

SOUTH AFRICA / JUDGMENT

WBHO Construction (Pty) Ltd v Trencon Construction (Pty) Ltd (LM269Mar19) [2019] ZACT 57 (19 August 2019) [2019] ZACT 57

COURT
Competition Tribunal

BEFORE
Yasmin Carrim, Andreas Wessels, Fiona Tregenna

CASE / FILE NUMBER
LM269Mar19

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Competition tribunal

SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM269Mar19

In the matter between

WBHO Construction (Pty) Ltd Primary

Acquiring Firm

and

Trencon Construction (Pty) Ltd Primary

Target Firm

Panel :

Yasmin Carrim (Presiding Member)

: Andreas Wessels (Tribunal Member)

: Fiona Tregenna (Tribunal Member)

Heard on :

17 July 2019

Order Issued on : 19 July 2019

Reasons

Issued on : 19 August 2019

REASONS

FOR DECISION

Approval

[1] On 19 July 2019, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between WBHO

Construction (Pty) Ltd and Trencon Construction (Pty) Ltd.

[2] The reasons for the approval follow.

Parties to the transaction

Primary Acquiring Firm

[3] The primary acquiring firm is WBHO Construction (Pty) Ltd ("WBHO"), a company duly incorporated in accordance with the laws of the Republic of South Africa. WBHO is a wholly owned subsidiary of Wilson Bayly Holmes Ovcon Limited ("WBHO Group"), which is a public company listed on the Johannesburg Stock Exchange. Its shares are widely held, and it is not directly or indirectly controlled by any single entity.

[4] WBHO is a large construction company with a broad spectrum of expertise in respect of all sectors of the construction industry. WBHO controls a number of companies in South Africa and around Africa. WBHO mainly operates through the following divisions:

- a. **Building and Construction** WBHO is involved in the building of inter alia office and commercial buildings, hospitals, shopping centres, residential developments and golf estates, hotels and resorts, casinos and stadiums.
- b. **Roads and Earthworks** WBHO provides largescale public and private projects across various infrastructural applications such as inter alia road construction and rehabilitation, bridges and structures, freeways and airports, harbours and railways.
- c. **Civil Engineering** WBHO provides civil engineering services in a number of sectors including mining, energy, water, and effluent treatment and silos and towers.

Primary Target Firm

[5] The primary target firm is Trencon Construction (Pty) Ltd ("Trencon"). Trencon is wholly owned by Mr. Amarnath Singh

and does not directly or indirectly control any firm. The majority of Trencon's directors are Indian individuals.

- [6] Trencon is a diversified construction company with experience in traditional building and civils contracts, as well as concession projects. Trencon concentrates on building construction (residential and nonresidential) and conducts civil engineering works, sans road works.

Proposed transaction and rationale

- [7] The current transaction stems from a previous large merger wherein WBHO formed an economic alliance with Fikile Construction (Pty) Ltd ("Fikile"), Motheo Construction Group (Pty) Ltd ("Motheo"), and Edwin Construction (Pty) Ltd ("Edwin")

- collectively referred to as the Emerging Contractors.[1] The Emerging Contractors are all smaller construction companies that are more than 51% owned and controlled by historically disadvantaged

persons ("HDPs").

- [8] The Alliance is the result of a settlement agreement concluded between a number of Construction Companies[2] and the Government of the Republic of South Africa (as represented by the Ministers of Rural Development and Land Reform, Economic

Development, Public Works and Transport) on 11 October 2016 ("the Settlement Agreement").

- [9] The current transaction entails the replacement of Fikile Construction Pty Ltd ("Fikile") with Trencon as an Emerging Contractor within the WBHO Alliance. The merging parties submitted that it was intended that postmerger, the merging parties will operate as a single economic entity (i.e. the WBHO Alliance).

- [10] Regarding rationale, WBHO submitted that the merger is intended to fulfil its obligations in terms of the Settlement Agreement as a result of Fikile's exit from the WBHO Alliance.

- [11] WBHO submitted that its views, and that of the Fikile's management regarding Fikile's business requirements were no longer aligned. The parties mutually agreed to terminate Fikile's participation as an Emerging Contractor under the Settlement Agreement and consequently as a member of the WBHO Alliance.

- [12] The Commission engaged Fikile's management to obtain a full account of the events which led to the decision by WBHO and Fikile to terminate their agreement. In this regard, Fikile duly corroborated WBHO's submission.[3]

Relevant market and impact on competition

- [13] The Commission identified horizontal overlaps in the following markets:

- a. The provision of services for civil engineering; other;
- b. The provision of services for general building: residential; and
- c. The provision of services for general building: nonresidential.

