

SOUTH AFRICA / JUDGMENT

Competition Commission v Murray and Roberts Limited (CR128Mar11/SA153Oct15) [2015] ZACT 128; [2015] 2 CPLR 571 (CT) (9 December 2015) [2015] ZACT 128

COURT

Competition Tribunal

BEFORE

N Manoim, A Wessels, I Valodia

CASE / FILE NUMBER

CR128Mar11/SA153Oct15

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: CR128Mar11/SA1530ct15

In the matter between:

The Competition Commission

Applicant

and

Murray & Roberts Limited Respondent

Panel

: N Manoim (Presiding Member)

A Wessels (Tribunal Member)

I Valodia (Tribunal Member)

Heard on

: 09 December 2015

Decided on

: 09 December 2015

Settlement Agreement

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Murray & Roberts

Limited annexed hereto marked "A".

09 December 2015

Date

Presiding Member

Mr N manoim

Concurring: Mr A Wessels and Prof. I Valodia

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CT CASE NO:_____

CC CASE NO: 2009May4446/2009 May4447/2009Sep4641

2010Apr5034

THE COMPETITION COMMISSION

Applicant

MURRAY & ROBERTS LIMITED

Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iil) and 58(1) (b) OF THE COMPETITION ACT, NO. 89 OF 1998, AS AMENDED, BETWEEN THE COMPETITION COMMISSION AND MURRAY & ROBERTS LIMITED, IN RESPECT OF CONTRAVENTIONS OF SECTION 4(1)(b) OF THE COMPETITION ACT

The Commission and Murray & Roberts Limited hereby agree that application be made to the Tribunal for the confirmation of this

Consent Agreement as an order of the Tribunal in terms of section 490 as read with sections 58(1) (a)(iii) and 58(i)(b) of the Act, in respect of contraventions of section 4(1)(b) of the Act, on the terms below:

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 Notice No. 628 of 23 May 2008, published in Government Gazette No. 31064 of 23 May 2008);

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 1st Floor, 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 "Concor" means Concor Limited and its subsidiaries. Concor was acquired by Murray & Roberts in 2006, after which the registered name was changed to Concor Proprietary Limited. It is active, amongst others, in the civil engineering construction and roads and earthworks sectors. Concor is currently a subsidiary of Murray & Roberts in its Infrastructure and Building Platform;

1.6 "Consent Agreement" means this agreement duly signed and concluded between the Commission and Murray & Roberts;

1.7 "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;

1.8 "Genrec" means a division of Murray & Roberts with its principal place of business at Cnr. Dekema & Niemann Roads Wadeville, 1428;

1.9 "Invitation" means the Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Act, as published on the website of the Commission on 1 February 2011;

1.10 "Murray & Roberts" means Murray & Roberts Limited, a public company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Douglas, Roberts Centre, 22 Skeen Boulevard, Bedfordview. Murray & Roberts offers civil, mechanical, electrical, mining and process engineering, general building, procurement, construction, commissioning, operations and maintenance services;

1.11 "Parties" means the Commission and Murray & Roberts;

1.12 "Respondent" means Murray & Roberts;

1.13 "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 BACKGROUND

2.1 This Consent Agreement concerns three (3) complaints in which Murray & Roberts is a respondent, namely:

2.1.1 Commission v Concor and others (2009May4446);

2.1.2 Commission v Concor and others (2009May4447); and

2.1.3 Commission v Murray & Roberts and others (2009Sept4641).

2.2 In an effort to expeditiously and efficiently settle the above

contraventions, which relate to conduct investigated prior to, as well as subsequent to, the issuing of the Invitation, the parties

have agreed to include all the above contraventions into one consolidated settlement agreement.

Commission v Concor and others (2009May4446)

2.3 On 16 July 2009, the Commissioner initiated a complaint against

Concor, Lennings DEC Rail Services (Pty) Ltd ("Lennings") and WBHO Construction (Pty) Ltd ("WBHO") in terms of section 498(1) of the Act for alleged conduct of collusive tendering in contravention of section 4(1)(b)(iii) of the Act. In this complaint, the Commissioner alleged that Concor, Lennings and WBHO entered into a collusive tendering agreement in respect of the tender for the upgrade of the even loops on the Sishen Saldanha Railway ore line ("Sishen Saldanha Project").

