

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 017475

In the matter between:

The Competition Commission

Applicant

And

Hochtief Solutions A.G.

Respondent


Panel : A Wessels (Presiding Member)
T Madima (Tribunal Member)
A Roskam (Tribunal Member)

Heard on : 14 August 2013, with addendum received on 18 October
2013

Decided on : 07 November 2013

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the Respondent, attached hereto as "**Annexure A**", to be read with the addendum to the Consent Agreement, attached hereto as "**Annexure B**".



A Wessels

Presiding Member

Concurring: T Madima and A Roskam

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT Case No.

CC Case No. 2009May4447

In the matter between

COMPETITION COMMISSION



Applicant

and

HOCHTIEF SOLUTIONS AG

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Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND HOCHTIEF SOLUTIONS AG IN RESPECT OF CONTRAVENTION OF SECTION 4(1)(b)(iii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

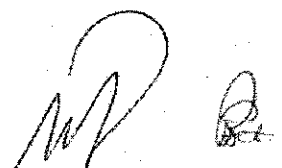
Preamble

The Commission and Hochtief Solutions AG hereby agree that 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 read with section 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended ("the Act"), in respect of a contravention of section 4(1)(b)(iii) of the Act, on the terms set out 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 "**CLP**" means the Commission's Corporate Leniency Policy (Government Gazette Notice no. 628 of 23 May 2008) published in Government Gazette no.31064;
- 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 Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.4 "**Commissioner**" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;
- 1.5 "**Complaint**" means the complaint initiated by the Commissioner in terms of section 49B of the Act against Hochtief, Concor (Pty) Limited ("Concor"), Group Five Limited, Dura Soletanche-Bachy (Pty) Limited ("Dura"), Stefanutti Stocks Holdings Limited ("Stefanutti"), Nishimatsu Construction Co Ltd ("Nishimatsu"), and Grinaker LTA Ltd ("Grinaker"), under case number 2009May4447;
- 1.6 "**Consent Agreement**" means this agreement duly signed and concluded between the Commission and Hochtief;
- 1.7 "**DHTC JV**" means the Durban Harbour Tunnel Contractors Joint Venture;
- 1.8 "**Hochtief**" means Hochtief Solutions AG (formerly known as Hochtief Construction AG until 15 February 2011), a public company incorporated under the laws of Germany with its principal place of business at Opemplatz 2, 45128, Essen, Germany. Hochtief is active in the construction industry, and provides building construction, civil and structural engineering;
- 1.9 "**Parties**" means the Commission and Hochtief;
- 1.10 "**Respondents**" means Hochtief, Concor, Group Five, Dura, Stefanutti, and Nishimatsu;

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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 Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Commission's Investigation and Findings

2.1. On 18 August 2009 the Commissioner initiated a complaint against Hochtief, Concor, Group Five, Dura, Stefanutti, Nishimatsu, and Grinaker ("the respondents"), for alleged conduct of collusive tendering or alternatively price fixing, in contravention of section 4(1)(b)(iii) and/or section 4(1)(b)(i) of the Competition Act, 1998 (as amended) ("the Act").

2.2. The complaint was initiated pursuant to a leniency application received by the Commission from Grinaker a subsidiary of Aveng (Africa) Limited ("Aveng"), in terms of the Commission's Corporate Leniency Policy ("CLP").

2.3. The Commission conducted its investigation and found that during 2004, the eThekweni Municipality put out a tender for the Durban Undersea Tunnel project, which involved the construction of a new tunnel which carries pipelines to transfer the sewage generated by Durban to a wastewater treatment works which is situated at an area called the Bluff. The new tunnel consisted of an entrance/exit buildings connected by a 4,5m diameter segmental concrete tunnel, some 530m long and situated approximately 35m below sea level. The tunnel was constructed using a tunnel boring machine.

2.4. The Commission further found that the eThekweni municipality only invited pre-qualified tenderers to submit bids for this contract, which included: Hochtief which was in a joint venture agreement with Concor ("DHTC JV")¹ in which Hochtief held 70% and was the appointed leader of the joint venture, and Concor

¹ At the time of tender, Hochtief owned 45% share in Concor. Concor is currently a wholly owned subsidiary of Murray & Roberts.

