COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 017012

In the matter between:

The Competition Commission	Applicant
and	
Raubex (Pty) Ltd	Respondent

Panel:	N Manoim (Presiding Member), Y Carrim (Tribunal Member) and T Madima (Tribunal Member)
Heard on:	17 July 2013
Decided on:	22 July 2013

Order

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

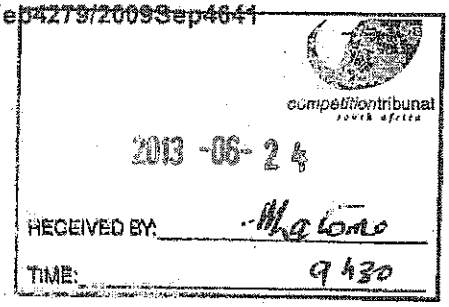
Presiding Member
N Manoim

Concurring: Y Carrim and T Madima

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No:
CC Case No:2009Feb4273/2009Sep4641



Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION **Applicant**

and

RAUBEX (PTY) LTD **Respondent**

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a)(iii) AS READ WITH SECTION 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND RAUBEX (PTY) LTD, IN REGARD TO CONTRAVENTIONS OF SECTION 4(1)(b) OF THE COMPETITION ACT, 1998

PREAMBLE

WHEREAS the Competition Commission is empowered to, *inter alia*, investigate alleged contraventions of the Competition Act, 1998;

WHEREAS the Competition Commission is empowered to, *inter alia*, conclude consent agreements in terms of section 49D of the Competition Act, 1998;

WHEREAS the Competition Commission has invited firms in the construction industry to engage in settlement of contraventions of the Competition Act, 1998;

WHEAREAS Raubex (Pty) Ltd has accepted the invitation and has agreed to settle in accordance with the terms of the Invitation;

NOW THEREFORE the Competition Commission and Raubex (Pty) Ltd 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 as read with section 58(1)(a)(iii) and section 58(1)(b) of the Competition Act, 1998.

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 "**CFTP**" means the Construction Fast Track Process announced by the Commission on 1 February 2011 to fast track the settlement process and to resolve the Commission's investigations into the construction industry;

1.3 "**CIDB Regulations**" refers to the Construction Industry Development Regulations, 2004 (as amended) (Government Notice No.692 of 9 June 2004, published in Government Gazette No.26427 of 9 June 2004);

1.4 "**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);

1.5 "**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;

1.6 "**Commissioner**" means the Commissioner of the Competition Commission, appointed in terms of section 22 of the Act;

1.7 "**Complaints**" means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case numbers 2009Feb4279 and 2009Sep4641;

1.8 "**Consent Agreement**" means this agreement duly signed and concluded between the Commission and Raubex (Pty) Ltd;

1.9 **"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 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.

1.10 **"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 **"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 complaints were initiated, as contemplated in section 67 of the Act;

1.12 **"Parties"** means the Commission and Raubex (Pty) Ltd ("Raubex");

1.13 **"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 complaints were initiated;

1.14 **"Raubex"** means Raubex (Pty) Ltd a company incorporated under the laws of the Republic of South Africa with its primary place of business at Heike Ernst, Building 1 Highgrove Office Park, 50 Tegel Ave, Centurion.

1.15 **"Respondent"** means Raubex;

1.16 **"Settlement"** refers to settlement in terms of the Invitation;

1.17 **"Subsector"** refers to the classes of construction work defined in Schedule 3 of the CIDB Regulations, substituted by Government Notice No. 8986 of 14 November 2008, published in Government Gazette No. 31603 of 14 November 2008;

1.18 "**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. The Complaints

2.1 On 10 February 2009 the Commission initiated a complaint in terms of section 49B(1) of the Act into alleged prohibited practices relating to collusive conduct in the construction of the stadiums for the 2010 FIFA Soccer World Cup against Murray & Roberts Limited, Grinaker-LTA Ltd, the construction operating business unit of Aveng (Africa) Limited, Group Five Limited, Basil Read (Pty) Ltd, WBHO Construction (Pty) Ltd, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv llc and Bouygues Construction SA.

