



The Competition Tribunal

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WRITTEN COMMENTS FROM CORRUPTION WATCH ON:

THE CONSENT AGREEMENTS IN TERMS OF SECTION 49D OF THE COMPETITION ACT READ WITH SECTION 58 (1))(a) (iii) & 58 (1) (b) BETWEEN THE COMPETITION TRIBUNAL AND VARIOUS CONSTRUCTION COMPANIES

INTRODUCTION

1. Corruption Watch is a non-profit civil society organisation registered as such in terms of the Companies Act of 2008. Corruption Watch is independent, and it has no political or business alignment. It is governed by an independent board of directors.
2. Corruption is commonly defined as the abuse of public resources and public power for private gain. These abuses frequently implicate public officials alone. As frequently, and particularly in the case of corruption in public procurement

processes, such abuses involve a collusive vertical relationship between decision makers on both the selling and purchasing sides of a procurement contract. On rare occasions corruption may involve private sector players acting alone. Horizontal collusion of the sort proscribed by Section 4(b) of the Competition Act is the most significant of these cases of 'pure' private sector corruption insofar as it involves a conspiracy for private gain against the public.

3. From the perspective of those primarily concerned with combating corruption, the most pernicious form of horizontal collusion is the rigging of bids in response to public sector tenders. This is a particularly egregious form of collusion in part because it represents an assault on the living standards of those most dependent on the provision of public services and who can least afford a reduction in their living standards. Moreover bid rigging directly subverts a procurement system – procurement by way of public tender – expressly intended to meet the constitutionally mandated requirement that public procurement be transparent, fair, equitable, cost-effective and competitive.
4. Confronting corruption, including horizontal collusion, requires an active and engaged citizenry that is prepared to hold leaders to account, including of course those in the private sector.
5. Notwithstanding the importance of effective law enforcement, corruption, including anti-competitive collusion, cannot be effectively combated by serial acts of investigation and prosecution alone. The armory of sanctions must include

public contempt, or, positively expressed, a culture which supports competition and vehemently opposes corruption.

6. Corruption Watch thus seeks to ensure that those who engage in corrupt activities are held accountable by developing and fostering tools which the public can use to report experiences of corruption. In addition we utilise the reports to identify policy reforms that will reduce vulnerability to corruption in public procurement and other public resource management systems.
7. Corruption Watch has four key thematic focus areas for 2013. One of these areas is corruption in public procurement.
8. Corruption in public procurement bears some responsibility for poor service delivery of social services and basic public goods and has resulted in escalating social unrest in an increasing number of low-income communities. One of Corruption Watch's goals is to identify and advocate for procurement systems resistant to corruption.
9. In a year and a half since Corruption Watch opened its doors it has received in excess of 3000 reports from the public, of which, on average 3 reports per day (and 38% of the total reports received), detail corruption. A large proportion of these reports detail corruption and irregularities in the context of public procurement.

10. These reports generally speak to vertical arrangements between public officials and private entities involved in procurement processes rather than to the horizontal collusion at issue here. We assume that because the public has confidence in the ability of the competition authorities to deal with horizontal collusion that it is there that instances of this conduct are predominantly reported.
11. Corruption of the public procurement system, whether by way of vertical collusion or horizontal collusion, undermines the efficient allocation of public contracts. In both instances, contracts are awarded not 'on the merits', not on the basis of the quality and price of the good or service in question, but in consequence of an allocation administered by a private vertical or horizontal arrangement. Horizontal collusion allocates contracts to the firm chosen by the cartel. Vertical collusion allocates contracts to the firm which has offered or agreed to pay a bribe to a decision maker on the purchasing side. Both vertical and horizontal collusion are thus profoundly anti-competitive.

