

IN THE HIGH COURT OF SOUTH AFRICA  
BOPHUTHATSWANA PROVINCIAL DIVISION

CASE NO: 1140/07

In the matter between:

**RENAISSANCE SECURITY & CLEANING SERVICES CC**  
**APPLICANT**

**and**

**RUSTENBURG LOCAL MUNICIPALITY 1<sup>ST</sup> RESPONDENT**  
**WHITE LEOPARD SECURITY SERVICES CC**  
**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**LANDMAN J:**

[1] On 28 June 2007 I dismissed this application with costs and indicated that reasons would follow later. These are

the reasons.

[2] Renaissance Security and Cleaning Services CC, the applicant, seeks the following relief on an urgent basis:

1. That pending the finalization of the review to be brought by the applicant against the decision and/or resolution of the first respondent awarding a tender and/or contract to the second respondent (White Leopard) for the provision of security services to the first respondent:
  - 1.1 The first respondent is interdicted and restrained from implementing the aforesaid tender due for commencement on 1 July 2007.
2. The tender concluded between the first and second respondent due for commencement on 1 July 2007 be and is hereby suspended.
3. An order interdicting the first respondent to comply (sic) with the terms of the contract it has with the applicant and that the applicant be and is hereby entitled to continue providing security services to the first respondent on a month to month basis.
4. Alternative to 1.1 and 2 above, an order that the

tender awarded to the second respondent by the first respondent for provision of security services is hereby set aside.

5. That the orders in 1.1, 2 and 3 operate as interim interdicts and/or mandatory orders pending the outcome of the review to be instituted by the applicant in terms of section 7 of the Promotion of Administrative Justice Act 3 of 2000.
6. Costs of suit in the event of opposition.

[3] The application is opposed by the Rustenburg Local Municipality the first respondent, ("the Municipality") and White Leopard Security CC the second respondent.

### **The facts**

[4] On 22 September 2005, the applicant was awarded a tender to provide security services to all the buildings and premises belonging to the Municipality. The contract commenced on 1 November 2005 and continued to 31 October 2006. By agreement between the applicant and the Municipality the contract operated thereafter on a month to month basis.

[5] During November 2006 the Municipality published a tender. The Municipality invited potential bidders to submit a tender for the provision of security services

under Tender No. RLM/DTS/0061/2006/07.

- [6] The applicant submitted a tender. Other bidders, including the second respondent, submitted their tenders.
- [7] After the expiry of some 90 days, the applicant and other bidders received a letter from the Municipality's Directorate of Safety and Security informing the recipient that the bid had expired and asking the recipient to confirm the validity of the tender rates and whether "the prices are still the same".
- [8] The applicant confirmed that its prices were still valid. The applicant was not awarded the tender. The applicant was also not informed that its bid was unsuccessful. The tender was awarded to the second respondent. The applicant came to know this when the Municipality gave the applicant one month's notice to terminate the extended monthly contract. The applicant sought information about the tender but none was forthcoming.
- [9] The applicant alleges that the tender process was irregular and that the tender should not have been awarded to the second respondent. The applicant says

that it heard that it was the preferred bidder and so should have been awarded the tender.

[10] In order for the applicant to succeed it must, *inter alia*, show that the review, which it contemplates, has a reasonable prospect of succeeding even if this is open to some doubt. If it is open to serious doubt the application must fail.

[11] The applicant attacks the award of the tender on the following grounds:

- (a) The tender expired but still the tender was awarded to the second respondent.
- (b) The duration of the tender awarded was invalid; and
- (c) The award of the bid to the second highest scorer was irregular.

I proceed to consider these complaints.

**(a) Expired tender**

[12] The applicant submits that in terms of the Supply Chain Management Policy (“the SCM Policy”) of the Municipality, a tender must be adjudicated within 90

days from the date of closure of the bid. The 90 days period expired before the Municipality could adjudicate on the tender and pronounce the successful tenderer. Any tender that is not adjudicated within 90 days should be re-advertised. The tender awarded to the second respondent was irregularly awarded because it ought to have been re-advertised. It must therefore be set aside.

[13] The Municipality explains that there is nothing in its the SCM Policy which provides that any tender not adjudicated within 90 days expires and should be re-advertised.

[14] It is the practice that where the adjudication of bids submitted by interested parties takes longer than 90 days, the Local Authority confirms with bidders whether their pricing is still valid and whether their bids are still open for acceptance. This avoids a situation where time is spent adjudicating bids that might be withdrawn prior to acceptances or where persons responding to the invitation to tender are unavailable or unwilling to continue with a contract where prices have changed and it is no longer profitable to do so.

[15] A directive was issued to the Directorate of Safety and

Security. The Directorate, addressed a letter to all persons who had submitted a bid requesting them “to confirm the validity of the tender rates and if the prices are still the same”.