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held 30% interest; Stefanutti which was in joint venture with Nishimatsu and Dura and Group Five which joined the joint venture later; as well as Grinaker.

2.5. The Commission's investigation revealed that on or about February 2005, representatives of Hochtief along with the representatives of the respondents which had prequalified to tender, met and agreed to add a fixed margin in the amount of R3 million on their respective bid prices, in respect to the Durban Undersea Tunnel tender. They also agreed that the firm which won the bid would pay a fixed sum of R1 million to the losing bidders.

2.6. The DHTC JV was awarded the tender and it paid the agreed sum to the losing bidders during 2006, in accordance with the collusive agreement. The Commission found that this conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The project commenced on 13 June 2005 and was completed on 27 June 2007.

3. Admission

Hochtief admits that it engaged in collusive tendering in respect of the Durban Undersea Tunnel Project in contravention of section 4(1)(b)(iii) of the Act, as set out in paragraphs 2.3 to 2.6 above.

4. Cooperation

Hochtief agrees to fully cooperate with the Commission in its investigation and prosecution of the remaining respondents in the complaint. This cooperation includes, but is not limited to:

- 4.1. To the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement; and



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- 4.2 testify in the complaint referral in respect of alleged contraventions covered by this Consent Agreement.

5. Future Conduct

Hochtief agrees 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 prohibited conduct 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 Competition Tribunal; and
- 5.5 undertakes 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

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59(1)(a), 59(2) and 59(3) of the Act, Hochtief is liable for and has agreed to pay an administrative penalty in the amount of R1 907 793 (one million nine hundred and seven thousand, seven hundred and ninety three rands), which represents 1.450% of Hochtief's annual turnover for the civil engineering subsector for the financial year ended 2010.

6.2 Hochtief will pay the amount set out in paragraph 6.1 above to the Commission within 30 days from the date of confirmation of this Consent Agreement by the Tribunal.

6.3 The penalty must be paid into the Commission's bank account which is as follows:

NAME: THE COMPETITION COMMISSION FEE ACCOUNT

BANK: ABSA BANK, PRETORIA

ACCOUNT NUMBER: 4050778576

BRANCH CODE: 323 345

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


7. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and Hochtief relating to the contravention of section 4(1)(b)(iii) of the Act that is the subject of the Commission's investigation under Commission Case No. 2009May4447.

Dated and signed at BRYANSTON on the 4 day of JULY 2013



For Hochtief



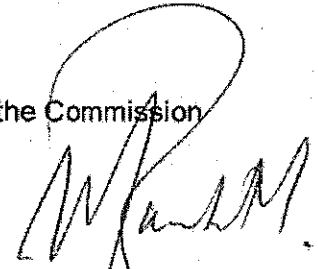
(RIAN PRETORIUS)

Chief Executive Officer

HOCHTIEF SOLUTIONS AG
Chas Everitt House
Unit E, La Rocca Office Park
321 Main Road
Bryanston
2021
Tel: (011) 463 1494
Fax: (011) 463 6459

Dated and signed at Pretoria on the 22 day of July 2013

For the Commission



Competition Commissioner

ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND HOCHTIEF SOLUTIONS AG

This is an addendum to the consent agreement concluded between the Competition Commission and Hochtief Solutions AG on 22 July 2013, in respect of the Durban Undersea Tunnel project.

1. Recordal

1.1 On 24 July 2013, the parties approached the Competition Tribunal ("Tribunal") to confirm the consent agreement.


1.2 The Tribunal heard the matter on 14 August 2013, and directed the parties to determine which loser's fee payments were made to which firms and if so, when such payments were made in respect of the project. Specifically, the Commission was required to contact each respondent to determine whether they received any loser's fee payments, and Hochtief was required to consult current and past employees to explain in an affidavit the findings of the search.


1.3 The Tribunal further directed the parties to submit an agreed addendum to the consent agreement reflecting the findings of their respective exercise.

1.4 The parties have conducted the required exercise and record their findings below. The parties have also agreed to the addendum, the terms of which are set out below.

