

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No.: 3516/2018

In the matter between:

BAYETHE PROJECTS CC

Applicant

and

THE NELSON MANDELA BAY MUNICIPALITY

First Respondent

BRONSCOR CC

Second Respondent

JUDGMENT

REVELAS J:

1. The applicant sought orders aimed at reviewing and setting aside a decision of the first respondent to award a tender (Contract No SCM/18-46S – Area 2) to the second respondent and substituting the aforesaid by awarding the tender to the applicant. The application is brought in terms of Uniform Court Rule 53 and section 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In its amended Notice of Motion the applicant sought relief which included the review and setting aside of the decisions to declare it non-responsive in respect of its bid for Area 1 and the award of the tender in respect of Area 1 to the second respondent and the substitution of that award by an award to the applicant. The applicant did not further amend its notice of motion, but attached a draft order to its heads of argument reflecting the relief which it now seeks, in which it has abandoned its claim for the review and setting aside of the decision to declare its Area 1 bid non-responsive. The applicant nevertheless persists with a claim that the award to the second respondent of its area 1 bid be set aside, and in place of a substitution order, now seeks that the bid in respect of Area 1 be remitted to the first respondent for reconsideration.

2. In 2007, the Directorate: Infrastructure and Engineering of the first respondent, addressed a memorandum to the relevant Bid Evaluation Committee, seeking the appointment for tenderers for Contract No SCM/18-45/S: Mechanical Infrastructure Services. The reason given for the request was that the first respondent's Plant Maintenance Division experienced mechanical workload challenges with regards to repairs and maintenance of mechanical equipment and new installations "as and when required". The memo mentioned that previously the Plant Maintenance Department of the first respondent had awarded a three year contract for mechanical services, to the applicant and SDM Manufacturing respectively for the period 29 January 2014 to 31 January 2017, on an "*as and when basis*".
3. The first respondent invited bids under the abovementioned contract number from interested parties to undertake "mechanical infrastructure services" consisting primarily of maintenance and repairs to the first respondent's waste water treatment works (Area 1); waste water pumpstation (Area 2); and water treatment works (Area 3). Bidders were invited to submit a bid in respect of one or more of these areas within 120 days until 12 October 2017, the closing day for bids. The second

respondent submitted a bid for area 1 and the applicant for areas 1, 2 and 3. The applicant submitted its tender on 12 October 2017.

4. On 29 November 2017 the Bid Evaluation Committee resolved that the tender be referred back to the Directorate to effect certain amendment before resubmitted it to the Directorate. The amendments involved doing the scoring tables over again so as to exclude those who did not meet the minimum requirements; including a section for non-responsive bidders; requesting a Supply Chain Practitioner to accompany the Directorate representative to site visits.
5. In December 2017, the first respondent's Directorate: Infrastructure and Engineering, submitted two reports to the Bid Evaluation Committee. In the first report there was an evaluation summary which adopted a cryptic description of "pass" or "fail" in respect of bidders. The applicant's evaluation outcome was "fail" in this first report. In the second report it was stated that the second respondent be recommended for appointment in respect of area 1, and SDM Manufacturing for area 3. It recommended that no appointment be made in

respect of area 2, suggesting it be re-advertised since none of the service providers (bidders) met the minimum criteria required and set out in the tender data.

6. On 16 February 2018 the Bid Adjudication Committee ('BAC') resolved that for area 2, all bidders were deemed non-responsive. It was further recommended that the tender be awarded as follows:

Area 1: to the second respondent

Area 3: to SDM Manufacturing

7. On 20 April 2018 the BAC resolved that their decision in respect of area 3 (to SDM Manufacturing) be put on hold subject to the Directorate referring the item to Internal Audit for further investigation.
8. On 2 May 2018 the first respondent published a cancellation notice, stating that SCM/18-46/S Mechanical Infrastructure Services has been cancelled. It did not state which area this applied to, but on the probabilities and the first respondent's

answering affidavit it the cancellation applied to area 2. On 18 May 2018 the first respondent advised the applicant that its bids had been unsuccessful (those relating to Areas 1 and 2 being relevant to this matter) as being non-responsive to the minimum requirements stipulated in the tender data. The applicant thereafter unsuccessfully pursued certain internal remedies before launching the present application.

9. Area 1 was awarded to the second respondent subject to the signing of a service level agreement. On 3 August 2018, the second respondent concluded a contract with the first respondent in terms of which its offer to provide the tendered services for Area 1 was accepted by the first respondent.
10. The first respondent advised the applicant that its bid was unsuccessful in that it did not meet the minimum requirements in respect of the following:

"Senior Mechanical x 1 Artisan: National Diploma and trade test not submitted; the four year experience requirement was not met.

