

Constructing competition

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In 2013, the Competition Commission of South Africa (“Commission”) reached settlements with 15 construction firms involved in collusive tendering. This was done in terms of the Construction Fast Track Settlement Process which incentivised firms to come forwards and make full disclosure of bid rigging in return for lowered penalties.¹ The penalties agreed with each of the firms that chose to settle the case through this process totalled R1.46 billion.

The 15 firms settling were: Aveng, Basil Read, Esorfranki, G Liviero, Giuricich, Haw & Inglis, Hochtief, Murray & Roberts, Norvo, Raubex, Rumdel, Stefanutti, Tubular, Vlaming, and WBHO.

The Commission revealed that 21 firms responded to the offer of the fast track settlement exposing bid rigging in over 300 ‘instances’, although the settlements reached only dealt with projects that were concluded after September 2006.² The extent of the conduct and the number of projects affected is interesting in so far as some of the conduct affected countries other than South Africa. Information available in the settlements confirmed by the Competition Tribunal shows that the conduct certainly affected construction projects in Botswana, Zimbabwe, Malawi and Burkina Faso.

Botswana

In Botswana, two construction projects were affected by the conduct. The first case was for the construction of a refinery mine (Tati Activox Area 1 and 2 project) in which the client was Botswana Metal Refinery.³ Grinaker-LTA a subsidiary of Aveng Africa and Stefanutti engaged in a joint venture and agreed with Stefanutti, Murray & Roberts and Basil Read on cover pricing which enabled the Grinaker-Stefanutti joint venture to win the project.

The second project, which involved the same firms, was for the construction of DMS civil works at Tati for the Tati Mining Company near Francistown.⁴ The Grinaker-Stefanutti joint venture agreed to give a cover price to Murray & Roberts and Basil Read such that Murray & Roberts was awarded the project.

Zimbabwe

In 2007, Stefanutti reached an agreement on cover pricing with Concor, a subsidiary of Murray & Roberts, on a project which involved the construction of concrete infrastructure for a platinum concentrating facility for Zimplats.⁵ Concor provided a cover price to Stefanutti which allowed Stefanutti to win the project.

Malawi

In 2007, Wade Walker, a subsidiary of Murray & Roberts, reached an agreement with Group Five regarding a project for the electrification of the uranium processing plant at Keyalekera Mine, in Malawi.⁶ Wade Walker agreed to submit a higher price for the project to enable Group Five to win the project. Group Five went on to win the project and the project was completed in 2010.

Burkina Faso

In this case, Wade Walker and Group Five Energy agreed that Group Five would submit a high bid for the project in order to enable Wade Walker to win the project. The project was for the construction of a zinc processing plant for AIM Resources at Perkoa Mine in Burkina Faso in 2007.⁷ However, the project was cancelled by the client shortly after its commencement.

Implications for competition in the region

The construction sector in Africa has been able to grow in recent years on the back of rapid urbanisation, strong economic growth, a rising middle class, and regional integration throughout the continent.⁸ Unfortunately, there is a growing body of evidence which shows that firms in key sectors have colluded on the outcomes of important infrastructure projects. For instance, the cement industry in South Africa was investigated for cartel conduct in 2008. PPC, Afrisam, Lafarge and NPC were implicated in conduct which affected the entire Southern African Customs Union (SACU) region, i.e. Botswana, Namibia, Lesotho and Swaziland.⁹



Source: www.constructiongear.com

Notes

Collusive conduct on important, large-scale projects directly undermines the developmental path of countries by making projects more expensive, especially for government projects, in an environment where financial resources are scarce. Buyers of construction services (which include taxpayers in some cases) are denied the benefits of competition on price, quality and choice between construction firms which could make sure that important infrastructure projects completed in a manner that is cheap and efficient.

In this regard, the recent findings in the construction industry in South Africa raise some important issues for competition authorities throughout the continent to consider. Although the firms implicated are headquartered in South Africa, the projects named above show that the conduct definitely affected jurisdictions other than South Africa. Importantly, the fact that conduct which took place before 2006 was not included in the settlements suggests that there are further projects throughout the continent that were affected by the collusive tendering. A search of the publicly available information on the firms implicated in the South African case confirms that these companies have a wide presence in Africa. Given the widespread extent of collusion in South Africa it is likely that this also characterised their conduct in other countries in the continent, especially where they are the main market participants.

In this context, competition authorities need to continue to be vigilant in terms of monitoring the behaviour of construction firms with regards to bid rigging. Authorities may also benefit from sharing information with and learning from one another regarding the mechanisms by which this conduct operated. This will aid authorities in detecting and prosecuting similar conduct in construction and other markets in a less costly and lengthy manner. Finally, there is a role for competition authorities, government agencies and industry regulators in ensuring that licensing and procurement practices are designed to enhance competition in the sector and not protect incumbents.¹⁰

1. South Africa Competition Commission media release (24 June 2013) titled '[Construction firms settle collusive tendering with R1.5 billion in penalties](#)'.
2. See note 1.
3. Competition Tribunal of South Africa Consent Agreement. '[The Competition Commission and Aveng \(Africa\) Limited](#)'. Competition Commission case no. 2009Feb4279/2009Sept4641.
4. See note 3.
5. Competition Tribunal of South Africa Consent Agreement. '[The Competition Commission and Murray & Roberts Limited](#)'. Competition Commission case no. 2009Feb4279/2009Sept4641.
6. See note 5.
7. See note 5.
8. See '[The Changing Face of the African Construction Industry](#)' (31 January 2014). *Engineering News*; and, Deloitte (2013) '[African Construction Trends Report 2013](#)'.
9. Competition Tribunal South Africa Case No. 93/CR/Nov11.