2. The Commission's Findings

The Commission contacted each of the respondents to determine whether they received any loser's fee payments, and obtained the following information:

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2.1 Concor

Concor was part of the DHTC JV which won the tender. It submitted that in terms of the agreement with Hochtief, Concor was to have nothing to do with the implementation of the loser's fee arrangements and that Hochtief would be in charge of that process as the joint venture leader. Concor has further confirmed that it is unaware of any payments made by Hochtief or which of the firms were eventually paid the loser's fee if any.

2.2 Group Five


Group Five was in joint venture with Dura. It submitted that it was approached by Hochtief to enter into the loser's fee arrangement, but refused to participate in this agreement. Group Five submitted that it did not receive any loser's fee payment in respect of the Durban Undersea Tunnel project. Group Five further submitted that if Dura negotiated a loser's fee with competitors, it did so independently of the joint venture with Group Five.

2.3 Dura

Dura submitted that it searched through internal investigations, consultations with its past and present employees, review of its accounting and all internal records to ascertain whether it had received any loser's fee payment in respect of the Durban Undersea Tunnel project. Dura however, submitted that it did not find evidence of any form of payment received by it in respect of the Durban Undersea Tunnel project.

2.4 Nishimatsu

Nishimatsu was in joint venture with Stefanutti. The Commission experienced challenges when trying to reach Nishimatsu, this was partly because the company is based in Japan, and also because of the language barrier. From its response, Nishimatsu seems to be unaware of any loser's fee payment. It indicated that the relevant employee who was best placed to confirm if Nishimatsu received any loser's fee had since retired from Nishimatsu.



2.5 *Stefanutti*

Stefanutti confirmed during the hearing of a consent agreement between the Commission and Stefanutti also held on 14 August 2013, that it did not receive any loser's fee payment because Nishimatsu which was the joint venture leader refused to participate in the collusive agreement, on the basis that it could not account for the loser's fee payment in its books. Stefanutti has also submitted that Nishimatsu never received any loser's fee payment in respect of the Durban Undersea Tunnel Project.

2.6 *Grinaker*

Grinaker submitted that it received the loser's fee payment from Hochtief on 29 March 2006 in accordance with the loser's fee agreement with its competitors regarding the Durban Undersea Tunnel Project. Such payment was described as "*market research in respect of cooperation in Southern Africa as agreed*".

3. Hochtief's Exercise

3.1 As directed by the Tribunal, Hochtief has conducted an internal as well as independent investigation to determine which firms were paid the loser's fee if any, and consulted current and past employees regarding such payment/s.

3.2 In its search, Hochtief found that, except for Grinaker, no other firm was paid the loser's fee.

3.3 **Bundle A** to the addendum contains affidavits by the relevant representatives of Hochtief detailing the outcome of the search as well as how the search was conducted, and who was consulted.

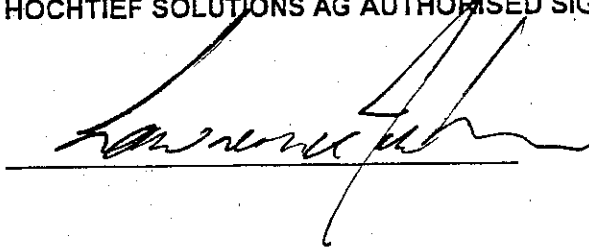
4. Clause 2.6 of the Consent agreement

In light of the foregoing the parties agree that clause 2.6 of the consent agreement be replaced to read:

2.6 The DHTC JV was awarded the tender. Grinaker was the only losing bidder which was paid the loser's fee in the amount of R1 million during March 2006 in accordance with the collusive agreement. The Commission found that this conduct is collusive tendering in contravention of section 4 (1)(b)(iii) of the Act. The project commenced on 13 June 2005 and was completed on 27 June 2007.

DATED AND SIGNED AT PRETORIA ON THE 23 DAY OF OCTOBER 2013

HOCHTIEF SOLUTIONS AG AUTHORISED SIGNATORY



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DATED AND SIGNED AT PRETORIA ON THE ____ DAY OF OCTOBER 2013



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Thembinkosi Bonakele

Acting Competition Commissioner