

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 26441/2010

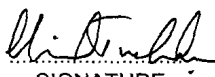
In the matter between:

4/12/2012

NEW DAWN TECHNOLOGIES (PTY) LIMITED

Plaintiff

and

(1)	REPORTABLE:	YES / NO
(2)	OF INTEREST TO OTHER JUDGES:	YES / NO
29/11/12		
DATE		SIGNATURE

MINISTER OF HOME AFFAIRS

First Defendant

STATE INFORMATION TECHNOLOGY AGENCY

(PTY) LIMITED

Second Defendant

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JUDGMENT

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Tuchten J:

- 1 This is an exception taken by the defendants to both the main and the alternative claims pleaded by the plaintiff. According to the particulars of claim, the plaintiff responded to an invitation to tender to supply the Department of Home Affairs ("the DHA") with an electronic document management system. As required under the invitation to tender, the plaintiff included in its bid response a form issued by the second

defendant ("SITA") on which the plaintiff supplied certain relevant information. This bid response as distributed to would be tenderers contained a great deal of information about the scope of the service required and contractual terms which were to be included in any eventual contract arising from the bid invitation. The plaintiff alleges that the bid response, together with the relevant bid invitation, contained the provisions of its contract with the DHA.

- 2 The bid response form contained sections called respectively "General Conditions of Contract/Proposal" and "Special Tender Conditions" which called for a response from a tenderer in relation to specific propositions by ticking one of two boxes provided for that purpose in the form, indicating whether the tenderer accepted or did not accept the proposition and, in one instance, whether the tenderer complied/agreed or did not comply. The plaintiff ticked all the accept boxes in the sections and the comply box. In other sections, the tenderer was required to indicate whether it did or did not comply with certain stated criteria and to substantiate its answer. The plaintiff ~~stated that it did comply and provided substantiation.~~ In a section headed Pricing, the tenderer had to insert its tendered prices, which the plaintiff did. The result was that each such proposition became a term of the offer constituted by the bid response as a whole.

- 3 SITA is a private company established under and incorporated pursuant to s 2 of the State Information Technology Agency Act, 88 of 1998 ("the Act"). The duties and powers of SITA are set out in s 7 of the Act. These include procuring, either as agent or principal, information systems and data-processing and associated services for state departments such as the DHA. The purpose of the tender was to procure such a system and data processing service.
- 4 The plaintiff instituted action against the defendants, alleging that its tender was accepted in about June 2006, upon which a contract came into existence between the plaintiff and the DHA and it started rendering services to the DHA pursuant to this contract.
- 5 Paragraphs 7.1 and 7.3 of the plaintiff's particulars read:

On a proper interpretation of the bid response submitted by the plaintiff and accepted by SITA and the DHA and the award of the tender to the plaintiff, the DHA had a right either to negotiate a final written contract with the plaintiff, incorporating the whole of the plaintiff's bid response, or to hold the plaintiff contractually bound to the terms of its bid response.

...

The DHA by January 2007 exercised an election not to negotiate a final written contract with the plaintiff, but to hold the plaintiff contractually bound to its bid response and to require of the plaintiff to proceed with the implementation of

the awarded tender. The DHA thereby waived its right to negotiate a final written contract.

- 6 The particulars of claim proceed to allege that from 28 February 2007 to June 2009, the DHA repudiated the contract between the parties by refusing to accept any performance by the plaintiff in terms of the contract and that the plaintiff thereafter continuously tendered to perform. On the strength of these allegations, the plaintiff claims payment of what it describes as its loss of profits, which it calculates as being the agreed contract price less its expenses saved by not performing under the contract.
- 7 There are certain provisions in the plaintiff's bid response which the plaintiff alleges give the DHA a right to require the plaintiff to negotiate with it towards the conclusion of what is termed a "final written agreement." In the alternative to its claim for an enforceable right to perform and get paid in terms of the contract, the plaintiff claims that the DHA was obliged by the terms of the bid response to negotiate with it in good faith and that if it had done so, a final written contract on substantially the same terms as those contained in the bid response would have been concluded. The plaintiff's claim under the alternative claim quantifies identically to its main claim.

8 The exception to the main claim focusses on those provisions of the bid response which provide for negotiations and the conclusion of a formal agreement or formal agreements after acceptance of the tender. I shall deal with them in the order they appear in the document.