CORRUPTION WATCH'S SUBMISSIONS ON THE FINE IMPOSED

12. Corruption Watch submits that the settlement agreements between the Competition Commission and the companies should be confirmed.
13. While we have noted that a considerable body of public opinion appears to favour the imposition of significantly higher administrative penalties, we accord a high level of deference to the Commission in the calculation of appropriate penalties:

14. We do this because we note that in settling the Commission has secured admissions of guilt from the respondents, thus opening the way to civil suits on the part of those directly damaged by the cartel. Agreement has also been secured as to the level of fines imposed. And the settlements require the parties to the settlement to co-operate in the prosecution of those companies that have not settled. We believe that these features of the settlement have been accorded insufficient weight by those calling for the Commission to recommend the imposition of higher penalties which we presume may, in the Commission's considered opinion, have jeopardised the achievement of a settlement.
15. In particular, those calling for higher penalties appear to have weighted insufficiently the resources that the Commission would have had to expend had it not achieved a settlement and were it thus obliged to investigate and prosecute collusion in each of the impugned construction projects. This would undoubtedly take several years to prosecute and cost millions of Rands in legal and other fees and in the management and investigation time that the Commission would have had to devote to these prosecutions, with the prospect of success uncertain. The settlement enables the Commission to devote its scarce resources to those firms that have not settled and to investigate and prosecute other cartels which still appear to be features of South Africa's economy.
16. However, while we urge confirmation of the settlement agreements we align ourselves with the sentiment that the punishment meted out to the companies by the imposition of administrative penalties does not sufficiently fit the offence,

particularly this rigging of public sector tenders, and so may not constitute sufficient punishment or have an adequate deterrent effect. We note particularly that the settlement embodies no consequence for any individual officers of the companies involved.

17. We therefore submit that additional sanctions must be imposed. Certain of these require action by other law enforcement authorities, others require active intervention by those directly damaged by the cartel. Others may be fruitfully incorporated into future settlement agreements or require policy and legislative interventions. We are fully cognisant that these are not all within the jurisdiction of the competition authorities. However we see this as an appropriate forum to air our proposals, which we set out below.

CORRUPTION WATCH'S SUBMISSIONS ON ADDITIONAL SANCTIONS TO BE EXPLORED

I CRIMINAL SANCTIONS AGAINST NATURAL PERSONS/INDIVIDUALS

18. The Prevention and Combatting of Corrupt Activities Act of 2004 (PRECCA) is our principal anti-corruption statute. It applies to both public and private sector officials and employees, as well as public and private entities¹.

¹ In accordance with the United Nations Convention Against Corruption (to which South Africa is a party), liability under PRECCA extends to natural and legal persons alike (See Section 2 (5) of PRECCA read with Section 1 (XX))

19. PRECCA makes provision for a general offence of corruption as well as specific offences.

20. Cartel conduct and in particular collusive tendering we submit falls within the scope of PRECCA, and in particular sections 12 and section 13 of the Act.

21. Section 12 of PRECCA sets out offences in respect of 'corrupt activities relating to contracts'.

22. In particular, Section 12(1) reads:

12. (1) *Any person who, directly or indirectly-*

(a) accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of that other person or of another person; or

(b) gives or agrees or offers to give to any other person any gratification whether for the benefit of that other person or for the benefit of another person

(i) in order to improperly influence in any way-

(aa) the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or

(bb) the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or

(ii) as a reward for acting as contemplated in paragraph (a)
is guilty of the offence of corrupt activities relating to contracts.

(Our emphasis)

23. We submit that individuals who manipulate a tender process by way of cover pricing or any form of collusion in contravention of the Competition Act are in fact also in contravention of section 12 of PRECCA and liable to be prosecuted under this statute.
24. Section 12 requires the exchange of a form of 'gratification' in order for conduct to be hit by this particular statutory provision. In our view however this requirement is not onerous as gratification is broadly defined in the Act and extends far beyond common forms of gratification such as gifts, donations and money².
25. Thus where firms, through their agents, participate in a bid-rigging cartel and engage in cover pricing to favour one or more firms in exchange for, for example a 'loser's fee', this amounts, in our submission, to an offence under PRECCA and those individuals who participated in this corrupt activity can and should be charged with this criminal offence, to which criminal sanctions, including imprisonment, attach.
26. In addition to Section 12, Section 13 of PRECCA provides for 'offences in respect of corrupt activities relating to procuring and withdrawal of tenders'.
27. Section 13 reads as follows:

'13. (1) Any person who, directly or indirectly accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person as-

² 'Gratification' is defined in Section 1 of PRECCA and details a non-exhaustive list of what amounts to gratification, including gifts, donations, money, avoidance of loss or liability, any service, favour, privilege or advantage of any description to name a few

- (a) an inducement to, personally or by influencing any other person so to act-
 - (i) award a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or substance or performing any other act to a particular person or;
 - (ii) upon an invitation to tender for such contract make a tender for that contract which has as its aim to cause the tender to accept a particular tender or;
 - (iii) withdraw a tender made by him or her for such contract: or
- (b) a reward for acting as contemplated in paragraph (a)(i) (ii) or (iii) is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders

(2) Any person who directly or indirectly-

- (a) gives or agrees or offers to give any gratification to any other person whether for the benefit of that other person or the benefit of another person as-
 - (i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract for performing any work providing any service, supplying any article, material or substance or performing any other act, to a particular person; or
 - (ii) a reward for acting as contemplated in subparagraph (i): or
- (b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person as-
 - (i) an inducement to withdraw the tender; or
 - (ii) a reward for withdrawing or having withdrawn the tender,is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.

(Our emphasis)

28. As is clear from a reading of Section 13, any person who accepts any gratification as an inducement to make, award or withdraw any tender for any work, may be found guilty of an offence under section 13 of PRECCA.
29. Thus, where an individual participates in a bid-rigging cartel and it is agreed that his/her firm will engage in cover pricing so that a rival firm can win the tender in exchange for a sub-contract, this will amount to corrupt activity under Section 13 of PRECCA. Again, criminal charges can be laid and if such individual is found guilty of this offence, he/she may be liable on conviction to a fine and or imprisonment from between five years to life, depending on the Court in which the conviction is secured. In addition, the Court may impose a further fine of up to five times the value of the gratification involved in the offence.
30. Furthermore, it is not only management level individuals, such as those involved in bid rigging 'negotiations' that can be held to account under PRECCA. Section 34 of PRECCA mandates 'persons in positions of authority' to report any corrupt activity or suspected corrupt activity involving in excess of R100 000.00 to the police and makes the failure to report, even in instances where the person in authority 'ought reasonably to have known' about the corrupt activity, a criminal offence. A fine or up to ten years in prison attaches to this particular offence known as a 's34 offence'. 'Persons in positions of authority' are defined in PRECCA and include Chief Executives and managers, secretaries and directors of companies, as defined in the Companies Act of 2008.

31. Section 28 of PRECCA also bears mentioning. This Section provides that a Court may on convicting a person of an offence under Section 12 or 13 of PRECCA also impose additional sanctions, including issuing an order that the particulars of the person convicted be entered on the National Treasury's Register, which recordal may initiate amongst other things the termination of existing State contracts and exclusion from future public contracting opportunities.
32. Corruption Watch thus submits that in the present matter, the authorities should explore the possibility of prosecuting individuals in terms of Section 12, Section 13, and Section 34 of PRECCA and that the prescribed penalties on conviction of fines and or imprisonment as well as recordal on the Treasury's Register be meted out.
33. To date, a lack of co-ordination between competition law and anti-corruption law has allowed criminal acts committed by individuals to go unpunished. International experience in combatting corruption clearly indicates that it is necessary to hold individual perpetrators to account for their corrupt activities if these assaults on the public are to be effectively tackled and deterred.

II CIVIL REMEDIES IN RELATION TO THE RESPONDENT COMPANIES

34. In addition to criminal remedies, we urge the institution of civil claims against companies who have caused loss to other parties through the corrupt conduct of their employees and directors. Wronged companies and State Departments are thus urged to participate in the fight against corruption by pursuing damages claims.

