

(Digital Audio Recording Transcriptions)/aj

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 68178-2017

DATE: 2017-11-27

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(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	<u>31/01/18</u> <u>[Signature]</u>
	DATE SIGNATURE



In the matter between

SOUTH SOUND CIVIL CC & ANOTHER

APPLICANT

and

NATIONAL DEPARTMENT OF PUBLIC WORKS

RESPONDENT

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J U D G M E N T

TUCHTEN (J): This is an application for an interim interdict pending a review in this court. Only prayer 4.2 of the Notice of Motion remains for adjudication; the other relief was not pressed at the hearing before me. Only the 1st Respondent opposes the relief; the 2nd Respondent abides. The Applicants and 2nd Respondent are all civil engineers. They tendered for a contract to remedy and forestall risks caused by water leaks and sink holes

in an area called MASOP i.e. military areas, south of Pretoria.

The Applicants' tender was evaluated together with the 2nd Respondent's tender. The Applicants tendered some R68 million and the 2nd Respondent tendered some R86 million. The tender was awarded to the 2nd Respondent. The 1st Respondent had the Applicants' tender price evaluated independently and the conclusion of the 1st Respondent's evaluator was that the Applicants' tender was too low.

The Applicants tendered as members of a joint venture. The issue was taken as whether the joint venture contract relied upon by the Applicants
10 relates to the present tender; but that issue is not relevant for present purposes. This is because the issue I am required to consider is whether there are grounds for believing that the Applicants will succeed in their review of the decision to award the decision to the 2nd Respondent, not whether the tender ought to have been awarded to the Applicants.

The Applicants apply urgently for the interdict pending the review. Urgency was an issue on the papers, but rightly not argued by the Respondent. The Applicants rely on certain alleged illegalities; urgency must be evaluated on the Applicants' case. The higher price of the tender of the 2nd Respondent and the consideration that the law must, where possible, be
20 upheld render the matter in my view urgent.

Furthermore the date for this hearing was allocated by the Deputy Judge President. It is the only case on my roll; this is therefore not a case where the Applicants were jumping the queue to the prejudice of other litigants. I therefore hold that this matter is urgent.

In order to succeed the Applicants must show a *prima facie* right,

apprehension of irreparable harm if the interdict is not granted and relief is granted in the main case, a balance of convenience in their favour and the absence of an alternative remedy.

The only element presently in issue is the *prima facie* right. Although the attack on the award of the tender to the 2nd Respondent is based on three grounds, the essence of the attack related to the 2nd Respondent's grading for the purposes of the Construction Industry Development Regulations 2004 as amended (the Regulations), made by the Minister of Public Works under Section 33 of the Construction Industry Development Board Act 38 of 2000.

Table 5 in Regulation 12(7) provides for the grading of contractors. Designations from 1 – 9 are awarded. A designation carries with it the power to perform contracts up to a certain monetary value. Of relevance for present purposes, a contractor with a designation of 7 is empowered to perform a contract to a maximum value of R40 million. The 2nd Respondent had a designation of 7, but the 2nd Respondent was also considered a potentially emerging PE contractor.

I shall show that this fact is of some relevance. In principle the 1st Respondent is restricted to awarding contracts to PE's who carry the appropriate designations, but there are exceptions. Under Regulation 25(8) the award can be made to a PE designated civil engineer under certain circumstances. Regulation 25(8) provides:

'Within the framework of a targeted development programme promoted by a client or employer, that client or employer may accept for valuation tender offers or

expressions of interest by a contractor who is registered as a potentially emerging enterprise, in terms of these regulations at a contractor grading designation one level higher than the contractors registered grading designation [under certain circumstances which it is unnecessary to read].’

Regulation 25(8) must be read with Regulation 5 which reads as follows:

10 ‘From the register of contractors a client may identify potentially emerging contractors within particular contractor grading designations for the purpose of developing programmes that target the improvement and progress of contractors.’

Targeted Development Programme (TDP) is not defined. It is not necessary for present purposes exhaustively to define such a programme. At the very least it must be one prepared in advance with identification of risks in appointing what amounts to an unqualified person and embodying safeguards against such risks.

20 Guidelines were put out for guidance of the profession by the Construction Industry Board; they give a good idea as to what is contemplated by TDP. The Board is created under Section 2 of the Act; the Board must function free of undue influence in promoting the aims of the Act which include enhancing health and safety and environmental outcomes, and improved efficiency and effectiveness of the construction industry.

