



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

Case number: 45193/201

Date: 15 August 2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	<input checked="" type="checkbox"/>
15/8/2012	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

PIET BOK CONSTRUCTION CC

Applicant

And

MINISTER OF PUBLIC WORKS

1st Respondent

THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

2nd Respondent

NEO SIYABONGA CONSTRUCTION AND PLANT HIRE CC

3rd Respondent

MAVIO TRADING ENTERPRISES CC

4th Respondent

MINISTER OF CORRECTIONAL SERVICES

5th Respondent

JUDGMENT

PRETORIUS J.

- [1] This is a review application where the applicant requests the court to review and set aside the decision by the first respondent to award tender number H09/052 to the Joint Venture formed by the third and fourth respondents. Secondly that the decision by the second respondent to grant the third respondent a 6CE Contractor Grading be reviewed and set aside; and that the first respondent be ordered to forthwith award said tender H09/052 to the applicant. The first respondent was represented in court by counsel who only had instructions to keep a watching brief, but not to participate in the proceedings.
- [2] The tender was for waste water treatment works and water purification works to be constructed, repaired, maintained and operated at Losperfontein and Groenpunt Prisons. That is the reason why the Minister of Correctional Services is cited as fifth respondent, but no recourse is claimed against the fifth respondent.
- [3] Losperfontein Prison has 1400 inmates and personnel and the Groenpunt Prison has 4000 inmates and personnel. They rely on water and sanitation 24 hours a day every day of the year.
- [4] On 19 October 1997 a tender was advertised . The tender conditions provided *inter alia* as follows:

"4.4 Standard risk management assessment criteria in respect of tenders received for routine projects in the engineering and construction works environments:

*Tender offers will be evaluated by an Evaluation Committee based on the **technical and commercial risk criteria listed hereunder**. Each criterion carries the same weight / importance and will be evaluated individually based on reports presented to the Evaluation Committee by the Professional Team appointed on the project. **A tender offer will be declared non responsive and removed from any further evaluation if any one criterion is found to be present an unacceptable risk to the Employer.***

In order for the evaluation reports to be prepared by the Professional Team, the Tenderer is obliged to provide comprehensive information on form DPW-09 (EC). Failure to complete the said form will cause the tender to be declared non-responsive and removed from any further consideration. The Employer reserves the right to request additional information over and above that which is provided by the Tenderer on said form. The information must be provided by the Tenderer within the stipulated time as determined by the Project Manager, failing which the tender offer will mutatis mutandis be declared non-responsive." (Court's emphasis)

- [5] It is clear from these conditions that any tenderer who fails to satisfy even one condition will be declared non-responsive and removed from any further evaluation. Should any one criterion be found to present an unacceptable risk to the employer the tenderer will be declared non-responsive.
- [6] The first respondent appointed Virtual Consulting Engineers (VCE) as consulting engineer for the project. Dr Veldtman of VCE conducted the risk assessment of the third and fourth respondents as they were the successful tenderers in a joint venture. The third and fourth respondents listed only one project under the heading "current work" which was for a piggery structure. Six projects were listed under previous work. In the first listed project the third and fourth respondents were subcontractors and the project manager could thus not comment. In project two it was indicated by the contact person at the number supplied by the third and fourth respondents that he had no knowledge of Neo Siyabanga Construction; the same applied for the third project. The fourth project related to a 450mm water pipe project and storm water drains for Lekwa Municipality. It was confirmed that the work had been completed successfully. Mr Kuona, the contact person for the fifth project, said that he had no knowledge of the firm Neo Siyabanga Construction.
- [7] The director Mr K Ramborosa of Hlangani Engineers were contacted, regarding the sixth project and confirmed that the 600mm pipe lines

were done, but that Neo Siyabonga were not involved in any of the contracts. There was no information available in five of the six projects listed by the third and fourth respondents as previous work done by them. Counsel for the third and fourth respondents had to concede that these facts provided by the third and fourth respondents on five of the six projects were lies, but requested the court to ignore it completely. The reason why the court should ignore these lies by the third and fourth respondents is, according to their counsel, that they had a sponsor for R4 million and therefor the court should not take the outright lies by the third and fourth respondents into consideration. According to counsel for the third and fourth respondents a sponsorship in such conditions would be good enough to secure the tender.

[8] They do not set out the reasons for the outright lies in respect of previous work. The only conclusion the court can come to is that they told these lies to ensure that the contract be awarded to them.

[9] The final conclusion Dr Veldtman came to regarding the joint venture of third and fourth respondents is:

*"No evidence of previous contracts which included reinforced concrete work or wastewater and water purification works could be found. **Experience in maintenance and operation of wastewater and water purification plants is essential, to execute the work at Losperfontein and Groenpunt Prisons. Based on the lack of sufficient appropriate construction experience Neo Siyabonga JV Mavio Trading will pose a***

risk in completing the Scope of Work related to the contract.” (Court’s emphasis)

[10] The risk assessment as set out by Dr Veldtman is not disputed. The third and fourth respondents aver:

“I wish to state that the risk component was not the sole criteria of determining the successful bidder. Save to state that the respondents was awarded the tender on the basis of having scored the highest points, the respondents are not able to give further reasons for the award and these shall be advanced by the first respondent.” (Court’s emphasis)

[11] The Bid Evaluation Committee (BEC) had a meeting on 24 March 2012 where it was decided:

“The Project manager will now compile a recommendation in which Piet Bok Construction, the second highest bidder, will be recommended.”

