

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

Case No. 7456/2017

In the matter between:

Aqua Transport & Plant Hire (Pty) Ltd

Applicant

and

The Chief Executive Officer of Dube
Tradeport Corporation N.O.

First Respondent

Dube Tradeport Corporation

Second Respondent

Rokwil (Pty) Ltd

Third Respondent

Judgment

Lopes J:

[1] On Wednesday the 3rd July 2017 the applicant, Aqua Transport & Plant Hire (Pty) Ltd ('Aqua') sought urgent relief from this court in two parts;

- (a) Interim relief, interdicting the second respondent, Dube Tradeport Corporation ('Dube'), from concluding a contract with the third respondent Rokwil (Pty) Ltd ('Rokwil'), pursuant to the award of a tender for the construction of bulk earthworks at Tradezone Two, located at the Dube Tradeport; and
- (b) Permanent relief, setting aside the award of the tender to Rokwill.

[2] The works are described as a very large public construction project, scheduled to take approximately 18 months' to complete, with a contract value of about R500 million. Dube is a state entity. Aqua operates within the construction and transport industry in KwaZulu-Natal, and its activities cover the general scope of civil engineering. Rokwil was the successful tenderer, and Aqua, an unsuccessful tenderer. The issue of interim relief was settled between the parties and, pursuant to an order granted on the 5th July 2017, the parties delivered answering, replying and further affidavits. The relief now sought by Aqua is:

- (a) to set aside the award of bid number DTP/RFP/32/IFR/02/2013 '*Construction of bulk earthworks at Tradezone Two located at Dube Tradeport*' to Rokwill;
- (b) to direct that Aqua's bid be scored in accordance with the original assessment of the Bid Evaluation Committee ('BEC') of the 23rd October 2016; and
- (c) to direct the Bid Adjudication Committee ('BAC') to reconsider all bids submitted in respect of the tender within a period of four weeks' from the date of the order, alternatively any equitable remedy that may be granted under the circumstances.

[3] The bids were to be assessed in three phases:

- (a) Phase one, where bids were assessed for compliance with the qualifications of the bidders, the provision of relevant certificates and the proper completion of tender documents. Non-compliant bids were excluded. Both Aqua and Rokwil were successful in passing phase one.
- (b) Phase two, where bids were evaluated for functionality, in terms of which each bidder was assessed by the BEC against various criteria and scored out of 100. Functionality was divided into two parts:
 - (i) (aa) access to bulk earthmoving equipment required;

- (bb) previous earthworks experience, requiring the hauling of 100 000 m³ of material or more; and
 - (cc) a site agent, engineer or technologist with experience in mass earthworks or similar projects, with more than 15 years' experience.
- (ii) An assessment of bidders on their environmental management plan, safety management plan, quality control practices, the experience of key personnel, relevant tenderers experience, the programme and method statement, and the location of the main bidder.

Only bids which scored a minimum of 70 percent in part one, were considered in part two. Any bid which scored less than 70 percent in part two was eliminated from further consideration. Both Aqua and Rokwil were initially successful in phase two.

- (c) Phase three, where bids were evaluated on price and preference in accordance with the 90/10 principle set out in the Preferential Procurement Policy Framework Act, 2000 ('the PPPFA').

[4] A summary of Aqua's complaints of the bidding process is:

- (a) The BEC members were briefed on the scoring guidelines for the bids on the 24th May 2016. They evaluated the bids, and on the 19th September 2016 found that four of them (including an alternative bid) were acceptable. On the 20th October 2016, after a Technical Evaluation Report (commissioned by Dube from an independent engineering firm, Delta), had been considered by the BEC, the BEC awarded Aqua a score of 94 percent in respect of part one of functionality, and 71.1 percent in respect of part two. All four bidders had passed the minimum threshold of 70 for both requirements, and progressed to the third phase.

