



## Deloitte Legal – Representing Tomorrow The Competition Lawyer

### Welcome to the third edition of Deloitte Legal’s competition update - The Competition Lawyer.

In this third edition, we shall focus on collusive tendering and provide a recent example of the South African Competition Commission’s clampdown on collusive tendering.

We, at Deloitte Legal, strive to be at the forefront of Competition Law in South Africa by providing up-to-date and innovative solutions to our clients’ Competition Law issues, as well as keeping them abreast of developments in Competition Law as and when such developments occur.

### The preamble of the Competition Act

The preamble to the Competition Act No. 89 of 1998 (“Competition Act”) provides that the purpose of the Competition Act is, inter alia, to:

- provide all South Africans with an opportunity to participate fairly in the national economy;
  - provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; and
  - restrain particular practices which undermine a competitive economy.
- One such practice is that of collusive tendering.

### Collusive Tendering

Collusive tendering, also known as bid rigging, and which forms part of what is known as “cartel activity”, refers to the situation in which competitors agree not to compete on bids to be submitted following receipt of an invitation to tender in respect of certain goods and/or services. In terms of section 4(b)(iii) of the Competition Act, collusive tendering is regarded as a restrictive horizontal practice<sup>1</sup> that is prohibited.

Collusive tendering may take a variety of forms, including:

1. complementary bidding – in terms of which competitors agree to bid prices to be submitted in response to a tender in advance, and/or agreement as to which competitors will submit the lowest bid/only acceptable bid in response to a tender;
2. bid suppression – where an organisation agrees not to submit a bid in response to a tender in order to allow a competitor to succeed in such bid;
3. bid withdrawal – where an organisation withdraws its bid so that an agreed competitor will be successful instead;
4. bid rotation – an agreement made between competitors in terms of which competitors agree to submit unfavourable bids in order to enable a particular competitor to succeed in a bid; and
5. non-conforming bids – where organisations deliberately include terms and conditions that they know will not be acceptable to the client.

The various forms of collusive tendering result in its participants limiting the competition that would ordinarily exist amongst competitors, which in turn results in a lack of the competition that typically drives organisations to innovate and/or price competitively. This may result in consumers being exposed to higher prices as well as a reduction in consumer choice.

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## Investigations into collusive tendering

The South African Competition Commission ("Commission") adopts a zero-tolerance approach in respect of collusive tendering.

On 2 August 2017, the Commission charged Stuttaford Van Lines ("SVL"), a furniture removals and moving company, with 649 charges of collusive tendering in relation to bids submitted for the transport of furniture by the Presidency, Parliament, certain state-owned enterprises and other government departments. This decision is recorded as the largest number of charges laid against any single company in the history of the Commission's anti-cartel enforcement.

The decision of the Commission emanates from an investigation, into collusive conduct of certain companies in the furniture removal industry. In this regard, the Commission requested that the Competition Tribunal ("Tribunal") fine SVL the maximum administrative penalty of 10% of SVL's annual turnover on each of the charges. Such a penalty is reserved for the most egregious breaches of competition legislation in South Africa.

The Commission's investigation revealed that SVL had been colluding with its competitors since at least 2007 by way of cover quotes. In terms of their collusive arrangement, the first competitor to be requested for a quotation would offer to source two or more quotations on behalf of the customer. That competitor would subsequently request two or more of its competitors to provide quotes as cover quotes. However, the bidders had previously agreed upon the prices to be submitted, and the "successful bidder" had been predetermined.

<sup>1</sup> A restricted horizontal practice is a restricted practice/action undertaken between competitors in the same line of business.

## How can Deloitte Legal assist you?

Have your staff undertaken competition law e-learning? Are you concerned about any of the aspects covered in this edition, particularly collusive tendering and cartel conduct? If so, Deloitte Legal is in a position to assist you.

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