

[5] Both WBHO and Group 5 are firms incorporated in terms of the laws of the Republic of South Africa which were active in the construction industry at the relevant time of the referral. Within the factual matrix of this case, Group 5 was represented by a Mr Steve Ryninks ("Ryninks")- whom the commission called as the sole witness in the matter.

[6] The basis for the referral was a meeting held between representatives of Group Five, WBHO, Basil Read and Murray and Roberts on 17 July 2006, under the auspices of the South African Forum of Engineering Contractors ("SAFCEC"). The Commission alleged that at this meeting the respondents agreed to fix trading conditions in relation to a tender put out by SANRAL for the construction of the N17 link road between New Canada and Soccer City in Johannesburg.

[7] On the Commission's version, the respondents met, discussed, and agreed on how SANRAL should restructure the contractual conditions of the N17 with the effect of assigning less risk to the contractors and more risk to SANRAL. As a manifestation

of this agreement, the Commission provided a letter addressed to SANRAL and authored by SAFCEC which purportedly fixed the conditions of the tender.

[8] WBHO opposed the matter.[1] In its answering affidavit, it argued that whilst the trading conditions in question were discussed among the competitors at the meeting of 17 July 2006, no agreement was reached as to how each of the tenderers would deal with the inconsistency in their respective bids. Further, in a supplementary affidavit filed later, WBHO indicated that the trading condition in question was changed by SANRAL prior to the bids being submitted.

[9] The matter was set down for hearing on 20- 21 July 2018, with closing argument to be heard on 09 November 2018. At the hearing on 20 July, the Commission called one witness, Ryninks of Group 5 and thereafter closed its case. The Commission was afforded the opportunity to reopen its case and call a representative from SANRAL, but elected not to.[2] WBHO elected to lead no witnesses in defense.[3]

[10] At the suggestion of the Tribunal the parties agreed to present closing arguments the next day, 21 July 2018. Whilst it was made explicit that no written heads of argument were required by the Tribunal, both parties helpfully submitted such regardless.

[11] Having considered the evidence and written argument before us we found that the Commission had failed to discharge its onus of proving, on a balance of probabilities, that the conduct of the respondents constituted an agreement directly or indirectly fixing a trading condition, or collusive tendering. We dismiss the case in terms of our order below.

The facts

[12] In April 2006, SANRAL advertised an invitation to bidders to bid for a contract for the design and construction of the section of an N17 link road between the Soweto

[1] No penalty was sought against Group 5 and Group 5 did not oppose the matter as it was the leniency applicant.
[2] Transcript of Proceedings 20 June 2018 Cr162Oct15 (Transcript Day 1) p95 line 19- p96 line 4.
[3] ibid p97 line 1.

highway and Nasrec Road ("The N17 Project"). SANRAL pre-qualified four construction firms to tender for the project, namely Group 5, WBHO, Basil Read, and Murray and Roberts. The project was to be for the benefit of the Johannesburg Roads Agency ("JRA").

[13] In early May 2006, SANRAL issued a request for tenders with regard to the project, requiring that tenders be submitted to it on or before 26 July 2006.

[14] In its condition of contract pertaining to the request for tenders, SANRAL stipulated that the Conditions of Contract for Turnkey Projects (First edition, 1999), prepared by the International Federation of Consulting Engineers (FIDIC) and known within the industry as the 'silver book contract' would apply in respect of the contract.[4]

[15] We pause our factual analysis to deal with the FIDIC conditions of contract. It was common cause among the parties that the construction industry uses a number of contractual standards to determine, among other things, project design and the allocation of risk. These standards are contained in standard form contracts used within the construction industry which are written and published by FIDIC.

[16] The best known FIDIC standards are the conditions of contract for:

16.1. Building and engineering works designed by the employer (known as "red book" contracts);
16.2. Plant and design build (yellow book"); and
16.3. EPC/Turnkey Projects ("silver book").

[17] Relevant to the matter at hand is that each one of the standards above allocates risk in a particular manner.

[18] Red book contracts provide for conditions of contract for construction where the design is carried out by the employer. The red book is intended for use on projects where the employer carries out the design and carries the risk associated therewith, and the contractor carries typical construction risks.