9 Clause 2:

) Based on the quality of the proposal submitted, SITA intends to select a preferred vendor with a view to concluding a service agreement (SLA) where applicable with such successful vendor.

10 Clause 5.9

This RFB, all the appended documentation and the proposal in response thereto read together, forms the basis for a formal contract to be negotiated and finalised between SITA and/or its clients and the enterprise(s) to whom SITA awards the proposal in whole or in part.

Mere offer and acceptance shall not constitute a formal contract of any nature between SITA and any vendor.

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11 Clause 9.28

The [DHA] specifically reserves the right to negotiate a final contract with the successful Tenderer. The contract will only be concluded on the signing of the contract and the agreement on service levels by both parties.

12 Clause 9.29

The Tenderer's response to this Tender, or parts of the response, will be included as a whole or by reference in the final contract.

13 The crisp point made on behalf of the DHA is that the accepted tender creates no contract between the parties and that despite the form of the bid invitation such a contract was only to arise on the conclusion, after negotiation, of a final written contract.

14 It was submitted that I should view the material in the particulars of claim against the background of the Act and the Regulations made pursuant to the Act. These measures broadly set out the procedures by which procurement by SITA and those departments and public bodies contemplated by the Act are to procure the networks, systems and services provided for in the Act. It was not however suggested that an agreement concluded otherwise than strictly in accordance

with the Act or the Regulations would be invalid merely for that reason. The submission was essentially that I should employ the statutory measures as an aid to interpretation. The thrust of the argument is that regulation 9(5) requires that SITA must, whenever it contracts for the procurement of certain "mandatory services" and after complying with certain formalities, conclude the "necessary contracts" with the successful bidder or bidders.

15 It is not the plaintiff's case that it has contracted with SITA for the services. The plaintiff's case is that it contracted with the DHA. There is nothing in the particulars of claim to suggest that the nature of the performance required of the plaintiff constituted mandatory services. So, in my view, on the material before me, reg 9 does not assist the DHA.

16 On the other hand, reg 12, which relates to optional services, provides for the conclusion of a contract by the department concerned. No specific form for such a contract is prescribed. And then, reg 14(3) ~~provides that an "accounting authority," defined to mean in relation to~~ a department the relevant person or body having financial accountability in accordance with the relevant legislation, may, "before notifying the successful bidder or bidders of the award of the bid", cancel the bid under certain circumstances. This suggests that the bid

may not be cancelled *after* the successful bidders have been notified.

Reg 14(6) imposes a duty on an accounting authority to notify SITA as well as the successful bidders of the award of the bid. Reg 14 tends to indicate that the award of a bid, *without more*, has contractual significance.

17 In summary, therefore, I think that I have insufficient information on the strength of which to place the material put up by the plaintiff within the scheme of the Act and the Regulations. The measures therefore do not, at this stage, afford any aid to interpreting the material which the plaintiff has pleaded contains the terms of its contract with the DHA.

18 In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18-19, the modern approach to interpretation of written contracts and statutes was explained. I shall confine my remarks to contracts because a contract is what is in issue in this case.

19 A contract is interpreted by attributing meaning to the words used in the contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into

existence. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

- 20 The scope of the tender was to provide the DHA with digitised records. The bid response provided in clause 9.30 for the plaintiff to accept, which it did, that an estimated 500 million cases would have to be digitised, a minimum of 13,3 million of which

... must be scanned within the first six months of the project as priority. Failure to meet or comply with this requirement shall result in the contract with the successful tenderer being terminated or penalties being applied.

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- 21 In addition, the "successful Tenderer" is required under clause 2.2.2.1 of annexure A to the bid response (a document headed "Functional Questionnaire) to transport paper documents from one DHA site to

another. For the scanning itself, the successful tenderer was required under clause 2.1 of the same Questionnaire to

... supply a fully functional scanning bureau for the completion of this project

to cover the

... expansion of the current EDMS (scanning, workflow, storage and retrieval ) for all functions of the [DHA] and transportation, preparation, scanning, indexing and quality assurance of a **backlog** [my emphasis] of paper documents in the [DHA].

22 In resisting the exception, counsel for the plaintiff drew my attention to certain provisions in the General Conditions of Contract/Proposal section in the bid response. I deal with them below.

23 Clause 9.5

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SITA reserves the right to; cancel/reject any proposal ...