

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 4391

16 February 2024

MEMORANDUM OF UNDERSTANDING

("MOU")

Entered into between

THE COMPETITION COMMISSION

("Commission")

a juristic person established in terms of section 19 of the Competition Act No. 89 of 1998 as amended ("Competition Act"), herein duly represented by **Ms. Doris Tshepe**, in her capacity as the **Commissioner** of the Competition Commission of South Africa

And

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

("CIDB")

a juristic person established in terms of section 2 of the Construction Industry Development Board Act No. 38 of 2000, ("CIDB Act"), herein duly represented by **Bongani Dladla**, in his capacity as the **Chief Executive Officer** of the Construction Industry Development Board

(Hereinafter collectively referred to as "the Parties")

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PREAMBLE

WHEREAS the Commission is mandated by the Competition Act to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions, and mergers, as well as conducting market inquiries;

AND WHEREAS the Commission, in terms of the provisions of section 21(1)(h) read with section 82 of the Competition Act may negotiate agreements with any regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of the Competition Act;

WHEREAS the CIDB, in terms of section 4(f)(ii) read with 5(4)(a) of the CIDB Act, shall promote, establish or endorse ethical standards within the construction industry that regulate the actions, practices and procedures of parties engaged in construction contracts;

AND WHEREAS the CIDB, has in terms of section 5(4)(a) published a code of conduct for the entire construction industry to establish and regulate the standards of behaviour that participants in the construction procurement process may expect from each other and against which their behaviour can be measured;

WHEREAS the Parties shall review this MOU on an ongoing basis to accommodate developments incidental to matters that require co-operation between the Parties in the construction industry.

NOW THEREFORE, the Parties agree as follows:

1. INTERPRETATION

In the interpretation of any terminology used in this MOU, any word or expression to which a meaning is assigned in the Competition Act and the CIDB Act has the meaning assigned to it unless otherwise specified.



2. PURPOSE OF THE MOU

2.1. This MOU is entered into to establish a framework for collaboration between the two regulatory authorities with a view of, *inter alia*:

2.1.1. fostering a consistent interpretation and application of the principles of competition when exercising their powers and their respective functions in terms of their enabling legislations;

2.1.2. managing areas of concurrent jurisdiction, to the extent applicable; and

2.1.3. providing for the exchange of information subject to the protection of confidential information.

3. PRINCIPLES OF COOPERATION

3.1. To achieve the purposes of this MOU, the Parties agree to:

3.1.1. cooperate with each other in mutual trust and good faith;

3.1.2. assist and support each other in respect of agreed upon services and commitments between them in terms of this MOU;

3.1.3. inform each other of, and consult each other on matters of common interest; and

3.1.4. provide to each other the necessary support for the successful performance of the tasks and programmes envisaged in this MOU.

3.2. The Commission agrees to assist the CIDB in its efforts in reviewing legislative and policy instruments for purposes of promoting competition in the construction industry as well as developmental and transformation objectives.

4. LEGISLATIVE FRAMEWORK

4.1. The Parties recognise that the Commission has primary jurisdiction to control, investigate, and evaluate alleged prohibited practices and mergers within any industry, and to grant or refuse exemption applications in respect of those practices and transactions.

- 4.2. The Parties recognise and agree that the CIDB prescripts empowers the CIDB to initiate investigations on suspicions or complaints of unethical conduct from any person aggrieved by an action taken or an omission to take such action in terms of the code of conduct, and if satisfied that sufficient grounds exist for the commission of such conduct, institute a formal inquiry into the complaint or suspicion.
- 4.3. Further, the Parties agree that the CIDB is authorised in terms of CID Regulation 11(4) to consider the transfer of records from one contractor to another for the purpose of assessing and determining the contractor grading designation where the transaction involves amongst others, the amalgamation of companies or the takeover of a company, which may depending on the required thresholds, trigger a reportable merger transaction in terms of the Competition Act.
- 4.4. This MOU shall in no way affect the independence and exercise of statutory powers by the Parties in terms of their enabling legislations.

5. COOPERATION BETWEEN THE PARTIES

- 5.1. The areas of cooperation between the Parties shall include, *inter alia*, the following:
- 5.1.1. Collaboration and cooperation on matters dealt with by either regulatory authority that affects the mandate and functions of the other.
- 5.1.2. Strategic collaboration on measures to promote competition in the construction industry.
- 5.1.3. Collaboration on advocacy and outreach initiatives to facilitate better access to the public and become more visibly involved in education and promotional campaigns, particularly in rural areas.
- 5.1.4. Any other areas of interest as may be identified from time to time.

6. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND THE CIDB UNDER THIS MOU

- 6.1. The CIDB may request and receive advice from the Commission, in respect of aspects falling under the competency of the Commission in matters relating to the construction industry or proceedings as set out in clauses 7 and 8 below.

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- 6.2. The Commission may request and receive advice from the CIDB, in respect of proceedings which require consideration of regulatory aspects falling under the competency of the CIDB as set out in clauses 7 and 8 below.
- 6.3. All requests for advice or information by either regulatory authority shall be submitted in writing.
- 6.4. The regulatory authority seeking advice or information must indicate a date upon which such advice or information shall be given by the other regulatory authority.
- 6.5. When the Parties consult each other under this MOU, they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise.
- 6.6. Should either regulatory authority consider a matter before it, within a set timeframe, such regulatory authority may share with the other its expected process, and the other regulatory authority shall endeavour to cooperate and assist towards the achievement of the targets set out in the project timelines.

7. COMPLAINTS

- 7.1. Where a complaint is lodged regarding a practice or conduct in respect of which either the Commission or the CIDB have jurisdiction, and one or either of the authorities has an interest in the complaint, the following process may be followed:
 - 7.1.1. The complaint may be lodged with the regulator that has jurisdiction ("recipient regulator");
 - 7.1.2. If upon receiving a complaint, the recipient regulator is of a view that it does not have jurisdiction over the matter, the recipient regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator.
 - 7.1.3. The Parties may consult with each other in respect of the complaint;
 - 7.1.4. If the CIDB is the recipient regulator, it may in its discretion liaise and consult with the Commission;

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- 7.1.5. If the Commission is the recipient regulator, it may in its discretion liaise and consult with the CIDB;
- 7.1.6. The Parties may, upon request from each other, participate in each other's proceedings in an advisory capacity;
- 7.1.7. In consulting each other in respect of the complaint, the parties must have regard to the principle that –
- 7.1.7.1. The Commission is to exercise primary authority to investigate and evaluate alleged prohibited practices and merger control approvals to give effect to the Competition Act; and
- 7.1.7.2. The CIDB has primary authority to exercise powers and perform functions assigned to it in terms of the CIDB Act in order to give effect to its relevant objectives and provisions contained therein.
- 7.1.7.3. The CIDB shall not approve the transfer of records from one contractor to another in terms of Regulation 11(4)(c), (d), (e) or (h) of the Construction Industry Development Regulations ("CID Regulations) contrary to the Competition Act.
- 7.1.7.4. The Commission must inform the CIDB of its decision on merger transactions involving a party(s) in the construction industry.
- 7.1.8. The recipient regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and the CIDB;
- 7.1.9. The recipient regulator may give the complainant(s) further directions regarding the investigation of the complaint in question;
- 7.1.10. If the matter is dealt with by the Commission, representatives from the CIDB may, at the request of the Commission, participate in the matter through, inter alia, attending meetings when required, providing inputs during the case investigation and making representations at the Competition Tribunal hearing, if necessary.



- 7.1.11. If the matter is dealt with by the CIDB, representatives from the Commission may, at the request of the CIDB, participate in the matter through, inter alia, attending meetings, providing inputs during the case investigation and making representations at the CIDB's proceedings if necessary;
- 7.1.12. The decision by any of the Parties to consult the other regulator shall be discretionary and voluntary, and either Party shall be entitled, with or without consultation, to make its independent decision in respect of the complaint in terms of its enabling legislation;
- 7.1.13. Nothing in the consultation procedures contemplated herein, shall detract from the jurisdiction of the Commission or the jurisdiction of the CIDB to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and the CIDB.

8. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

- 8.1. A Joint Working Committee ("Committee") constituted by representatives of the Parties, as nominated by the respective regulators, shall be established pursuant to this MOU and shall function on an on-going basis.
- 8.2. The functions of the Committee shall be:
- 8.2.1. to manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this MOU;
- 8.2.2. to propose, when necessary, any amendment of or supplementation to this MOU;
- 8.2.3. to advise management of the Commission and the CIDB on issues affecting competition in the construction industry, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to, the following:
- 8.2.3.1. The types of conduct or transactions affected by both the Competition Act and the CIDB Act in respect of which concurrent jurisdiction is to be exercised by the two regulators;



8.2.3.2. The international best practice approach to issues of overlap concerning jurisdiction between Commission and the CIDB, as the case may be;

8.2.3.3. Amendments to the relevant or applicable statutes that may be necessary from time to time; and

8.2.3.4. Any other related matter.

8.3. The Committee shall meet regularly, but no less than twice a year, to ensure both regulatory authorities are aware of developments in areas of common interest.