Trade test x 5 Artisans: submitted equivalent not trade test; the three year experience requirement was not met.

Boilermaker x 2: Only one boilermaker submitted; submitted equivalent and not trade test; the three year experience not met."

11. For purposes of this application, what was required of bidders were the following minimum criteria. These were set up in "lines" and the relevant lines are referred to below.

Line 1

Applicants were to provide a work profile history of past work experience together with business references and contact details (i.e. address, telephone and contact number. A template – annexure 1 – had to be completed.

Line 3

Service providers were required to show that they would be able to demonstrate a financial ability to carry the contract to this end three years audited financial statements were to be submitted with all tenders.

Line 5

All applicants for the tender were obliged to have at least five qualified Mechanical Artisans (trade tested) per area and "[A] least two to four years' post trade test experience is compulsory x5" The applicants were accordingly obliged to attach proof of the trade test and "three years' industrial experience post trader test and complete attached Annexure 1"

Line 13

A qualified welder (also trade tested) with three years' industrial experience was required. The Annexure 1 template provided was to be completed to prove the three years' industrial experience and post trader test.

Line 14

A qualified boilermaker with three years' industrial experience post trade test was also required for each area and the obligatory proof of the trade test was also required.

"Senior Mechanical x 1: N Dip, Trade Test Cert, 4yrs industrial experience post trade test.

Mechanical Artisan x 5: Trade test and 3yrs industrial experience post trade test.

Boilermaker x 2: Trade test and 3yrs industrial experience post trade test."

12. The second respondent only tendered in respect of Area 1 and was awarded Area 1. No award was made in respect of Area 2. The applicant, however states that the second respondent's tender in respect of Area 1 was non-responsive as it did not fill the minimum criteria. Several of the employees of the applicant and their qualifications were a listed by the applicant to demonstrate that they had indeed met the minimum requirements set out in the tender data. The applicant's challenge to the award of the tender in area 1, is that the second respondent's tender was non-responsive as it did not fulfil the aforesaid criteria. The applicant set out in a very long list the relevant lines in the data requirements to demonstrate that the second respondent did not meet the minimum requirements whereas, in its own view it had met those requirements.
13. The first respondent disputed this. In respect of line 1 it asserted that the second respondent had indeed complied with the minimum requirements set out in lines 1, 3, 5, 13 and 14 of the minimum criteria and that, in fact, the applicant's papers in respect of line 1 were incomplete.

14. In respect of line 3, the first respondent pointed to the record to show that the second respondent did indeed attach financial statements for three months.
15. The first respondent stated that in respect of line 5, Mr Anton Hugo, the mechanical artisan of the second respondent, satisfies the minimum criteria in that the trade test certificate he provided was issued in terms of section 13 of the Manpower Training Act of 1981 which defines trade to include "any branch of a trade, or any group of trades or branches of trades". An apprentice is defined in the Manpower Training Act as "any person employed in terms of a contract of apprenticeship, registered in terms of section 16(3)(d) or Section 18(1)(c) or (3) and for the purposes of sections 42, 50, 51, 54 and 56, includes any minor employed in terms of the provisions of section 5". It follows, says the first respondent, that the certificate submitted is in accordance with what was required and thus fulfilled the set criteria.
16. The applicant also decried the proposal of Mr Sean Musquin the basis that he is a millwright and not an artisan. According to the South African Qualifications Authority (SAQA) an electro

mechanic is a millwright and multi-skilled artisans responsible for installation, maintenance and repair of plant equipment and that is known as a millwright. According to the first respondent, that puts paid to the applicant's complaint in respect of line 5.

Line 13

The applicant complained that Mr Lukhosi did not meet the three year industrial experience post-grade test. The first respondent conceded this and adapted the view that its contract with the second respondent was to be declared invalid, as the shortfall in experience seemed to be insubstantial.

Line 14

The second respondent's proposed boilermaker Mr Morné Rousseau's post trade test industrial experience fell short of twelve days. The first respondent contends that the shortfall is immaterial. I tend to agree. Since the only issue that with the tender submitted by the second respondent was Mr Lukhosi's insufficient post grade test industrial experience.

The first respondent contended that the applicant's tenders in respect of both areas were non-responsive by virtue of the following:

Line 4

In respect of the applicant's proposed senior mechanical artisan, Mr Goshomi, a South African national diploma and no trade tests were submitted and the four years of experience criteria was not met. The artisan in question has Zimbabwean qualifications only and there is no confirmation from SAQA that his qualification are recognised here or what their South African equivalent is.