- (b) On the 24th October 2016, the BEC determined that Aqua had scored the highest points in respect of pricing, and recommended that it be awarded the tender. The next day the BEC report was submitted to the BAC.
- (c) On the 25th October 2016 the BAC raised concerns about the BEC report, and referred it back to the BEC for reconsideration.
- (d) The concerns raised by the BAC included whether Aqua's construction programme was realistic, whether it had the relevant experience, and they questioned Aqua's methodology with regard to a shorter works programme.
- (e) The BEC then decided that all the successful bids would have to be re-assessed. The original scores and comments of the BEC members were checked against the valuation criteria as stated in the tender document, to ensure consistency in the scoring of the bids.
- (f) On the 27th October 2016, the BEC reconsidered the bids and reduced Aqua's scores for part two of functionality from 71.1 to 58.1, and disqualified Aqua from proceeding to the third phase.
- (g) The BAC eventually awarded the tender to Rokwil (at the third phase the BAC determined that the tender was to be awarded to another bidder, Sisonke Joint Venture, but this was subsequently altered).

[5] On the 5th April 2017, Aqua lodged an appeal against its disqualification. On the 28th April 2017, a bid award announcement was published in the Mercury Newspaper recording that Rokwil had been awarded the tender. Aqua addressed correspondence to the CEO of Dube, recording that the information sought by Aqua in order to enable it to process its appeal had not been provided by Dube, and that any award of the tender to Rokwil would be unlawful.

[6] The CEO of Dube responded, confirming that the final award of the contract would only be made after the conclusion of the appeal process. Correspondence was exchanged between the parties and their legal representatives. On the 10th May 2017, Aqua submitted its formal notice of appeal against the decision of the BEC to reduce Aqua's overall functionality score, and the decision of the BAC to award the tender to Rokwil.

[7] A decision dismissing the appeal was communicated by the CEO of Dube to Aqua on the 25th May 2017. Aqua complains that the CEO did not follow the requirements of the internal appeals procedures of Dube, because Aqua did not receive the reasons for the award of the bid in accordance with clause 1.1.2 of the internal appeals procedure, and there was no compliance with clause 1.1.6, which requires the CEO of Dube to notify other bidders of the appeal.

[8] Lastly, Aqua complains that the CEO of Dube sat as both judge and jury in their own cause. His committee had made the original decision, and he was the only one who evaluated the appeal against that decision. The rationale for dismissing the appeal was that the referral by the BAC back to the BEC was rational, with merit and within the powers of the BAC. The reduction of Aqua's functionality score by the BEC could not be revisited, and the CEO could find no fault with the reasons advanced by the BEC for so doing.

[9] The next step was taken by Aqua on the 31st May 2017, when it lodged a Notice of Intention to Appeal with the KwaZulu-Natal Provincial Bid Appeals Tribunal. On the 23rd June 2017 the Provincial Bid Appeals Tribunal notified Aqua that its appeal was out of time, because it should have been lodged within 5 days' of the notification of the award. No grant of condonation was possible.

[10] This review was initially brought on an urgent basis because it was alleged that construction and fencing had commenced on the site around the 28th June 2017. This has been denied by Dube.

[11] In its founding affidavit, Aqua records that it seeks to review and set aside three decisions:

- (a) The decision of the BEC to reduce Aqua's part two functionality score from 71.1 to 58.1, thus resulting in the disqualification of Aqua's bid;
- (b) The decision of the BEC to award the contract to Rokwil; and
- (c) The decision of the CEO of Dube not to uphold Aqua's appeal against those two decisions.

[12] The initial grounds of review were the following:

- (a) The referral for reconsideration by the BAC was unlawful and made on the basis of the unwarranted dictates of a third person;
- (b) The reconsideration itself was unlawful; and
- (c) The reconsideration was irrational.

[13] In Aqua's founding affidavits various allegations are made regarding improprieties having been committed during the evaluation process. This was raised at the outset of the argument, when Mr *Kemp* SC, who appeared for the applicant together with Ms *Pudifin-Jones* recorded that the applicant apologises to 'the party involved' and stated that the papers do not make out a case that the third respondent was involved in any impropriety. He persisted, however, that impropriety was, in part, revealed in the deliberate frustration of the relevant procurement laws. Mr *Kemp* stated that he would only argue impropriety in so far as the facts demonstrate conduct which was *in fraudem legis*.

[14] Mr *Broster* SC, together with Mr Suleman, who appeared for Rokwil submitted that it was not a matter of apology, but the withdrawal of the allegations of impropriety. Mr *Kemp* then replied that the applicant withdrew the statements in paragraphs 82-85 of Aqua's founding affidavit. He referred to paragraph 75 of Aqua's replying affidavit where it records that it does not rely on any fraud implicating Rokwil, but on procedural and substantive unfairness. Mr *Kemp* also withdrew the allegations in paragraph 88 of his heads of argument referring to a two-stage 'manipulation' of the tender process, and the tender process amounting to nothing more than 'a charade'.