[4] Contract Data for contract no. 047/2005 and Project Description. Trial Bundle p1554.

[19] The yellow book provides for conditions of contract for construction works where the design is carried out by the contractor. Under the usual arrangements of this type of contract, the contractor carries out detailed designs and provides the work in accordance with the employer's broad technical requirements. Under these conditions the information provided by the employers is taken as reliable, whereas in the silver book, discussed below, the contractor bears the onus to verify the information. Under these conditions of contract, the guiding principle is that risk is allocated according to which party is in a position to control it.

[20] The silver book is most suitable for use on process, power and private infrastructure projects where a contractor is to take full responsibility for the design and execution of the project. To increase cost certainty, the silver book requires the contractor to accept a higher level of risk than is typical under most other forms of contract. The silver book, as an example, transfers the full risk of ground conditions to the contractor. Similarly, the contractor assumes the responsibility, subject to some exceptions for the accuracy of the employer's requirements. Given the high level of risk transfer, it is conventional for the employer to allow sufficient time in its procurement program for the contractor to obtain and consider all relevant information before signing the contract.

[21] Returning to the factual analysis, because the N17 tender purported to be a silver book contract, it would be conventional for the tender to allocate the duty of design and build entirely to the contractor.

[22] However, in the conditions of tender, a number of design conditions were stipulated. Certain of the design parameters for the project were stipulated by SANRAL such as the vertical and horizontal alignment of the road, the pavement layer and the road surface, as well as the traffic loading and ground condition information for the project. These parameters were typically the domain of the contractor

[23] Ryninks, under cross examination indicated that this arrangement was inconsistent with the conventional silver book conditions of contract:

"MR TRENGOVE: ... The contract specifies.., lays down a lot of designer, new technical specifications which the, which the bidder is required to accept.

MR RYNINKS: Correct.

MR TRENGOVE: And that was the part that was inconsistent with the silver book, correct?

MR RYNINKS: Inconsistent with, well yes and it consists with the silver book. In other words it was pushing it towards the yellow book."[our emphasis] [5]

[24] WBHO submitted that upon reviewing the conditions of tender it was immediately concerned that it would not be able to assess and price the risk associated with the design parameters stipulated by SANRAL and verify the information provided by SANRAL either at all or in the time available before the tenders were due for submission.[6]

[25] On 17 May 2006, an initial tender clarification meeting took place, ath the instance of SANRAL's engineering consultants, Stewart Scott International. Tender clarification meetings are common-place in the construction industry. The minutes of the meeting reflect that there was some concern around the change in the conditions from silver to yellow. A question and answer relevant to these facts was recorded in the minute of the meeting:

"Q6: As a pavement is stipulated is it the intention that the client will be liable for the pavement design? Is the Contractor required to check the pavement design?

A6: The Contractor is only liable for a limited defects period and the Client accepts liability for the pavement design. The Contractor is required to ensure quality control in the construction of the pavement."[7]

[26] The effect of this concession by the consulting engineers would have been to relax the application of the silver book conditions, and realign the responsibility for risk associated with the design of the pavement to SANRAL.

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[5] Transcript Day 1 p62 lines 11-19.
[6] Witness statement of G Dunlop. Trial Bundle p 1544 para 10.
[7] Notes of Tender Clarification Meeting on 17 May 2006 trial bundle p1597.

[27] Ryninks submitted that this concession could not be considered to be legally binding until formalised in an addendum submitted by SANRAL.[8]

[28] On 5 June 2006, a query clarification form stemming from the meeting of 17 may 2006 convened by SANRAL was released by the Johannesburg Road Agency ("JRA"), the owner of the contract through SANRAL.

[29] The question was asked: "*Are the pavement layer work details shown in the schedule of quantities and drawings binding?*" The answer was that "*These documents are not binding and details are provided for information pavement designs to be included in the lump sum price are given in book 2- volume 3 part 3- employers requirements.*"[9] [Our emphasis].

[30] The clarification note had the effect of muddying the water on the position of the allocation of risk in relation to the pavement design.