[12] The applicant argues that the third and fourth respondents had to be removed from any further evaluation. On 20 April 2010 the BEC found:

“It should be noted that the approval granted on the 12/03/2010 with respect to award necessarily being made to highest point scoring tenderer exist only in circumstances when such a tenderer does not meet legislative requirements e.g. No tax

*clearance certificate in cases where documented evidence exists on failed or cancelled projects. **The CIDB grading should be the requirement of the contractor's technical capacity to do the work.***"

and:

"After thorough discussion by the BEC members decision is made that Project Manager have to compile a recommendation to appoint Neo Siyabonga JV Mavio Trading." (Court's emphasis)

[13] The third and fourth respondents score was 91.19, whilst that of the applicant was 91 points. The score of the joint venture was higher due to the BEE credentials.

[14] The joint venture attempted to cede its right, title and interest in the tender to the Stuart Group (Pty) Ltd against payment of R1,200 000.00. The "Memorandum of Cession Agreement" was signed, but not implemented. It was in contravention of the general conditions of the contract.

[15] VCE compiled reports on both the applicant and the joint venture of third and fourth respondents. The conclusion reached by Dr Veldtman of Virtual Consulting Engineers regarding the applicant was:

"The Contractor has completed various contracts related to wastewater treatment reinforced concrete structures as well as pumps installations:

- The tender price is market related and well balanced.*
- **All references confirmed a high level of work and quality and contract administration.**" (Court's emphasis)*

[16] This in contrast to the conclusion he reached regarding the joint venture of third and fourth respondents:

"It seems as if the JV has limited construction experience and the reference given for current work is as a sub-contractor. Confirmation of the quality of work could not be given by the client, Department of Agriculture, and a technical risk evaluation could not be done.

The contract consists of building work and does not contribute to experience in civil engineering work related to wastewater purification work.

For previous work, confirmation could only be obtained for Project no 4 from Mr K Mahlangu who confirmed the completion of a water pipe and storm water drains contract.

No evidence of previous contracts which included reinforced concrete work or wastewater and water purification works could be found. Experience in maintenance and operation of wastewater and water purification plants is essential, to execute the work at Losperfontein and Groenpunt Prisons. Based on the lack of sufficient appropriate construction experience Neo Siyabonga JV Mavio Trading will pose a risk in completing the Scope of Work related to the contract (Court's emphasis)

[17] In the "Re-evaluation due to previous evaluation that were deemed to be flawed" under "Motivation for not recommending the highest scoring Tender" it is set out:

"7.3 Motivation(s) for not recommending the highest scoring Tenderer (if applicable):

A previous submission recording the reasons for not awarding to the highest scored bidder, was approved on 12 March 2010. (refer to the attached original submission).

*The highest scored bidder was evaluated for technical risks with the information available on previous and current projects. **No information of similar projects was provided.** However, the reference provided by the bidder, was contacted and it was ascertained that the said bidder was a sub-contractor on projects that were indicated. The main contract value was*

around R22 000 000-00 and the sub-contract value of work was around R 2 900 000-00 which consisted of general building work. On another project to the value of R 1 100 000-00 the said bidder has been involved with subcontract work to the value of around R 500 000-00. The nature of this work was storm water drainage and water reticulation work. It is not understood why the said bidder did not provide any references to bigger civil engineering contracts and the grading of the said bidder is not understood. **In light of the fact that the said bidder could not provide details relating to similar projects, the risk to award this contract to the said JV is deemed too high.**

The commercial risk is also deemed high, as the tariffs are unbalanced. Lastly, arithmetical errors made by this bidder also indicates an R529 142.40 loss to the bidder.

Therefore the technical and commercial risk of appointing the highest scored bidder is deemed to be extremely high and unacceptable." (Court's emphasis)

[18] The documents that the applicant attached to the application indicated that the BEC supported the award to the applicant, but the decision was again referred to the BEC from the Bid Adjudication Committee (BAC) on 2 December 2010.

[19] It is clear that the tender was awarded to the joint venture on 2 February 2011 on its CIDB grading. The evaluation in the risk assessment did not play any role in awarding the tender to the joint venture of third and fourth respondents.

[20] The second respondent declared in its answering affidavit:

"The 2006 regulations with regard to newly constituted enterprises allowed contractor applications to be graded using financial capability only, as these enterprises will not have a track record. As such, these enterprises were allowed to provide a sponsorship to substantiate its net asset value."

[21] This could by no means be applicable on third and fourth respondents as they had provided a so-called track record of projects they had completed although this was based on outright lies. The requirement to adhere to the satisfaction of the risk assessment was totally ignored and disregarded by the National Bid Committee.

