



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.:
CR166Dec14/SA091Sep19

In the matter between:

Competition Commission

Applicant

And

Power Construction (West Cape) Pty Ltd
Power Construction (Pty) Ltd

First Respondent
Second Respondent

Panel : Yasmin Carrim (Presiding Member)
: Enver Daniels (Tribunal Panel Member)
: AW Wessels (Tribunal Panel Member)
Heard on : 11 September 2019
Decided on : 11 September 2019

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Power Construction (West Cape) Pty Ltd; Power Construction (Pty) Ltd annexed hereto marked "A".

Presiding Member
Ms Yasmin Carrim

11 September 2019

Date

Concurring: Mr Enver Daniels and Mr Andreas Wessels

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT CASE NO: CR166Dec14/SA091Sep19

In the matter between:

THE COMPETITION COMMISSION

And

POWER CONSTRUCTION (WEST CAPE) (PTY) LTD

POWER CONSTRUCTION (PTY) LTD

FIRST RESPONDENT

SECOND RESPONDENT

SETTLEMENT AGREEMENT

The above parties agree that application be made to the Competition Tribunal for the confirmation of this Settlement Agreement as an order of the Tribunal in terms of section 49D read with section 58(1)(b) of the Competition Act no. 89 of 1998, as amended.

1 DEFINITIONS

For purposes of this settlement agreement the following definitions shall apply:

- 1.1 "Act": the Competition Act 89 of 1998, as amended;
- 1.2 "Commission": Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its offices at 1st Floor, Mulayo Building (Block C), the dtl Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

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- 1.3 **"H&I"**: Haw and Inglis Civil Engineering (Pty) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at Hillcrest Estate, Racecourse Road, Durbanville;
- 1.4 **"Parties"**: Commission, Power (West Cape) and Power Construction;
- 1.5 **"Power Construction"**: Power Construction (Pty) Ltd with registration number: 2006/035328/07, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its principal place of business situated at Rialto Road, 27th Floor, Grand Moorings Precinct, Century City;
- 1.6 **"Power Respondents"**: Power Construction and Power (West Cape);
- 1.7 **"Power (West Cape)"**: Power Construction (West Cape) Pty Ltd with registration number: 1995/009237/07, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa with its principal place of business situated at 27th Floor, One Thibault Square, Cape Town;
- 1.8 **"Settlement Agreement"**: This agreement concluded between the Parties; and
- 1.9 **"Tribunal"** means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its offices at 3rd

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

2 BACKGROUND

- 2.1 On 1 February 2011, the Commission issued an invitation to firms in the construction industry to engage with it regarding suspected contraventions of the Act.
- 2.2 On 15 April 2011, Power Construction addressed a letter to the Commission that described the conduct that forms the subject of this matter, in terms whereof Power Construction explained that it was unsure whether its conduct fell within the meaning of any prohibited conduct under the Act, but submitted it nonetheless in order to ensure complete cooperation with the Commission.
- 2.3 Subsequent to Power Construction's letter on the 15th of April 2011, the Commission conducted an investigation and then concluded that Power (West Cape)'s conduct amounted to it entering into a collusive agreement.
- 2.4 On 17 December 2014, the Commission referred its findings of collusive

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bidding involving Power (West Cape) and H&I.¹ In its referral to the Tribunal, the Commission also cited Power Construction as Power Construction had acquired Power (West Cape)'s business in 2007 in terms of an internal restructuring.

- 2.5 In their answer to the Commission's referral, the Power Respondents admitted that Power (West Cape) had colluded with H&I in a once off bid rigging contravention, but raised several legal defences. These arguments were ultimately dismissed by the Competition Appeal Court.²

3 CONDUCT IN CONTRAVENTION OF THE ACT

- 3.1 In April 2006, SANRAL invited tenders for the periodic maintenance (overlay and re-seal) of National Route N1 Section 4 from Touws River to Laingsburg.
- 3.2 On 3 May 2006, H&I asked Power (West Cape) to submit a cover bid for the aforesaid tender. H&I requested Power (West Cape) to submit a bid higher than its own as it was concerned that SANRAL may cancel the tender owing to a lack of viable bidders.
- 3.3 Although Power (West Cape) did not intend bidding for this tender, it

¹ H&I was granted immunity from a fine for providing information of the conduct.

² 145/CAC/Sep16.

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agreed to provide a cover bid and submitted the agreed bid of R99,980,000 to facilitate the tender being awarded to H&I.

3.4 On 28 July 2006, the tender was awarded to H&I. No monetary compensation was provided to Power (West Cape) for providing the cover bid.

3.5 The Commission found that the above conduct contravened section 4(1)(b)(iii) of the Act.

4 ADMISSION

4.1 Power (West Cape) admits that it engaged in the above collusive conduct, which is in contravention of section 4(1)(b)(iii) of the Act.

5 FUTURE CONDUCT

The Power Respondents agree to:

5.1 prepare and circulate a statement summarising the content of this agreement to its managers and directors within 14 (fourteen) days of the date of confirmation of this Settlement Agreement as an order of the Tribunal; and

5.2 if not already doing so, 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. This programme will be submitted to the Commission within thirty days of this Settlement Agreement being confirmed by the Tribunal.

6 SETTLEMENT AMOUNT

- 6.1** The Power Respondents acknowledge that Power (West Cape) is currently dormant without significant assets. The Parties agree that Power Construction will pay the settlement amount of R3,069,887.43 (Three Million Sixty-Nine Thousand Eight Hundred and Eighty-Seven Rand and Forty-Three cents) on Power (West Cape)'s behalf.
- 6.2** Power Construction will pay the above amount in six installments of R511,647.91. The first instalment shall be paid within 30 days from the date of the Tribunal's order confirming this Settlement Agreement and thereafter every two months.
- 6.3** Payment of the amount referred to in paragraph 6.1 above shall be made into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

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Branch name: Pretoria
Account holder: Competition Commission Penalties Account
Account number: 40-8764-1778
Account type: CALL ACCOUNT
Branch Code: 638056
Reference: CR166Dec14(Power)

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

7 MONITORING

- 7.1 All reports in relation to conditions set out in this Settlement Agreement, including but not limited to compliance programmes, proof of payment(s) etc., shall be submitted to the Commission at CartelSettlements@compcom.co.za

8 FULL AND FINAL SETTLEMENT

- 8.1 This Settlement Agreement is entered into in full and final settlement of the conduct set out under clause 3 and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and the Power Respondents in respect of the matter under Tribunal case number CR166Dec14.



For Power Respondents

Dated and signed at Blackheath on the 7th day of August 2019

G. A. Paves

Name:

Designation: Executive Chairman

For the Commission

Dated and signed at ISHWANE on the 15th day of August 2019


TEMBINKOSI BONAKELE
Commissioner