[31] SANRAL's position on the allocation of risk in the contract as of July 2006 was thus entirely uncertain. The contract was a silver book contract, which required the contractors to assume the risk for the provided designs and ground condition information which the contractors did not have time to interrogate. The minutes of the tender clarification meeting reflected that it was SANRAL, the employer, that would assume the risk for the designs. But a further clarification note indicated that the ground conditions provided were done so for information purposes only and were not binding.

[32] In this uncertain context, on 13 July 2006, Judy Clack of WBHO emailed the contracting parties for the N17 Project. The email read:

> "*Attached please find a list of concerns regarding the N17. We suggest a meeting be held at SAFCEC on Monday 17 July at 14h00. Please confirm attendance with myself.*" [10]

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[8] Transcript Day 1 p71 line 1.
[9] Queries received from Consortia Issued 5 June 2005. Trial bundle p1600.
[10] Email dated 13 July 2006 trial bundle p 1601.

[33] Attached to the document was a list of 5 concerns. The first of which detail succinctly the confusion regarding the allocation of risk on the project:

> "*We wish to raise some concerns about the general conditions of contract being used for this project, as it has been designated as the FIDIC document for EPC Turnkey Projects (first Edition 1999) in terms of clause C1.4.1.*
>
> *With reference to clause 5 although amended slightly by the contract data, we understand that all aspects of the design rest with the contractor. In terms of this document the vertical and horizontal alignments are fixed, and the pavement design has been specified by the client, who also accepts liability for this design … The pavement design is referenced in Book 2, Volume 3, Part 3- Employers Requirements (item 3.8—Pavement and Geotechnical Design Requirements on page 3/3.920), which is contractual, however the clarifications provided are not stated in an addendum and are therefore not contractual. Clause 5 states that the contractor shall be responsible for the design of works and for the accuracy of such employers requirements which obviously creates a conflict.*"[11]

[34] We pause here to examine the role of SAFCEC. It was submitted and not challenged, that SAFCEC acts as a national representative of civil engineering contractors, having a wide range of functions. It plays an integral role in formulating industry policy and ensures that legal and regulatory frameworks do not hinder competitive and fair business practices.[12]

[35] Ryninks, in his testimony submitted:

> *"We have a Contractual Affairs Committee that typically deal with matters of concern around contracting terms in the industry. We deal with, well things get brought to our attention like irregular awards, new legislation when it comes out that we as a collective then make comment during the commentary period for legislation, those type of things.*"[13]

[36] Returning to the SAFCEC meeting held on 17 July 2006, on Ryninks' version the parties discussed their mutual concerns and dissatisfaction regarding the SANRAL conditions. The parties agreed that the conditions were not acceptable to them and

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[11] Trial Bundle 1602.
[12] Witness statement of Steven Henry Ryninks ("Ryninks witness statement") Trial bundle p1535-1536.
[13] Transcript Day 1 p24 lines 20-24.

this fact would be communicated to SANRAL through SAFCEC in an attempt to lobby SANRAL to change the conditions.[14] These concerns were the same as those raised at the tender clarification meeting convened by SANRAL.

[37] The representative of WBHO evidently broached the idea that the parties agree to align their bids if SANRAL did not change its conditions of contract, but after some debate, the idea was rejected and it was agreed that the bidders would price and qualify their bids independently if SANRAL did not change its conditions of contract.[15]

[38] In his evidence in chief, Ryninks stated:

> *"MR RYNINKS: There were certainly issues unique to each company but they weren't necessarily discussed and it leads to kind of where we ended up because what we didn't want to do was bid on the same conditions. I mean we believed we had a competitive advantage in the tender and we wanted to submit our own bid. What we were prepared to do and what we did do was we did agree to ask SANRAL to consider changing the conditions from Silver to Yellow such that the elements of risk if you like would be more palatable to the organisations and make a potentially more realistic price to SANRAL, but there was never an intention to completely align bids because we believed we had a competitive advantage."*[16]

[39] During cross examination, the following exchange took place:

