REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/44912

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
~~(3) REVISED.~~

26/6/18 .... DATE
.... SIGNATURE

In the matter between:

MINING QUALIFICATIONS AUTHORITY	**Applicant**
and	
IFU TRAINING INSTITUTE (PTY) LTD	**Respondent**

JUDGMENT

SUTHERLAND J

INTRODUCTION:

[1] The applicant, the Mining Qualifications Authority, an Organ of State established under the Mine and Safety Act 29 of 1996, seeks to review its own decision to award a tender to the respondent, IFU Training Institute(Pty) Ltd, which a private contractor. The applicant is an entity mandated to administer skills training schemes for the mining sector. As part of it work, it outsources such management responsibilities to private contractors. The present case concerns a project to train artisans in the Northern Cape Province.

[2] The test for such a review is the application of the principle of legality, more particularly whether the action of the organ of state was incompliance with several public procurement instruments, resting ultimately on section 217(1) of the Constitution which provides that procurement of services be "....in accordance with a system which is fair, equitable, transparent competitive and cost – effective." [1]

[3] At issue is:

3.1. first, whether the bid by the respondent, was in four respects irregular, and if so, were the irregularities material, warranting disqualification, and,

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[1] The other legislative instruments include the Public Finance Administration act, the Preferential Procurement Policy Framework Act, and Treasury regulations, See in regard to the procurement framework: State Information Technology Agency v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC); Minister of Home Affairs v The Public Protector [2018] 2 All SA 311 (SCA) at [38]

3.2. second, whether an unlawful deviation by the applicant in the award of the tender to the respondent occurred.

[4] The alleged Bid irregularities committed by the respondent are:

4.1. The absence of an original tax clearance certificate for the Northern Cape Rural College (RCNC), an entity that was to participate in the delivery of the service which was the subject matter of the tender.

4.2. The subcontracting to the NCRC of more than 25% of the tender.

4. 3 The absence of accreditation, at the time of the bid, to undertake tuition in diesel mechanics, one of the four courses constituting the training project.

4.4. The misrepresentation that the respondent had thirty years' experience in the relevant field of managing technical skills education.

[5] The alleged unlawful deviations from the tender procedure are multiple, but, in essence, is centred on plucking the respondent out from the discarded bidders bin and circumventing the competitive evaluation process to award the tender to it.

[6] The approach to such a controversy is to first determine whether an irregularity was committed and if it constitutes a ground of review, whereafter, its materiality to the purpose for which the stipulation in the bid invitation is determined.[2]

THE BID IRREGULARITIES

[7] The respondents bid was initially disqualified. The disqualification was for failing to furnish an original tax clearance certificate for the NRC college and for awarding 80 % of the tender, in terms of a subcontract, to NCRC, which was in excess of the 25% maximum prescribed by the tender specifications, that could be so subcontracted. There were further irregularities uncovered later as a result of the Auditor-General's intervention.

The grounds of the initial disqualification

The subcontracting to the NCRC of more than 25% of the tender.

[8] The relationship between the respondent and the NCRC was stated by the respondent to be a subcontract. In argument, the applicant sought to escape from this declaration.

[2] See: Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African social Security Agency and Others 2014 (1) Sa 604 (CC) [Allpay I] at [27] - [28].

[9] Respondent stated "80%" in answer to the question: "What % of the contract will be subcontracted?" Apparently, when the officials perusing the Bid for formal compliance read that statement the Bid was disqualified and not evaluated. At least, prima facie that response by the applicant's officials was proper.

[10] This statement of the Respondent is explained in the answering affidavit. It is stated that the 80% answer is a 'misnomer' because the question was misunderstood. The deponent of the applicant states that she thought the question referred to the proportion of the *performance* of the project, not to proportion of *value*.[3] The true position is said to be that only 21 % was subcontracted to NCRC. This is plain, the argument runs, from a reading of the document respondent submitted headed "costs summary".[4] In that summary it is stated that 21% of the costs are attributable to "training costs". It is claimed that this is the extent of the disbursement to NCRC. Despite the document headed a 'summary', there are no other documents comprising costs that are the source of the so-called summary, nor is it supplemented in the papers before this court. In my view, it is not obvious that the allegation in the Answering Affidavit is really supported by the details in the summary. Moreover, why and how would the reader of the question and answer know that a different meaning was attributable to the answer and that by a cross reference to another part of the bid submission the clue to an alternative and prevailing meaning could be found in an obscure reference to training costs?