The referral for reconsideration by the BAC:

[15] Aqua complains that the BEC had initially determined that it met part two of the functionality threshold in stage two. The BEC had been looking at functionality for approximately a month, and on the 19th September 2016 they reduced the number of bidders to four. The report was then sent to the BAC with the recommendation that the contract be awarded to Aqua. On the 26th October 2016, a mere two days' later, the BAC raised concerns about the BEC report and referred it back to the BEC for reconsideration. Aqua does not accept that there had been a re-evaluation and re-assessment of the functionality for all of the bidders. Mr *Kemp* submits that the only bidder to have been affected was Aqua. He submitted that the probabilities were strongly against errors having been committed by the members of the BEC in the initial scoring of Aqua, but no errors with regard to the other bidders. Mr *Kemp* referred to the steps taken by the BEC as set out in the documentation, which omitted to mention any meeting on the 26th or 27th days of October, 2016.

[16] Mr *Kemp* submitted that if the criteria for functionality had changed after the initial BEC decision, then all the parties should have been advised of that fact. Fairness demanded that everyone should have been able to see how the bids were scored. He submitted that Dube, as the state organ, has to justify why it has not complied with the process of fairness. 'He said that "something odd took place" when the decision was taken to eliminate Aqua and award the contract to Rokwil.

[17] The allegations of Aqua are denied in the answering affidavits, and Dube has made it clear that the scores of all the surviving bidders in phase two were examined by the BEC. They found it necessary only to amend the scores allocated to Aqua. This amendment effectively lowered the score of Aqua for part two by thirteen percent.

[18] Mr *Madonsela* SC, who appeared for the CEO of Dube and Dube together with Mr *Khuzwayo*, submitted that any documents which were omitted in the initial provision of the record by Dube, were omitted in error because of the sheer volume of the documentation, and the haste with which documents were prepared because the application was an urgent one. He submitted that the documents are now present and have been dealt with in the affidavits, and there can accordingly be no prejudice to any of the parties. Indeed, no prejudice was alleged in the sense that any of the parties required an adjournment in order to deal with matters in the affidavits.

[19] To counter to the allegations made about the meeting of the BAC on the 25th October 2016, Mr *Madonsela* referred to the record of that meeting. A number of concerns were raised by members of the BAC, based upon those highlighted in the Delta report, which had been obtained at the stage that the BEC was considering the bids. In the Delta report under 'Technical Risk Review and Assessment' it records:

'Based on the tender documentation and information submitted by the bidders and the subsequent disqualification of seven of the bidders according to the tender rules, a detail [sic] combined technical and engineering review and analysis was conducted by Delta BEC on the top seven tenders received. Please note that any possible disqualifications due to the Part 2 compliance were not considered in this evaluation as the Part 2 compliance confirmation would be done by DTPC.

This analysis was done to evaluate the complete and successful implementation and execution of the project, as well as any possible risks involved on the project based on the tender information available. The following major risks were considered and evaluated with each of the top seven bidders:

- **Impact of possible changes in any major quantities**, such as cut to fill, rock, environmental and erosion protection measures.
- **Impact on P & G s on a possible extension of time on the contract**,
- **Impact of an experienced contractor and management team.'**

[20] The report then goes on to record that the only concern or major risk is indicated in the case of Aqua. The concerns raised in respect of Aqua were:

- (a) The fact that the availability of plant and equipment to Aqua was seen as a risk because Aqua's core business is transport and plant hire. Using Aqua's stock of plant and machinery for this project would place Aqua's core business and cash flow under pressure.
- (b) Aqua's project experience, although complying with the tender request, has not been focussed on construction work, but rather on plant and equipment provision for major contracts. Lack of experience in large bulk earthwork contracts as well as major construction projects in general, increases the risks associated with Aqua.
- (c) Aqua achieved a low score for previous project experience, in respect of which it scored the lowest points of the top ten bidders.
- (d) Aqua's tender was unbalanced, with some quantities varying due to unbalanced rates, which could have a more severe impact on the re-measured contract in comparison with the other bidders. According to the procurement rules, bidders are not permitted to alter rates once a contract is accepted. That would be unfair to other bidders.
- (e) Aqua's quality plan and quality assurance scored the lowest of the top ten bidders.
- (f) There was a qualification in Aqua's tender relating to the use and the availability of water during the construction process.

