



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D9024/2020

In the matter between:

**AQUA TRANSPORT AND PLANT HIRE
(PTY) LIMITED**

APPLICANT

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

MILLING TECHNIKS (PTY) LIMITED

SECOND RESPONDENT

G & G CIVILS CC

THIRD RESPONDENT

ORDER

[1] The decision by the first respondent to award Tender 1R-41114 titled Annual Contract for Rehabilitation of Roads located in the Central Region of the eThekweni Municipality for a period of three years to the joint venture of the second and third respondents is declared to be unconstitutional and invalid and is hereby set aside.

[2] The first respondent is directed to re-advertise and commence the tender for the Central Region of eThekweni Municipality afresh.

[3] The first respondent is directed to pay the costs of this application.

JUDGMENT

SINGH AJ:

Introduction

[1] The applicant, Aqua Transport and Plant Hire (Pty) Limited submitted a tender to the first respondent for the Central Region of the eThekweni Municipality under Contract Number IR-41114 titled Annual Contract for Rehabilitation of Roads for a period of three years.

[2] The following facts were common cause on the papers:

(a) The applicant, in submitting the tender, was responding to an invitation by the first respondent and pursuant to such invitation attended a formal clarification meeting which was held by the first respondent on 14 February 2019.

(b) In order for the tender to be responsive, the bidder had to meet the following mandatory requirements with regard to key personnel:

(i) The Contracts Manager had to be registered with the Engineering Council of South Africa (ECSA) as a professional Civil Engineer or professional Civil Engineering Technologist or have registration with the South African Council for the Project and Construction Management Professions (SACPCMP) as a professional Construction Project Manager and also had to have ten years road construction experience or seven years road rehabilitation experience;

(ii) Construction Managers had to have registration with ECSA as a professional Civil Engineer, Technologist or Technician or have registration with SACPCMP as a professional Construction Project Manager with five years road construction experience or three years road rehabilitation experience.

(iii) An Assistant Construction Manager had to have a Civil Engineering accredited Diploma/Degree and a minimum of four years road construction experience or two years road rehabilitation post qualification experience.

(iv) An Assistant Foreman had to have a minimum of five years road construction experience.

(c) The applicant had to achieve a minimum of seventy points in respect of the functionality assessment and failure to meet the criteria for the requirements of the key personnel would render the tender non-responsive;

(d) The closing date in respect of the bid was 15 March 2019;

(e) The applicant submitted its tender document with supporting documents including its Bill of Quantities timeously;

(f) The price of the applicant's bid was R69 523 114,52;

(g) On 22 January 2020, the applicant was advised that its bid was unsuccessful and that the first and second respondents who formed the joint venture ("JV") were the successful bidders;

(h) The applicant requested reasons for the decision of the first respondent and requested certain documents in support of the reasons;

(i) In response thereto, the first respondent advised the applicant that its tender did not meet the minimum of seventy points for the functionality assessment as

stipulated in the tender and was therefore deemed to be non-responsive. The first respondent further advised that the applicant had attained a quality score of 55.5 points;

(j) The first respondent also attached the applicant's scorecard together with the reasons as to why the criteria were not met.

(k) The first respondent advised that the Contracts Manager's curriculum vitae demonstrated experience mostly aligned to Pavement Design, Materials Engineer and rehabilitation investigation. He thus lacked experience in engineering road construction works as required and overall, he only had one year road rehabilitation construction experience and therefore scored zero in the assessment;

[3] The applicant noted an appeal against the decision of the first respondent to the first respondent's Appeals Committee and in its written decision, the Appeals Committee upheld the applicant's appeal.

[4] The applicant alleged that following the decision of the Appeals Committee, there was no evidence that the first respondent had re-evaluated the applicant's tender albeit that the first respondent indicated in a letter that it had done so and that the tender was still unsuccessful.

[5] Two further letters were addressed by the applicant to the first respondent and on 24 November 2020, the first respondent advised that no letter of award will be issued *'until the appeal process is finalized'*.

[6] It was against the foregoing background that the applicant launched the present application.

[7] The JV, who were cited as the second and third respondents in this matter withdrew their opposition to the application and filed a Notice to Abide by the decision

of this court, hence the only parties before this court is the applicant and first respondent.

Issues to be determined

[8] The parties delivered a joint statement of issues and at the hearing of this matter, agreed that I was required to determine the following issues:

(a) Whether the tender awarded by the first respondent to the JV of the second and third respondents for the rehabilitation of various roads within the Central Region of the eThekweni Municipality was fair, equitable, transparent, competitive and cost effective in accordance with S 217(1) of the Constitution and other legislation;

(b) Whether the decisions of the Bid Evaluation Committee and Bid Adjudication Committee to award the tender in question to the JV was arbitrary, irrational, irregular, unfair, unreasonable, unconstitutional and not cost effective.

The applicable legislation

[9] The starting point is the Constitution. Section 217(1) reads as follows:

‘When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.’