Commission v Concor and others (2009May4447)

2.4 On 18 August 2009 the Commissioner initiated a complaint against

Concor, Hotchiet Construction AG ("Hotchief"), Group Five Limited ("Group Five"), Dura Soletanche-Bachy (Pty) Ltd ("Dura"), Stefanutti Stocks Holdings Limited ("Stefanutti"), Nishimatsu Construction Co Ltd ("Nishimatsu"), and Grinaker LTA, a division of Aveng (Africa) Ltd ("Grinaker"), for alleged collusive tendering or alternatively price fixing relating to the Durban undersea tunnel project ("Durban Undersea/Harbour Tunnel Project").

Commission v Murray & Roberts and others (2009Sept4641)

2.5 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 under case number 2009Sep4641 into particular prohibited practices relating to conduct in construction projects, by the firms listed below.

2.6 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, Aveng (Africa) Ltd ("Aveng"), Stefanutti Stocks Holdings Ltd, Group Five Ltd, Murray & Roberts, Concor, 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, Radio Geotechnics (Pty) Ltd, Dlabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC, Wiison Bayly Holmes-Ovcon Ud and other construction firms, including joint ventures.

2.7 The Commission's investigation of the above complaint, as well as several others in the construction industry, led the Commission to believe that there was widespread collusion in the construction

sector in contravention of section 4(1)(b)(iii) of the Act. Accordingly, in line with the purposes of the Act as well as the Commission's functions, the Commission decided to invite construction firms that were involved in collusive conduct to apply to engage in settlement on favourable terms. The Invitation was issued in the interests of transparency, efficiency, adaptability and development of the construction industry, the provision of competitive prices. It was also intended to expedite the finalisation of the investigations in a cost-effective manner.

2.8 The Invitation was published on the Commission's website on 1 February 2011. The Invitation required firms to apply for settlement by disclosing all construction projects that were the subject of prescribed and non-prescribed prohibited practices. The closing date to apply for settlement in terms of the Invitation was 15 April 2011,

2.9 Pursuant to this Invitation, Murray & Roberts settled seventeen

projects with the Commission in terms of the process contemplated by the Invitation.

2.10 In addition, information received from Stefanutti, Grinaker and Aveng in terms of the Invitation implicated Murray & Roberts in collusive conduct relating to the Tati Mining Company's nickel mine project in Botswana ("Tati Nickel OMS") and the steel fabrication for the Green Point Stadium ("Green Point Stadium Project").

3 COMMISSION'S INVESTIGATION AND FINDINGS

Sishen Saldanha Project

3.1 From its investigation the Commission found that on 23 August 2006, Transnet Ltd ("Transnet") invited eight companies to submit an expression of interest ("EOI") for the Sishen Saldanha Project which involved civil earthworks, track laying and overhead traction equipment work at the Sishen

Saldanha Railway ore-line.

3.2 Concor, Lennings and WBHO responded to the invitation by submitting EOLs, and were advised by Transnet on 20 October 2006, that they had pre-qualified for the tender.

3.3 The Commission found that in or about November 2006, WBHO reached an agreement with Lennings and Concor in respect of the Sishen Saldanha Project. In terms of this agreement, Lennings would submit a Cover Price provided by WBHO and Concor to ensure that WBHO and Concor would win the tender. It was further agreed that the track work would be subcontracted to Lennings, and that Lennings would quote identical prices for the track work to both WBHO and Concor.

3.4 The Commission found that Lennings submitted a tender to Transnet that was priced the highest, and WBHO submitted the lowest price. WBHO was ultimately awarded the Southern section of the tender, and the Northern section was awarded to Concor.

3.5 The Commission found that this conduct amounts to collusive conduct in contravention of section 4(1)(b)(lii) of the Act.

Durban Undersea/Harbour Tunnel Project

3.6 Following its investigation the Commission found that during 2004, the eThekweni Municipality put out a tender for the Durban Undersea/Harbour Tunnel Project, which involved the construction of a 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.

3.7 In expectation of this tender Hochtief and Concor formed a joint venture called the Durban Harbour Tunnel Contractors Joint Venture ("the DHTC JV"). At all relevant times, Hochtief owned a 45% interest in Concor and a controlling Interest of 70% in the DHTC JV. Hochtief was appointed as the leader of the DHTC JV.

3.8 The Commission further found that the eThekweni municipality only invited pre-qualified tenderers to submit bids for this contract, which included the DHTC JV, Stefanutti (which was in a Joint venture with Nishimatsu), Dura and Group Five.

3.9 The Commission's investigation also revealed that on or about February 2005, representatives of the DHTC JV, Group Five, Dura, Stefanutti, Nishimatsu and Grinaker met and agreed to add a fixed amount of R3 million to their respective bid prices, in respect to the tender. They also agreed that the firm which won the tender would pay a fixed sum of R1 million to each of the losing bidders.