[3] AA537/64.1
[4] Record, page109,

[11] The 80% answer, even if meant to mean something else, is plainly evidence of non-compliance. In my view, the decision to disqualify the respondent was justified.

[12] Was the applicant authorised to forgive such an error in the answer? No case is made out to explain upon what authority the 'error' was addressed and a sort of 'rectification' took place. This aspect is addressed again in the context of process deviations.

The absence of a Tax Certificate of NCRC

[13] The bid specifications required the bidders to furnish an original tax clearance certificate for themselves and for any other party with whom the bidder was in a relationship of a "consortium, joint venture or subcontractor".[5] The respondent had a relationship with NCRC which it itself described as that of a sub-contractor. It is common cause no tax certificate was produced at the time the bid submission window closed.

[14] There was some debate about the proper nature of the relationship, but plainly it certainly fell under the broad range in the specifications. The notion was advanced that because it was a stipulation of the project to 'work with' local TVET colleges, and NCRC being such an institution, this requirement could not really be applicable. Having regard to the broad-spectrum description of associated parties to whom such a stipulation

[5] Record: TGM 6.1, page 61.

applied this contention cannot be correct. The obsession with a subcontract is misplaced.

[15] Plainly, the failure was a material non-compliance. The demand for an original tax certificate is plainly an integrity check and was unquestionably information needed by the officials vetting the bids to be satisfied all the participants in the project were tax compliant. Its materiality to the integrity check is self-evident.

[16] The *ex post facto* production of a tax certificate showing tax compliance by NCRC is immaterial. An attempt was made to suggest that everyone would know that a TVET college such as the NCRC, does not pay income tax. Ironically by the time of hearing, a tax clearance certificate was issued by SARS and it emerges that the NCRC has a tax number. Quite for what kind of tax NCRC is accountable is not disclosed. However, the nub of the issue is the timeous production of a tax certificate for the officials of the applicant to know the tax status of NCRC at the time that they were obliged to make their decisions about the compliance with the bid specfications.

The additional grounds invoked to justify disqualification

The lack of accreditation for diesel mechanics.

[17] It is common cause that neither the respondent nor NCRC were accredited to train diesel mechanics when the bid was submitted and indeed, even now, they await,

apparently with confidence, accreditation to be conferred. They were both accredited for three other courses. The respondent, nevertheless, pitched for all four courses.

[18] The respondent plainly is not eligible to have been awarded a bid for the diesel mechanic course.

[19] Axiomatically it was a material aspect, and indeed the fact that they still wait on accreditation, years later, is exactly why it was functional to the bid to have the accreditation prior to the bid submission. It was suggested that severability of the four courses was possible. As no real case to underpin that contention is made out it must fail. The notion of a tender being awarded to different bidders for each course is in my view fanciful.

The '30 years' experience' statement

[20] It is common cause that in answer to the question: "Total number of years the company/form has been in business?" the respondent answered "30 years"

[21] The respondent had been formed as a special purpose vehicle for this project. It had no experience whatsoever of anything. The answer was, on the face of it, untrue.

[22] It follows that it was a misrepresentation. The respondent explains the circumstances under which that answer was given. Ms Francis, the 'controlling mind of

the respondent', says it is she who claims 30 years' personal experience, and she attributed her personal experience to her freshly minted company. She makes two significant statements:

22.1. "IFU was registered and incorporated in order to be the SPV through which the rights and obligations under the SLA were performed. There is nothing uncommon about this and it is in fact preferable to have a sanitized entity to fulfil a contract of this nature and magnitude" [6]

22.2. "I am the controlling mind behind IFU and bring to IFU the experience which I gained through fulfilling similar roles in other businesses over 30 years. That there was no dishonest intent is evidenced by the fact that it was disclosed that IFU was only registered in 2015 and the reference letters submitted pertained to other businesses in which I was involved"[7]

[23] The more significant issue is however is whether the statement defeated the purpose for which it was asked? The question obviously solicited experience in undertaking the function specified in the project *by the bidder.* The plain truth is that the business indeed had no experience whatsoever. Francis' claim of 30 years of experience is experience of what? The Answering Affidavit is framed in general terms and conveys no substantive information, but the bid itself included a document submitted by the respondent, as part of the company profile, headed "company

[6] Answering Affidavit at p542/80
[7] AA542/81

Information".[8] Francis' experience is described therein. It is said to extend over 25 years, not 30 years, a curious discrepancy. The main thrust is that her strengths lay in marketing. After some waffle she alludes to her having "... developed and implemented national programmes some of which focussed on skills-development and mentorship to unemployed and marginalised youth", a sentence of some vagueness. Her relevant experience is only thinly mentioned. Two other staffers are named who have 25 and 18 years' experience; their credentials reflect exposure to relevant aspects of the training project and look reasonably substantial.