[22] No reason is set out by the second respondent as to why the third and fourth respondents were not disqualified immediately due to their inexperience and outright lies which caused Dr Veldtman to come to the conclusion that they would pose a risk to complete the work related to the contract.

[23] It is clear from all the evidence that the third and fourth respondents have no previous experience in the operation and maintenance of wastewater and water purification plants. The two prisons are not ordinary facilities and have inmates and corrective facility personnel who are dependent on proper water supplies and sanitation 24 hours a day year in and year out. These are not facilities that can be closed down whilst work is being done.

[24] The court finds that the tender should not have been awarded to the third and fourth respondents due to their lack of experience and the fact that they had lied in their tender document regarding previous work done. They should have been disqualified immediately as non-responsive on those grounds. The work they have done at the prisons since the tender has been awarded was maintenance work as they are waiting for a decision on the environmental impact assessment. They have thus not started the project as such.

[25] The tender was originally advertised on 19 October 2007 and awarded to the third and fourth respondents on 2 February 2011. It took three years and four months for the tender to be awarded. Should the court find against the respondents the whole process will have to start afresh. In the light of the history of it taking three years and four months to award the tender and the conditions due to the work having to be done at the prisons, the court has to decide whether there are

exceptional circumstances in this matter which would cause the court to order the second respondent to appoint the applicant.

[26] Section 8 (1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 3 of 2000 provides:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(a) ...

(b) ...

(c) setting aside the administrative action and-

(i) ...

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;" (Court's emphasis)

[27] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)** O'Regan J held:

"[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to

*matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. **A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.** ”*

and at par 57:

“[57] In circumstances such as these, moreover, where the decision-maker is seeking to evaluate a large number of applications against similar criteria, the dictum in the Computer Investors Group case is not

relevant. In cases such as the present, it will be permissible, and indeed will often be desirable, for administrative decision-makers to adopt and apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent." (Court's emphasis)

[28] In **Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA)** Hefer AP found:

"[14] It is not necessary to deal at length with a reviewing Court's power to substitute its own decision for that of an administrative authority. Suffice it to say that the remark in Johannesburg City Council v Administrator, Transvaal, and Another that 'the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary' does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in Livestock and Meat Industries Control Board v Garda

'... the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ... although the matter will be sent back if there is no reason for not doing so, in

essence it is a question of fairness to both sides'." (Court's emphasis)

[29] In this instance the court must not only have regard to the fairness of dealing with the tender to the applicant and third and fourth respondents, but also as to fairness to inmates and personnel at Losperfontein – and Groenpunt prisons.

[30] The fact that the applicant had initially been recommended by the BIC as the preferred tenderer, *inter alia*, due to its previous experience must be taken into consideration. It was the Bid Adjudication Committee (BAC) who did not approve the bid by the applicant. The BAC decided that the CIDB grading should be the only requirement of the contractor's technical capacity.

[31] This technical capacity was the reason for the applicant's contention that the third and fourth respondents could not have been appointed. It is clear that the third and fourth respondents lied in respect of the projects they had previously been involved in and completed. There is no evidence that they have any experience in sanitation or water purification works.

[32] The information supplied by the applicant as to previous projects related to wastewater treatment; constructing a reservoir; upgrading of a water purification plant; earthworks; road; stormwater and sewage; sewage. All these projects were completed and when Dr Veldtman

enquired all the clients were satisfied. The tender price was 11.5% below the pre-tender estimate and 14% lower than the average of all the tenders received. The abovementioned projects related to similar work as the current tender.

[33] The court has to agree with Dr Veldtman that the joint venture of third and fourth respondents "will pose a risk in completing the Scope of Work related to the contract." Furthermore the third respondent's CIDB rating had lapsed on 27 May 2011.

[34] It is clear that in this instance this is an exceptional case as set out in section 8 (1) (c) (ii) of Promotion of Administrative Information Act. Therefore the court should intervene and appoint the contractor to avoid a further lapse of three years and four months before a contractor is appointed. This is specially so where the contract is in regards to the two prisons which rely on clean water and adequate sanitation for 4000 and 1500 people respectively.

[35] The second respondent filed a notice indicating that the second respondent will abide by the court order.

[36] I therefore make the following order:

1. The decision by the First Respondent to award the tender under tender number H09/052 to the Joint Venture formed by the Third and Fourth Respondents, is reviewed and set aside;
2. The First Respondent is ordered to forthwith award the tender under tender number H09/052 to the applicant;

3. The Third and Fourth Respondents are ordered jointly and severally to pay the applicant's costs including the costs occasioned by the use of two counsel.



Judge Pretorius

Case number	: 45193/2011
Heard on	: 25 July 2012
For the Applicant / Plaintiff	: Adv Maritz SC
	: Adv Vermaak
Instructed by	: PJ Faurie Inc
For the 1 st Respondent	: Adv Mangolele
Instructed by	: State Attorney
For the 3 rd and 4 th Respondent	: Adv Majozi
Instructed by	: Motalane Kgariya Inc
Date of Judgment	: 15 August 2012