35. Corrupt and anti-competitive conduct is a conspiracy against the public. While robust law enforcement is a necessary element in combating corruption and competition offences, it is insufficient. Parties who have been damaged by the construction cartel should consider rectifying this inadequacy by pursuing civil claims. This is particularly so in the case of the public sector entities who have been harmed by the cartel. Aside from the financial issues involved it will serve to send a clear message about the broad consequences of such activity.
36. Civil damages also have a potentially deterrent effect. In the US damages claim arising out of collusive conduct may be, and frequently are, trebled. We draw attention to the moves afoot in the United States to re-look at calculating damages in the context of an anti-trust lawsuit, potentially permitting higher damages awards than those allowed even under the present treble damages regime. Recent data from the US³ now shows that in the relatively small number of anti-trust damages suits that have resulted in Court decisions (as opposed to more commonplace settlement agreements), the average overcharge was found to be 31%.
37. Corruption Watch thus urges our Courts, in damages cases, to explore the imposition of what is termed 'treble damages' in US anti-trust lawsuits.

³ See the July 2013 submission by the Anti-trust Institute to the US Sentencing Commission

III DIRECTORS' PERSONAL LIABILITY

38. In addition to damages claims, it is important to also consider the Companies Act of 2008 and the duties imposed on Directors to act in the best interests of the company when exercising powers and performing functions.
39. In the event that civil claims are successfully instituted against Respondent companies, the Companies Act makes provision for a company to claim the loss, damage or costs sustained by the company as a result of a breach of the duty of care, skill and diligence as well as to claim loss or damage sustained by the company as a consequence of a breach of the requirement on directors and senior officers to act in good faith and in the best interest of the company. We align ourselves fully with the views expressed in the media by the Public Investment Corporation urging companies implicated in the bid-rigging cartel to claw-back the bonuses of past and present directors who have personally profited from the unlawful conduct.
40. The Companies Act makes specific provision for a shareholder, director, registered trade union or any other person to demand that a company commence legal proceedings in this regard.
41. In light of these provisions, we submit that there is an overarching duty on directors to ensure compliance with the Competition Act, the Companies Act as well as anti-corruption law and that failure to do so by a director must result in heavy penalties being imposed on those directors, which penalties will attach as a result of successful damages

claims and thereafter action initiated by amongst others, shareholders – who form part of the engaged citizenry needed to combat corruption.

42. In summary, public procurement laws and regulations are designed to amongst other things promote competition between bidders and secure the best value for public money. The fight against bid rigging and corruption should be an integral part of this process. There are many ways to fight corruption and collusion in public procurement. The enforcement of anti-corruption law is an essential in fighting collusion in public procurement.

CORRUPTION WATCH'S RECOMMENDATIONS

43. In light of the above, Corruption Watch:

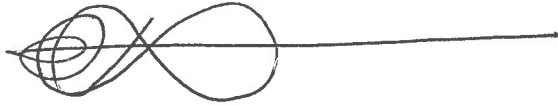
- a. Commends the Competition Commission for securing consent agreements with the 15 Respondent companies and recommends that the Competition Tribunal confirms these settlements;
- b. Urges the Competition Commission to make provision in future consent agreements for 'naming and shaming' of individual perpetrators;
- c. Calls on the relevant prosecuting authorities to lay criminal charges against those individuals who have contravened the Prevention and Combatting of Corrupt Activities Act;

- d. Calls on the Respondent companies to take steps against those individuals implicated including employment-related sanctions and to cooperate with the authorities in bringing individual perpetrators to book;
- e. Calls on companies and Government Entities who have suffered loss at the hands of the Respondent companies to institute damages actions to recover losses;
- f. Calls on shareholders to hold directors of the companies in which they hold an interest to account;
- g. Calls on the Courts and, if necessary, the policy- and law-makers to draw from international trends and provide for the trebling of damages in the case of corruption-related offences, including bid-rigging and;
- h. Calls generally for a comprehensive and integrated approach to fighting corruption in South Africa, which approach demands the involvement of multiple stakeholders, most notably an engaged and active citizenry.

44. We thank the Competition Tribunal for this opportunity to be heard.

45. Kindly contact us should you require further information.

Sincerely,



Nicola Whittaker and Kabelo Sedupane

Legal and Investigations' Team

Corruption Watch