



competitiontribunal
south africa

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: 019786

In the matter between:

The Competition Commission

Applicant

and

Civcon Construction (Pty) Ltd

Respondent

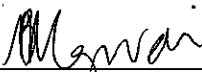
Panel : M Mazwai (Presiding Member)
M Mokuena (Tribunal Member)
F Tregenna (Tribunal Member)

Heard on : 19 November 2014

Decided on : 19 November 2014

Order

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

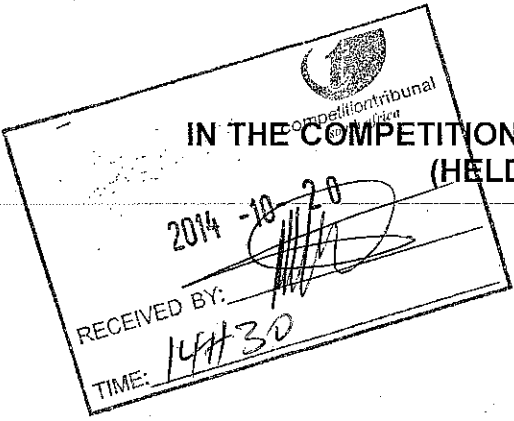


Presiding Member
Ms. M Mazwai

19 November 2014
Date

Concurring: Ms. M Mokuena and Prof. F Tregenna

ANNEXURE A¹
2



CT CASE NO: _____

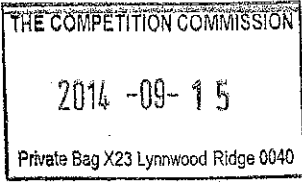
CC CASE NO: 2009Sep4641

In the matter between:

THE COMPETITION COMMISSION

Applicant

and



CIVCON CONSTRUCTION (PTY) LTD

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D, 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 CIVCON CONSTRUCTION (PTY) LTD , IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998.

Preamble

The Competition Commission and Civcon Construction (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Competition 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, on the terms below:

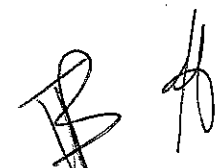
1 DEFINITIONS

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 **“Civcon”** means Civcon Construction (Pty) Ltd, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 18 Industry Road, Clayville, Olifantsfontein, Gauteng, 1665. Civcon is involved in the provision of civil infrastructure, mining work, roads construction and building work. Civcon, is formerly known as Civcontract Civils (Pty) Ltd.
- 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 Civcon;
- 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 **“Infraset”** means a division of Aveng (Africa) Limited (“Aveng”), a public company incorporated in terms of the laws of the Republic of South Africa with its registered place of business at Block A, Aveng Grinaker-LTA Park, Jurgens Street, Jet Park, Boksburg, 1459. Aveng is a multi-disciplinary construction and engineering group, anchored in South Africa with expertise in a number of market sectors namely power, mining, infrastructure, commercial, retail, industrial, oil and gas;
- 1.10 **“Invitation”** means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act, as published on the website of the Commission on 1 February 2011;
- 1.11 **“Loser’s fee”** in the context of collusive tendering, means a fee paid by



the successful tenderer to the losing tenderer(s) as compensation for the costs of tendering;

- 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 Civcon;
- 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 Civcon;
- 1.16 **“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

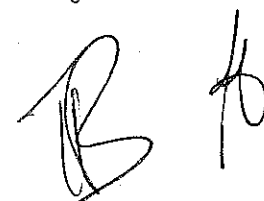
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immunity in terms of the CLP, the Commission initiated a complaint in terms of section 49B(1) of the Act under case number 2009Sep4641 into particular prohibited practices relating to conduct in the construction industry in relation to various projects, 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, Giuricich 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 The Commission's investigation of the above complaint, as well as of 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 purposes 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 issued in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices. It was also intended to expedite the finalisation of the investigations in a cost-effective manner.

