

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 016998

In the matter between:

The Competition Commission

Applicant

and

Hochtief Construction AG

Respondent

Panel: N Manoim (Presiding Member), Y Carrim
(Tribunal Member) and T Madima (Tribunal
Member)

Heard on: 18 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.

	
2013 -06- 24	
RECEIVED BY:	<i>M. G. M.</i>
TIME:	9h30

CC Case No. 2009Feb4279/2009Sep4641

Application for confirmation of a consent agreement

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

HOCHTIEF Solutions AG

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 HOCHTIEF SOLUTIONS
AG ("HOCHTIEF"), 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;

MR

4

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 HOCHTIEF Solutions AG has accepted the invitation and has agreed to settle in accordance with the terms of the invitation;

NOW THEREFORE the Competition 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 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

2


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 Flor, 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 Hochtief;
- 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. **"Hochtief"** means HOCHTIEF Solutions AG a company incorporated under the laws of Germany with its principal of business at Opernplatz, 45128, Essen Germany. Its main business in South Africa was Civil Engineering works;

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 Hochtief;

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 Hochtief;
- 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 CIBD 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 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, 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 Solentache-Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Piling 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 -

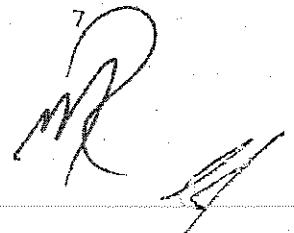
(a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(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."

A handwritten signature, possibly 'MR', followed by some initials or a flourish, located in the bottom right corner of the page.

3.3. The collusive conduct engaged in, in the context of the Invitation, 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 its 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. The specific collusive conduct in respect of Hochtief is that described in para.5 herein below, i.e. a loser's fee arrangement.

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 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. Applications by Hochtief

4.1. Hochtief applied on 15 April 2011 for Settlement in terms of the Invitation.

4.2. Hochtief applied and disclosed three (3) prohibited practices, one of which is a prescribed prohibited practice. Of the two (2) non-prescribed prohibited practices, one (1) prohibited practice concerns an on-going case which the Commission had already investigated and decided to refer to the Tribunal.¹ This prohibited practice is therefore not included in this Consent Agreement.

4.3. Hochtief is therefore liable to settle one (1) prohibited practice pursuant to the Invitation.

4.4. Hochtief was not implicated in any projects that it did not disclose.

4.5. The one (1) contravention by Hochtief of section 4(1)(b)(iii) of the Act which is the subject of this Consent Agreement is set out below.

¹ The matter was investigated under Commission case number 2009May4447 and it is known as the Undersea Tunnel Project referral.

5. DISCLOSED PROJECT

Berg River Dam (Tender No: TCTAB020)

Hochtief whilst in joint venture with Concor (Hochtief-Concor Joint Venture) reached agreement with Grinaker LTA, Group Five, WBHO, and Western Cape Empowerment Joint Venture (The BRP Joint Venture), as well as the Basil Read, Ceccon, Olderbrecht Joint Venture, on or about 2004, in that they agreed on a losers' fee in respect of this project. In terms of the agreement, Hochtief-Concor Joint Venture concluded a loser's fee arrangement with the BRP Joint Venture, and the Basil Read, Ceccon, Olderbrecht Joint Venture, in terms of which it was agreed that if BRP JV were to win the tender, a losers' fee would be payable to the unsuccessful tenderers. This is collusive tendering in contravention of section 4(1)(b)(iii) of the Act. This project was for the construction of a dam at the Berg River for Trans Chaledon Channel Authority. The project was completed on 19 September 2009.

6. Admission

Hochtief admits that it entered into the agreement detailed in paragraph 5 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, Hochtief:

- 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, Hochtief 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. availing its employees and former employees (insofar as it is within its power) to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement.

8.2. Hochtief has developed and implemented and shall continue to 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. Hochtief 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. Hochtief shall circulate a statement summarising the contents of this Consent Agreement to all management and operational staff employed at Hochtief 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, Hochtief 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, Hochtief 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 Hochtief in the relevant sub-sector in the Republic and its exports from the Republic for the financial year preceding the date of the Invitation.
- 9.3. The total number of meetings and projects which Hochtief has been found to have contravened the Act, fall under the Civil Engineering CIDB sub-sector.
- 9.4. Accordingly, Hochtief is liable for and has agreed to pay an administrative penalty in the sum of R1 315 719 (One Million Three Hundred and Fifteen Thousand Seven Hundred and Nineteen Rand) which penalty is calculated in accordance with the Invitation.

10. Terms of payment

- 10.1. Hochtief shall pay the amount set out above [in paragraph 9.4] to the Commission within thirty (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
Branch Code: 323 345

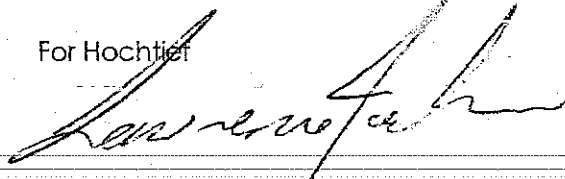
10.3. The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

11. Full and Final Settlement

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

Dated and signed at CAPE TOWN on the 16 day of MAY 2013.

For Hochtief



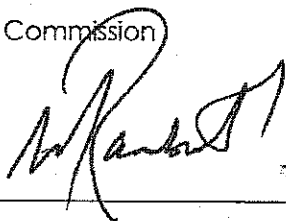
LAURENCE JACKSON BRANCH MANAGER

[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