



DEVELOPMENT THROUGH PARTNERSHIP

PORTFOLIO COMMITTEE ON PUBLIC WORKS

Briefing on the Outcomes of
the Competition Commission

10 SEPTEMBER 2013

1. PRESENTATION OUTLINE

2. Purpose
3. Background of Competition Commission (CC) investigations
4. Outcomes of the CC investigations
5. cidb's Observations at the Competition Tribunal Hearings
6. International Experience
7. Impact/Scale of Collusion
8. cidb Regulatory Framework
9. Sanctions in terms of cid Regulations
10. cidb's Commitment to prevent corruption and collusion
11. cidb Progress

2. PURPOSE

The purpose of this presentation is to brief the Portfolio Committee on the following:

- Outcomes of investigations by the Competition Commission (CC);
- International outcomes and impact/scale of collusion;
- Procedural process to be followed as per the cidb Regulatory Framework;
- Available sanctions that may be imposed by the cidb on the firms that are found guilty of collusion; and
- cidb's commitment to prevent corruption/collusion and progress to date.

3. BACKGROUND OF CC INVESTIGATIONS

- In 2008, the CC initially conducted research in the industry following an outcry about the costs of the 2010 FIFA World Cup stadiums, including roads under Gauteng Freeway Improvement Programme (GFIP), dams, mines, e-tolls etc.
- The CC uncovered evidence of possible collusion.
- In February and September 2009 the CC initiated investigations in terms of section 49B (1) of the Competition Act, 1998 against major construction firms for the possible collusion in the industry.
- In November 2009, the CC received approximately 160 Corporate Leniency Policy (CLP) applications.
- In February 2011, the CC launched a Construction Fast Track Settlement as a strategy to process and settle matters expeditiously.
- The cidb provided information to the CC during the investigation process and CC undertook to provide the cidb with investigation report after the Competition Tribunal hearings.

4. OUTCOMES OF THE CC INVESTIGATIONS

Tribunal Hearings held on 17 and 18 July 2013

- Of the 21 firms participating in the CC's Construction Fast-Track Settlement Process, 3 firms were not liable to settle due to prescription of claims; 18 firms entered into negotiations for settlement, with consent agreements filed with the Tribunal for 15 firms.
- The remaining 3 firms (namely Group 5, Power Construction and Construction ID) have not reached settlement with the CC. They have denied the claims made against them by the CC, rejected the settlement offer but remain under investigation.
- From the Settlement applications, the 21 firms further implicated an additional 22 firms that had not participated in the CC's Construction Fast-Track Settlement Process; and will be investigated after the completion of the settlement discussions with the 21 firms.

4.1 OUTCOMES OF THE CC INVESTIGATIONS CONTD.

The fines imposed on firms set out in the table below, collectively totalling R1,46 bn :

NO.	COMPANY	FINE	CIDB GRADING
1.	Aveng	R306 576 143	9
2.	Basil Read	R94 936 248	9
3.	Esorfranki	R155 850	8
4.	G Liviero	R2 011 078	9
5.	Giuricich	R3 552 568	8
6.	Haw & Inglis	R45 314 041	9
7.	Hochtief	R1 315 719	9
8.	Murray & Roberts	R309 046 455	9
9.	Norvo Construction	R714 897	6
10.	Raubex	R58 826 626	9
11.	Rumdel	R17 127 465	9
12.	Stefanutti	R306 892 664	9
13.	Tubular	R2 634 667	7
14.	Vlaming	R3 421 662	8
15.	WBHO	R311 288 311	9

4.2 OUTCOMES OF THE CC INVESTIGATIONS CONTD.

- There are 37 firms registered in 9GB and 92 in 8 GB.
- There are 51 firms registered in 9CE and 112 in 8CE.
- Generally the large construction firms have divisions that will register as both GB and CE.
- Of the 15 firms who signed the Consent Agreements:
 - 10 firms registered as grade 9,
 - 3 firms registered as grade 8,
 - 1 firm registered as grade 7; and
 - 1 firm registered as grade 6

