



competition commission
south africa

COMMISSION WELCOMES THE DECISION OF COMPETITION APPEAL COURT AGAINST CONSTRUCTION FIRM

The Competition Commission welcomes the Competition Appeal Court's dismissal of the appeal by Power Construction (Pty) Ltd and Power Construction (West Cape) (Pty) Ltd, collectively referred to as the Power Construction, against a series of *in limine* points (legal technicalities), which include disputing the Commission's jurisdiction and the validity of the Commission's investigation.

Yesterday, the Competition Appeal Court upheld the Competition Tribunal's August 2006 decision that the Commission's initiation had met all requirements for a valid initiation and therefore had jurisdiction to investigate the collusion.

The Commission had referred a case of bid rigging and collusive tendering against Power Construction and Haw and Inglis (Pty) Ltd (Haw and Inglis) to the Tribunal in December 2014. Haw and Inglis, who had been awarded the contract after colluding with Power Construction, participated in the Construction Fast Track Settlement Process (Fast Track Settlement) and admitted liability. They paid an administrative penalty of R45.3 Million.

This case emanated from Commission's investigations in the construction industry in 2009 after the Commission received evidence that there was pervasive collusion in the construction sector. Subsequently, given the magnitude of the cases, the Commission launched the Fast Track Settlement in February 2011 to expedite the resolution of these cases.

Under the Fast Track Settlement, the Commission has to date reached settlement with 22 firms found liable and the Tribunal confirmed all the settlement agreements between 2013 and 2015. The combined administrative penalties levied against these firms has totalled over R1.5 billion. Following the conclusion of the Fast Track Settlement, the Commission referred, to the Tribunal, 19 cases against firms that opted not to settle, including the case against Power Construction.

The Competition Appeal Court judgement paves the way for the prosecution of Power Construction before the Tribunal.

[ENDS]

Issued by: Siphon Ngwema, Head of Communications
On behalf of: The Competition Commission of South Africa
Tel: 012 394 3493 / 078 048 1213 / 081 253 8889
Email: Siphon@compcom.co.za

BACKGROUND

During April 2006, SANRAL invited tenders for the periodic maintenance (overlay and re-seal) of National Route N1 Section 4 from Touws River to Laingsburg i.e. the N1 Contract. This was an open tender.

A compulsory briefing session (otherwise referred to as a site inspection) with the prospective bidders was held on 20 April 2006. Mr Kevin Konkol, who at the time was employed as the Contracts Director of Haw and Inglis, attended the briefing session as Haw and Inglis.

According to Konkol the majority of the firms represented at the briefing session were unlikely to be considered for the tender because these firms did not have the required grading in terms of the Construction Industry Development Board (CIDB) Register.

In terms of the tender notice, only tenderers with a category 8CE or higher grading would be considered for the N1 Contract. As far as Konkol was aware, there were only two other firms represented at the briefing which met the required CIDB status requirement, namely, Group Five Limited (Group Five) and Power Construction (West Cape). As a result, in Konkol's view, only Haw and Inglis, Group Five and Power Construction (West Cape)'s bids would be considered for the tender.

As Konkol was preparing Haw and Inglis's tender documentation he contacted various suppliers for quotes that would be used by Haw and Inglis in tendering for the N1 Contract. These suppliers, such as asphalt suppliers, informed Konkol that they had not been approached by any other firms for quotations relating to the N1 Contract. Konkol was concerned that Haw and Inglis would be the only viable bidder for the N1 Contract and, as a result, SANRAL would cancel the tender.

On 3 May 2006, two days before the final date for the submission of bids, Konkol contacted Mr John Beddingham who at the time was employed as a Chief Estimator with Power Construction (West Cape). Konkol asked Beddingham whether Power Construction (West Cape) would submit a cover price for the N1 Contract to avoid the risk of SANRAL cancelling the contract owing to a lack of viable bidders.

Beddingham agreed to this arrangement and Konkol indicated that the cover price should be above R99 Million. Since the above request to Beddingham was about two days before the closing date for the N1 Contract, Beddingham indicated that, notwithstanding Power Construction (West Cape)'s agreement to the above arrangement, it would be very difficult for him to compile the required tender documentation in time. Konkol then provided Beddingham with a Bill of Quantities document to assist Beddingham in compiling Power Construction (West Cape)'s tender documents, including the cover price, before the closing date for the N1 Contract.

On 5 May 2006, Power Construction (West Cape), in accordance with the terms of the collusive agreement with Haw and Inglis, submitted its tender for the N1 Contract with the tender price of R99,98 Million. Haw and Inglis submitted its tender price of R98,5 Million.

On 28 July 2006, the tender was awarded to Haw and Inglis. The project was completed on 23 January 2008.

On 30 June 2007, Power Construction (West Cape) sold its business to Power Construction.