

# **BID-RIGGING AND COLLUSION IN THE CONSTRUCTION INDUSTRY**

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**Hardin Ratshisusu, Deputy Commissioner**

**Competition Commission of South Africa**



**competition commission**  
south africa

# Outline

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# Background

- Prior to democracy in 1994 the South African state played a prominent role in the economy including in the operation and functions of competition law and policy
- Competition law regulation gave a lot of discretion to the Minister and what was then known as the Competition Board
- Following the advent of democracy in 1994 the new South African Government gave high priority to the redressing of economic imbalances corresponding to racial divisions in the country – strong competition policy became an important tool
- The Competition Act (as amended) was introduced in 1998 and became operational on 1 September 1999

# Competition authorities

- Competition Act created three independent competition authorities:
  - **Competition Commission (CCSA)** – investigative and prosecutorial arm
  - **Competition Tribunal (Tribunal)** – adjudicative arm which reviews decisions of the CCSA and is the decision-maker in large mergers
  - **Competition Appeal Court (CAC)** – a high court which hears appeals and reviews decisions of the Tribunal and is the last court of instance in competition-related matters with the Constitutional Court remaining the highest court in South Africa in relation to constitutional matters
- Three independent competition authorities have, as of September 2017, 18 years of enforcement history

# Competition authorities

**Constitutional Court**

Appeal of Tribunal decisions

**Competition  
Appeal Court**

Appeal of exemptions,  
intermediate mergers or non-  
referral decisions, defence of  
referral decisions

**Competition Tribunal**

Exemption applications,  
complaints and merger  
notifications

**Competition Commission**

# Structure of the Competition Act

## Structure of the Competition Act:

- Chapter 1 – interpretation, purpose and application of the Act
- Chapter 2 – prohibited practices including horizontal and vertical restrictive practices, abuse of dominance and exemptions
- Chapter 3 – merger control
- Chapter 4 – CCSA, Tribunal and CAC
- Chapter 4A – Market Inquiries (came into effect 2013)
- Chapter 5 – investigation and adjudication procedures
- Chapter 6 – enforcement
- Chapter 7 – offences
- Chapter 8 – general provisions
- Schedules

# Structure of the Competition Act

## Chapter 2 of Competition Act – Section 4(1)(b)

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 it involves any of the following restrictive 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 – examples include:
  - agreements on allocating customers and profit margins
  - cover pricing
  - payment of loser's fee to a bidder who submitted a cover price
  - subcontracting as a way of compensation to losing bidders
- **NB: Horizontal relationship – a relationship between competitors**

## Increase in enforcement

- **2004** – Corporate Leniency Policy (“CLP”) came into force (modified in 2008)
- CLP grants complete or partial exemption from prosecution for cartel conduct under section 4 of the Competition Act to firms that collaborate with the competition authorities
- Introduction of CLP led to the increase in cartels being uncovered leading to the number of cases referred by the CCSA to the Tribunal to **increase from 106 (2004 – 2008) to 186 (2009 – 2013)**



# Increase in enforcement

## Referrals by CCSA to the Tribunal of complaints, consent orders and settlements (2004 – 2013)



## Increase in enforcement

- **2009:** CCSA initiated complaints into alleged prohibited practices of bid-rigging and general collusion in the construction sector
- CCSA received multiple applications for leniency in terms of its CLP and concluded bid rigging and collusion was widespread
- CCSA also noted other jurisdictions faced similar challenges regarding the prevalence of bid-rigging in construction and developed a fast track settlement system – e.g. United Kingdom, Netherlands
- **2011:** CCSA launched Fast Track Settlement Process inviting construction firms to voluntarily disclose rigged projects

# Fast Track Settlement Process

## Objectives included:

- Incentivise firms to admit their collusive conduct
- Encourage truthful and comprehensive disclosure
- Strengthen evidence against firms not settling
- Minimise legal costs for prosecution
- Speedy resolution of cases
- Set the construction industry on a new competitive trajectory

# Fast Track Settlement Process

- **2013 Phase I Fast Track Settlement Process:**

- CCSA initiated an investigation into the construction sector relating to tenders for the construction of 2010 FIFA World Cup stadia
- CCSA received approximately 150 marker applications (intention to apply for leniency) and 65 CLP applications which implicated the majority of medium and large firms in bid rigging conduct
- CCSA developed and launched a fast track settlement programme in February 2011 to incentivise firms to enter into settlement arrangements:
  - Admission by construction firms to bid-rigging 298 contracts to the value of R111.9 billion
  - Tribunal imposed administrative penalties in the amount of R1.46 billion, the biggest fine imposed in any industry
  - 15 firms reached settlements with the Commission

# Fast Track Settlement Process

- **2014: Phase II Fast Track Settlement Process:**

- Several of the firms implicated in the construction cartel were not willing to settle under Phase I of the Construction Fast Track Settlement programme
- CCSA continues to investigate these construction cases/projects
- As of August 2016:
  - 10 firms settled (13 or 23) projects
  - 11 firms (19 projects) referred to the Competition Tribunal for prosecution
  - 14 firms (20 projects) not prosecuted

