COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016980

In the matter between:

The Competition Commission	Applicant
and	
Haw & Inglis Civil Engineering (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" and the addendum thereto marked "B.

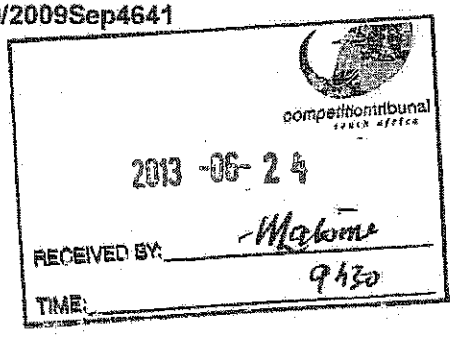
Presiding Member
N Manoim

Concurring: Y Carrim and T Madima

"A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD IN PRETORIA

CT Case No. CC Case No. 2009Feb4279/2009Sep4641



Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION **Applicant**

and

HAW & INGLIS CIVIL ENGINEERING (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 , HAW & INGLIS CIVIL ENGINEERING (PTY) LTD ("HAW & INGLIS") IN REGARD TO CONTRAVENTIONS OF SECTION 4(1)(b)(iii) 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;

WHEREAS Haw & Inglis Civil Engineering (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 Haw & Inglis Civil Engineering (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 sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act, 1998.

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 **"CIDB"** means the Construction Industry Development Board;

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 1 st 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 **"Complaint"** means the complaints initiated by the Commissioner of the Competition Commission in terms of section 49B of the Act under case number 2009Feb4279 and 2009Sep4641;

1.8 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Haw & Inglis;

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 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.

1.10 **"Haw & Inglis"** means Haw & Inglis Civil Engineering (Pty) Ltd a company incorporated under the laws of the Republic of South Africa with its principal place of business at Hillcrest Estate, Racecourse Road, Durbanville with registration no 1969/008806/07. Haw & Inglis main business is Civil Engineering work;

1.11 **"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;

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

1.13 **"Parties"** means the Commission and Haw & Inglis;

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 complaints were initiated;

1.15 **"Respondent"** means Haw & Inglis Civil Engineering (Pty) Ltd;

1.16 **"Settlement"** refers to settlement in terms of the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act and the procedures detailed therein;

1.17 **"Sub-sector of the construction industry"** 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; and

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 Complaint

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 Grinaker-LTA the construction operating business unit of Aveng, Group Five Limited, Basil Read (Pty) Ltd, WBHO Construction (Pty) Ltd, Murray & Roberts Limited, Stefanutti Stocks Limited, Interbeton Abu Dhabi nv llc and Bouygues Construction SA.

2.2 In addition, on 01 September 2009, following the receipt of applications for immunity in terms of the Commission's Corporate Leniency Policy (CLP), the Commission initiated a complaint in terms of section 49B(1) of the Act into particular prohibited practices relating to conduct in construction projects, by the firms listed below. 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 (the construction operating business unit of Aveng, 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.

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 over 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 217 of the

Constitution, 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, developing the performance of the construction industry, incentivising competitive behaviour, disrupting cartels 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 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 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 contains the details of the non-prescribed prohibited practices and the calculation of the penalty is based on the 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 Friday 15 April 2011.

4 Application for settlement by Haw and Inglis

4.1 On 15 April 2011 Haw & Inglis applied for leniency and Settlement in terms of the Invitation.

4.2 In its application Haw & Inglis applied and disclosed ten (10) prohibited practices (9 projects and 1 meeting). Two (2) out of the 10 prohibited practices are prescribed, leaving 8 non-prescribed prohibited practices.

4.3 Haw & Inglis was first to apply for two (2) non-prescribed prohibited practices and was granted Conditional Immunity in terms of the CLP for these two prohibited practices.

4.4 Haw & Inglis is therefore liable to settle the remaining six (5 projects and 1 meeting) prohibited practices.

4.5 The six (6) prohibited practices or contraventions (all of which are in the civil engineering sub-sector) by Haw & Inglis of section 4(1)(b)(iii) of the Act which are the subject of this Consent Agreement, are set out below.

5 DISCLOSED PROJECTS

5.1 **Rehabilitation of N1- Springfontein** (Tender no. N001-130-2004/1)

Haw & Inglis reached an agreement with Raubex (Pty) Ltd (Raubex) and Grinaker-LTA on or about June 2006 in respect of the Rehabilitation of N1-Springfontein Project, in that, Haw & Inglis, Raubex and Grinaker-LTA agreed not to submit tenders for this project. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The project was awarded to Blacktop Surfaces (Pty) Ltd.

5.2 **SANRAL: N11 Amersfoort to Ermelo** (Tender no. NRA N011- 067- 2003/9)

Haw & Inglis reached agreement with Raubex on or about January 2007, in that they agreed on a cover price in respect of the rehabilitation of the national route 11, Section 6 & 7 from Amersfoort to Ermelo project. In terms of the agreement, Haw & Inglis provided Raubex 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. The project is on-going.