> *MR TRENGOVE: The high watermark of the cooperation, was to formulate a request to SANRAL to consider a proposal that was the high watermark.*
> *MR RYNINKS: To consider a proposal to amend the conditions generally, yes.*
> *MR TRENGOVE: Ja. But that was a request, a demand to consider what was merely a proposal, correct?*
> *MR RYNINKS: Yes.*
> *MR TRENGOVE: And there was no agreement on what bidders would do if SANRAL did not accede to the request?*
> *MR RYNINKS: Correct.*
> *MR TRENGOVE: And there was no agreement on a single contractor.*

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[14] Ryninks Witness statement trial bundle p 1537 para 18.
[15] Ibid.
[16] Transcript Day 1 p31 lines 11-21.

MR RYNINKS: Correct.

MR TRENGOVE: And in the result the bids that went in, were entirely independent drafted bids, with no agreement on any of that?

MR RYNINKS: Correct[17] [our emphasis].

[40] On 19 July 2006, an email was circulated from Ted Thomas of SAFCEC. The email was addressed to all the attendees of the 17 July meeting. It read as follows:

"I have made contact with Dave Montgomery at Stewart Scott as requested, but he is unable to organise a meeting today due to unavailability of other important members in his organization. He has however requested a copy of the complaints/ concerns expressed by the SAFCEC members involved in the tender bid for further consideration prior to holding the meeting. With this in mind, and based on the discussions held on the 17 July 2006, I have attached for your perusal a document entitled "Notes on the N17 Conditions of Contract- For Discussion Purposes only" for your perusal and comments. If you are all in agreement with the contents, I will send a copy to Dave as requested. If you disagree with the comments made, please advise of any changes that are required in order that we can all agree prior to the submission to Dave".[18]

[41] The letter attached to Thomas' mail is reproduced below:

[17] Transcript Day 1 P57 lines 2-19.
[18] Trial Bundle 1603.

SAFCEC CONTRACTUAL AFFAIRS

NOTES ON THE N17 CONDITIONS OF CONTRACT

FOR DISCUSSION PURPOSES ONLY

SAFCEC members have requested that a meeting be held to discuss the following issues prior to the submission of their tender bids on the aforementioned Project.

The Employer has decided to use the FIDIC Conditions of Contract for EPC/Turnkey Projects (Silver Book) where:

(i) a higher degree of certainty of final price and time is required;

(ii) the Contractor takes total responsibility for the design and execution of the project, with little involvement of the Employer.

For projects using the FIDIC Silver Book, it is necessary for the Contractor to assume responsibility for a wider range of risks than under the traditional Red and Yellow Books.

To obtain increased certainty of the final price, the Contractor is often asked to cover such risks as the occurrence of poor or unexpected ground conditions, and that what is set out in the requirements prepared by the Employer actually will result in the desired objective.

If the Contractor is to carry such risks, the Employer must give him the time and opportunity to obtain and consider all relevant information before the Contractor is asked to sign on a fixed contract basis.

The Employer must also realize that asking responsible contractors to price such risks will increase the construction cost and result in some projects not becoming commercially viable.

Subsequent to the tender pre-qualification process, the Contractor is now obliged to incorporate the following Employer Requirements into his design and price:

a) the vertical and horizontal alignment of the road;
b) the pavement design;
c) the anticipated traffic requirements as stated in table C3.8.1: Pavement Design Parameters;
d) full compliance with the current draft EIA Regulations.

When taking the aforementioned information into consideration, our members are of the opinion that:

SAFCEC CONTRACTUAL AFFAIRS

i) The six week tender period afforded to the Contractor is insufficient to check and verify the information provided by the Employer;

ii) The inclusion of the Employer Requirements into the Contractor's design and price makes the Conditions of Contract contained in the FIDIC EPC/Turnkey Projects document extremely onerous and could well affect the commercial viability of the Project.

With this in mind, the SAFCEC members that have pre-qualified on this project have requested that the Employer consider the following proposals:

1. That the Conditions of Contract contained in the FIDIC EPC/Turnkey Projects Conditions of Contract (Silver Book) be replaced with the Conditions of Contract contained in the FIDIC Plant and Design-Build document (Yellow Book) where (quote) "the Contractor designs and provides, in accordance with the Employer's requirements, plant and/or other works; which may include any combination of civil, mechanical electrical and/or construction works" (unquote).

