



COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 019091

In the matter between:

The Competition Commission

Applicant

and

B & E International (Pty) Ltd

Respondent

Panel : N Manoim (Presiding Member)
T Madima (Tribunal Member)
A Roskam (Tribunal Member)

Heard on : 24 July 2014

Decided on : 24 July 2014

Order

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



Presiding Member
N Manoim

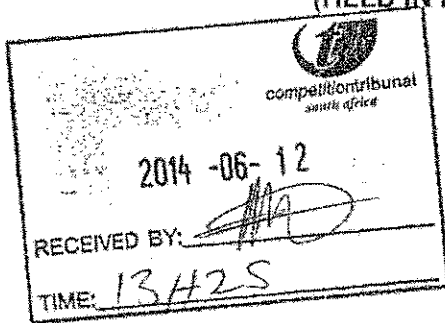
24 July 2014
Date

Concurring: T Madima and A Roskam

Annexure "A"

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

and

B&E INTERNATIONAL (PTY) LTD

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS
58(1) (a) (iii) and 58(1) (b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS
AMENDED, BETWEEN THE COMPETITION COMMISSION AND B&E

**INTERNATIONAL (PTY) LTD, IN RESPECT OF CONTRAVENTIONS OF SECTION
4(1)(b)(iii) OF THE COMPETITION ACT, 1998**

The Competition Commission ("Commission") and B&E International (Pty) Ltd ("B&E International") 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 as read with sections 58(1)(a)(iii) and 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.

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1 DEFINITIONS

For the 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 "B&E International" means B&E International (Pty) Ltd, a private company incorporated under the laws of the Republic of South Africa with its principal place of business at 93 - 94 Maple Street, Pomona, Kempton Park, Johannesburg, South Africa. B&E International 's core business is the provision of mobile crushing and screening services to the civil engineering industry in South Africa and elsewhere in Africa. It is also involved in surface mining and mineral processing;
- 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 1st Floor, 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 of the Competition Commission in terms of section 49B of the Act under case number 2009Sep4641;
- 1.7 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and B&E International;
- 1.8 **"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, 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 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;
- 1.9 **"Eskom"** means Eskom Holdings SOC Limited, the South African power utility public company.
- 1.10 **"Grinaker-LTA"** means an operating business unit of Aveng Africa Limited with its principal place of business at Block A, Aveng Grinaker-LTA Park, Jurgens Street, Jet Park, Boksburg, 1459. Grinaker-LTA is a multi-disciplinary construction and engineering group, anchored in South Africa with expertise in a number of market sectors; Power, Mining, Infrastructure, Commercial, Retail, Industrial, Oil and Gas.
- 1.11 **"Invitation"** means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act, as

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published on the website of the Commission on 1 February 2011;

- 1.12 **"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 on-going or had not ceased three years before the complaint was initiated, as contemplated in section 67 of the Act;
- 1.13 **"Parties"** means the Commission and B&E International;
- 1.14 **"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 after 30 November 1998, but more than three years before the complaint was initiated;
- 1.15 **"Respondent"** means B&E International;
- 1.16 **"Scheme"** means Eskom's Ingula pumped-storage scheme located within the Little Drakensberg mountain range, 23 km north-east of Van Reenen's, comprises an upper dam (Bedford) and a lower dam (Braamhoek). The upper reservoir site is located in the Free State and the lower reservoir site in KwaZulu-Natal. The escarpment forms the border between the two provinces;
- 1.17 **"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 01 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 under case number 2009Sep4641 into particular prohibited practices relating to conduct in construction projects, by the firms listed below.
- 2.2 The complaint concerned alleged contraventions of section 4(1) (b) of the Act as regards price fixing, market allocation and collusive tendering. The investigation was initiated against the following firms: Grinaker LTA , Aveng (Africa) Ltd, Stefanutti Stocks Holdings Ltd, Group Five Ltd, Murray & Roberts, Concor Ltd, G. Liviero & Son Building (Pty) Ltd, Gluricich Coastal Projects (Pty) Ltd, Hochtief Construction AG, Dura Soletanche-Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Pilings CC, Rodio Geotechnics (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 Subsequent to the initiation of the complaint, the Commission received



numerous applications for leniency under the CLP, which implicated several construction firms in collusive practices.

