

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



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### BREWING ISSUES WITH THE “PUBLISHED LIST” OF EQUIPMENT UNDER THE NEC

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The Contractor’s Plant Hire Association (the “CPHA”) has, historically, published lists of rental rates for various equipment offered by its members. These lists have offered the construction industry, and the public alike, a quick and easy reference to arrive at a fairly accurate estimate of the equipment costs that would be incurred to undertake any kind of construction work. These lists never appeared to be offensive in any way, shape or form, until fairly recently.

In August 2021, the Competition Commission published a media release confirming that the CPHA and 22 of its members would be facing charges for (alleged) contravention of section 4(1)(b)(i) of the Competition Act, 89 of 1998 (“the Act”) by allegedly fixing prices and/or fixing trading conditions when renting out their earthmoving machinery and plant

equipment. This was after an investigation was initiated following a complaint to the Commission in February 2017<sup>1</sup>. The result of this was a referral to the Competition Tribunal, which referral was published in the Government Gazette in September 2021<sup>2</sup>.

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<sup>1</sup>See the media release here: <https://www.compcom.co.za/wp-content/uploads/2021/08/CPHA-AND-22-OF-ITS-MEMBERS-TO-FACE-CHARGES-FOR-FIXING-RENTAL-RATES-FOR-EARTHMOVING-MACHINERY-AND-PLANT-EQUIPMENT.pdf>

<sup>2</sup>[https://www.gov.za/sites/default/files/gcis\\_document/202109/45131gen545.pdf](https://www.gov.za/sites/default/files/gcis_document/202109/45131gen545.pdf)

The details on the complaint, the investigation and any findings in relation thereto are scarce but one can only speculate that this alleged “price fixing” refers to the CPHA’s published list of equipment rates and the “fixing of trade conditions” refers to the standard terms of hire. There is, furthermore, no information regarding the status of the matter before the Tribunal.

Whether or not the Commission’s “findings” are correct is beyond the scope of this article. It is, however, important to understand what it actually means when the Commission concludes that certain conduct contravenes the Act, and refers it to the Competition Tribunal because the wording of the media release can be misleading.

The Commission has conducted an investigation into the conduct of the CPHA and concluded (for itself) that such conduct was a contravention of the Act. This does not necessarily mean that such conduct was in fact a contravention of the Act. The complaint must now, as it has been, referred to the Competition Tribunal, which will decide, much like trial court, whether the allegations by the Commission are correct and deliver a binding and enforceable judgment. Until that happens, the Commission’s “findings” are not enforceable.

Even if the Tribunal decides that the conduct of the CPHA contravened the Act, the Commission and members charged will have recourse to the Competition Appeals Court.

Be that as it may, such a finding by the Commission, although unenforceable, will nevertheless prevent a respondent who has been charged from persisting

with the impugned conduct.

### **The Potential Impact on Construction Projects**

Lists of equipment rates and indices, have long been used in the construction industry, in South Africa the lists of rates published by the CPHA have been the “go-to” for many years. These lists have been used to ascertain the “reasonable market value” rental rates, particularly in the course of disputes, and even in the calculation of contractor’s prices for tender submissions. In this context it would not be a major issue if the CPHA’s published rates are ultimately declared to be in contravention of the Act by the Tribunal, however, significant issues would arise when contracting under the NEC3 or NEC4.

### **Published Lists under the NEC**

In the NEC Contract Data Part 2 (Data provided by the Contractor), in relation to the Shorter Schedule of Cost Components (SSCC), the Contractor is required to identify the applicable institution/body who’s published list of Equipment shall be applicable to the contract.

This published list is used to assess the costs to which Contractor is entitled in the context of Compensation Events. Compensation Events are calculated in using Defined Cost, which, depending on the Option applicable to the contract, will be stipulated in either the Schedule of Cost Components (SCC), or the SSCC. If the SSCC is applicable (Options A and B), the contractor’s equipment cost will be based on the published list referred to in the Contract Data.

Apart from the fact that the CPHA has not published an updated hire rates list for the past few years, if the CPHA (or any other body or association that publishes hire rates lists) is selected by the Contractor in the Contract Data, and the publishing of that list constitutes a contravention of our competition laws, the employer (or the tender adjudication board) may consider that sufficient grounds to disqualify the contractor's tender.

On the other hand, the list selected by the contractor may be deemed to not exist. In other words, the effect will be that the a published list does not exist for the purposes of assessing Compensation Events.

In these circumstances, it is often the case that the contractor would not specifically list and provide rate for all the equipment covered by the "published list" in the Contract Data. This would effectively mean that said equipment (which was intended by the contractor to be stipulated in the published list) would neither be in the published list nor stated in the Contract Data.

In terms of item 27 in the SSCC, amounts for the abovementioned equipment would be "at competitively tendered or open-market rates, multiplied by the time for which the equipment is required..."

Determining "competitively tendered or open-market rates" can very easily give rise to disagreements between the respect role-players. The mere question of how such rates are calculated is a question that our courts have been asked to consider for many years.

If the Project Manager does not employ a pragmatic

approach to assessing open market rates, a dispute is inevitable.

### **Resolution**

The resolution to this entire (potential) issue may best be employed at the time the contractor submits his tender. Although the CPHA list of rates has not yet been declared to be unlawful to an enforceable degree, until there is sufficient clarity in the form of a decision by the Competition Tribunal, it is advisable that the contractor does not select a body/association for the purpose of the "published list of equipment". The Contractor should rather list all of the necessary and potentially necessary equipment and the suitable rates in the Contract Data.

This will avoid the contractor's tender being disqualified at tender stage and avoid a dispute based on the seemingly mundane question of how to determine open market rates if, or when, a Compensation Event arises once the contract commences.

### **Conclusion**

Although many of the standard form construction contracts are being utilised all over the world, FIDIC and the NEC were not, and could not be designed taking into account potential conflicts with laws in all other countries.

The NEC, for example, was produced in the United Kingdom in which the publishing of a list of rental rates for equipment of members of an association does not, it would appear, contravene the laws of the UK. The Civil Engineering Contractors Association (CECA), which publishes a list of rental rates for equipment annually, is often named in the Contract Data for contracts in the UK.

When using standard form construction contracts, it is important to acknowledge that certain aspects or features of that particular contract may not be suitable for use in every country.

The terms and features of standard form contracts must always be scrutinised by both parties to avoid issues and unnecessary costs down the line. This is particularly important when using the contracts which were drafted for use in other countries.