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**South African Coal Ash**

SARS Tax Exemption No: 930012713

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## **BEST PRACTICES GUIDELINE: ANTI-COLLUSION**



**BPG 015**

Past President: Deidre Herbst  
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## **1. INTRODUCTION:**

The following paragraph is always marked in agenda's when **SACAA** holds any formal meeting:

### **MEMBERS CODE OF CONDUCT:**

Members note that discussions at this meeting will be limited to discussions about **SACAA**'s business. Members agree not to discuss their individual company needs, preferences or strategies.

Members of the Association commit themselves to the following principles:

- ➔ To refrain from any actions which are or may be construed as being anti-competitive as envisaged by competition law, namely the Competition Act No.89 of 1998 as amended.
- ➔ Members who feel uncomfortable with discussions at the meeting must note their discomfort with the chairman, excuse themselves from the meeting and ensure that their objections and departure are clearly recorded.
- ➔ ***Members are reminded that everyone attending this meeting must comply with competition law – before, during and after the meeting, and during formal and informal discussions.*** Amongst other things, you may not discuss with each other or exchange confidential commercial information including information about prices, tenders, customers, sales, costs, revenues, trading terms and conditions, discounts, rebates, promotions, terms of supply, purchasing strategies, sales strategies, distribution strategies or any other business strategies. Any discussions that lead to collusion are illegal and if you are guilty your business will face severe penalties and you may be criminally liable.

Members further commit to promote the affairs of the Association and the industry in accordance with their fiduciary duties towards **SACAA** and not to use the meeting to further the interests of their respective businesses.

When physical meetings were held, **SACAA** would ask visitors not to stand and talk in small groups (2 – 3 people). This could be seen as “collusion” meetings, especially if only two companies were represented.

## **2. What you should be alert to:**

Bid rigging when suppliers illegally agree amongst themselves who's going to win a particular bid.

They do this avoid competing to make customers the best offer, at the lowest price.



These agreements can take several forms such as:

- ✦ **Bid rotation** – firms agree to take it in turns to submit the lowest bid.
- ✦ **Bid suppression** – one or more firms agree not to bid or withdraw their bids.
- ✦ **Cover pricing** – bidders arrange for one or more of them to submit an artificially high bid, distorting the producer’s impression of the competitive price.

Bid rigging is a type of illegal cartel activity. As well as bid rigging, business cartels can also involve other illegal practices such as sharing commercially sensitive information, fixing prices (keeping them artificially high) and dividing up markets with competitors.

### **3. Why surface mines and construction directors, managers and suppliers should take care of:**

Bid rigging is illegal and there can be significant financial and personal consequences for breaking the law.

Bid rigging can inflate prices and reduce quality of service, innovation and productivity. It’s an unfair practice where the end-customer can be tricked into thinking they have been offered a competitive price.

In the case of public sector projects, it is the taxpayer who loses out if the bidding process includes artificially inflated bids.

### **4. Consequences of breaking the law:**

- ⊗ Businesses can be fined a percentage of their annual turnover.
- ⊗ Company directors can be disqualified from acting as directors or being involved in the management of a company.
- ⊗ In the most serious cases, individuals can face criminal prosecution, resulting in personal fines and even imprisonment.
- ⊗ Reputational impact can be negative and long lasting and can potentially harm your chances of winning future contracts and put at risk of claims for damages from affected customers.



### **5. What you can do:**

#### Suppliers

- Ensure you and your employees are clear on competition laws and what practices break the rules – directors should lead by example and provide staff training.
- Have a good internal reporting process in place, so people feel they can speak up if

they witness illegal behaviour.

- Never agree to bid rigging, price fixing, market sharing or sharing competitive sensitive commercial information with rivals.
- If you are approached to get involved in anti-competitive behaviour you should clearly and immediately reject the approach, report the incident internally, seek independent legal advice.