   Or

2. That an Addendum be issued confirming that the Employer accepts full responsibility for the risks associated with the data contained in Part 3 of the Contract documentation [*Engineers Requirements*], and that Sub-Clause 4.12 [*Unforeseeable Difficulties*] and any other relevant Clause be amended accordingly.

[42] The document was amended slightly by Ryninks. He included a phrase which indicated to SANRAL that the construction firms should be allowed to qualify their respective bids despite the conditions that a conforming bid should first be priced.[19]

[43] The letter was, thereafter, presumably sent to SANRAL. We say presumably because the Commission failed to call any witnesses from SANRAL or JRA to testify to the fact that the letter was received. They likewise failed to call anyone from SAFCEC to prove that the email was sent.

[44] On 24 July 2006, the JRA released addendum number 4 to the tender conditions. The addendum read:

> "*It is confirmed that the employer accepts design risk for all the geometric design and pavement design in the Employer's conceptual Design, including responsibility for the traffic data and projections on which such a design is based.*"[20]

[19] Ryninks witness testimony trial bundle p1538.
[20] The Second Respondent's Supplementary Answering Affidavit Trial Bundle p107.

[45] On 26 July 2006, WBHO submitted its tender. The tender was a qualified one. It excluded the design risk which SANRAL had assumed in addendum number 4. WBHO submitted that the qualification remained in its tender because addendum 4 had been released too close to the submission date (being 26 July 2006) for WBHO to have amended its tender.

[46] Group 5 also submitted a bid on 26 July 2006. In its bid, Group 5 indicated that "All responsibility and risk relating to these elements [conceptual design data and geometric alignments, as well as pavement design], including the traffic data and projections on which the designs are based, is therefore carried by the JRA".[21]

The Commission's case

[47] In its referral, the Commission alleged that on 17 July 2006, the representatives of the four pre-qualified firms met at the SAFCEC offices and discussed their displeasure with SANRAL's contractual conditions for the N17 Project.

[48] In the same meeting, so the Commission continues, the respondents came to an agreement regarding a new set of conditions which SANRAL should use to structure its contractual conditions.

[49] This agreement allegedly included the agreement that should SANRAL reject the proposal, the respondents should be afforded enough time to determine the final tender price with certainty.

[50] The Commission alleged that the letter was brought to the attention of SANRAL, but SANRAL declined to change its contractual conditions as requested which resulted in WBHO and Group Five qualifying their tenders in accordance with the agreement discussed at the meeting of 17 July.

[51] The Commission alleged that this amounted to a fixing of trading conditions in contravention of s4(1)(b)(i) and (ii) of the Act.

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[21] Trial Bundle p1616.

[52] In oral argument, Mr Seape for the Commission, in an attempt to prove an agreement to fix trading conditions hinged his case on the following:

> *... before the 17th of July Group Five would have known only what its position in relation to the conditions of contract was, but it would not have been certain about what other bidders' position in relation to the conditions of contract were. ... And we say this is significant because what the agreement then does is that it eliminates in the minds of the bidders the uncertainty brought about the unknown, so whereas the bidders would not have known precisely what the full breadth of the other, or what the other bidders' concerns were prior to the 17th of July, those same bidders would have been constrained by essentially what they didn't know.*
>
> *We say that a bidder's knowledge of its competitor's views of the conditions of contract and the approach that its competitor planned to adopt would fundamentally affect how the bidder approached the tender itself. A bidder would be forced, ... to abandon a potentially innovative approach to one of the unsatisfactory aspects of the tender once it realised that its approach was inconsistent with the approach taken and agreed upon by the other bidders, conversely we say the bidder may have been emboldened to pursue a once unsatisfactory approach after the bidder realised that its competitors had also considered implementing the same approach.*
>
> *So, thus we say the agreement to meet and discuss the concerns that the bidders shared extinguished the element of uncertainty in the minds of the bidders that otherwise would have existed to promote competition.*[22] [our emphasis].