[24] Assuming it was incumbent on the officials perusing the bid to cross check the statements made, they would have been unable to conclude that the controversial answer "30 years" was true, even if they grasped that the people behind the respondent were the repositories of experience. Accordingly, the answer did misrepresent the expertise available to be marshalled by the respondent.

[25] However, the bid did not call for any specific experience as a threshold to eligibility and thus the misstatement was not material in relation to an aspect of mandatory compliance. The criticism is confined to a filling in of information untruthfully. Had there been an evaluation and at that stage experience was scored for comparison, the misstatement would have been material and probably would have put the respondent at risk for that reason. However, it is not strictly necessary to decide that question.

[8] Record, page 91

THE DEVIATION IRREGULARITY

[26] The applicant was obliged to follow the procurement procedures prescribed by the Treasury.[9] The code of conduct alluded to Treasury regulation 16A6.2. The applicant was required to have a supply chain system that would process bids through a process of evaluation and thereafter adjudication. It is a formal process, and meetings of the committees were required which were to be recorded and be minuted.

[27] The respondent was initially disqualified as described above. For unknown reasons, the then CEO took an interest in the fate of the respondents failed bid pursuant to a so-called 'due diligence' exercise. He is now the ex-CEO. No evidence of any due diligence report exists.

[28] He instructed Ms Maila, the Executive Stakeholder Relations Manager, to compose a memorandum, in which the contention was to be advanced that the respondent had been unfairly disqualified. Moreover, the memorandum was to recommend the award of the tender to the respondent. This Maila dutifully did. The tender was accordingly awarded. The document does not expressly identify itself as an instrument to effect a deviation from the normal procurement process. The appointment was formalised the same day that the last supporting signature appeared on the recommendation schedule, a part of the memorandum. The contract was concluded the following day.

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[9] See: Record: 610 ff "Code of Conduct for Bid adjudication Committees.

[29] Given the critique set out above about the propriety of the disqualification on what grounds could it have been undone? The memorandum opined that the 80% answer was misunderstood, meaning that the anonymous investigator in the due diligence exercise spontaneously linked the question and answer with the summary of costs document, interpreted it and concluded that the right answer to the question was 21%. The wriggle out of the failure to give a tax certificate for NCRC is based on an unsubstantiated claim that NCRC is tax exempt, a fact belied by the later tax clearance certificate furnished.

[30] The authority to perform this act of revisionism was not authorised by the bid specifications.[10] However, ignoring that difficulty, the conclusion of what must logically have been thought to be an irregularity by the applicant in disqualifying the respondent did not proceed to the further logical conclusion that the applicant should declare the respondent a qualified competitor and allow it to go forward to be evaluated by the Bid Evaluation Committee (BEC). The decision of, in effect the CEO, was to leapfrog that step. Moreover, not only was BEC role skipped, so was that of the Bid Adjudication committee (BAC). Thus in one fluid sweep, the respondents bid was un-disqualified, not evaluated, not adjudicated and was declared the victorious winner of the tender.

[31] This wave of the wand was represented as a deviation, a procedure theoretically possible, given appropriate circumstances. No plausible circumstances to warrant it have been presented. The high point of the memorandum is to emphasis the BEE

[10] See: Minister of Environmental affairs and Tourism v Pepper Bay fishing (Pty) Ltd 2012 (4) SA 308 (SCA) at [31] [35]; Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka municipality [2014] 1 ALL SA 545 (SCA) at [10] – [15]

credentials of the respondent in comparison with the other bidders and to wax glowingly about the already signed Memorandum of understanding with NCRC.

[32] Moreover, an authentic deviation is required to be decided upon by the CEO receiving a recommendation which he then approves. In this case he was the initiator. Further a report to the Treasury was mandatory; an obvious integrity check procedure, was not made.