## NON-COLLUSION DECLARATION EXAMPLE

The undersigned declares:

I am the \_\_\_\_\_ (Title) of \_\_\_\_\_ (Company)  
the party making the foregoing bid.

The bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation. The bid is genuine and not collusive or sham. The bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid.

The bidder has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding. The bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder.

All statements contained in the bid are true. The bidder has not, directly or indirectly, submitted his or her bid price of any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof to effectuate a collusive or sham bid, and has not paid, and will not pay, any person or entity for such purpose.

Any person executing this declaration on behalf of a bidder that is a corporation, partnership, joint venture, limited liability company, limited liability partnership, or any other entity, hereby represents that he or she has full power to execute, and does execute, this declaration on behalf of the bidder.

I declare under penalty of perjury under the applicable laws that the foregoing is true and correct and that this declaration is executed on:

\_\_\_\_\_ (Month) \_\_\_\_\_ (Day) of \_\_\_\_\_ (Year),

At \_\_\_\_\_ (City), \_\_\_\_\_ (Province).

**Signature of Declarant:** \_\_\_\_\_

**Printed name of Declarant:** \_\_\_\_\_

**Name of Bidder (Company):** \_\_\_\_\_

**Title of Office:** \_\_\_\_\_

## 6. Bribery in Construction:

Bribery is a form of corruption and is seen as being more prevalent in construction and engineering than any other sector.

It is more likely to occur during the tendering and procurement stages of contracts although it can occur at any stage.

This is mainly because on large contracts, individuals within organizations can influence or even decide on the procurement of goods.

This provides the opportunity for corruption, compounded by a lack of transparency and governance and inaccurate recording in financial statements.

An example would be a payment by a supplier 'A' to a client employee in order to influence a purchase decision in favour of A's product.

A further example would be a subcontractor bribing an employee of the main contractor to gain their favour over a rival subcontractor. Bribery can ultimately affect the quality of the final construction — if an inferior product is used as a result of bribery, an inferior construction will almost certainly result.

The nature of building can make bribery easy to conceal. For instance, bribes might be made to ensure the inclusion of cheap, sub-standard materials on a building project. The money saved may be paid as a further bribe to ensure that the checkers sign-off the finished construction.

This can then be difficult to discover, as works on construction projects are often covered up by other materials or embedded deep in hard to inspect places. Bribes can be paid directly.

But they are more likely to be paid through third parties and intermediaries, something that is more prone to occur when companies move into new markets and place more of their operations with third parties, especially overseas.

The scope for bribery is greater on large, national projects due to:

- ▲ The scale involved.
- ▲ The complexity of projects allowing concealment of illegal activities.
- ▲ The myriad contractual links and supply chains involved.
- ▲ The reliance on local agents abroad.
- ▲ The acceptance of bribery in some cultures.
- ▲ The involvement of corrupt officials.



## **7. Construction project directors and managers:**

- Make it clear to suppliers that you are on the lookout for signs of bid rigging, price fixing, or market sharing and advise you will bring any suspicions to the Competition Commissions' attention.
- We recommend including a link to **SACAA**'s Campaign against collusion.
- Don't take shortcuts by asking a regular supplier to source the competitive bids for a project – this may out you at risk of facilitating anti-competitive conduct.
- Make any bid qualifications as broad as possible so that they can be met by the widest range of suppliers.
- Shop around for suppliers when inviting bids.
- Ask for bids to be broken down into as much detail as possible.
- Keep records of bids for comparison purposes.
- Insist that main contractors assign subcontracts through a competitive process.
- Seek information from bidders about their associated companies and subsidiaries.
- Obtain a signed declaration of non-collusion from each bidder and make this a term of the contract.
- Do not arrange meetings to bring together rivals to discuss a tender where you intend to appoint one supplier.
- In the case of joint tenders and integrated procurement bids – set clear ground rules at the start of meetings where competing suppliers are present.