Line 5

No trade tests for the five mechanical artisans were submitted nor an equivalent. The three years of experience requirement was also not met.

Line 14

Two boilermakers were required. The applicant proposed only one without trade test papers nor three years' experience.

17. The applicant challenged the first respondent's criticisms and criteria on several grounds. The latest supply chain management policy of the first respondent defines *"Non responsive" in terms of a bid as that it " does not comply in all material aspects with the requirements set out in or contained in an invitation to bid, including the applicable specifications"* (emphasis added by the applicant). The applicant argued that the first respondent's call for new minimum qualification criteria for the applicant's

engineering staff ("red seal certificate") constitutes a material and unfair change to the tender and should have been addressed in the "tender data". The applicant also referred to the minutes of a compulsory clarification meeting which was held on 19 September 2017, and stated that the absence in the minutes to seal certificates was a further indication that bidders were not made aware thereof that it was a minimum requirement. However, Mr Karish Nagura, the deponent to the second respondent's answering affidavit stated that he was present at the clarification meeting and "*[n]otwithstanding the fact that the minute of that meeting does not record that potential bidders were required to submit 'Red Seal Trade certificates' in respect of their artisans, my recollection is that that was pertinently raised during the meeting by the first respondent's project manager, Mr Lunga Mahote.*" Mr Nagura also stated that after the meeting Mr Mahote explained that Red trade Seal Certificates were required because of the first respondent's previous experience that contractors had employed persons with foreign qualifications who were not suitably qualified which led to the delivery of substandard work.

18. The applicant took further issue with the red seal certificates. The deponent to the founding affidavit, Mr Victor Zwane stated that it was his understanding that the red seal certificate is the National Artisan Trade certificate issued in terms of section 26D of the Skills Development Act 37 of 2008. He submits that there is no difference between this certificate and the previous artisan's certificates which were issued in terms of sections 13 and 28 of the Manpower Training Act, 56 of 1981. He states that they are equal in status and in this regard relied on a letter from the Department of Higher Education and Training.
19. The first respondent argued that issues relating to the red seal trade test certificates were irrelevant in light of the fact that several of the applicant's employees had Zimbabwean qualifications that could not be verified as equal to the South African qualifications and in many instances provided no trade test certificates of either country or SAQA.
20. The first respondent concluded in retrospect, that the second respondent had indeed failed to meet the specified tender criteria in one respect and accordingly should have been declared to have been unresponsive. This is a question of fact, it

argues. As there is a dispute between the applicant and the first respondent as to the extent of the second respondent's failure to comply, regard must be had to the facts put up by the first respondent. The first respondent, in its answering affidavit now points out that the second respondent's acceptance was outside the validity period of the offer. In addition, the respondent contends that the official of the first respondent who acted on its behalf had no authority to accept the offer and conclude the agreement.

21. In view of the respondent's latest approach to the awarding of the contract in respect of area 1 to the second respondent, it actually supports the relief sought by the applicant in one respect, namely the setting aside its own decision taken to award the tender in respect of Area 1 to the second respondent, and remitting it back to make a decision afresh.
22. The second respondent contends that its failure to meet the specified requirements is so minor that it should be overlooked. The first respondent argues that the requirement was clearly material given the purpose of the empowering provisions a ground of review of the award to the second respondent has

accordingly been established and “*there is no room for shying away from it*”. In the circumstances, the first respondent submitted, the first step identified by the Constitutional Court must result in a decision pursuant to section 172(1)(a) of the Constitution to the effect that its decision was invalid.

23. In my view, it is not open to the first respondent in these proceedings to argue for the setting aside of its own decision in respect of the award of the tender in relation to Area 1 to the second respondent in this application. Just as Mr Motasi, the independent and impartial person appointed in terms of Regulation 50 of the Municipal Supply Chain Management Regulations stated in a memo (written on the letterhead of the first respondent’s “Chief Operating Officer”):

“The decision that of the BAC, that Area 2 be cancelled, is valid as this municipality is bound by such decision regardless the incorrect publication thereof. This is based on the principle applicable in ***Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA)*** where court (sic) held that invalid act or decision remain valid until set aside.”

24. Having the tender awarded to the second respondent set aside on the grounds argued for, would necessarily involve a

substantial application which, if it had merit, ought to have been brought much sooner.

