

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCVAAL PROVINCIAL DIVISION)**

Case No: **27318/06**

Date heard: **27 & 28 November 2007**

Date of judgment: 30-07-2008

In the matter between:

CADE TRANSPORT (PTY) LTD

APPLICANT

and

CROSSROADS DISTRIBUTION (PTY) LTD

1st RESPONDENT

THE SOUTH AFRICAN POST OFFICE

2nd RESPONDENT

**THE CHAIRMAN OF THE BOARD OF DIRECTORS
OF THE SOUTH AFRICAN POST OFFICE LTD N.O.**

3rd RESPONDENT

**THE CHAIRMAN OF THE PROCUREMENT COMMITTEE OF THE SOUTH AFRICAN POST OFFICE LTD (FOR
THE PROVISION OF NATIONAL LINEHAUL
TRANSPORTATION) N.O.**

4th RESPONDENT

**THE CHAIRMAN OF THE EXECUTIVE COMMITTEE OF THE BOARD OF TH SOUTH AFRICAN POST OFFICE
LTD
(FOR THE PROVISION OF NATIONAL LINEHAUL**

TRANSPORTATION) N.O.

5th RESPONDENT

PRICEWATERHOUSECOOPERS

6th RESPONDENT

JUDGMENT

Du Plessis J:

I took inordinately long to prepare and deliver this judgment. Rather than burdening them with excuses, I

offer to the parties my sincere apologies.

Towards the end of 2005 the South African Post Office Ltd. the second respondent, set in motion a process to invite tenders for appointment as its sole provider of national linehaul transportation services. At the end of the process, the second respondent identified the first respondent as the preferred bidder. After further negotiations, the two parties entered into an agreement in terms whereof the first respondent was appointed for a period of five years to provide the service.

The applicant also tendered. In this application it seeks, primarily by way of review, to set aside the decision to appoint the first respondent and to have itself appointed instead of the first respondent.

The tender process consisted of essentially two stages. The first stage, called the Expression of Interest stage, essentially was what may be termed a sifting exercise in which seven bidders were identified and invited to participate in the second stage. The second stage was called the Request for Proposals (RfP) stage. The applicant and the first respondent took part in the second stage.

In the second stage bidders had to submit what was called "compliant bids", that is, bids that complied fully with the specifications in the RfP documents. Bidders were given the choice, in addition to a compliant bid, also to submit a variant bid, that is, a bid that could vary from the specifications. The submission of variant bids was subject to certain terms that I shall deal with in due course.

Together with its compliant bid, the applicant submitted a variant bid. Among other grounds of review that it relies on in the papers, the applicant avers that the second respondent did not consider its variant bid before it appointed the first respondent as the preferred bidder. In argument, counsel for the applicant relied only on this ground of review and, therefore, it is the only one I need to consider.

It is common cause that the second respondent did not consider the applicants variant bid as a discrete and self standing bid. The variant bid was, however, taken into account when the applicant's compliant bid was evaluated. In order to explain this, a brief outline of some features of the RfP-process is necessary

The sixth respondent was appointed as the second respondent's procurement advisor. As such it performed important functions in the administration and management of the tender process. It was the sixth respondent's function ultimately to make a recommendation to the second respondent as to the preferred bidder. To that end, personnel of the sixth respondent formed an independent evaluation committee that was tasked with evaluating bidders and their bids against three criteria that had from the outset been identified in the tender documents and of which bidders were apprised. The three criteria were *ability and experience* (weighted 40), *financial bid* (weighted 30) and *broad based black economic empowerment* (weighted 30). In the RfP documents, bidders were also

provided with a break down of each criterion into guiding factors that would inform the consideration of each criterion.

The evaluation committee evaluated the bidders and their bids, and prepared an evaluation report. The evaluation report recommended that the first respondent be considered for selection and appointment as the preferred bidder.

According to the report, the applicant achieved the lowest score of those evaluated.

The evaluation report was submitted to a working committee comprising personnel of both the sixth respondent and the second respondent. Having considered the report and a presentation made to them and having debated the matter, the working committee supported the recommendation of the evaluation committee. On 2 March 2006 the working committee presented its findings and made its recommendation to the second respondent's Procurement Committee (formerly known as its Tender Board). When it presented its findings and made its recommendations, the working committee did not identify bidders by name but referred to them as bidders "A" to "F". (It is on the papers unclear why. but at this stage there were only six bidders left.)

The Procurement Committee debated the matter and resolved to support the evaluation committee's recommendation. Accordingly, the Procurement Committee made such a recommendation to the second respondent's Executive Committee who, after hearing a presentation by the sixth respondent and debating the recommendation, resolved to adopt it and make it to the second respondent's Board of Directors. After considering a written submission for bid approval, the Board accepted the recommendation and resolved to appoint the first respondent, who at that stage was still known under the code name "Bidder C", as the preferred bidder.