The law

[53] Any agreement which involves the fixing of trading conditions, is prohibited by section 4(1)(b) of the Act and no justification can be provided. With regard to defining an agreement for the purposes of a s4(1)(b) violation, the agreement is one as defined in the Act and not based in contract in a civil law setting. In *Videx Wire Products,* the Competition Appeal Court ("CAC") provides guidance which is of relevance to the level of specificity and particularity required of agreements in per se prohibitions in section 4(1)(b) of the Act . The CAC indicates that:

[22] Transcript of the Hearing CR162Oct15 21 June 2018 (Transcript Day 2") p8-9 lines 16- 14.

"*Prohibited conduct in the form of an overarching agreement would require there to be the requisite element of consensus . . .*"[23]

[54] and then goes on to say that:

". . . *the requirement of consensus does not mean that such consensus should amount to a contract at private law. Particularly in regard to the per se prohibitions in s 4(1)(b), the parties would, by the very illicit nature of their arrangement, not contemplate legal enforcement. They need not even have agreed upon a punishment mechanism. Importantly, the court added in MacNeil that 'the content of the consensus need not . . . rise to the level of precision sufficient to satisfy the requirement of certainty applicable to private law contracts, ie the precision needed to defeat an argument that the alleged agreement is void for vagueness.*"[24]

[55] In defining the concept of fixing trading conditions, Sutherland submits that whilst the expression 'Price fixing' has acquired a technical meaning all over the world, it is not quite clear what is meant by per se prohibited fixing of trading conditions. [25]

[56] In determining the scope of the prohibition against conduct which amounts to the fixing of trading conditions, the Tribunal has held that:

"*The range of trading conditions hit by this sub-section is limited by the contextual cobbling together of price fixing and the fixing of 'any other trading condition', which, in our view, points to aspects of a particular trade/transaction that are intimately related to price, i.e. quantity and quality. Hence for a 'trading condition' to be hit by this section of the Act it should be part of the price-quantity-quality nexus of the concerned transactions/trade.*"[26]

[57] In the *Venter* case, the Tribunal defined a trading condition further, holding that that:

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[23] *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* (124/CAC/Oct12) [2014] ZACAC 1 (14 March 2014).
[24] Ibid para 13.
[25] Sutherland, P & Kemp, K *Competition Law of South Africa* Lexis Nexis Loose-leaf updated Oct 2016 p5-66.
[26] Competition Commission v Patensie Sitrus Beherend Beperk, Tribunal case number 37/CR/Jun01, at para 35.

"The use of the qualifier "other" that precedes "trading condition" suggests, at the very least, it is in some way similar, albeit not identical, to the notion of price. At its very least it must constitute a term on which a firm trades or offers to trade with its customers or refuses to offer as a term to customers. The prohibition contained in the rule is of no such kind."[27]

[58] Turning then to collusive tendering, commonly also understood as bid rigging, the act is one whereby firms agree amongst themselves to collaborate in their response to invitation to tender.[28] Collusive tendering is oft cited as one of the most egregious anti-competitive practices.

Analysis

[59] We turn now to assess the case established by the Commission as against WBHO by making determinations of fact as to the nature of the agreements made by the tendering parties.

[60] On the facts provided there was a meeting between the pre-qualified firms, to discuss the conditions of the tender and the manner in which it allocated risk. This finding is self-evident on the facts.

[61] At this meeting the parties decided to send a letter to SANRAL/ JRA in an attempt to clarify the contract's allocation of risk and to voice concerns over the fact that if the contract were to retain its original form, the risk allocation may result in parties qualifying their bids.

[62] We were unable to find any indication in the wording of the letter sent from SAFCEC to SANRAL which proved that the agreement among the tendering parties extended any further than the submission of a letter. There were no indications in the letter that the parties would align their responses in the event of SANRAL refusing the proposal by SAFCEC to change the conditions of the contract.

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[27] Venter v The Law Society of the Cape of Good Hope and others [2013] 2 CPLR 477 (CT).
[28] R Whish & D Bailey "Competition Law" 9th ed Oxford University Press 2018 p547.

