

# Competition Law

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SOUTH AFRICA

Submitting multiple tender bids:  
Clever or collusion?



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## Submitting multiple tender bids: Clever or collusion?

### Is it unlawful to submit multiple bid submissions, some of them with other service providers, in response to a tender? Would this by default amount to collusive tendering?

Collusive tendering (also known as bid-rigging) involves bidders agreeing to collude and co-ordinate their bids in order to pre-determine the winner at a particular price. It is slyly aimed at increasing market share and maximising profit by lessening competition. Collusive tendering can take many forms, for example, cover bidding – where competitors agree to submit bids that are intended to be unsuccessful (artificially inflating prices or non-compliant with mandatory requirements) so that the pre-determined one can win the contract. Another example is bid suppression, when one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding so that the designated winning bid will be accepted.

The Competition Commission (Commission) has taken a hard line against any form of tendering that has even the slightest shade of collusion about it, often in the context of a tenderer submitting multiple bids – particularly if one of those bids is a joint venture with another party. Thanks to the recent Competition Appeal Court decision in *The Competition Commission v Waco Africa and Others* (246/CAC/Jun23) [2024] ZACAC 3, we now have more clarity on when such conduct amounts to collusive tendering.

In this case, SGB-Cape had submitted four bids in response to a tender for the provision of scaffolding and insulation services. SGB-Cape submitted one bid on its own, and three bids as part of joint ventures with three other entities (the JV partners). Each of the JV partners was either black women or black youth owned. Of all the respective parties to the joint ventures, only SGB-Cape had the expertise and experience to execute the technical portion of the tender project. SGB-Cape was also the only entity that could price the full bid and did so on behalf of the JV partners for all the bids. The JV partners provided labour brokering services (complementary to the primary work to be executed) and assisted with that portion of the bid pricing. Prior to submitting the bids, SGB-Cape advised the purchaser (who issued the tender) that it would be submitting multiple bids, meant to address the empowerment requirements for the tender. When submitting the tenders, SGB-Cape clearly stated in each bid that it was submitted as part of three others.

Later, during the bid adjudication phase, a complaint was lodged with the Competition Commission alleging that SGB-Cape and the JV partners had engaged in collusive tendering (prohibited in terms of section 4(1)(b)(iii) of the Competition Act 89 of 1998, as amended). Upon conclusion of its investigation, the Commission decided to refer the complaint to the Competition Tribunal (Tribunal), alleging that the respective joint ventures amounted to collusive tendering and/or price fixing, in the alternative. The Tribunal held that the parties



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had not colluded since the JV partners were not able to tender on their own (lacking the necessary expertise) and therefore they were in a vertical relationship with SGB-Cape (i.e. they provided an input, their human resource services, to SGB-Cape) and therefore had not contravened section 4(1)(b)(iii). A finding against collusive tendering may only be made where the bidders are in a horizontal relationship (that is, where parties are competitors of one another). The Commission appealed the Tribunal's decision to the Competition Appeal Court; where the court delivered two judgments, a minority judgment (by a single judge), and a majority (by two judges). Both judgments agreed that the parties had not engaged in tender collusion (nor price fixing); but the judgments reached this outcome for different reasons.

### The majority decision

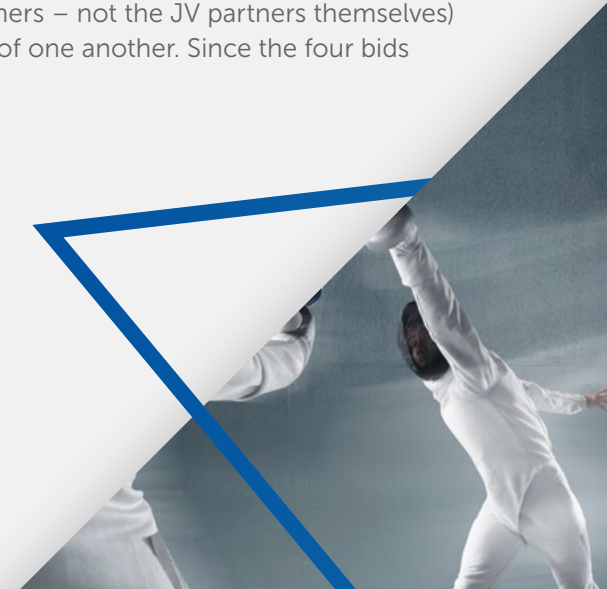
The majority (precedent-setting) judgment held that typically collusion in this arrangement is structured as a "hub and spoke". The hub (in this case SGB-Cape), while not competing with the spokes (the JV partners), receives information from one or more spokes and passes that on to another spoke – facilitating the exchange of competitively sensitive information, which allows the spokes to collude. In this case, that information was pricing. However, the court showed that while the JV partners submitted their pricing information to SGB-Cape, it did not in turn pass that information on to the other partners. In fact, the JV partners had no knowledge of each other's identities or bids.