5.3 **SANRAL: N2 Section 10-Gamtoos to Van Stadens River** (Tender no. NRA N002 – 100-2005/1)

Haw & Inglis reached an agreement with Grinaker-LTA on or about 30 June 2006 in respect of the SANRAL: N2 Section 10- Gamtoos to Van Stadens River Project. In terms of the agreement, Haw & Inglis provided a cover price to Rand Roads, a business unit of Grinaker LTA to enable Rand Roads to win the tender. The tender was, however, not awarded to Rand Roads but to Koelro Construction, which was not party to the cover price arrangement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The tender, which was for the rehabilitation of N2 section 10- Gamtoos to Van Stadens River was completed on 01 August 2007.

5.4 **Eastern Cape Government: Upgrading of the Mount Frere** (Tender no. SCMU 10 – 06/07 - 0043)

Haw & Inglis reached an agreement with WBHO Construction (Pty) Ltd ("WBHO") and Rumdel Construction (Pty) Ltd ("Rumdel") on or about July 2006 in respect of the Eastern Cape Government: Mount Frere Project, in that, Haw & Inglis agreed to provide a cover price to WBHO and to Rumdel to enable WBHO to win the tender. The project was awarded to WBHO in line with the cover price arrangement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The tender was for the upgrading of the district road including earthworks, paving, structure and drainage. The project was completed on 14 June 2010.

5.5 **SANRAL: Upgrading of Trunk Road 57/3 from Alice to Middledrift** (Tender no. NRA P002 — 030 — 2006/1)

Haw & Inglis reached an agreement with Raubex, WBHO and Rumdel on or about August 2006 in respect of the SANRAL upgrading of the Trunk Road 57/3 from Alice to Middledrift Project. In terms of the agreement, Haw & Inglis provided cover prices to Raubex, WBHO and Rumdel to ensure that they submit uncompetitive bids to enable Haw & Inglis to win the tender. The tender was awarded to Haw & Inglis in accordance with the cover price arrangement. This conduct is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. The tender was for the upgrading of Trunk Road 57/3 from Alice to Middledrift for SANRAL. The project was completed on 16 November 2008.

5.6 **2006 Road Contractors Meetings (Johannesburg)**

Haw Inglis reached agreement with Basil Read, Concor, Raubex, Grinaker LTA and WBHO at the 2006 Road Contractors Meeting, in that, these firms who were attendees at the 2006 Road Contractors Meeting agreed to allocate tenders for the construction of roads, and that firms who were not interested in the project or in winning the tender or were not allocated a project would submit uncompetitive 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.

6 **Admission**

Haw & Inglis admits that it entered into the agreements detailed in paragraphs 5.1 to 5.6 above with its competitors in contravention of section 4(1)(b)(iii) of the Act.

7 **Co-operation**

In so far as the Commission is aware, and in compliance with the requirements as set out in the Invitation, Haw & Inglis –

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, Haw & Inglis 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 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 testifying as a witness for the Commission in any cases regarding the contraventions contained in this Consent Agreement.

8.2 Haw & Inglis 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 the following –

8.2.1 a Competition Policy to be drafted and implemented by Haw & Inglis;

8.2.2 provide for specific training on competition law aspects particularly relevant to Haw & Inglis;

8.2.3 ensure that such training will be made available to all new employees joining Haw & Inglis. Furthermore, Haw & Inglis will update such training annually.

8.3 Haw & Inglis 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; and

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

8.5 According to the written undertaking it has provided in compliance with the requirements as set out in the Invitation, Haw & Inglis 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, Haw & Inglis 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 Haw & Inglis 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 prohibited practices which Haw & Inglis has been found to have contravened the Act, fall under the Civil Engineering sub-sector.

9.4 Accordingly, Haw & Inglis is liable for and has agreed to pay an administrative penalty in the sum of R45 314 041 (Forty Five Million Three Hundred and Fourteen Thousand and Forty One Rand) which penalty is calculated in accordance with the Invitation.

10 Terms of payment

10.1 Haw & Inglis shall 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 as an order of 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

10.3 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 5.1 to 5.6 of this consent agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Haw & Inglis in respect of this conduct only.

Dated and signed at Durbanville **on the** 4 **day of** June **2013**

For Haw & Inglis

FRANCIS ANTONI CHEMALY [DIRECTOR]

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

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

For the Commission

Shan Ramburuth
(Commissioner)

"B"

ADDENDUM TO THE CONSENT AGREEMENT BETWEEN THE COMMISSION AND HAW & INGLIS, RELATING TO TERMS OF PAYMENT

1. The Commission and Haw &Inglis agree that Haw &Inglis shall pay the amount set out in paragraph 9.4 of the consent agreement as follows:

   1.1 The first payment of 15 104 680 (fifteen million one hundred and four thousand six hundred and eighty rand), payable within 30 days after the Tribunal's order;

   1.2 The second payment of 15 104 681 (fifteen million one hundred and four thousand six hundred and eighty one rand), payable exactly six months after the first payment; and

   1.3 The third payment of 15 104 680 (fifteen million one hundred and four thousand six hundred and eighty rand), payable exactly six months after the second payment.

2. The above terms substitute the terms stipulated in paragraph 10.1 of the consent agreement.

DATED AND SIGNED AT DURBANVILLE ON THE 15TH DAY OF JULY 2013

HAW & INGLIS CIVIL ENGINEERING (PTY) LTD AUTHORISED SIGNATORY

DATED AND SIGNED AT PRETORIA ON THE 16 DAY OF JULY 2013

Shan Ramburuth

Competition Commissioner

competitiontribunal

2013 -07- 16

RECEIVED BY: Steve

TIME: 11:26