2.4 The Commission's investigation of the above complaint, as well as several others in the construction industry, led the Commission to believe that there was widespread collusion in the construction sector in contravention of section 4(1) (b) (iii) of the Act. 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 launched and 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.

2.5 The Invitation required firms to apply for settlement by disclosing all construction projects that were the subject of prescribed and non-prescribed prohibited practices. The closing date to apply for settlement in terms of the Invitation was 15 April 2011.

2.6 The Commission received settlement applications from 21 firms that disclosed a total number of 300 projects which were the subject of collusive conduct. Of the 300 projects disclosed, 160 projects involved

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prescribed prohibited practices and 140 non-prescribed prohibited practices.

2.7 The 21 firms that responded to the Invitation implicated 25 firms which did not respond to the Invitation. Of the 21 firms, fifteen concluded consent agreements with the Commission, which agreements were confirmed as orders of the Tribunal on 22 and 23 July 2013.

2.8 The Commission thereafter continued with its investigation of the 25 firms that did not respond to the Invitation and were implicated by those that applied. B&E International is one of the 25 implicated firms. B&E International has agreed to settle the project it is implicated in.

3 CONDUCT IN CONTRAVENTION OF THE ACT

Braamhoek Quarry Dam (Tender no. CED0022/EM)

B&E International reached an agreement with Grinaker-LTA on or about February 2007 in respect of the Braamhoek Quarry Dam tender. In terms of the agreement, Grinaker-LTA received a cover price from B&E International and also discussed tender qualifications with it in 2007. The purpose of this was to ensure that Grinaker-LTA would submit a higher price than B&E International and thereby would be eliminated as a competitor from the tender. The tender was ultimately awarded to B&E International. The provision of a cover price by

B&E International to Grinaker-LTA is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

The Braamhoek Quarry Dam project was for civil works for the Braamhoek pumped storage scheme. The client for the project was Eskom and the project started 14 May 2007 and was completed October 2013.

4 ADMISSION

B&E International admits that it entered into the agreement detailed in paragraph 3 above with its competitor, Grinaker-LTA, in contravention of section 4(1) (b) (iii) of the Act.

5 CO-OPERATION

In so far as the Commission is aware, B&E International:

- 5.1. has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its control, relating to the prohibited practice;
- 5.2. has provided full and expeditious co-operation to the Commission concerning the prohibited practice;
- 5.3. 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;

- 5.4. has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practice;
- 5.5. 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.

6 FUTURE CONDUCT

B&E International agrees to:

- 6.1 prepare and circulate a statement summarising the content of this agreement to its employees, managers and directors within fourteen (14) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;
- 6.2. refrain from engaging in collusive tendering in contravention of section 4 (1) (b) (iii) of the Act, and from engaging in any prohibited practice in future;
- 6.3. develop, implement and monitor a competition law compliance programme 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;

6.4. 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 Tribunal; and

6.5. undertake henceforth to engage in competitive bidding.

7 ADMINISTRATIVE PENALTY

7.1 Having regard to the provisions of sections 58(1) (a) (iii) as read with sections 59(1) (a), 59(2) and 59(3) of the Act, B&E International agrees that it is liable to pay an administrative penalty in the sum of R 8 158 447 [Eight Million One Hundred and Fifty Eight Thousand Four Hundred and Forty Seven Rand], which penalty represents 2% of B&E International annual turnover for the financial year ended February 2013.

7.2. B&E International shall pay the amount set out above in paragraph 7.1 to the Commission within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.

7.3. This payment shall be made 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: Case number 2009Sep4641 & B&E International.

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

8. Full and Final Settlement

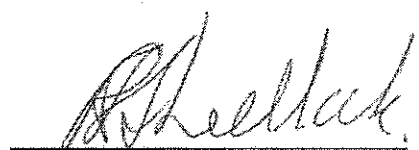
This agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and B&E International in respect of this conduct only.

FOR B&E INTERNATIONAL (PTY) LTD

Dated and signed at ROMONA on the 27 day of MAY 2014

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Name: ROBERT LEONARD SHELDRIK

Managing Director

FOR THE COMMISSION

Dated and signed at PRETORIA on the 17th day of JUNE 2014



TEMBINKOSI BONAKELE
COMMISSIONER