[16] The first sentence of this letter refers, to this bid having “expired”. This refers to the period during which pricing should remain valid and open for acceptance.

[17] The second respondent and the applicant both responded to the letter by ticking the box “pricing rates still valid” and returning it to the Municipality. This indicates that they did not believe that the tender process had ended. The contrary is true.

[18] I am of the opinion that this is a logical explanation. The applicant could not have believed that the time for acceptance of bids had expired. If it had thought so, there was no reason to confirm its prices. What would the purpose have been in doing so if the bid had expired? There is no merit in this contention.

**(b) Invalid period**

[19] The applicant states, correctly, that the advertised tender was for a duration of 17 months. The second

respondent was “awarded” the tender for a period of three years. The applicant submits that this is irregular and therefore unlawful. The tender must be set aside.

[20] The Municipality concedes that there have been recommendations and indications by the Municipality that the second respondent will be awarded a contract for a three year term. As the tender was advertised for a contract lasting only 17 months the conclusion of a three year contract under the circumstances would be *ultra vires*.

[21] The Municipality says that the contract with the second respondent will be confined to a 17 month period. No prejudice has been or will be caused to the applicant by doing this.

[22] Mr Mohkari, who appeared for the applicant, submitted that the Municipality was *functus officio* when it awarded the tender for 3 years and it was not empowered to reduce it to the 17 months as advertised. He referred to two unreported decisions.

[23] Mr Morrison, who appeared for the Municipality, contended, on the other hand, that it was permissible



to amend the acceptance of the bid with the consent of the second respondent. I doubt whether the *functus officio* rule applies in this case. The Municipality awarded the tender (which specified a 17 month period) to the second respondent. But then the Municipality entered into a contract for a 3 year duration. There is nothing to show that the tender was awarded for 3 years.

[24] The reference to 3 years in the contract concluded was a mistake. A mistake which the Municipality correctly recognises must be rectified. It can do this with the consent of the second respondent. The *functus officio* rule does not apply to the rectification of a contract.

**(c) Alleged irregular awarding of bid to second higher scorer**

[25] It is common cause that the applicant was the highest scorer. Yet it was not awarded the tender. The applicant was not advised why it was not awarded the tender. The applicant believes that the tender was awarded to the second respondent irregularly.

[26] The Municipality denies any irregularity. It says a proper understanding of the procurement process is

necessary to deal with the applicant's allegations. Clause 2(2) of the SCM Policy requires the Accounting Officer to make awards, in contracts of this nature, only in terms of the Committee System established under clause 26 of the SCM Policy. Clause 12(1)(d) of the SCM Policy requires that the Municipality follow a competitive bidding process if a tender is for an amount which would exceed R200 000.000 in contract value.

[27] Clause 26 of the SCM Policy established three committees to prepare and evaluate bids. These are the Bid Specification Committee, the Bid Evaluation Committee and the Bid Adjudication Committee. The Bids Specification Committee is responsible for establishing the specifications for the bid to be issued. The Bid Evaluation Committee evaluates the bids in accordance with the specifications issued and the points system set out in the bid documents as well as "each bidder's ability to execute the contract". The Bid Evaluation Committee sends its evaluation and recommendation to the Bid Adjudication Committee. The Bid Adjudication Committee, if it does not have authority to award a tender (as here), refers it to the Accounting Officer. See clause 115 of the Local Government: Municipal Finance Management Act 56 of 2003.

[28] The Bid Evaluation Committee noted that the applicant was currently rendering a service to the Municipality and had done so since 1 November 2005. However the Municipality continued to experience theft and other damage during the term of the applicant's contract. Points of criticism were that the applicant did not transport its guards to site as it is a standard practise in the security industry and the applicant did not supervise its guards properly. The applicant's employees came to the Municipality with industrial problems and the guards displayed a lackadaisical and average performance.

[29] The Bid Adjudication Committee recommended the award of the tender to the second respondent. The recommendation of the Bid Adjudication Committee was made on 10 May 2007. The Accounting Officer approved its recommendation on 11 May 2007.

[30] The Municipality specifically reserved to itself the right not to necessarily accept the lowest bid.

