

**FORM A**

**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISIONJUDGMENT**

PARTIES:                      Respiratory Care Africa (Pty) Ltd & MEC for  
Health, East Cape & 6                      others

Case Number:                      1977/08  
High Court:                                      Eastern Cape Division  
DATE HEARD:                      29/01/09

DATE DELIVERED:      05/02/09

JUDGE(S) :                      Froneman

LEGAL REPRESENTATIVES -

*Appearances:*

for the Applicant(s):              Daniels  
for the Respondent(s):      Buchannan (1); Gqamana (2);  
Rork (7)

*Instructing attorneys:*

for the Applicant(s):              Nettletons  
for the Respondent(s):      Whitesides; WR&C; Dullabhs

CASE INFORMATION -

*Nature of proceedings.*

**Topic:**

**Key Words:**

**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE DIVISION**

**Case No 1977/2008**

**In the matter between**

**RESPIRATORY CARE AFRICA (PTY) LIMITED**

**Applicant**

**and**

**MEC FOR HEALTH, EASTERN CAPE PROVINCE**

**First Respondent**

**MEDHOLD GEMS, a division of the TC GROUP**

**Second Respondent**

**DRAGER MEDICAL (PTY) LTD**

**Third Respondeat**

**MYRIAD MEDICAL (PTY) LTD**

**Fourth Respondent**

**CLINICAL AND MEDICAL SERVICES (PTY) LTD**

**Fifth Respondent**

**THE SCIENTIFIC GROUP (PTY) LTD**

**Sixth Respondent**

**EAST CAPE X-RAY CC**

**Seventh Respondent**

**JUDGMENT**

**Froneman J.**

[1] During June 2008 the first respondent invited tenders for the supply, delivery and installation of medical equipment for health institutions in the province. The applicant was one of the successful bidders in respect of some of the equipment but unsuccessful in respect of other equipment. It now seeks to review and set aside that part of the tender process in which it was unsuccessful, but it is quite happy with the part of the process where its tenders were successful.

[2] The first respondent contends that the bid documents and the pre-bid meeting with prospective

bidders made it clear that relevant required certificates had to be inserted in the appropriate section for each separate bid and that a failure to do so would result in that tender being nullified.

[3] It is common cause that the applicant's tender in its unsuccessful part was eliminated because these bids did not contain the required certificates in their proper places. The applicant's bid for the ICY ventilator was eliminated because there was no radiation control board certificate attached to it. The bids for the pulse oximeter, vital signs monitor full house monitor and anaesthesia units were eliminated because *CE* certification and the ISO 9000 were not inserted in the correct sections of each bid. The applicant's bids for an ECG (option 1), an ECG (option 2), infant incubators, laryngoscopes and crib ICU equipment were successful. There is no allegation that the applicant failed to comply with the requirement relating to proper certificates in respect of these bids.

[4] The applicant contends that the procurement process was not fair, equitable and transparent, as is required by law. It relies, essentially, on two grounds for this conclusion. The first is that the rule referred to in para [2] above (that the failure to insert the requisite certificates in the correct places with the respective tenders would invalidate those parts of the bid) was never properly conveyed to the applicant and is in any event too vague to be capable of proper and fair enforcement. Secondly it contends that even if it does qualify as a valid rule it was inconsistently applied, to the applicant's detriment.

[5] In my judgment both contentions must fail, for the very simple reason that the opposing papers filed by the first respondent, show that there was a clear and enforceable rule, that the rule and the consequences flowing from a failure to adhere to it were explained at the pre-bid meeting, and that the alleged inconsistencies in the application of the rule did not exist when the initial bids were

considered.

[6] It is trite law that in motion proceedings contested factual issues must normally be decided on the respondent's version of events where there is no referral to oral evidence. The applicant did not seek to refer any factual disputes to oral evidence and I do not consider there to be any cogent grounds for making such a referral. The respondent's assertions to the effect set out above are in my view consistent with the bid documents, logical and inherently probable. There is nothing on record to justify referring the matter to oral evidence about those aspects, let alone to reject them on the papers as they stand.

[7] The statements under oath that the rule and its effect were explained at the pre-bid meeting are not contradicted by the terms of the bid documents. In my view the terms of the bid documents make the same position clear enough on their own (see in particular clauses 2.1, 2.2 and 2.3 of part 1 at page 42 of the record, as well as clause 22 at pages 46 and 47 of the record). As noted earlier, it is common cause, or at least not seriously disputed, that in respect of the unsuccessful parts of its bid the applicant did not comply with the requirement of attaching the relevant certificates to the relevant bids. It was not suggested that the rule or requirement itself was arbitrary or unfair so as to constitute a ground for review under the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). A requirement that bids must be complete and easily ascertainable in relation to requisite supporting documentation does not strike me as unreasonable, given the scale of work required in the assessment of bids.

[8] The second leg of the argument for review was that the rule or requirement was applied inconsistently, in that there were instances where other bidders also did not attach the relevant certificates in the right places, but that they were not disqualified

for those bids. These assertions are denied and explained in the replying affidavit filed on behalf of the first respondent. During argument it was submitted by applicant's counsel that these assertions under oath should be rejected. In my view there are no cogent reasons for doing so. There is nothing in the papers to suggest why the first respondent should act dishonestly or irrationally by making false assertions in order to prejudice the applicant. The fact that in respect of those instances where the applicant met the requirements it was successful in some of its bids supports the contrary probability, namely that its assertions about the non-compliance in respect of the unsuccessful bids are true. Why would the first respondent accept the applicant's bids as successful where they comply with its requirements and then give a false explanation for the exclusion of the applicant's other bids?

[9] In my judgment the applicant has failed to make out a case for review on the facts of the case. This finding makes it unnecessary to deal with the further arguments raised by seventh respondent's counsel specifically in respect of the seventh respondent's successful bid.

[10] The application is dismissed with costs, including, in the case of first respondent, the costs of two counsel.

**J.C. FRONEMAN**

**JUDGE OF THE HIGH COURT**