IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 42023/09

DATE: 8/10/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

24/09/2010
DATE

SIGNATURE

IN THE MATTER BETWEEN

AZOLA RECRUITMENT SOLUTIONS CC — APPLICANT

AND

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA — 1ST RESPONDENT

DELOITTE CONSULTING (PTY) LTD — 2ND RESPONDENT

JUDGMENT

KOLLAPEN, AJ

Introduction

[1] Section 217(1) of the Constitution of the Republic of South Africa requires that when an organ of state contracts for the provision of goods or services it must do

so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Those constitutional provisions are also mirrored in the provisions of the Public Finance Management Act no 1 of 1999, which is of application to the powers and functions of the first respondent.

The factual background

[2] The applicant in this matter responded to a call put out by the second respondent acting as agent of the first respondent calling for bids in respect of a tender for the appointment of a service provider to conduct recruitment and selection processes for the first respondent. The process that was to be followed was set out in a document called "requests for bids – general services" and it was contemplated that awards would be made by a Bid Adjudication Committee appointed by the first respondent. It was further contemplated that any such award made by the Bid Adjudication Committee would be a final award. The closing date for submissions in response to the tender was 4 March 2009 at 11:00. The request for bid document provided expressly in clause 5 thereof that late bids would not be considered and that a late bid would be considered to be any bid that arrived even one second after 11:00. The procedure for late bids would be that the bid would be returned unopened to the bidder.

[3] The applicant in response to the request for bids submitted a response which was submitted at approximately 11:15 on 4 March 2009 (fifteen minutes late). Due to an administrative error the applicant's late bid was not returned unopened as

provided for in the rules relating to the bid but was evaluated with all the other bids that had been received on 4 March 2009. The applicant's bid scored the highest of all the bids that were considered and the Bid Adjudication Committee approved the award of the tender to the applicant.

[4] This award was made on 21 May 2009 whereafter the applicant was advised in writing of a successful bid and discussions ensued between the applicant and the second respondent acting as agent for the first respondent to take the matter forward with a view to entering into a contract as contemplated in the request for bids document.

[5] It appears that some time thereafter in particular on 1 June 2009 the second respondent discovered the error made in considering the late bid of the applicant and advised the first respondent of this error coupled with a recommendation that the contract be cancelled and they then proceed to make the correct award. 0n 5 June 2009 the applicant was advised that a decision had been taken to withdraw the award of the tender to itself and that the first respondent would not be concluding a contract with the applicant.

Legal issues

[6] The applicant seeks to challenge the decision taken by the first respondent to revoke the award of the tender to itself. In support of such challenge the applicant contends that:

(a) having taken a final decision to award the tender to the applicant the first respondent was *functus officio* and was not entitled to revoke its decision;

(b) even if there was a basis on which to revoke the award of the tender to the applicant the applicant contends that any such decision had to be taken by the Bid Adjudication Committee and not by any other person;

(c) that even if the respondent was entitled to revoke the award the decision still falls to be reviewed and set aside for the following reasons:

(i) the decision-maker failed to appreciate that they had a discretion to condone the late submission of the applicant's bid;

(ii) the decision-maker failed to exercise such discretion at all, let alone in accordance with the principles set out in section 217(1) of the Constitution;

(iii) the decision-maker failed to give the applicant an opportunity to be heard prior to deciding to revoke the award of the tender to it.

7] Most of the facts appear to be common cause between the parties and the challenge brought by the applicant centres essentially around firstly the capacity and authority of the first respondent to revoke the award. In this regard there is a dispute of fact with regard to whether the first respondent revoked the award or whether the first respondent cancelled the procurement process in its entirety which cancellation carried the consequence that the award was revoked. It appears from the papers that the decision to revoke the award was taken separately from the decision to cancel the procurement process. In addition the dates of these respective decisions – 5 June 2009 in respect of the revocation of the award and 7 July 2009 in respect of the cancellation of the procurement process clearly indicates that these decisions though related were separate decisions.

A. <u>*Functus officio*</u>

[8] In terms of the request for bids document it was communicated that the decision of the Bid Adjudication Committee would be a final decision. Indeed from the record of proceedings of the Bid Adjudication Committee it was clear that all that was required beyond the decision of the committee was for the CEO of the first respondent to act on the award made. It was argued that no provision was made for the CEO to cancel or revoke the award that had been made and in this regard this was used to support the contention that the CEO was *functus officio*.