9. INSTITUTIONAL CONTACT PERSONS

9.1. For purposes of this MOU:

9.1.1. The Manager of the Advocacy Division will be the main contact person at the Commission.

9.1.2. The Director of Construction Industry Regulation will be the main contact person at the CIDB.

9.1.3. Should the regulatory authorities have to exchange information, as a result of discussions at the Committee, the processes set out in this MOU shall be followed.

10. EXCHANGE OF INFORMATION

10.1. Subject to clause 12 below, the Commission and the CIDB may exchange information as may be necessary to give effect to this MOU.

11. CONFIDENTIALITY

11.1. Any information shared by either Party pursuant to this MOU must be used only for lawful purposes.

11.2. Any request made by either of the Parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the Parties' respective enabling legislation, policies or procedures.

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- 11.3. The Parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.
- 11.4. To the extent permitted by law, the Parties shall hold confidential information received from each other pursuant to this MOU and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.
- 11.5. The Commission and the CIDB shall, prior to disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.
- 11.6. The sharing of confidential information, in accordance with this MOU, relies on the assurances given in 12.1 and 12.2 below and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.
- 11.7. Where confidential information is disclosed either by the Commission or the CIDB in contravention of this MOU, such disclosing Party shall be solely liable in law for such disclosure.
- 11.8. Any of the Parties may in its discretion decline a request for access to confidential information made in terms of this MOU.

12. GENERAL PROVISIONS

- 12.1. The provision of, or request for information under this MOU may be denied:
- 12.1.1. where compliance would require the Commission or the CIDB to act in a manner that would violate the applicable law;
 - 12.1.2. under circumstances where there is an imminent risk to national security;
or
 - 12.1.3. when a Party determines that compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

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12.2. The provisions set forth under clauses 12 must prevail with respect to any information provided or actions taken under this MOU prior to its termination.

13. NON-VARIATION

13.1. This MOU constitutes the whole of the MOU between the Parties relating to the subject matter hereof.

13.2. No amendment or consensual cancellation of this MOU or any term of this MOU, including this clause shall have any effect unless recorded in a written document signed by duly authorised representatives of both Parties.

14. TERMINATION OF PREVIOUS MOUs

14.1. This MOU terminates existing MOUs between the Commission and the CIDB, published in the Government Gazette General Notice 40140 of 2016.

14.2. Any pending transactions, projects, requests being processed in terms of the MOU published in the Government Gazette General Notice 40140 of 2016 shall be brought to completion in terms of this MOU and shall be considered in effect.

15. EFFECTIVE DATE OF THE MOU

15.1. This MOU shall come into effect on the date on which it is last signed by the persons authorised to act on behalf of either of the Parties.

15.2. This MOU shall be governed in accordance with the laws of the Republic of South Africa.

16. DURATION OF THE MOU

16.1. This MOU shall remain in force until it is amended or repealed by the Parties acting jointly.

17. REVIEW OF THE MOU

17.1. This MOU shall, on an ongoing basis and when necessary, be reviewed to accommodate developments incidental to matters that require co-operation between the Parties in the construction industry. The review shall take into account

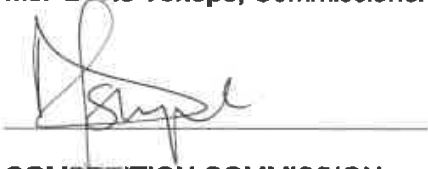


Signatures

For: Competition Commission SA

Signed at Pretoria on this 14th day of December by

Ms. Doris Tshepe, Commissioner of the Competition Commission South Africa.



COMPETITION COMMISSION


WITNESS 1

WITNESS 2

For: Construction Industry Development Board

Signed at Pretoria on this 07 day of June 2023 by

Mr. Bongani Dladla in his capacity as Chief Executive Officer of the Construction Industry Development Board



CONSTRUCTION INDUSTRY DEVELOPMENT BOARD



WITNESS 1



WITNESS 2