[14] In the initial assessment of the WBHO Alliance, the Commission had relied on data from Statistics South Africa as well as from the

merging parties' competitors for the market share information. In the current transaction, the Commission relies on the merging parties' estimates which were based on data from Statistics South Africa, the Construction Industry Development Board ("CIBD"), the South African Reserve Bank, as well as the South African Forum of Civil Engineering Contractors ("SAFCEC").

[15] The Commission considered the merging parties estimates and found no reason to question the merging parties estimates as the proposed transaction arises less than two years since the Commissions initial investigation.

[16] The average combined market share of the merged entity will be low, falling below 10% in each relevant market. Furthermore, the market share accretion resulting from the proposed transaction is insignificant. The Commission also identified a number of prominent

rivals in the relevant markets such as Aveng, and Murray & Roberts. The Commission concludes that the merged entity is unlikely

to exercise market power given the presence of several viable alternatives who will be able to discipline the merged entity.

[17] Further, the Commission identified a vertical overlap, in so far as WBHO manufactures/ produces mesh and rebar ("upstream products") which are purchased by Trencon and its competitors in the downstream market for the provision of general building (non residential) and general building (residential) services.

[18] However, Trencon's procurement of mesh and rebar from all suppliers equates to 5.6% of WBHO's total sales of mesh and rebar and WBHO is just one of many manufacturers of these products in the market.[4] Therefore the Commission found there is no likelihood of foreclosure as a result of the proposed transaction.

Public interest

[19] The merging parties submitted that no retrenchments will occur as a result of the proposed transaction. The Commission is of the

view that the proposed transaction is unlikely to negatively affect employment as the businesses of the merging parties will not be integrated posttransaction. There will be no employee rationalisations or duplications as a result of the proposed transaction.

[20] In addition, the merging parties submitted that in line with section 12A(3)(c) the proposed transactions result in public interest

benefits as it enables the Emerging Contractors (in their capacity as BEE and Historically Disadvantaged firms) to become competitive. The merging parties outline the following benefits:

- a. It will improve the development of skills among HDPs in critical areas in the industry;

- b. It encourages participation and ownership of SMEs and enterprises managed and owned by HDPs; and
- c. It provides for demonstrable and measurable expansion opportunities in the construction industry which promotes competition, innovation and growth in the market.

[21] The Commission agreed and found that the proposed transaction raises strong public interest benefits in terms of the Act. The WBHO

Alliance ensures that small blackowned construction companies are able to scale their businesses and hopefully, one day, be able to compete directly with firms such as WBHO.

[22] The Commission was of the view that it is necessary to monitor the performance of the WBHO Alliance in their attainment of these

public interest benefits. The Commission therefore required the merging parties to provide a report to the Commission on all the

projects the merging parties would have participated in as part of the WBHO Alliance. The merging parties must submit reports annually

detailing the projects they have worked on during the joint venture. Further, they must provide a report upon termination of the alliance.

[23] The WBHO Alliance therefore presents a tangible opportunity for Trencon to be developed into a large, competitive firm in line with the objectives of section 12A(3)(c) of the Act.

Conclusion

[24] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Accordingly, we approved the proposed transaction subject to conditions. For convenience the set of conditions are attached, marked as "Annexure A".

Ms. Yasmin Carrim

19 August 2019

Date

Mr. Andreas Wessels and Prof. Fiona Tregenna concurring.

Tribunal Case Manager: Andiswa Nyathi & Alistair DeyVan Heerden

For the Merging Parties: Paul Coetser and Paul Cleland from Werksmans Attorneys

For the Commission: Thabelo Masithulela & Busisiwe Ntshingila

[1] WBHO Construction and Fikile Construction and 2 Others LM024Apr17

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- [2] Aveng (Africa) (Pty) Ltd ("Aveng"), Basil Read Holdings (Pty) Ltd ("Basil Read"), Group Five Construction Limited ("Group Five"), Murray and Roberts Limited ("Murray and Roberts"), Raubex (Pty) Ltd, Stefanutti Stocks (Pty) Ltd ("Stefanutti") and WBHO Construction ("WBHO").
- [3] Please see page 487489 of the merger record.
- [4] These include companies such as Allied Mesh and Fitters, Biflex wire products, GKD Group South Africa, 1PM Steel and Merco Industries,
- amongst others.
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