Before considering, in the above context, how the respondents dealt with the applicant's variant bid, a few observations about variant bids in general are called for. I have pointed out that bidders, who had submitted compliant bids, were in terms of the RfP entitled also to submit variant bids. Clause 6.7.2 of the RfP documents provided that such a variant bid "may vary from the specifications ... provided that they are clearly identified, including all costs and benefit ramifications thereof and suitably motivated." The clause further provided that variant bids had to contain "appropriate costing that may be compared with the compliant (bid)." As envisaged in clause 6.4 of the RfP documents, a bidders' conference was held on 23 January 2006. As further envisaged in the documents, bidders were afforded an opportunity at the conference to raise and have clarified queries relating to the project. After the conference the second respondent distributed to bidders a document entitled "Bidders' Questions and Answers". In the latter document it was stated that a variant bid "is a bid which is completely responsive to the information required in the RfP. Bidders will only quote on routes as specified in the RfP and accept distances and times as given.

For reasons that I shall deal with, the evaluating committee regarded the applicant's variant bid as not in accordance with the RfP documents and the Bidders Questions and Answers document. Accordingly, the variant bid was not considered as a discrete, self standing bid. What the committee, however, did was to take the variant bid into consideration when it evaluated the applicant's compliant bid. Thus, when evaluating the applicant's "understanding of the task (creative alternatives)" the fact that the applicant had submitted a variant bid with "consolidated routes with unknown impact" was taken into account to the applicant's benefit. The variant bid was similarly taken into account when evaluating other aspects of the applicant's compliant bid but it was not considered in the context of the *financial bid* criterion. The Procurement Committee, the Executive Committee and the Board of Directors were not pertinently informed that the applicant ("Bidder A") had submitted a variant bid. The evaluating committee and the working committee took it upon themselves to decide that the variant bid was not to be treated as a separate bid.

It is manifest that the second respondent did not consider the applicant's variant bid. The fact that the evaluation committee took note of the variant bid is of no consequence. In the final analysis the Board of the second respondent was the decision maker. Mr Pistorius for the respondents did not argue otherwise. His submission was that the second respondent had no obligation to consider the applicant's variant bid as the bid did not comply with the predetermined requirements set for such a bid in the RfP documents and in the Bidders Questions and Answers document. The essential question in this case therefore is whether the variant bid complied with the requirements for such a bid.

The respondents contend that the variant bid was "skeletal". The bid forms part of the record of proceedings that was submitted in terms of Rule 53 of the Rules of Court. If regard is had to the bid itself, it is, to the extent that a lay person can understand it, skeletal indeed. In its affidavits the applicant, in the nature of argument, extolled the merits of its variant bid. The applicant did not tender, however, factual evidence that further explains the variant bid. In the circumstances the court must make the best of the evidence before it and on the basis of what is to be found in the variant bid itself, decide whether it complied with the relevant requirements

The applicant's compliant bid and its variant bid are contained in one set of documents. In the body of the bid, only one sentence is used to describe and, presumably motivate, the variant bid. The sentence reads as follows: ""Our variant bid is our proposed innovative solution which obviously varies from the specifications set forth, and this fact is reflected in the schedules, where routes have been consolidated and incorporated." Schedule B to the bid contains more detail of the variant bid. I do not profess fully to understand the schedule that is in the form of a number of tables. One can discern from the tables, however, that the applicant's bid is aimed at consolidating routes. I have also been informed from the bar that the variant bid proposes the use of more pay-load effective trailers with which to carry the second respondent's post.

According to the Bidders' Questions and Answers document, variant bids had to be "completely responsive to the information required in the RfP. Bidders will only quote on routes as specified in RfP and accept distances and times as given". The applicant's variant bid did not "quote on routes as specified" but suggested that routes be consolidated. In that sense it was not "completely responsive to the information required in the RfP". For this reason alone, the second respondent had no obligation to consider the variant bid.

It was argued on the applicant's behalf that the applicant's idea of consolidating routes has such obvious merit that the second respondent was bound to consider it. The difficulty with the argument is that the true merit of the variant bid can only be judged in the full context of the service that the second respondent renders. Put differently, the merit of the variant bid can only be judged if one has a full picture of how it would impact on the second respondent's business as a whole. Moreover, the second respondent sought tenders on existing routes and not advice as to how it should run its business. The duty to manage the second respondent rests with its properly appointed management and it is not for a bidder or for this court to prescribe to it how it should conduct its business. If the second respondent sought bids for specified routes, that is the bids that bidders were bound to submit and that the second respondent was obliged to consider.

There are further aspects of the applicant's variant bid that failed to comply with the requirements for such a bid. The bid did not set out all "cost and benefit ramifications" thereof in that, from the bid itself, it is impossible to determine how it would impact on the second respondent's business in general. The applicant contended that the variant bid is substantially cheaper than that of the first respondent. Again, that argument can only be judged if one is given the full context of the second respondent's business and that is what was required of the bid.

Far from being "fully motivated", the applicant's variant bid was not motivated at all.

The variant bid did not contain appropriate costing that may be compared with" compliant bids. By consolidating routes and by not supplying information as to the effect on the business of the second respondent of so consolidating routes, the variant bid made it impossible for the second respondent to compare the cost of the variant bid with compliant bids. As the respondents put it, it was unable to compare "like with like".

It is concluded that the second respondent had no obligation to consider the applicant's variant bid.

The applicant on the one hand and the respondents on the other were represented by two counsel. The cost of two counsel was warranted.

In the result the following order is made:

The application is dismissed with costs, including the costs of two counsel

B. R. DU PLESSIS

JUDGE OF THE HIGH COURT

Applicant's Legal Representation:

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REF: L Badenhorst/ A.Engelbrecht

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6th Respondents Legal Representation:

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