[31] The Municipality submits it had a first hand opportunity to evaluate the applicant's performance. The Municipality had concerns over the ability of the

applicant to render a high level of service and to provide good value to the Municipality. A number of incidents were experienced which caused concern. Some such incidents are:

- (a) An armed guard employed by the applicant and allocated to guard the residence of the Executive Mayor of the Municipality, accidentally or negligently discharged his firearm whilst on duty, shooting himself in front of the Executive Mayor's children.
- (b) The applicant demonstrated an inability to properly manage and deal with its employees leading to employees of the applicant seeking to involve the Municipality in the resolution of its disputes.
- (c) Guards deployed by the applicant have on numerous occasions abandoned their posts leaving Municipal assets unguarded.
- (d) Guards employed by the applicant at the Traffic Offices of the Municipality have on various occasions been accused of soliciting or taking bribes from members of the public in return for assisting them to complete documents or to jump the queue.
- (e) At the Civic Centre guards refused to attend to

allocated posts. They insisted on guarding positions inside the Licensing Department where they could solicit funds from persons not knowing how to complete forms and documents.

- (f) The Directorate of Safety and Security had to deal with incidents of discrimination within the applicant; a failure of the applicant to grant proper leave and/or sick leave to its guards; and guards employed by the applicant being afraid to speak out at what they perceived as unfair conditions of service.
- (g) A letter of complaint was received by the Directorate of Safety and Security from a member of the public on 31 May 2007. The writer complained again of incidents of bribery or corruption, involving the soliciting or taking of funds by guards employed by the applicant to assist them to avoid lengthy queues and delays.
- (h) Guards employed by the applicant were frequently found to be asleep on duty. The applicant acknowledged in writing that this problem exists resulting in lapses of security.

[32] The Municipality submits that as a public body the Municipality is required to do all in its power to avoid corrupt practises which undermine the fabric of our

society and is required to take proper steps to ensure that assets under its control are properly secured.

[33] Letters were addressed to the applicant about the problems which the Municipality experienced. The applicant replied to one such letter as follows:

**“RE: IMPROPER BEHAVIOUR OF GUARDS**

Our company is in dire need to rectify the improper behaviour of guards sleeping on duty at the mayor’s house last night.

Kindly give us a chance to take corrective measures in deploying more matured (sic) guards and we will further monitor their performance by installing base radio and guard monitors on site.

This will help us to constantly get reports from our control every 30 minutes and the house patrolled every 15 minutes all around.

Kindly give us a go ahead and install such by Monday.

Our sincere apologies in lapse of security when guards derelcted their duties.”

[35] The Municipality submits that it was obliged to reject the applicant’s bid if the applicant had failed to perform satisfactorily on a previous contract with the Municipality or any other organ of State.

[36] The Accounting Officer agreed with the conclusion of the Bid Evaluation Committee and the Bid Adjudication Committee. He says that the applicant is not the best party to provide security services to the Municipality and that its track record is not good enough.

[37] Clause 38(1)(d) of the SCM Policy provides that:

“38. The accounting officer must establish measures for the combating of abuse of the supply chain management system, which must stipulate the following:

(1) The accounting officer must-

.....  
.....  
.....

(d) reject any bid from a bidder-

- (i) if any municipal rates and taxes or municipal charges owed by that bidder or any of its directors to the municipality, are in arrears for more than three months, as reflected in an appropriate affidavit submitted by the bidder; or
- (ii) who during the last five years has failed to perform satisfactorily on a previous contract with the municipality or any other organ of state after written notice was given to that bidder that performance was unsatisfactory.” (My emphasis.)

[38] Mr Mokhare submitted that no such letter had been written. This is not so. Clearly there had been several letters to the applicant complaining about

unsatisfactory performance. The applicant has also conceded in writing that its performance has been unsatisfactory. Clause 38(1)(d) does not require that the tender committees or the accounting officer should offer the applicant a further opportunity to submit representations concerning its performance of a previous contract. The tender conditions make it abundantly clear to the tenderer that satisfactory performance is a consideration which will be taken into account. If the applicant could explain the circumstances of its admittedly unsatisfactory performance it was required to address this in its bid. It does not appear to have done so. The fact that the applicant received the highest score cannot weigh against the specific injunction to reject a bid on account of past unsatisfactory performance. This point has no merit.

[39] In the premises the applicant has not established that it has a reasonable prospect that a court of review will interfere with the tender process and the award. It is therefore unnecessary to deal with the prayer that the applicant, be permitted to continue with the monthly contract which was lawfully cancelled.

[40] In the premises the application was dismissed with costs.



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A A LANDMAN  
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT : ADV MOKHARI  
FOR THE 1<sup>ST</sup> RESPONDENT : ADV MORRISON  
FOR THE 2<sup>ND</sup> RESPONDENT : ADV MOKATE

ATTORNEYS:

FOR THE APPLICANT : S M MOOKELETSI  
FOR THE 1<sup>ST</sup> RESPONDENT : MINCHIN & KELLY  
FOR THE 2<sup>ND</sup> RESPONDENT : KGOMO MOKHETLE  
& TLOU

DATE OF HEARING : 29 JUNE 2007  
DATE OF JUDGMENT : 10 AUGUST 2007