[10] The relevant section is peremptory and places an obligation on an organ of state including municipalities such as the first respondent, which contract for goods and services to do so in a fair, effective, competitive and cost effective manner. The aforementioned approach has been reinforced by the Local Government: Municipal Systems Act No. 32 of 2000 (“the MSA”) and the Local Government: Municipal Financial Management Act 56 of 2003 (“the MFMA”) read with the Regulations of the MFMA¹.

¹ Municipal Manager: Qaukeni Local Municipality and others v FV General Trading CC [2009] 4 ALL SA 231 (SCA)

[11] Section 111 of the MFMA requires a municipality to implement a Supply Chain Management Policy which gives effect to the provisions of section 112 of the MFMA and echoes S 217 of the constitution that there must be competitive bidding processes and procedures for the evaluation of bids to ensure that the best deal from a monetary perspective is obtained by organs of state in the procurement of goods and services.

[12] It is peremptory that there be certainty and uniformity when considering applications for tenders. In order to attain this, there is a duty on organs of state to ensure that their invitations to tender are precise. The clearer the invitation, the greater the prospects of fairness and the lesser the likelihood of arbitrary decisions being made by an organ of state².

The parties submissions

[13] It is common cause that the applicant's quotation in respect of the tender price was the sum of R69 523 114,52 whereas the price quoted by the JV was R79 800 000,00.

[14] Counsel for the applicant, Mr *K. Naidu* submitted that against the Constitution and other national legislation, the first respondent was obliged to give consideration to the applicant as the applicant's quoted price was the lowest amongst all the bidders who responded to the invitation, including the JV.

[15] In relation to the qualifications of its key personnel, the applicant in its papers alleged as follows:

(a) The applicant carried out road rehabilitation works in other parts of KwaZulu-Natal, the Eastern Cape and the northern and southern regions of the eThekwin Municipality and therefore had extensive experience in road rehabilitation;

² Rodpaul Construction CC t/a Rods Construction v Ethekewini Municipality and Others 2014 JDR 1122 (KZD)

(b) There is no dispute that the proposed Contracts Manager had the necessary professional qualification to hold such position;

(c) The dispute was whether he complied with the first respondent's requirements in respect of work experience;

(d) With regard to the requirement of work experience, the first respondent's invitation stated that ten years road construction experience or seven years road rehabilitation experience would be sufficient and that the satisfaction of either one of the two (2) categories would suffice;

(e) Neither the invitation to tender document nor the minutes of the clarification meeting held by the first respondent with prospective bidders specified or defined what constitutes road construction experience;

(f) The broadest possible meaning ought to be attached to the definition of the term 'road construction' and that the proposed Contracts Manager ought not to have scored zero.

[16] The applicant made similar allegations regarding the professional qualifications and work experience of their other key personnel and that if the key personnel were correctly and fairly evaluated and scored, then the applicant would have passed the functionality assessment and been successful in its bid.

[17] The Appeals Committee which had been appointed by the first respondent had upheld the applicant's appeal and remitted the applicant's tender to the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) in order for them to reconsider the applicant's Contracts Manager's experience and thereafter consider the remaining key personnel as they had also scored zero.

[18] The applicant contended that there was no evidence of such re-evaluation of its tender but that the first respondent nonetheless advised the applicant that the application for the tender was still unsuccessful. At this juncture, I must state that

proof of the re-evaluation by the first respondent was put up in the record before me hence the applicant's contention in this regard is incorrect.

[19] The applicant's overall submission was that the decision of the BEC and BAC to award the tender to the JV was arbitrary, irrational, irregular, unfair, unreasonable, unconstitutional and/or unlawful and that the award ought therefore to be set aside.

[20] Ms *Mtati* who appeared for the first respondent submitted that in relation to the tender price, the tender award was not a guarantee that any work would be awarded to the successful bidder.

[21] The first respondent conceded that the applicant had furnished the lowest tender price but emphasized that if the functionality assessment was not met then the tender would not be responsive and that the cheapest tender price therefore did not mean that such bidder must be appointed.

[22] In my view, the tender price quoted is not the most important criteria in determining whether the tender is responsive but rather the need for the bidder to ensure that it met the needs of the functionality assessment which is more important. This was also emphasized in the minutes of the clarification meeting.

[23] The first respondent further submitted that it is not the function of this Court to determine what the pre-requisites should be for a valid tender and such function is that of the first respondent unless those conditions are immaterial, unreasonable or unconstitutional. The first respondent relied on the decision of *Dr J.S. Moroka Municipality and Others v Betram (Pty) Limited and Another*³.

[24] The substantive requirements for the Contracts Manager's position were as follows:

(a) A particular level of professional qualification and registration; and

³ [2014] 1 ALL SA 545 (SCA)

(b) Ten years of road construction experience OR seven years of road rehabilitation experience (my emphasis).

[25] The first respondent submitted that the professional qualification of the Contracts Manager was not in dispute but rather his work experience in road rehabilitation. In its answering affidavit, the first respondent averred that road construction is actual construction of roads whereas road rehabilitation is actual construction work of rehabilitating roads. Essentially it stated that there was a difference between these two (2) concepts.

[26] I pointed out to Counsel for the first respondent that in respect of the work requirement the word “or” was used and on a plain dictionary meaning of the word ‘or’ it meant “alternate”.