[9] In *Pering Mine (Pty) Ltd v The Director-General of Mineral and Energy Affairs* All SA 2005(4) SA 641 (T) the court held that:

> "It is trite that where an administrative official has made a decision that affects a private individual's interest, he is *functus officio* and unless the enabling statute expressly or by necessary implication gives him the authority to do so he may not re-open the decision which he has taken."

[10] However, the request for bids document and the terms and conditions incorporated therein cannot be viewed in isolation. They have to be understood

and interpreted in the context of the enabling legislation that governs the operations of the first respondent.

[11] Now in this regard it is clear that the first respondent is an organ of state and that the Public Finance Management Act no 1 of 1999 ("PFMA") applies to the operations of the first respondent. In terms of the PFMA the CEO of the first respondent is the accounting authority of the first respondent and in terms of section 51(1)(a)(iii) the accounting authority must ensure-

> "An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective."

In this regard the PFMA in terms of section 56(1) grants to such an accounting authority the power to delegate functions or to instruct officials to perform duties assigned to the accounting authority. It must be evident that the decision to establish a Bid Adjudication Committee and to entrust it with the authority to take final decisions must be a power that was delegated by the accounting authority to the Bid Adjudication Committee. While ordinarily such a decision of the Bid Adjudication Committee would be a final decision it is significant that the PFMA provides in terms of section 56(3) that the accounting authority "may confirm, vary or evoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision."

[12] Such a provision is clearly understandable in the context of the position of public entities and the ultimate responsibility of both accounting officers and CEO's of such entities.

It would be inconceivable that a delegation of authority could take place and that a CEO or accounting authority would be bound to act in terms of any decision taken as a result of such delegation which is patently wrong or patently in violation of the law. One must have regard to the fact that public entities ultimately utilise public resources and account in the public domain for the exercise of their powers and functions and under those circumstances it is clearly understandable that the residual power to revoke or vary or confirm a decision taken fits into the broad architecture of the manner in which public entities are structured and in the manner in which they are required to exercise their powers and functions. Of course such a power, when exercised must be exercised lawfully and for good reason.

Under these circumstances I am not convinced that the CEO of the first respondent was *functus officio* at the time when the first respondent revoked the award.

[13] For the reasons already given such a power continued to vest in the first respondent and the revocation of the award was consistent with the broad terms of

the power of the first respondent set out more fully in the Public Finance Management Act.

From that it must also follow that the revocation which occurred in this instance need not have been effected by the Bid Adjudication Committee. The CEO had the express authority to effect such revocation and under those circumstances the argument that the first respondent was *functus officio* when it revoked the award on 5 June 2009 is not sustainable.

H. <u>The discretion to condone late submissions</u>

[12] In this instance and save for the bid being submitted late it is common cause that the applicant's tender was in terms of the criteria determined by the first respondent the most suitable bid. The issue as to whether the late submission of the bid should have resulted in the disqualification of the bid even after it was adjudicated upon has been raised by the respondent as a term that bound the applicant entitling the respondent to resile from the award made. While such conditions with regard to the timeous submission of bids are not uncommon one must assume that their inclusion would be to advance fairness and equity amongst those who wish to tender for state contracts. There is also a public interest consideration that cannot be ignored, namely that bidders should not be able to extract any unfair advantage by submitting a bid out of time. In the formal sense one must associate oneself with the sentiments to the extent that they seek to

promote fairness and equity amongst competing parties. On the other hand one must guard against such conditions being interpreted and imposed with rigidity.

[15] It was argued on behalf of the first respondent that the conditions relating to the submission of bids constituted contractual terms and once the applicant had elected to submit such a bid the applicant was bound by the contractual terms, namely that no late bids would be considered and the respondent suggested that under those circumstances the contractual terms should take precedence.

[16] At the same time and in response to this it was pointed out that even if the conditions contained in the bid document constituted a contract its provisions were subject to the principles of administrative justice. In *Logbro Properties CC v Bedderson NO & Others* 2003 2 SA 460 the Supreme Court of Appeal held that notwithstanding that some of those conditions that would be inserted in a request for bids document were contractual in nature, they did not supersede the principles of administrative justice which continued to govern the relationship between the parties and under those circumstances some of the contractual rights and obligations would necessarily yield before the public duties and organ of state had under the Constitution. These public duties were to ensure that it acted lawfully, procedurally and fairly.

[17] It is evident, therefore, that the exclusive reliance by the first respondent on the contractual terms of the bid without regard being had to the broader principles of

administrative law cannot be sustainable and that a court is both entitled and enjoined to consider those contractual provisions against the broader context of the principles of administrative justice.