[33] Several arguments on behalf of the respondent, gamely but vainly offered a perspective to rescue the applicant's conduct from impalement on the spike of irregularity.

33.1. It was suggested that the BAC indeed did consider the respondents bid. This was based on a round robin type collation of signatures of 4 of the seven members, who supposedly were impressed by the Maila memorandum. The argument fails for a number of reasons: first, the other three members of the BAC were not, at least on these papers even aware of the question being put; second, the very mandate of the BAC and its function of adjudication are at odds with the idea of a round robin, which is nowhere an authorised means of decision-taking by the BAC; third, what was there to be adjudicated if the bid had never been submitted to evaluation the role of the BEC, who, it is common cause were not given an opportunity to participate.

33.2. In addition, the other prescribed features of a lawful deviation are absent. The CEO must report the deviation to the Treasury. Such a report was not made. Moreover, the absence of a minute by the BAC is another shortcoming. The round robin signature procedure was improper.

[34] The award of the tender was the outcome of an outrageous abuse of authority by the executive of the applicant. It was irregularly awarded.

The Delay in launching a review of itself

[35] As PAJA does not apply, the only rule to apply is that it was brought within reasonable time. No challenge is made that the time taken was unreasonable.

[36] The explanation for the time elapsed is that a Treasury investigation unearthed the malfeasance by the executive and from that moment onwards matters proceeded expeditiously. The Auditor -General reported on 8 July 2016, and 9 months after the award of the tender on 23 March, this application was launched on 19 December 2016.

CONCLUSIONS

[37] Accordingly, the treatment of the bid by the applicant's executive was vitiated by several irregularities. The deviation was crass and unlawful.

[38] The tender must therefore be set aside and the contract that followed upon it.

THE APPROPRIATE REMEDY

[39] The proposal advanced is that the respondent be required to continue until a new tender has been properly awarded. An order suspending invalidity pending that happening is necessary. The approach in *Allpay II* is proposed.[11]

[40] The risk of prejudice to the learners must be assessed. The Principal administrative burden seems to be carried by NCRC. The applicant suggests it can properly award a new tender within two months. No interruption in the actual instruction and training will occur, provided the termination of the respondent's role is dovetailed with its successor.

[41] The question of a forfeiture of profit was controversial. However, taking the circumstances under which the respondent came to be awarded the tender, no factor is apparent why it should retain any profit made by its efforts. In my view it unnecessary that a clear case of complicity is proven; it is enough that the award is tainted by irregularity.[12] Were it otherwise, the plea of an innocent tenderer would as matter of course outweigh the public interest. The pendulum should usually swing the other way.

[11] Allpay Consolidated Investment Holdings (Pty) Ltd Chief executive officer, South African social Security Agency and Others 2014(4) SA 179 (CC). the order granted is at page 181.
[12] Eg, Allpay II (supra)

What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils.

THE ORDER

1. Tender No MQA 13/15-15 to IFU training Institute was irregularly awarded.
2. The tender is set aside.
3. The invalidity of the tender and the contract concluded pursuant thereto between the parties is suspended pending the award of a valid tender.
4. The respondent shall continue to perform under the contract until relieved by the award of a valid contract.
5. The applicant shall within 5 days of the date of this order initiate lawful steps towards the award of a fresh tender.
6. The respondent shall, upon being called upon in writing to do so by the applicant, submit to a statement and debatement of account in respect of the tender to determine the sum of profits, if any, derived by the respondent therefrom.
7. If the accounting and the sum of profit determined is disputed by either party, the parties shall submit to expedited arbitration to resolve the dispute.
8. Upon the conclusion of the steps in (5) and/or (6) and upon the written demand by the applicant to pay to it the sum of the profits so derived, the respondent shall pay the determined sum within 60 days thereof, together with interest a tempore mora as prescribed from time to time from date of determination of the payable sum until date of payment.

9. The respondent shall bear the costs of the application including the costs of two counsel.

Roland Sutherland
Judge of the High Court
Gauteng Local division, Johannesburg

Heard: 11 June 2018
Judgment: 26 June 2018

For Applicant:
Adv Gilbert Marcus, with him
Adv Emma Webber,
instructed by Lovell Hoskins Inc.

For Respondent:
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