[63] We are alive to the dicta of *Videx Wire* that collusive agreements are not always put to ink, but the unchallenged testimony of Ryninks expressly holds that there was no further agreement beyond the submission of a letter.

[64] Further, the Commission was unable to point to any further facts proving that there was an agreement to align the responses of the bids or even that there was the perception from SANRAL/JRA that the response to the refusal of the proposal would be aligned.

[65] The Commission sought to draw the inference of an agreement of alignment by directing our attention to the fact that both Group 5 and WBHO qualified their bids.

We could not however draw such an inference. The testimony of Ryninks indicated that the allocation of risk in tender was so abnormal that he had not seen a condition like it since the N17 project that time.[29] He submitted that a firm, when faced with an allocation of risk such as the one in the N17 tender had the option of (i) pricing in the risk, which may have unduly increased the price of the tender; (ii) qualifying the bid or (iii) not bidding. He submitted that the process of pricing in a risk was an odious one that many construction firms would hesitate to do.[30] The more likely explanation as to why two firms which had elected to bid and had qualified their bids in the same manner is that such qualification made business sense and was part of the ordinary business practises of the firm.

[66] At first blush this conduct does not amount to the fixing of trading conditions or collusive tendering as has been previously found by the Tribunal.

[67] It is true that, as a general rule, meetings and any form of agreements between competing tenderers, absent the employer, should be avoided. Whilst the meeting rooms of SAFCEC may be no smoke-filled, side-rooms or quaint coffee shops, they still provide a forum in which the competitive process may be circumvented and any agreement made without the presence and consent of an employer, may result in a finding of anti-competitive conduct.

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[29] Transcript Day 1 p63 lines 10-11.
[30] Transcript Day 1 p50 lines 10-14.

[68] However, simply proving that tenderers met to discuss the conditions of a tender does not absolve the Commission of its onus to prove that such action amounts to an agreement which the Act seeks to prohibit.

[69] On the facts before us, the tendering parties were concerned about a condition in a tender. A question had been posed and answered at a meeting initially called by SANRAL in one way and a tender clarification note had been issued by SANRAL, answering the question in another way. In this context and to obtain clarity, a meeting was called and a letter sent to SANRAL.

[70] We were given no reason by the Commission to treat this meeting as one that was any more than a tender clarification-seeking meeting.

[71] Ryninks testified that the nature of this tender was so unique that he had not seen another one like it. Therefore, the process had to be clarified, prior to bids being submitted. We also note that this meeting was one which took place after all other processes as between tenderers and employer had been exhausted. The tendering parties did not seek to hide the meeting from the employer.

[72] On the facts before us, we could not conclude that there was any agreement reached beyond that which was ultimately presented to the employer in the letter to SAFCEC.

[73] We thus did not find that the conduct of WBHO as described amounted to an agreement as contemplated in the act.

Information Exchange

[74] The Commission, in closing argument argued that the agreement to hold a meeting and submit a letter should be construed as amounting to illegal conduct because it facilitated the exchange of information. The Commission argued that the simple presence of the parties at the meeting signaled to the other parties that the firms viewed the condition as problematic.[31]

[31] Transcript Day 2 p8 lines 16-19.

[75] It is trite that collusive tendering can take on any number of forms and it is not required in these reasons to extensively catalogue all of them. However, on the topic of information exchange, the European Commission, in its Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Guidelines), addressing the prohibition on the exchange of information between competitors indicates:

> *"It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market"*[32]

[76] The Guidelines indicated further that information exchange between firms will only fall foul of Article 101 of the Treaty of the Functioning of the European Union, if the exchange establishes, or is part of an agreement, a concerted practice or a decision between firms.[33]

[77] On the concept of a concerted practice, the Court of Justice of the European Union has indicated that the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.[34]

[78] On the concept of information exchange, Sutherland writes:

> *"..an exchange of information often will be important to the proper functioning of the collusive tendering process, although it cannot by itself constitute collusive tendering. Collusion with regard to the bidding process itself will be necessary before it will be per se prohibited. Nevertheless, the information exchange may be prohibited in terms of the rule of reason while it also may be evidence of a per se prohibited price fix"* [35]

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[32] European Commission "*Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*" 2011/C11/01 para 61.
[33] Ibid para 60.
[34] C-8/08, T-Mobile Netherlands, para 26; Joined Cases C-89/85 and others, Wood Pulp, [1993] ECR 307, para 63.
[35] Sutherland (above note 25) p5-77.