# Penalties under the Competition Act

- Section 59 of the Competition Act empowers only the Tribunal to impose an administrative penalty:
  - For a prohibited practice (including conduct under section 4(1)(b))
- The Tribunal can impose an administrative penalty of no more than 10% of a firm's annual turnover in the preceding financial year
- When imposing an administrative penalty, the Tribunal must consider:
  - The nature, duration, gravity and extent of the contravention
  - Any loss or damage suffered as a result of the contravention
  - Behaviour of the respondent firm
  - Market circumstances in which the contravention took place
  - Levels of profit derived
  - Degree of cooperation by the respondent firm with the CCSA and the Tribunal
  - Recidivism
- Largest single firm fine is against ArcelorMittal for R1,5 billion for cartel conduct

# Penalties under the Competition Act

- Section 65 of the Competition Act allows for any person who has suffered loss or damage as a result of anticompetitive behaviour, to seek an award of damages from the courts
- Government's Construction Settlement Agreement (Voluntary Rebuilding Programme) – agreement between Government and various construction firms implicated in the construction cartels included possibility of settling outstanding and potential civil claims for follow-on damages by government stakeholders affected by the cartel conduct
- However not all government entities supported the VRP and so construction firms could still face civil claims for damages
- Recent examples of successful awards for damages awarded against SAA for over R1billion in relation to Comair and Nationwide

# Penalties under the Competition Act

## Introduction of section 73A: Criminalisation of cartel conduct

- A person/individual face criminal liability for engaging in conduct under section 4(1)(b) of the Competition Act
- A person/individual found guilty of such an offence faces a fine not exceeding R500,000.00 (which cannot be paid by the firm) or imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment



# Case Example: Long running cartel

## ***Competition Commission v Southern Pipeline Contractors & Others***

- Case follows a leniency application by Rocla admitting to long-running cartel activity in the pre-cast concrete market
- Rocla admitted to cartel conduct in relation to price-fixing, market allocation (Gauteng, KZN, Western Cape) and collusive tendering with 9 other firms for the period between 1973 – 2007
- The Tribunal imposed total administrative penalties of over R80 million

# Applications for exemption: Council for Built Environment

- 2011/2012 CBE filed exemption applications on behalf of five of its six member councils (SACAP, SACPCMP, SACLAP, SACQSP, SACPVP) in terms of Schedule 1 of the Competition Act which gives CCSA powers to exempt rules of a professional association if the rules:
  - Are binding on members
  - Have the effect of substantially preventing or lessening competition in a market
  - Are required to maintain professional standards or the ordinary function of the profession
- Restriction of competition sought in terms of the exemption application:
  - Restriction of competition between registered and unregistered professionals
  - Restriction of competition between professionals registered with the CBE's respective councils
  - Restriction of competition between professionals registered with the same professional council but in different registration categories

# Applications for exemption: Council for Built Environment

## CCSA recommendations:

- IDOW Rules are likely to restrict competition between registered and unregistered persons regardless of competence, academic qualifications, practical experience and skills
- IDOW Rules will reduce the number of persons operating in the different professions under the CBE which is likely to reduce the quantity of services offered, which may result in the fees for services increasing above competitive level.
- Other regulations currently in force in the built environment that cater for public health, safety and financial risks associated with work performed by professionals
- IDOW Rules are not in line with international best practices.

# Some recommendations to enhance competition in construction industry

## Regulatory recommendations

- Enhance powers of the CIDB to deal with procurement irregularities by contractors including tougher sanctions
- Review of the CIDB grading system to take into consideration the ability of a contractor to execute the work as well as past performance
- Introduce support measures (e.g. deepening contractor development) and a regulatory framework to enable emerging firms to participate and bid for large infrastructure projects

## Procurement recommendations

- Government should consider spreading out the expenditure on large infrastructure projects over a longer time horizon
- There has to be consideration on the options to split large construction projects into packages to allow for broader participation by construction firms
- Transparent tender evaluation and adjudication processes

## Firm-level recommendations

- Procurement integrity management; adherence to CIDB Code of Conduct; Support for emerging firms

Source: Ratshisusu, H (2014). *Limiting Collusion in the Construction Industry: A review of bid-rigging in South Africa*. Journal of Economic and Financial Sciences (Available on-line on SABINET)

# Recommendations to enhance competition in construction industry

| Dos  | Don'ts   |
|--|--|
| Participate in tender and other business activities independently from your competitors  | Discuss or co-ordinate on any aspect of a tender with your competitors               |
| Conduct your market facing activities independently from your competitors  | Discuss or exchange any competitively sensitive information with competitors         |
| regular competition law compliance training for all relevant personnel   | Use industry associations as a platform for cartel conduct                           |
| Ensure industry association meetings have agendas circulated before hand – if any problematic items are included, note your objections in writing  | Use joint bids as an opportunity to discuss or exchange non-bid specific information |
| Ensure that industry association meetings are minuted – object and ensure that objections are recorded and leave the meeting if problematic topics are discussed – ensure that your departure is recorded in the meeting minutes |  |
| Ensure that joint bids are approved of in writing by the client and that Chinese walls are in place to prevent non-bid specific exchanges of competitively sensitive information   |  |
| If in doubt, seek advice – the Commission offers an Advisory Opinion service   |  |

**Thank you**

**Tel:** +27 (0)12 394 3200

**Fax:** +27 (0)12 394 0166

**Email:** [hardinr@compcom.co.za](mailto:hardinr@compcom.co.za)

Follow us on Twitter **@CompComSA** or me

**@hardinratshi**



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