[27] In respect of the re-evaluation of the Contracts Manager, following the appeal, the first respondent submitted that taking into account pavement design, material engineer and rehabilitation experience, the Contracts Manager only had fifty four months’ experience which was equivalent to four and a half years and that in calculating the said period, it relied on the two page curriculum vitae submitted by the applicant on behalf of the Contracts Manager.

[28] A perusal of the Contracts Manager’s curriculum vitae and the re-evaluation sheet did not explain why certain work experience was taken into consideration and other work experience was ignored.

[29] The Contracts Manager’s work experience from March 2009 to September 2018, save for his work experience for June 2017, appears as follows:

(a) February 2018 to September 2018 N002-200-2016/1F-SUB01: Material Engineer for the upgrade of community access roads in Lusikisiki, SANRAL – eight months;

- (b) March 2018 to September 2018: N002-200-2016/3F-SUB01: Materials Engineer for the upgrade of community access roads Flagstaff, SANRAL – seven months;
- (c) May 2018 to August 2018: rehabilitation of embankment failure on McLean Street (Umkomaas, Ethekewini Municipality - four months;
- (d) November 2017 to February 2018: Materials Engineer for detail rehabilitation design of D2023 and Enembe Roads, Mandeni Municipality – three months;
- (e) October 2017 to December 2018: Materials Manager for the detail rehabilitation design review and tender documentation for P34-3/, KZN. Department of Transport – fifteen months;
- (f) August 2017 to December 2017: Pavement Management System appointed by eThekewini Municipality to undertake road pavement assessment for the northern region with a network of 825 kilometres of flexible roadway – five months;
- (g) March 2016 to November 2017: Materials Engineer for rehabilitation of P6-5 Dundee, KwaZulu-Natal Department of Transport – twenty one months;
- (h) April 2016 to November 2017: Material Engineer for rehabilitation of P34-2 Dundee to Utrecht, KwaZulu-Natal Department of Transport – twenty months;
- (i) December 2014 to April 2015: Materials Engineer for rehabilitation of N2-24/25 Lovu River to Umlaas Canal, SANRAL – five months;
- (j) October 2009 to January 2010: Hibiscus Municipality appointment as Resident Engineer/Project Manager on road rehabilitation project – four months;
- (k) May 2009 to September 2009: KZN Department of Transport involving pavement rehabilitation, investigations pavement analysis and design and technical support – five months;

(l) March 2009 to April 2009 – SANRAL appointment as Pavement Design Technologist involving pavement investigation and materials utilization for Greytown Road Interchange and rehabilitation of the N3 between Greytown Road and Sanctuary Road Interchange – two months;

(m) March 2009 to April 2009: Pavement Design Technologist by DAEA – two months.

Analysis of submissions

[30] The first respondent in its answering affidavit does not explain what methodology was used to compute the work experience of the Contracts Manager or the reasons for certain work experience being disregarded by it. With regard to the work done during October 2017 to December 2018 the Contracts Manager was allocated four months when on a plain calculation that time period equates to fifteen months. The first respondent alleged that experience was based on duration of projects and not number of projects. It further averred that when one undertakes five projects in two months, this counts as two months' experience. Ms *Mtati* at the hearing of this matter was also unable to explain the methodology and criteria used to compute the Contract Manager's work experience.

[31] The Constitution and national legislation are clear that in order for a tender process to be fair, equitable and transparent, part of that fairness and transparency is a duty on the part of organs of state to send out invitations to tender which are clear and precise as to the requirements and needs of the specific tender. Clarity and precision will ensure that there is no room for arbitrary and illogical decisions being made in determining the outcome of tender.

[32] The need for clarity and precision was more so in this matter because in the event of the Contracts Manager or any one of the key personnel not meeting the requirements of the first respondent, all key personnel would receive a score of zero and this would automatically render the tender non-responsive. In *casu*, this is what

happened. When the Contracts Manager scored zero, all the other key personnel scored zero regardless of their levels of experience.

[33] I am of the view that the wording of the first respondent's tender invitation was not clear and precise as to what experience was required in respect of the key personnels' work experience. Further in relation to the methodology used in computing the work experience of key personnel, the first respondent was unable to explain how work experience was calculated or how a bidder would be made aware of what work experience is to be taken into account and what work experience was not be taken into account when the bid was being assessed. The first respondent as an organ of state must therefore take steps necessary to amend its invitation to tender to ensure that such invitation is fair, equitable and transparent and does not place unfair obstacles in the path of bidders.

[34] In the result, I make the following order:

(a) The decision by the first respondent to award Tender 1R-41114 titled Annual Contract for Rehabilitation of Roads located in the Central Region of the eThekweni Municipality for a period of three years to the joint venture of the second and third respondents is declared to be unconstitutional and invalid and is hereby set aside.

b) The first respondent is directed to re-advertise and commence the tender for the Central Region of the eThekweni Municipality afresh.

c) The first respondent is directed to pay the costs of this application.

SINGH AJ

APPEARANCES

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DATE OF HEARING: 27 JANUARY 2023

DATE OF JUDGMENT: 22 FEBRUARY 2023