5. CIDB'S OBSERVATIONS AT THE COMPETITION TRIBUNAL HEARINGS

- Anti-competitive practices in the industry are widespread ranging from “bogus tenders” to other practices such as “losers fees”.
- The intention of CC was not to apply punitive measures but rather to prevent future collusive practices in the industry through the corporate leniency policy and the construction fast track process.
- Inadequate information provided because of alleged unavailability of relevant personnel due to retirement and resignation.
- Most of the funds received by firms through collusive practices were recorded under plant hire in the financial statements.
- Measures introduced by the firms to avoid future collusive behaviour included training on Competition Compliance Monitoring Programmes.

6. INTERNATIONAL EXPERIENCE

- The cidb undertook a desk study of international literature on collusion in the construction industry in Netherlands, United Kingdom, Hong Kong and Canada.
- In **Netherlands**: Collusion was investigated by a Royal Commission in 2002, in which around 650 firms were implicated. The Royal Commission resulted in fines amounting to around Euro239m being imposed. The parliamentary inquiry in the Netherlands revealed that the government was defrauded an average of 8.8% on public construction projects (OECD, 2008).
- In **United Kingdom**: Collusion was investigated by the Office of Fair Trade in 2008, and resulted in fines of £129.2 million being imposed on 103 construction firms.
- In **Canada**: Collusion investigations are still underway.
- In **Hong Kong**: Court ruled that collusion is an acceptable behaviour .

7. IMPACT/SCALE OF COLLUSION

- In 2011, firms implicated in collusion accounted for more than 45% of total construction of projects valued at R100m.
- Approximately 300 projects implicated in collusive practices amounted to the value above R26 billion.
- Participants at the November 2012 Construction Industry Transformation Summit noted and endorsed that “...there are strong indications that collusion is likely to restrict new entrants [into the industry] by restricting competition to existing entrants”.

8. CIDB REGULATORY FRAMEWORK

Code of Conduct for all parties engaged in construction procurement:

- Section 29 (1) of the Construction Industry Development Board Act, 2000 makes provision for the enforcement of the Code of Conduct. The cidb may convene and conduct an inquiry into any breach of the Code of Conduct.
- The Code of Conduct establishes a broad framework within which an action or default by any party to the procurement process may be judged. Any action or default which conflicts with the Code of the Conduct is deemed unacceptable and subject to sanction in terms of the Construction Industry Development Act and Regulations.
- Amongst others, the Code of Conduct dictates that a contractor must not to engage in collusive practices that have direct or indirect adverse impacts on the cost of the project to the employer.
- Collusive behaviour is therefore a clear violation of the Code of Conduct.

8.1 CIDB REGULATORY FRAMEWORK CONTD.

Procedural Process for Investigations & Disciplinary Hearings:

- Regulation 28(1) of the Construction Industry Development Regulations, 2004 (as amended) states that if the cidb has any reasonable grounds to suspect that a person has acted contrary to, or has omitted to act in terms of the Code of Conduct, the cidb must appoint an Investigating Officer to investigate that complaint or suspicion
- Regulation 28(10) states that if an organ of state, other than the cidb, undertakes an investigation and the findings of that organ of state indicate that a person acted contrary to or has omitted to act in terms of the Code of Conduct, that organ of state must provide the cidb with its findings and all other documentation relevant to its investigation
- Regulation 28(11) states that upon receipt of the findings and documentation contemplated in sub-regulation (10) the cidb must refer the matter to the Investigating Officer appointed by the cidb as contemplated in sub-regulation (1)

8.2 CIDB REGULATORY FRAMEWORK CONTD.

- Regulation (12) states that the Investigating Officer must, within 30 days of the referral by the cidb, submit a report to the cidb which contains at least –
 - (a) a statement on whether, in the opinion of the Investigating officer, the person implicated by the investigation of the organ of state has acted contrary to or has omitted to act in terms of the Code of Conduct or failed to comply with the provisions of the Code of Conduct; and a recommendation regarding the action that the cidb should take.
- Regulation 29(6) states that the Investigating Committee appointed by the cidb in terms of sub-regulation (1)(c) must consist of at least –
 - (a) two persons who have **expertise** in the fields relevant to the inquiry; and
 - (b) a person qualified in law, who must act as the **chairperson** of the Investigating Committee.