## **8. Sub-Contractor:**



As buildings become increasingly complicated, so it becomes less and less likely that any one contractor will have the required skills to carry out all of the works necessary to construct them, and it may not make good commercial sense to take on new employees for one project that would then have to be laid off for the next.

Increasingly therefore, contractors will use sub-contractors to carry out particular elements of the works.

Sub-contractors (or subcontractors) are sometimes referred to as 'subbies', or increasingly, simply as 'suppliers'.

Elements of the works that might be awarded to sub-contractors might include; piling, roofing, cladding, civil engineering, steelwork, plumbing,

electrical services, and so on.

## **Types of sub-contractor**

There are three main types of sub-contractor:

### **Domestic sub-contractor:**

A sub-contractor selected and appointed by the main contractor.

### **Nominated sub-contractor:**

A sub-contractor selected by the client to carry out an element of the works. The client negotiates a price with the nominated sub-contractor and then instructs the main contractor to appoint them for those works. The main contractor will include the sub-contractor's price as a prime cost sum in the contract sum for the main contract, to which they add overheads, profits and attendance.

### **Named sub-contractor:**

A sub-contractor for a particular package selected from a list of acceptable sub-contractors provided by the client. Named sub-contractors are allowed for in the tender documents for the main contract in the form of a provisional sum for which the main contractor makes allowances for mark up, attendance and programme within its tender offer.

Once appointed, the main contractor seeks tenders for the package from the named sub-contractors, places a sub-contract with the successful tenderer, and the provisional sum is replaced with the tendered figure.

### **Use of sub-contractors:**

The use of sub-contractors enables the main contractor to undertake more complex projects whilst not unacceptably increasing their risk, however, concerns have been expressed about the prevalence of sub-contractors because of a perception that the main contractor has less control over the skills and training of sub-contractor employees and so there may be a negative impact on quality and health and safety on site.



Sub-contractors might be managed by the contractors' sub-agent or package manager.

Increasingly, sub-contractors will themselves sub-contract elements of their package of works to other suppliers. This has resulted in the development of complex supply chains, with different tiers of suppliers, some of whom may be entirely unknown to the client.

NB: On management contracts the works will be carried out by 'works contractors' and on construction management contracts the works will be carried out by 'trade contractors', although technically trade contractors are not sub-contractors as they are contracted by the client, and only managed by the construction manager.

## Contractor vs. supplier:



In very broad terms, 'contractors' are organizations appointed by clients to complete construction works. However, this apparently straight-forward definition is complicated by the fact that contractors tend not to have all the trades or goods required to construct a building themselves. This means that they are likely to appoint a range of subcontractors and suppliers to help build the works for which they have been contracted.

Traditionally, 'suppliers' were considered to be organizations contracted to provide physical supplies such as goods, materials, plant, and so on, either directly to the client or to the contractor or subcontractors.

However, this definition has become blurred by the increasing complexity of the construction supply chain and the emergence of practices such as off-site fabrication in which the provision of complex fabricated goods might include activities that would otherwise be classified as construction work, and the increasing outsourcing of operational contracts for the supply of services (rather than goods) to run completed developments.

A simpler distinction therefore might be that a contractor is contracted to complete construction works whilst a supplier is contracted to supply particular goods or services.

However, the distinction has been further complicated by using the term 'supplier' to refer to any 'provider of services or goods either directly to the employer or to another supplier in a supply chain' and suggesting that 'a tier 1 supplier can provide services to the project (for example, development of the project brief, architectural services, engineering services, construction management services), or can provide goods to the project.

This catch all definition suggests that the term 'supplier' could be used to refer to contractors, subcontractors, consultants, suppliers and service providers.

## **9. Reporting anti-competitive behaviour:**

- If you think you have been involved in a business cartel, report it to us at **SACAA**.
- If you think you have witnessed others breaking the law, report it to us at **SACAA**.
- To learn more and for information on how to report anti-competitive behaviour to us, visit our campaigns.



**FOR MORE GUIDANCE AND  
ADVICE, VISIT SACAA'S  
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