2.2 On 01 September 2009, following the receipt of applications for immunity in terms of the CLP, the Commission initiated the Complaint in terms of section 49B(1) of the Act into prohibited practices relating to collusion in the construction industry. The Complaint concerned alleged contraventions of section 4(1)(b) of the Act as regards collusive tendering, price fixing and market allocation in respect to tenders. The investigation was initiated against the following firms: Murray & Roberts, Grinaker LTA Ltd, Aveng (Africa) Ltd, Stefanutti Stocks Holdings Ltd, Group Five Ltd, 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.

3. The Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act

3.1 The Commission's investigation of the Complaints, as well as several others of the Commission's investigations in the construction industry, led the Commission to believe that there was widespread collusion in contravention of section

4(1)(b)(iii) of the Act in the construction industry.

3.2 Section 4(1)(b) provides-

"4. Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering."

3.3 The collusive conduct engaged in, in the context of the invitation and this Consent Agreement, was collusive tendering or "bid-rigging". Collusive tendering involves particular conduct by firms whereby as competitors they collude regarding a tender resulting in the tender process being distorted. The bid prices and the bid submissions by these competitors as well as the outcome of the tender process is not the result of competition on the merits. "Cover pricing" in this context occurs when conspiring firms agree that one or more of them will submit a bid that is not intended to win the contract. The agreement is reached in such a way that among the colluding firms, one firm wishes to win the tender and the others agree to submit non-competitive bids with prices that would be higher than the bid of the designated winner, or the price will be too high to be accepted, or the bid contains special terms that are known to be unacceptable to the client. Collusive tendering therefore applies to agreements or concerted practices which have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa.

3.4 In terms of section 2 of the Act, two of the key objects of the Act are to promote the efficiency, adaptability and development of the economy, and to provide consumers with competitive prices and product choices. Section 21(1) of the

Constitution of the Republic of South Africa, 1996 calls for a procurement or tender system which is fair, equitable, transparent, competitive and cost-effective.

3.5 In addition, the Commission is required in terms of section 21(1) of the Act, *inter alia*, to implement measures to increase market transparency, to investigate and evaluate alleged contraventions of Chapter 2 of the Act, and to negotiate and conclude consent agreements in terms of section 49D for confirmation as an order of the Competition Tribunal in terms of section 58(1)(b) of the Act.

3.6 Therefore, in the interest of transparency, efficiency, disrupting cartels and incentivising competitive behavior in the construction industry and a cost-effective, comprehensive and speedy resolution of the investigations referred to above, the Commission decided to fast track these investigations and their resolution by inviting firms that were involved in collusive tendering in the form of bid-rigging of projects in the construction industry, to apply to engage in settlement on the terms set out in the Invitation.

3.7 On 1 February 2011 the Commission issued a media release about the Invitation and published same on its website. In the Invitation, hereto attached and marked as **Annexure A**, the Commission offered firms the opportunity to settle the alleged contraventions of the Act, if they would:

3.7.1 submit an application in terms of PART 2 of the Invitation;

3.7.2 agree to pay an administrative penalty or penalties determined by the Commission as envisaged in paragraph 10.2 read with paragraphs 19-28 of the Invitation; and

3.7.3 comply with the requirements of the settlement process as set out in PART 1 and PART 3 of the Invitation.

3.8 This agreement sets out the details of the non-prescribed prohibited practices only, which the respondent is liable to settle regard being had to the provisions of section 67(2) of the Act and the penalty is calculated taking into account only the said non-prescribed prohibited practices.

3.9 Applying firms were required to *inter alia* provide the Commission with truthful and timely disclosure of information and documents relating to the prohibited practices and to provide full and expeditious co-operation to the Commission concerning the prohibited practices.

3.10 An applying firm could request the Commission to consider its application in terms of the Invitation as an application for a marker or as an application for immunity under the CLP. Firms could also apply for a marker or for immunity under the CLP before making an application in terms of the Invitation.

3.11 The deadline to apply for a settlement in terms of the Invitation was 12h00 on 15 April 2011.

4. **Applications by Raubex**

4.1. Raubex applied for leniency and Settlement in terms of the Invitation. Raubex is involved in road construction, rehabilitation and associated infrastructure developments across Southern Africa. Through its subsidiary, Raumix Pty Ltd, it also produces and supplies crushed aggregate to the broader construction and mining industries.

4.2. Raubex applied for leniency and Settlement and disclosed nine (9) prohibited practices (8 projects and 1 meeting) which are non-prescribed and which fall under the civil engineering subsector.