The Board must also determine best practices to promote these and other values. Its pronouncements on the administration of the legislative scheme created by the Act and its Regulations will therefore carry weight. In one of the guidelines put out by the Board, In Form Practice Note #32 of September 2014 the Board says this at paragraph 3.3.1:

‘A TDP is a deliberate commitment by a client to specific development objectives, such as the establishment of a TDP for the development of PE status contractors.

10 This therefore implies that a client must provide adequate support mechanisms to supply the development outcome specified in a TDP.

Guidance on establishing various elements of support can be found in the CIDB guidelines for Implementing Contractor Development Programmes.

3.3.3.2 A TDP essentially requires that:

- the client commits to creating access to development opportunities to improve the grading status of the PE status contractor. In this regard the client will have the discretionary powers on the selection of projects on which
- 20 PE status contractors will be invited to tender on in an open competitive process;
- support mechanisms such as training and mentorship may be provided to support the development objectives; other support mechanisms may also be identified for application within a TDP.’

The evidence before me shows that no TDP whatsoever exists, even in an attenuated form. From this it follows that the tender was awarded to a civil engineer which did not have the requisite qualifications to receive such a large tender. The conclusion must therefore be that the award of the tender to the 2nd Respondent was *prima facie* unlawful.

It is strictly unnecessary to go further, but the award of such a large tender to an unqualified person is disturbing. It is further disturbing that the 1st Respondent appears uncritically to have accepted the finding of the evaluator that the Applicants could not implement the tender at the price
10 tendered by them. The Applicants have a proven track record with the 1st Respondent.

One would have expected the 1st Respondent itself to have examined the Applicants' tender, and its officials themselves formed a view on the question. There are grounds for believing that the 1st Respondent abdicated its decision making function in this regard to its evaluator, rather than taking a decision itself with the evaluator's opinion as merely one of the factors that guided the 1st Respondent in coming to its own independent conclusion. Regulation 25(7)A is also relevant. It reads:

20 'An organ of state may, subject to its procurement policy and notwithstanding anything to the contrary contained in this regulation, evaluate and award a tender offer from a tenderer who is registered but who tendered outside of his or her tender value range as contemplated in Regulation 17, provided that:

(a) the margin with which the tenderer exceeded his or her

tender value range contemplated in Regulation 17 is reasonable;

(b) the award of the contract does not pose undue risk to the organ of state;

(c) the tender offer in all other respects comply with these regulations; and

(d) the report referred to in Regulation 21 or 38(5) and (6) indicates whether the sub regulation was applied in the award of the tender.'

10 I need say no more in this regard than it does not appear that sub Regulation 7A played any part in the award of this tender. But in its guidelines to this provision, the Board suggests that 15% over the limit might be reasonable, but that 20% would be unreasonable. It has this to say in Form Practice Note #3 of August 2006:

20 'In the context of the Construction Industry Development Regulations, 'reasonable' means that the employer's assessment of the capabilities and capacity of the tenderer to perform a certain specific contract above the tender value range of his or her contractor grading designation is fully justifiable and acceptable to someone who is not part of the evaluation process.

It would be unreasonable to award a contract to a registered contractor which is significantly higher than the maximum tender value range associated with their current

contract grading designation.

In order to provide some broad guidance in the case of tenders close to a threshold it is suggested that tendering of up to 10 – 15% above the upper limit of the tender value range associated with the particular contractor grading designation would in most circumstances be considered reasonable.

On the other hand tendering an amount of 20% or more above the upper limit is likely to be considered unreasonable’.

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In the present case the limit was exceeded by over 100%. I accordingly find that there is clear evidence to demonstrate that the 1st Respondent has acted outside its powers in awarding the tender to the 2nd Respondent. There is a real risk that the unlawful award of the tender to the 2nd Respondent may result in physical danger to the public and prejudice to the public purse. An interdict must therefore issue.

I make the following order:

1. Pending the final determination of the proceedings for judicial review and otherwise under Part B of the Notice of Motion dated 3 October 2017, the Respondents are interdicted from taking any action in the execution or implementation of the tender for emergency call out services, repair and maintenance, in the military area south of Pretoria and any contract

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concluded pursuant to the award of such tender to the 2nd
Respondent;

2. The costs of this application are reserved for consideration of
the court hearing the review.

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TUCHTEN J
JUDGE OF THE HIGH COURT
DATE: 31/01/18...