3.10 The DHTC JV was awarded the tender.

3.11 The Commission found that this conduct amounts to collusive conduct in contravention of section 4(1)(b)(iii) of the Act.

Tati Nickel OMS

3.12 In or about February 2007, Stefanutti in joint venture with Grinaker agreed with Murray & Roberts Botswana (Pty) Ltd to submit a cover price for the tender of the Tati Mining Company nickel mine to enable Murray & Roberts Botswana (Pty) Ltd to win the tender. The tender was awarded to Murray & Roberts Botswana (Pty) Ltd.

3.13 This conduct is collusive tendering In contravention of section

4(1)(b)(iii) of the Act. The project was for the civil works at the Tati Mining Company's nickel mine near Francistown in Botswana.

3.14 The Commission found that this conduct amounts to collusive conduct in contravention of section 4(1)(b)(iii) of the Act.

Green Point Stadium Project

3.15 The Commission investigated alleged collusive tendering relating to fabricated steel for the roof of the Green Point Stadium.

3.16 From Its investigation, the Commission found that the Green Point Stadium Joint Venture Company Proprietary Limited, (i.e. the main contractor on the Green Point Stadium) had appointed Pfeifer of Germany to be responsible for the construction of the main roof. Pfeifer, in turn, issued a tender for a steel fabrication sub-contract required for the main roof. DSE Fabrication ("DSE"), a division of Aveng, and Genrec were invited to tender.

3.17 During 2007, Genrec indicated to DSE that It had decided not to submit a tender for the Green Point Stadium Project but also mentioned that Genrec would, however, be Interested in being considered as a potential subcontractor to DSE, should DSE win the tender.

3.18 Pursuant to the above Interaction, Genrec provided DSE with its priced bill of quantities relating to the Green Point Stadium Project. Genrec had already compiled these bills of quantities prior to deciding not to submit a tender and provided them to DSE to assist DSE in determining its price for the Green Point Stadium Project.

3.19 DSE won the tender but did not sub-contract any work to Genrec.

3.20 The Commission found that this conduct amounts to collusive conduct In contravention of section 4(1)(b)(iii) of the Act.

4 ADMISSION

Murray & Roberts admits that Concor, Murray & Roberts Botswana (Pty) Ltd and Genrec entered into the agreements detailed in paragraph 3 above with their competitors, in contravention of section 4(1)(b) of the Act.

5 COOPER ATION

5.1 Murray & Roberts agrees lo fully cooperate with the Commission in .its invesligation and prosecution of the above conduct This cooperation includes, but is not limited to:

5.1.1 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

5.1.2 To the extent that it is able, testify In the complaint referral in respect of the alleged contravention covered by this Consent Agreement.

6 FUTURE CONDUCT

Murray & Roberts agrees and undertakes to:

6.1 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 Consent Agreement as an order of the Tribunal;

6.2 refrain from engaging in collusive tendering in contravention of section 4(1)(b)(iii) of the Act, and from engaging in any prohibited practice under the Act in future; and

6.3 undertake henceforth to engage in competitive bidding.

7 ADMINISTRATIVE PENAI.TY

7.1 Having regard to the provisions of sections 58(1)(a)(ili) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Murray & Roberts agrees to pay an administrative penalty in the sum of R64 141 798.86 (sixty four million, one hundred and forty one thousand, seven hundred and ninety eight Rand and eighty six cents).

7.2 The administrative penalty of R64 141 798.86 (sixty four million, one hundred and forty one thousand, seven hundred and ninety eight Rand and eighty six cents), shall be paid by Murray & Roberts to the Commission on 31 August 2016 (accruing no interest).

7.3 Payment of the amount referred to in paragraph 7.1 above 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 Accoun

Account number: [...]

Account type: Current Account

Branch Code: 323 345

Reference: Case number 2009Sep4641 and others (Murray & Roberts)

7.4 The amount referred to In paragraph 7.1 above shall be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8 FULL AND FINAL SETTLEMENT

This Consent Agreement is entered into in full and final settlement of the specific conduct set out in paragraph 3 above and, upon confirmation by the Tribunal, concludes all proceedings between the Commission and Murray & Roberts in respect of this conduct.

For Murray & Roberts

Dated and signed at Bedford View on the 6th day of October 2015

Name: H. J. LAAS

Designation: CEO

For the Commission

Dated and signed at Pretoria on the 9th day of October 2015

Tembinkosi Bonakele

COMMISSIONER

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