- 2.4 The Invitation was published on the Commission's website on 1 February 2011. 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.
- 2.5 The Commission received settlement applications from twenty one (21) firms that disclosed a total number of 300 projects which were the subject of collusive conduct. Of the three hundred (300) projects disclosed, 160 (one hundred and sixty) (160) projects involved prescribed prohibited practices and 140 (one hundred and forty) involved non-prescribed prohibited practices. 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. This phase of the investigation of the complaint was termed "Phase 1".
- 2.8 Upon completion of Phase 1, the Commission proceeded to investigate the conduct of the 25 firms that did not respond to the Invitation and

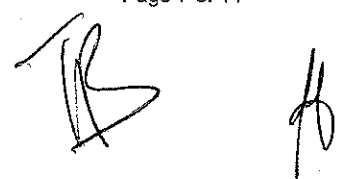
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were implicated by those that applied. Civcon is one of the 25 implicated firms. Civcon has agreed to settle the project it is implicated in.

3 CONDUCT IN CONTRAVENTION OF THE ACT

South Deep Mine Project

- 3.1. Civcon reached an agreement with Infraset on or about 15 September 2006, in that they agreed on a cover price and a loser's fee in respect of the South Deep Mine project.
- 3.2. In terms of the agreement, Infraset received a cover price from Civcon to enable Infraset to win the tender. It was further agreed that, in exchange for the cover price, Infraset would pay Civcon a loser's or a compensation fee in the amount of R500 000.00 (Five Hundred Thousand Rand) should Infraset win the tender. Despite this agreement, Civcon was awarded the tender. Although it was agreed that the successful bidder would pay the loser an amount of R500 000.00, Infraset received a total amount of R171 000.00 (One Hundred and Seventy One Thousand Rand), including value added tax, as a compensation or a loser's fee from Civcon. This conduct is collusive tendering in contravention of section 4(1) (b) (iii) of the Act.
- 3.3. The project was for the manufacture and delivery of pre-cast concrete

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brattice wall panels at the South Deep Twin Vent Shaft Storage Area.

4 ADMISSION

Civcon admits that it entered into the agreement detailed in paragraph 3 above with its competitor, Infraset, in contravention of section 4(1)(b) (iii) of the Act.

5 FUTURE CONDUCT

Civcon agrees and undertakes to:

- 5.1. 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;
- 5.2. refrain from engaging in collusive tendering in contravention of section 4(1)(b)(iii) of the Act, and from engaging in any prohibited practice under the Act in future;
- 5.3. 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;
- 5.4. submit a copy of such compliance programme to the Commission within 60

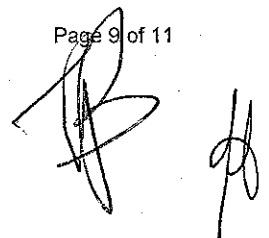


days of the date of confirmation of the Consent Agreement as an order by the Tribunal; and

5.5. undertake henceforth to engage in competitive bidding.

6. ADMINISTRATIVE PENALTY

- 6.1. 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, Civcon agrees that it is liable to pay an administrative penalty of R798 385.98 (Seven Hundred and Ninety Eight Thousand Three Hundred and Eighty Five Rand and Ninety Eight Cents) which penalty represents 1% of Civcon's annual turnover for the year ended February 2013.
- 6.2. Civcon shall pay R798 385.98 to the Commission in six (6) monthly instalments of R133 064.33 (One Hundred and Thirty Three Thousand Sixty Four Rand and Thirty Three Cents) per month. The first monthly payment shall be payable within 30 days from the date of confirmation of this Consent Agreement as an order of the Tribunal.
- 6.3. This payment shall be made into the Commission's bank account, details of which are as follows:

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11

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/Civcon.

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

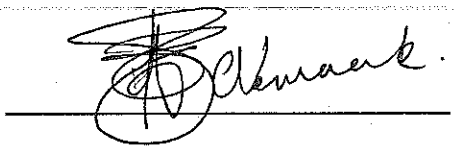
7. FULL AND FINAL SETTLEMENT

This agreement 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 Civcon in respect of this conduct only.

For Civcon Construction (Pty) Ltd

12

Dated and signed at TECHNOPARK on the 11 day of SEPTEMBER 2014



COENIE JB VERMAAK

CHIEF EXECUTIVE OFFICER

For the Commission

Dated and signed at PRETORIA on the 22 day of SEP-
TEMBER 2014



TEMBINKOSI BONAKELE

COMMISSIONER