The majority held that this meant there was no exchange of confidential information and therefore no evidence of any horizontal (i.e. competitor) agreement between the respective joint ventures. It was a "hub without a rim".

In its analysis of the alleged collusive tendering, the court held that it is necessary to deconstruct a commercial arrangement to see what the incentives are. Since the JV partners could not be bidders on their own (they were labour brokers), including them in the bid did not result in bid suppression. Without SGB-Cape the JV partners could not have tendered on their own and had no incentive to withhold their bids in favour of a bid with SGB-Cape. The court decided that this consideration, the fact that the JV partners did not have access to any of the confidential pricing information, and that the JV partners had no knowledge of any other bid, meant that this behaviour could not be considered collusive tendering.

### The minority decision

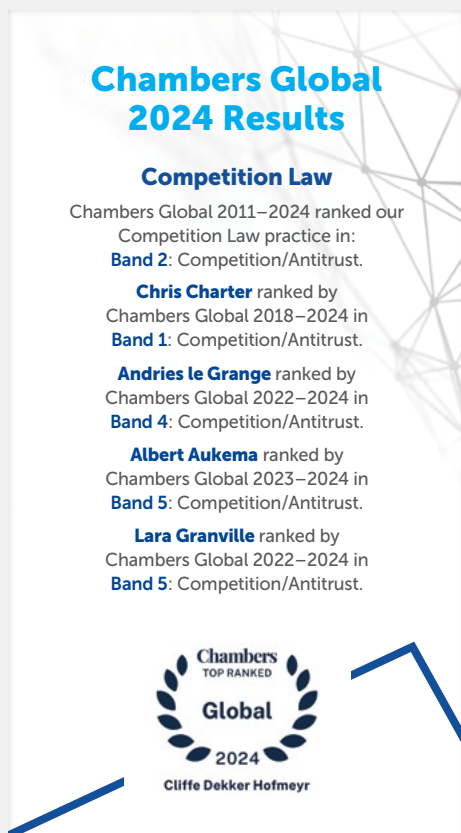
Counter to the majority, the minority found that the joint ventures (i.e. the vehicles formed by SGB-Cape and the respective JV partners – not the JV partners themselves) were competitors of one another. Since the four bids



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were submitted for the same tender project and each joint venture was capable of executing the tender work on its own, this meant that the joint ventures were competitors. The JV partners were not competitors of SGB-Cape, but the joint ventures competed with SGB-Cape's own bid since all four bids were responsive to the same tender.

A finding of a horizontal relationship is not sufficient to conclude collusive tendering, though. The judge explained that the word **collusion**, "*connotes an element of secrecy, deceit or surreptitious conduct*". Further, all forms of collusive tendering have two elements in common:

- the aim to mislead purchasers (those issuing tenders) by creating the appearance of competition while concealing secretly inflated prices, and
- an agreement which predetermines the winning bidder (restricting competition among bidders).

The judge found that there was no indication that SGB-Cape attempted to deceive the purchaser. It had written to the purchaser beforehand explaining that it intended to submit multiple bids (on its own and in joint venture with others) and the bid submissions themselves made it clear that it had submitted a total of four bids. These bids did not limit output or raise tender prices but provided the purchaser with an expanded offering to address the empowerment requirements of the tender. These bids were made in a "*blatant, transparent and easily detectible manner*". This means that 'collusion' was not present.

On the point of the JV partners providing SGB-Cape with their pricing information, the judge found that SGB-Cape was the only entity capable of efficiently pricing the bids (keeping in mind its expertise in the subject matter of the tender). The parties' efforts did not prevent or impede any alternative bid by other bidders in the market.

### The way forward

These are welcome judgments that take a pragmatic and business-conscious approach. Prospective bidders may take comfort in the fact that in certain circumstances it is appropriate for parties to submit bids on their own as well as with other parties in joint venture – provided it is done transparently and in an easily detectable manner and it is responsive to the tender requirements. Joint venture partners should not be competitors of one another (while not inherently unlawful, such arrangements are fraught with competition law risks), but parties that provide complementary services may find it appropriate to jointly offer a more compelling bid to the purchaser. The court has confirmed that the incentive behind the decision to submit multiple bids should be examined to determine whether there is any intention to deceive, or whether it is simply a legitimate attempt to employ a business strategy to competitively obtain as much work as possible. The minority decision does not create precedence but still contains compelling reasoning, that may prove persuasive in future arguments in similar situations. Lastly, prospective bidders should still be alive to the tender terms and requirements. If the tender prohibits multiple bids, only one bid should be submitted.

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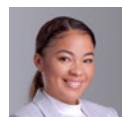
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