

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 829

15 JULY 2016

**MEMORANDUM OF AGREEMENT**

Entered into between

THE COMPETITION COMMISSION
(Hereinafter referred to as “the Commission”)

And

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD
(Hereinafter referred to as “the Board”)**WHEREAS~**

The Commission is a regulatory body established in terms of the provisions of section 19 of Competition Act, 1998 (Act No.89 of 1998), as amended (“the Competition Act”), herein duly represented by Mr Tembinkosi Bonakele, in his capacity as the Commissioner of the Commission.

WHEREAS~

The Board is a statutory body established in terms of section 2 of the Construction Industry Development Board Act, 2000 (Act No.38 of 2000), herein duly represented by Ms Hlengiwe Khumalo in her capacity as the Acting Chief Executive Officer of the Board.

WHEREAS~

In terms of the provisions of section 4(f) of the Construction Industry Development Board Act, the Board shall promote, establish or endorse uniform and ethical standards that regulate the actions, practices and procedures of parties engaged in construction contracts.

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In terms of section 5(4)(a) of the Construction Industry Development Board Act and in order to promote uniform and ethical standards within the construction industry, the Board must publish a code of conduct for all construction-related procurement and all participants involved in the procurement process.

In terms of paragraph 2.3 of the code for all parties engaged in construction procurement ("the code of conduct"), one of the principles governing the conduct of all parties involved in construction-related procurement is that in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other comply with all applicable legislation and associated regulations.

Paragraph 3 of the code of conduct lists examples of conduct that conflicts with the code including but not limited to:

- Contractors engaging in collusive practices that have direct or indirect adverse impacts on the cost of the project to the employer;
- Tenderers, except for the purpose of joint venture formation or collective action to deal with unfair conditions or other faults in documentation, engaging in collusive practices with other tenderers, or potential tenderers; and
- Tenderers not exchanging information regarding tenders with any other tenderer prior to the closing time and date for tenders.

WHEREAS~

The Commission is established in order to, *inter alia*, investigate, control, and evaluate restrictive horizontal and vertical practices, abuse of a dominant position, exemptions and mergers.

WHEREAS~

The Commission, in terms of section 21(1)(h), read with sections 3(1A)(b), 82(1), (2) and (3) of the Competition Act, is responsible for :

- negotiating agreements with any regulatory authority;
- coordinating and harmonizing the exercise of concurrent jurisdiction in respect of competition matters; and
- ensuring the consistent application of the principles of the Competition Act.

THEREFORE, the parties agree to conclude this Agreement as follows:

1. OBJECTIVE AND SCOPE

The objective of this Agreement is to establish a formal basis for-

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- 1.1. co-operative governance enshrined in section 41 of the Constitution and section 3(1A), 21(1)(h) and 82 of the Competition Act in the exercise of jurisdiction over competition matters within the construction industry;
- 1.2. managing areas of concurrent jurisdiction over prohibited practices as indicated above; and
- 1.3. providing for the exchange of information and the protection of confidential information.

This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the regulatory bodies herein.

2. COMMENCEMENT AND DURATION

This Agreement shall commence on the date of the last signature of the parties, and shall remain in force until it is replaced, cancelled or repealed by agreement, in writing, between the parties.

3. INVESTIGATION OF COMPLAINTS

3.1 Complaints: Concurrent Jurisdiction

- a. Where a complaint is lodged about a practice in respect of which the Commission and the Board have concurrent jurisdiction over the conduct mentioned in paragraph 3 of the cidb's code of conduct, the following process shall be followed:
 - i. The regulator that receives the complaint ("the recipient regulator") may make the complaint available to the other regulator within 7 (seven) days after a formal decision to investigate the complaint has been taken;
 - ii. Where the recipient regulator deems it appropriate, the recipient regulator may inform the complainant that the matter shall be discussed jointly by the Commission and the Board in terms of this Agreement;
 - iii. The Board and the Commission may consult each other and evaluate the complaint in order to establish how the complaint may be managed in terms of this Agreement;
 - iv. The recipient regulator may inform the complainant of the decision of the consultation between the Commission and the Board as soon as possible;
 - v. The recipient regulator may give the complainant further directions regarding the prosecution of the complaint in issue;
 - vi. In the event that the complaint is dealt with by the Board, persons from the Commission may participate in an advisory capacity;

- vii. In the event that the complaint is dealt with by the Commission, persons from the Board may participate in an advisory capacity.

3.2 In evaluating how the complaint may be managed, the parties must have regard to the principle that-

- i. The Commission has primary authority to investigate and evaluate alleged prohibited practices in order to give effect to the Competition Act;
- ii. The Board has primary authority to exercise powers and perform functions assigned to it in terms of the Construction Industry Development Board Act.

3.3 Nothing in the procedure contemplated in paragraph 3.1 shall detract from the jurisdiction of the Board or the Commission to receive and deal with complaints in terms of their enabling statutes. Nor shall it preclude a complainant from lodging a complaint with both regulators.