4.3. Raubex was not first to apply for the prohibited practices it disclosed, and is therefore liable to settle all 9 of them in terms of this Consent Agreement.

4.4. The 9 prohibited practices or contraventions by Raubex of section 4(1)(b)(iii) of the Act which are the subject of this Consent Agreement are set out below.

5 Disclosed Meeting and Projects

5.1. *The 2006 Road Constructors meeting*

Raubex reached agreement with Basil Read, Concor, Haw Inglis, Grinaker-LTA and WBHO on or about 2006, in that, they were attendees at the 2006 Road Contractors Meeting where they agreed to allocate tenders for the construction of roads. There was also an agreement in terms of which firms who were not interested in the projects or in winning the tenders, or were not allocated a project, would submit non-competitive bids to ensure that those that were interested in winning particular bids, won them. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

5.2 *Upgrading Road Gamtoos to Van Staden River (Tender Ref No:NRA N.002 – 100 – 2005/1)*

Raubex reached agreement with Rand Roads, a business unit of Grinaker LTA, on or about June 2006, in respect of this project. In terms of the agreement Raubex provided a cover price to Rand Roads to enable Rand Roads to win the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of the national route 2, Section 10, from Gamtoos to van Stadens River, for the South African National Roads Agency Limited ("SANRAL"). This project was awarded to Koelro (Pty) Ltd. The project was completed on 1 August 2007.

5.3 *Upgrading Road 57/3 from Alice to Middeldrift (Tender Ref No:NRA P.002 – 030 – 2006/1)*

Raubex reached agreement with Haw & Inglis on or about July/August 2006, in that they agreed on a cover price in respect of this project. In terms of the agreement, Raubex provided a cover price to Haw Inglis to ensure that Haw Inglis won the tender. In line with the collusive agreement, Haw Inglis was

awarded the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of Trunk Road 57/3 from Alice to Middeldrift for SANRAL. The project was completed on 16 November 2008.

5.4 **Upgrading *of National Route 2, Section 8, Tsitsikamma to Witelsbos (Tender Ref No:NRA N.002 – 090 – 2000/1C – C0)***

Raubex reached agreement with Concor, on or about October 2006, in that they agreed on a cover price in respect of this project. In terms of the agreement, Concor provided Raubex with a cover price to enable Concor to win the tender. The tender was awarded to Concor in line with the collusive agreement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of 14 kilometres of the national route 2, Section 8, from Tsitsikama to Witelsbos, for SANRAL. The project was completed on 23 May 2010.

5.5 ***Upgrading of National Route 12, Section 12, Beefmaster Intersection to Bloemhof (Tender Ref No:NRA N.012 – 120 – 2006/1)***

Raubex reached agreement with Concor on or about November 2006, in that they agreed on a cover price in respect of this project. In terms of the agreement, Concor provided Raubex with a cover price to enable Concor to win the tender. In line with the collusive agreement, Concor was awarded the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of the national route 12, Section 12, Beefmaster to Bloemhof, or SANRAL. The project was completed on 29 January 2011.

5.6 ***Rehabilitation of National Route 11 Section 6&7, from Amersfoort to Ermelo (Tender Ref No:NRA N011 – 067 – 2003/9)***

Raubex reached agreement with Concor and Haw & Inglis on or about January 2007, in that they agreed on a cover price in respect of this project. In terms of the agreement, Raubex provided Concor and Haw & Inglis with a cover price to

enable Raubex to win the tender. In line with the collusive agreement, Raubex was awarded the tender. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of the national route 11, Section 6 & 7 from Amersfoort to Ermelo, for SANRAL. The project is on-going.

5.7 ***Upgrading of National Route, Hilltop - Barberton (Tender Ref No:NRA R.040 – 020 – 2006/1)***

Raubex reached agreement with WBHO in that they agreed on a cover price in respect of this project. In terms of the agreement, Raubex received a cover price from WBHO to enable WBHO to win the tender. WBHO was awarded the tender for this project in line with the collusive agreement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of the road R40 from Hilltop to Barberton, for SANRAL. The project was completed on 10 June 2009.