25. The alternative relief sought by the applicant is that if the tender for Area 1 is set aside and remitted to the first respondent, there should be directives that the first respondent shall request all tenderers who submitted responsive tender offers, to extend the validity period of their tender offers for such period as the first respondent considers necessary. In view of the approach I adopt in this matter it is not necessary to consider the submissions made in this regard.
26. The procedures followed and decisions taken in the course of acquisition by an organ of state of goods and services fall within the definition of administrative action in the PAJA. That much is trite.
27. Section 217 of the Constitution, the Preferential Procurement Policy Framework Act ¹, the Local Government: Municipal

¹ 5 of 2000.

Finance Management Act ² , the Municipal Supply Chain Management Regulations³ and the Municipality's Supply Chain Management Policy provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. *"The lens for judicial review of these actions, as with other administrative action is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA"*⁴.

28. The Constitutional Court has decisively set out the proper legal approach to the consideration of whether a procurement process was administratively flawed, by applying six principles (as summarised by Mr Richards, counsel for the first respondent)⁵
- These are:

28.1 an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process;

² 56 of 2003.

³ GN 868 dated 30 May 2005.

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para [45]

⁵ *Allpay (supra)* paras [22] to [56]

28.2 the materiality of compliance with legal requirements depends upon the extent to which the purpose of the requirement is attained;

28.3 the constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding;

28.4 the fairness and lawfulness of the procurement process must be assessed in terms of the provisions of PAJA;

28.5 Black economic empowerment generally requires substantive participation in the management and running of any enterprise;

28.6 it is only at the remedy stage that appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.

29. It follows that once a ground of review under PAJA has been established "*there is no room for shying away from it*", as the

applicant itself argued. The decision (or other administrative action) must be declared unlawful. Only thereafter are the consequences of the declaration of unlawfulness given effect to in a just and equitable order under section 172(1)(b) of the Constitution. Section 8 of PAJA gives detailed legislative content to the Constitution's "*just and equitable*" remedy⁶.

30. Judicial cognisance can be taken of the fact that the water management arrangement in the area which falls under the first respondent is beset by maintenance problems and is in fact in crisis. One would expect proper contractors and suitably qualified artisans to be appointed to perform the sorely needed functions to solve the water problems concerned. The first respondent (through Mr Mahote) was therefore is therefore entitled to insist on proper qualifications for artisans, and in any event, it has been demonstrated on these papers that the applicant's complaints illustrated by the tables of criteria and individual employee qualifications are not sufficient to justify setting aside the award made in favour of the second respondent. The first respondent had in its answering papers illustrated that the second respondent had complied with the criteria and in so far as there were shortcomings, they were of a minor nature.

⁶ *Allpay* at para [25]

31. Moreover, there is no averment from any party to these proceedings that the applicant delivered exemplary or proper work, or solved any of the numerous problems relating to water management when it previously was awarded the three year contract which ended in January 2017. It appears that the applicant was piqued about not obtaining the contract for a second time. Yet it set out no facts upon which a legitimate expectation for being appointed again could be based and did not even present its case in those terms.
32. On the other hand, the second respondent has, at least on the face of it, contracted in good faith with the first respondent and has begun with the work the tender requires it to perform. There is no allegation that it is unable to perform those duties or that its work is below standard. It is a matter of concern that the first respondent has taken so many steps to ensure that none of the three areas covered by its invitation to tender and accepted by it, are completed. The tender for Area 3 is on hold, the tender for Area 2 has been cancelled and now the first respondent seeks the setting aside of the tender for area Area 1 as well. Lately courts have observed a tendency amongst the

municipalities of the Eastern Cape to have their own administrative actions (taken in the context of vying bidders for tenders), set aside by the courts. These applications, usually brought out of time, come at the expense of the taxpayers and the delivery of basic constitutionally protected amenities to the poor. In the present matter the second respondent will be severely and unnecessarily prejudiced if the tender for Area 1 is set aside. Accordingly the application cannot succeed.

33. There is no reason why the unsuccessful applicant should bear all the costs of the application in view of the first respondent's ambivalent approach in this matter.
34. In the circumstances the following order is made :
 1. The application is dismissed.
 2. The applicant and the first respondent are liable to pay the second respondent's costs of the application, jointly and severally, the one paying the other to be absolved.

Judge of the High Court

Appearances:

For the Applicant: Adv Zietsman instructed by Greyvensteins, St George's House, 104 Park Drive, Port Elizabeth

For the first respondent: Adv Richards instructed by Rushmere Noach Inc., 5 Ascot Office Park, Conyngham Road, Port Elizabeth

For the second respondent: Adv Pienaar instructed by Gregory Clark & Associates Inc., 9 Buffelsfontein Road, Mount Pleasant, Port Elizabeth

Date heard: 18 June 2020

Date delivered: 05 November 2020