3.4 Complaints: No Concurrent Jurisdiction

- a. Where a complaint is lodged about a practice in respect of which either the Commission or the Board has jurisdiction, but there is no concurrent jurisdiction, the following process shall be followed:
 - i. The complainant must lodge the complaint with the regulator that has jurisdiction;
 - ii. If upon receiving a complaint, the regulator is of the view that it does not have jurisdiction over the complaint, the regulator with whom the complaint is lodged shall inform the complainant accordingly and advise the complainant to file the complaint to the relevant regulator;
 - iii. If the Board is the regulator with jurisdiction, it may, if it is legally competent under its legislation to take into account considerations of competition principles, consult with the Commission so as to ensure the consistent application of competition principles to the complaint in question;
 - iv. If the Commission is the regulator with jurisdiction, it may, if it is legally competent under its legislation to take into account considerations of the Board's Code of Conduct and Construction Procurement Best Practices, consult with the Board so as to ensure the consistent application of construction industry principles to the complaint in question;
 - v. The Board and the Commission may, upon request from each other, participate in each other's proceedings in an advisory capacity.

3.5 In the circumstances contemplated in 3.4 above, the decision of the regulator exercising jurisdiction to consult the other regulator shall be discretionary and

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voluntary. The regulator exercising jurisdiction may with or without consultation make its independent decision.

- 3.6 When the Commission and the Board consult each other as contemplated in 3.1 or 3.4 above, they shall do so at no cost to each other.
- 3.7 In either of the circumstances contemplated in 3.1 or 3.4 above, the Board and the Commission shall act expeditiously as circumstances permit and shall each encourage the other party to achieve a timely response.

4. EXCHANGE OF INFORMATION

Subject to paragraph 6 below, the Board and the Commission may exchange such information as may be necessary to give effect to this agreement.

5. APPLICATION FOR IMMUNITY OR CORPORATE LENIENCY

- 5.1 If the Commission receives an application for immunity in terms of its Corporate Leniency Policy (CLP), the granting of such immunity to the applicant does not prevent the Board from conducting an inquiry against the relevant applicant/construction firm to determine whether or not they have contravened the code of conduct. Furthermore the Commission may, prior to a decision being taken on the application, consult the Board for advice on such an application.

6. TREATMENT OF CONFIDENTIAL INFORMATION

- 6.1 Any information shared by the Commission and Board pursuant to this Agreement shall be used only for lawful supervisory and statutory purposes.
- 6.2 The Board and the Commission may share confidential or restricted information subject to their statutory confidentiality requirements¹.
- 6.3 The regulator providing the confidential or restricted information pursuant to this Agreement shall clearly indicate what information is confidential or restricted to the regulator receiving the confidential information.
- 6.4 The regulator requesting confidential or restricted information may be required to submit a written confidentiality undertaking in respect of the information provided by the other regulator.

7. IMPLEMENTATION AND DISPUTE RESOLUTION

- 7.1 The Board and the Commission may each designate a specific individual from its organization to manage the implementation of this agreement. These individuals will liaise in relation to all instances of cooperation initiated in terms of this agreement, to ensure that the obligations of the respective parties are satisfactorily fulfilled.

¹ Section 44 of the Competition Act and Rule 14 of the Rules for the Conduct of Proceedings in the Competition Commission.

7.2 If the Board or the Commission is of the opinion that the other party is not acting in accordance with the letter or spirit of this agreement, the matter may be dealt with through interaction between the Chief Executive Officer and the Commissioner.

8. VARIATION AND AMENDMENTS TO THE AGREEMENT

Any variations or amendments to this Agreement shall have no legal effect and shall not be binding on the Board and the Commission unless reduced into writing and signed by parties authorized to act on behalf of both the parties.

9. DOMICILIUM CITANDI ET EXECUTANDI AND SIGNATORIES

The parties choose the following addresses as their respective points of contact to receive any process and communication for purposes of this Agreement:

The Competition Commission
Department of Trade and Industry Campus
Mulayo Building, Block C
77 Meintjies Street
Sunnyside
Pretoria
Contact Person: Head: Stakeholder Relations

The Construction Industry Development Board
Blocks N & R
SABS Campus
No. 2 Dr Lategan Road
Groenkloof
Pretoria
Contact Person: Manager: Legal and Compliance

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10. PUBLICATION

In accordance with the provisions of this section 82(3)(d) of the Competition Act, this Agreement shall be published in the **Gazette** for public information as soon as it has been signed.

SIGNED on behalf of CIDB at PRETORIA on the 29 FEBRUARY 2016



Signature of Duly Authorised Signatory

HLENGIWE KHUMALO

Name

ACTING CEO

Designation



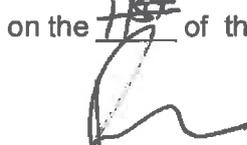
Witness 1



Witness 2

Signed on behalf of Competition Commission South Africa at PRETORIA

on the ^{7ST}~~15TH~~ of the JUNE 2016



Signature of Duly Authorised Signatory

THEMBINKOSI BONAKELE

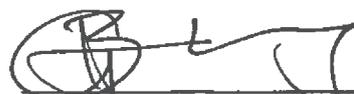
Name

COMMISSIONER

Designation



Witness 1



Witness 2