5.8 ***Upgrading of N1 from Zandraal to Verkeerdvlei (Tender Ref No:NRA N001 – 156- 2006/1)***

Raubex reached agreement with Basil Read on or about February 2007, in that they agreed on a cover price in respect of this project. In terms of the agreement, Raubex provided Basil Read with a cover price to enable Basil Read to win the tender. The project was awarded to Basil Read in line with the collusive agreement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of the N1, Section 16 from Glen Lyon to Zandraal, for SANRAL. The project was completed on 15 November 2009.

5.9 ***Upgrading of National Route 1 Section 15, Glen Lyon to Zandraal (Tender Ref No:NRA N001 – 156 – 2007/1)***

Raubex reached agreement with Basil Read and WBHO on or about March 2007, in that they agreed on a cover price in respect of this project. In terms of the agreement, Raubex provided Basil Read and WBHO with cover prices to

enable Raubex to win the tender. The project was awarded to Raubex, in line with the collusive agreement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act.

This project was for the rehabilitation of N1, Sections 15 & 16 from Glen Lyon to Zandraal, for SANRAL. The project was completed in September 2009.

6 Admission

Raubex admits that it was involved in collusive conduct in contravention of section 4(1)(b)(iii) of the Act in that it tendered collusively in respect of the prohibited practices described in paragraphs 5 above.

7 Co-operation

In so far as the Commission is aware, and in compliance with the requirements as set out in the Invitation, Raubex:

7.1 has provided the Commission with truthful and timely disclosure, including information and documents in its possession or under its control, relating to the prohibited practices;

7.2 has provided full and expeditious co-operation to the Commission concerning the prohibited practices;

7.3 has provided a written undertaking that it has immediately ceased to engage in, and will not in the future engage in, any form of prohibited practice;

7.4 has confirmed that it has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices;

7.5 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.

8 Agreement Concerning Future Conduct

8.1 In compliance with the requirements as set out in the Invitation Raubex agrees and undertakes to provide the Commission with full and expeditious co-operation from the time that this Consent Agreement is concluded until the subsequent proceedings in the Competition Tribunal or the Competition Appeal Court are completed. This includes, but is not limited to:

8.1.1 to the extent that it is in existence and has not yet been provided, providing (further) evidence, written or otherwise, which is in its possession or under its control, concerning the contraventions contained in this Consent Agreement;

8.1.2 Raubex will avail its employees and former employees to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement;

8.1.3 Raubex shall develop, 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.

8.2 Raubex shall develop, 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.

8.3 Raubex shall 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.

8.4 Raubex shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Raubex within 60 days from the date of confirmation of this Consent Agreement by the Tribunal.

8.5 Raubex will not in the future engage in any form of prohibited conduct and will not engage in collusive tendering which will distort the outcome of tender processes but undertakes henceforth to engage in competitive bidding.

9 Administrative Penalty

9.1 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, and as envisaged in paragraph 10.2 read with paragraphs 19-28 of the Invitation, Raubex accepts that it is liable to pay an administrative penalty ("penalty").

9.2 According to the Invitation, the level of the penalty is to be set on the basis of a percentage of the annual turnover of Raubex in the relevant subsector in the Republic and its exports from the Republic for the financial year preceding the date of the Invitation.

9.3 The meetings and projects which Raubex has been found to have contravened the Act, fall under the Civil Engineering CIDB subsector.

9.4 Accordingly, Raubex is liable for and has agreed to pay an administrative penalty in the sum of R58 826 626 (Fifty Eight Million, Eight Hundred and Twenty Six Thousand, Six Hundred and Twenty Six Rand) which penalty is calculated in accordance with the Invitation.

10 Terms of payment

10.1. Raubex will pay the amount set out above [in paragraph 9.4] to the Commission within 30 days from the date of confirmation of this Consent agreement by the Tribunal.

10.2. 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
Brach Code:	323 345

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

11 Full and Final Settlement

This agreement is entered into in full and final settlement of the specific conduct listed in paragraphs 5 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Raubex in respect of this conduct only.

Dated and signed at 16h00 **on the** 10 **day of** May **2013.**

For Raubex

Rudolf Johannes Fouché

[FILL IN NAME AND POSITION OF PERSON THAT IS SIGNING]

CEO

Dated and signed at Pretoria on the 21 day of June 2013.

For the Commission

Shan Ramburuth
Commissioner