[79] As canvassed above, exchanges of information ought be seen as censurable conduct when such exchange is indicative of, or facilitates the subversion of competitive dynamics. In the context of this case the question is thus, did the 'signal' sent by the merging parties in attending the meeting amount to an indication or facilitation of the subversion of the competitive process?

[80] To support its case that it was, the Commission would require the Tribunal to infer that the JRA placed this condition in its tender to construct a plane of competition on the issue, requiring the tenderers to innovate in their bids.[36]

[81] However, the Commission's witness and WBHO submitted that the nature of the condition was simply an anomaly, a mistake by the JRA that needed to be clarified. It certainly seemed that the willingness of the JRA to submit an addendum acquiescing to the request of the tendering firms supports this version.

[82] The Commission provided no insight into whether the original allocation of risk by the JRA created a plane of competition or was simply an oversight by SANRAL and JRA even when they were explicitly given the opportunity to call SANRAL as a witness.[37] Whilst we were not called upon by the respondents to make an adverse inference from the failure to call SANRAL, without their testimony, the Commission's point could be taken no further.[38]

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[36] Transcript Day 2 p9 lines 1-13: "*We say that a bidder's knowledge of its competitor's views of the conditions of contract and the approach that its competitor planned to adopt would fundamentally affect how the bidder approached the tender itself. A bidder would be forced, we say that, as I, we posit that a bidder would be forced to abandon a potentially innovative approach to one of the 5 unsatisfactory aspects of the tender once it realised that its approach was inconsistent with the approach taken and agreed upon by the other bidders, conversely we say the bidder may have been emboldened to pursue a once unsatisfactory approach after the bidder realised that its competitors had also considered implementing the same approach. So, thus we say the 10 agreement to meet and discuss the concerns that the bidders shared extinguished the element of uncertainty in the minds of the bidders that otherwise would have existed to promote competition.*"

[37] Transcript Day 2 p96 lines 1-4.

[38] As was held in the case of Olivier v Minister of Safety and Security 2008 (2) SACR 387 (w) 393 c-f citing Titus v Shield Insurance Co 1980 (3) SA 119 a party's failure to call an available witness may lead to an adverse inference being drawn from such a failure against the party concerned. The case held further that the extent of such an inference is dependent on the circumstances on the individual case. In the present matter, we do not draw any active negative inference from the failure to call SANRAL, but rather note that the Commission's more nuance theory of harm would require a greater level of substantiation than that provided.

[83] We were, thus provided with no facts to suggest that the attendance at the meeting could amount to any exchange of information that was indicative of, or facilitated the subversion of the competitive process moving forward.

[84] We thus did not find that conduct of WBHO as described amounted to the exchange of any form of information which could have influenced the plane of competition.

Conclusion

[85] There may well be situations in which attending a meeting to discuss the difficulties parties have with a tender should be considered illegal, but the facts of this case do not support this conclusion.

[86] The Commission was unable to discharge its onus to prove that the conduct in question constituted either an agreement or an unlawful exchange of information in contravention of the Act.

[87] The case as it stands against WBHO thus stands to be dismissed.

ORDER

[1] The Commission's referral under case number CR162Oct15 is dismissed.

[2] No order is made as to costs.

Mr Enver Daniels

11 April 2019
Date

Mrs Medi Mokuena and Ms Mondo Mazwai concurring

Tribunal Researcher: Alistair Dey-Van Heerden

For the Respondent: Adv. W Trengove SC *assisted by* Adv. G Marriott
Instructed by Nortons Inc.

For the Commission: Adv M Seape *instructed by* Ndzabandzaba Attorneys Inc.