8.3 CIDB REGULATORY FRAMEWORK CONTD.

- The Investigation Committee must consist of independent, impartial and unbiased persons who must perform a quasi- judicial function which include powers to hear evidence, make findings and decide on the appropriate sanction
- Regulation 29 (12) prescribes the rights of the respondent at the formal enquiry
- Regulation 29 (15) (b) states that, if the Investigating Committee finds the respondent guilty in terms of paragraph (a), the Investigating Committee must
 - (i) inform the respondent of the finding and clearly state the reasons for the finding;
 - (ii) take cognizance of any aggravating or mitigating circumstances; and
 - (iii) sanction the respondent as contemplated in sub-regulation (18)

9. SANCTIONS IN TERMS OF THE CONSTRUCTION INDUSTRY DEVELOPMENT REGULATIONS

In terms of Regulation 29(18), the sanctions which the Investigating Committee may impose include the following:

- (a) Ordering the removal of the name of a contractor from the register in accordance with section 19 of the Act where the charge relates to a transgression of Section 18(1) of the Act;
- (b) Issuing a warning to the respondent, which warning remains valid for a period not exceeding one year;
- (c) Downgrading the respondent's current contractor grading designation in the register by a maximum of two grades, for a period determined by the Investigating Committee;
- (d) Imposing a fine not exceeding R100 000.00 on the respondent;

9.1 SANCTIONS IN TERMS OF THE CONSTRUCTION INDUSTRY DEVELOPMENT REGULATIONS CONTD.

- (e) Restricting or prohibiting the respondent from participating in public sector construction works procurement for a period of time, which period may not exceed 10 years;
- (f) Ordering the cancellation of the registration of the respondent and placing a prohibition on the re-application for registration by the respondent;
- (g) Making a cost determination that the accused, the cidb or the party who initiated the investigation, must defray all or part of the costs incurred to conduct the formal inquiry;
- (h) Ordering specific performance relevant to the charges brought against the respondent;
- (i) Any combination of the sanctions referred to in paragraphs above

10. CIDB'S COMMITMENT TO PREVENT CORRUPTION AND COLLUSION

- Develop and pilot requirements for transparency and integrity systems by Dec 2013.
- Develop and submit an Anti-Corruption model to Board by March 2014 – which are aimed at reducing fraud and corruption in the industry.
- Investigate the feasibility of identifying a best practice for Integrity Management Systems, which could lead to the development of such a best practice and recognition of such systems for Grade 5 to 8 contractors.

11. CIDB PROGRESS

- Engagements with the Board
 - **21 May 2013 – Special Board meeting resolved –**
 - Board/EXCO Task Team appointed
 - TOR to be developed for the appointment of Officer and Committee, for Board approval
 - **27 June 2013 – Board/EXCO meeting resolved-**
 - Declaration of conflict of interest by Board Members
 - **30 July 2013 – Board meeting resolved –**
 - Approval for the appointment of the legal advisor (including Senior Counsel)
 - Approval of the TOR for the Officer and Committee
- Appointment of Legal Advisors (including Senior Counsel)
 - To assist the cidb with the process of establishing appropriate institutional mechanisms and structures to address all matters related to the construction cartel within parameters of the cidb regulatory framework including-
 - Prescription period
 - Impact of Corporate Leniency Policy application (immunity to prosecution)
 - Conflict matters
 - Scale/ Scope of investigation
 - Investigation on the additional 22 firms
 - Finalisation of award and contracting 10 Sept 2013
- Appointment of Investigating Officer and Investigating Committee
 - Bids to be advertised on 13 September 2013 in the Tender Bulletin and 15 September 2013 in the Sunday Times newspaper
 - Closing a month after the advertising dates



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THANK YOU