THE focus of the Namibian Competition Commission is likely to be on the country’s construction industry in the not too distant future.

This follows the South African Competition Commission’s investigation into the South African industry, which has revealed numerous competition law violations. The Swakopmund Municipal Council also recently alleged collusion between four major construction companies relating to a tender for road construction services. These companies face fines of up to 10 percent of their annual global turnover. The companies have been accused of collusive tendering (bid rigging and price fixing). This is prohibited outright by the Namibian Competition Act. Investigations into the tenders submitted to the Swakopmund Municipal Council allegedly revealed that they were all completed by the same person, and all tendered to complete the work at the same price. The council’s legal advisers have alleged that there were several misrepresentations made in the tender filing and that there was collusion in contravention of the law and perhaps even tender fraud. The Swakopmund council has already blacklisted the firms accused of collusion.

The Competition Commission has not yet made a formal decision to investigate the council’s complaint, but are no doubt scrutinising it closely. Namibian investigations are gathering momentum and 15 investigations into restrictive business practice complaints are currently in progress.

The Namibian Competition Commission is likely to gain insights from their southern neighbour’s experiences in prosecuting conduct in this industry. For example, the South African Competition Commission successfully prosecuted a concrete pipes cartel which was described as the most enduring, comprehensive and stable cartel ever prosecuted. Fines of over R70 million were imposed. An administrative penalty of R129 million was eventually agreed upon between the commission and wire mesh and rebar manufacturer Steeledale, representing eight percent of the firm’s turnover, in exchange for co-operation in prosecuting the remaining members. Both cases were assisted by the corporate leniency policy, which permits companies to come forward with information on their anti-competitive conduct, in exchange for immunity or more lenient penalties.

Investigations into a variety of sectors of the South African construction industry remain on-going. The South African Competition Commission has initiated a “fast-track settlement mechanism” to expedite their investigations. This has resulted in numerous South African companies in the sector coming forward to confess contraventions. While the Namibian commission has not yet established this policy, it is no doubt in the pipeline. In the commission’s latest newsletter, it indicated that it has approved a corporate leniency policy which has been referred to the Minister of Trade and Industry for consent to the prescribing of rules for the granting of leniency or immunity.

These matters cannot be taken lightly. Construction companies ought to take steps such as implementing compliance programmes, training staff on the provisions of the Competition Act and conducting thorough audits of the company’s and its agents’ business practices, in order to avoid the potentially significant consequences of having to pay an administrative penalty and incur the reputational damage which is associated with facing a competition law complaint. Buyers who rely on tenders should also take precautions to avoid falling prey to collusion.

Useful guidelines on dealing with the significant problem of bid rigging conduct have been published by the Organisation for Economic Co-operation and Development, which recommend that by consulting competition law experts, tenders can be designed to limit the risk of bid-rigging. They also identify several warning signs and patterns that should arouse suspicion, such as where the winning bidder repeatedly subcontracts work to unsuccessful bidders or where regular suppliers fail to bid on a tender they would normally be expected to bid for, but continue to bid for other tenders.

From a tendering firm’s perspective, it is equally important that they educate themselves on the application of competition law to tenders, so that they can avoid a potentially expensive run-in with the Namibian Commission and the ensuing reputational harm. Companies can implement compliance programmes, train their staff and audit their agents and practices.

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