[18] The next question which must be determined is whether the contractual requirement with regard to submitting the bid in time is consistent with the principles of fairness, equity and transparency. It was a clear requirement that time was not only a formal requirement but also a substantial one which appears to go to the heart of the issue of the fairness and transparency of the endearing process. While I am mindful that our courts have cautioned against placing undue reliance on form as opposed to substance in this regard see *Millennium Waste Management v Chairperson Tender Board* 2008 2 SA 481 as well as *Minister of Social Development v Phoenix Cash & Carry Pietermaritzburg CC* 2007 3 All SA 115 (SCA) where the courts cautioned against an over-reliance on form as opposed to substance indeed where the court alluded to the possibility of permitting condonation for non-compliance with peremptory requirements in certain circumscribed instances.

[19] At the same time when a public body such as the first respondent puts out a call for tenders and stipulates a cut-off time and the consequences of any late submissions, it represents to the world at large that it will act on the process it has publicised and there must be a compelling argument that acting on and enforcing

those substantial requirements is consistent with fairness and transparency and may well indeed be demanded by the requirements of fairness and transparency.

[20] I am accordingly of the view that the cut-off time that was advertised was simply not a technical requirement. It was central in ensuring fair competition by requiring all potential bidders to submit their bids by a specified time. In this regard it also warrants mention that the fairness is not only to those who were being considered for awards but to the public at large were entitled to act upon the request for bids and to assume that the first respondent will comply with the requirements set out in the request for bid documents with regard to the time for submissions as well as the consequences for late submission.

[21] It was hardly suggested that the cut-off time was arbitrary or that its operation resulted in any unfairness or prejudice to the applicant or any other potential bidder.

[22] Under those circumstances it certainly appears to me that the contractual requirement of a specified cut-off time was consistent with the requirements of fairness and equity required in terms of the principles of administrative justice.

[23] I now deal with the issue of the discretion that the decision-maker may have had and the manner in which such discretion may have been exercised.

[24] It appears from the papers that once the first respondent had discovered the error in considering the late bid of the applicant the first and second respondent took various measures and these included consulting with National Treasury whose advice was that the first respondent not proceed with the contract on account of the irregularity. The first respondent was also advised by the second respondent that proceeding with the contract in the light of the now discovered irregularity would possibly constitute irregular expenditure.

[25] It is accordingly clear that the first respondent applied its mind to the options open to it including the option of condonation and the consequences of such options. It was probably correct in concluding that it was bound to ensure compliance with the terms of the tender including the time-limits for the submission of bids and that its scope for condonation was limited if it existed at all.

[26] The first respondent then convened a meeting with the applicant for 5 June 2009 to put forward its position and at such meeting provided proof to the applicant of the late submission of the bid by the applicant. The applicant was not able to refute the evidence provided relevant to the late submission of the bid. There were further discussions in this meeting with regard to why the bid was considered if indeed it was late.

[27] The meeting of 5 June 2009 provided the space and the opportunity for the applicant to be heard prior to the revocation of the award and I am of the view that

the decision to revoke the award is accordingly not reviewable on the ground that the applicant had not been afforded an opportunity to be heard prior to revocation of the tender to it.

[28] It warrants mention that beyond deciding to revoke the award the first respondent has also taken a decision to cancel the entire procurement process and to start it *de novo*. I believe such an approach is consistent with the requirements of fairness and transparency in that not only does it seek to correct an irregularity which appears cannot be corrected but creates the space and the opportunity for all who are interested including the applicant to have a fresh opportunity to make submissions with regard to the appointment of experts required by the first respondent.

[29] In the circumstances I am satisfied that:

(a) the first respondent was not *functus officio* when it revoked the tender to the applicant;

(b) the first respondent did apply its mind to the option of condonation of the late bid but for good reasons was not able to condone the late submission of the bid by the applicant;

(c) the applicant was afforded the opportunity to be heard before the award was revoked.

I accordingly make the following order: The application is dismissed with costs.

J KOLLAPEN
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

42023-2009

HEARD ON: 3 AUGUST 2010
FOR THE APPELLANT: ADV H BARNES
INSTRUCTED BY: BOWMAN GILFILLAN c/o SAVAGE JOOSTE & ADAMS INC
FOR THE RESPONDENTS: ADV M M RIP SC
INSTRUCTED BY: DE SWART VOGEL MYAMBO