- (g) There was a concern with Aqua's programme and work schedule. Out of the top ten bidders Aqua scored the lowest on the combined technical and engineering aspects and combined risk evaluation.

[21] Mr *Madonsela* submitted that it was relevant that at the meeting of the BAC on the 25th October 2016, no conclusion was reached that the matter was to revert to the BEC for re-evaluation. However, the minutes of the BEC on the 26th October 2016 record that its recommendation report had been tabled at the BAC the previous day, and the BAC had reviewed the report and referred it back to the BEC, raising concerns with the BEC report as well as the consultant's technical report (evidently Delta). It is, however, clear from the Delta report that the main concern rested with Aqua. In my view there can be no suggestion that the BAC acted improperly in referring the BEC to the Delta report.

[22] The involvement of Delta does not indicate any impropriety in the bidding process. I say this even on the basis that the bidders may have had no knowledge of Delta's involvement. It does not appear that Delta sought to introduce new requirements to the bidding process. What it clearly did was evaluate what had been placed before it, in order to establish whether or not the bids matched up to the requirements of the project. The fact that Delta's examination may have questioned aspects not required to be explicitly dealt with in the tender documents, does not mean that their consideration was unfair to the bidders. I would view the use of the independent assessment to be a wise and considered decision on the part of Dube, particularly where it assisted those having to assess the bids for Dube. Far from being the case that this was unwarranted interference, it was in my view prudent. It is significant that there are no allegations whatsoever that any of the professional members of Delta who were involved in compiling the report, were in any way connected to any of the bidders or had any other motivation, than to assist Dube in arriving at the correct award.

[23] In my view the allegations of impropriety which were withdrawn at the outset of the argument played a great part in the initial decision to bring the review application. It was only as matters progressed through the affidavits, that Aqua came to realise that those allegation were totally unfounded. They are not, however, irrelevant, because they provided the driving force fuelling the application itself. Once made, those allegations provided a momentum which was carried through to the hearing.

[24] Aqua had based its complaints of the alleged unwarranted influence of a third person or body, on the contents of the minutes of the BEC meeting dated the 24th October 2016, in which there is a reference to an anonymous letter that was received by Dube. Aqua linked the reference to that letter to a parallel process being conducted, and arrived at the conclusion that some unnamed person was persuading the BAC as to how to arrive at its decisions. The anonymous letter, however, related to the bid document itself, and the possibility of problems in the bill of quantities. It had nothing to do with the evaluation of the tenders by either the BEC or the BAC. It accordingly provided no basis for a ground of review, and was correctly abandoned by Aqua.

[25] This is more particularly so where it is alleged by Aqua that the purpose of referring the matter back to the BEC was for an exclusive focus on Aqua's scores. This is denied in the answering affidavits, and once again, no proper basis is made out on the papers to support this proposition. Indeed, Dube makes it clear in its answering affidavits that the scores of all the surviving bidders in phase two were looked at by the BEC. However, they only found it necessary to amend the score of Aqua. As the most successful bidder up to phase three, it is, perhaps, natural that the Aqua bid would have attracted careful scrutiny. The Delta report records, however, that the three best tenders with the lowest remaining tender prices were compared with the average tender price of all bidders, as well as the original Delta BEC project estimate.

The alleged unlawfulness of the reconsideration:

[26] Aqua relies on the allegation that the reconsideration was itself unlawful, because only Aqua's bid was re-assessed. This was denied in the answering affidavits. On the basis of the dicta in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) the version of the respondents is to be accepted, in respect of the disputes of fact in this regard. I can conceive of no basis for dismissing, without more, the allegations in the affidavits of Dube. Aqua has put up no compelling evidence which demonstrates that it was being unfairly treated, or that the process was unlawful.

The alleged irrationality of the reconsiderations:

[27] With regard to the third ground of review, Mr *Kemp* submitted that the reconsideration was irrational. This is because the three grounds on which Aqua's bid was re-examined do not rationally connect to the reconsideration decision, and are not fair or remotely reasonable or consistent. In fact the areas which were reconsidered were dealt with as follows:

- (a) the tenderer's experience – scores reduced from an average of 3 to 2;
- (b) the tenderer's programme, including duration – score reduced from an average of 3 to 2;
- (c) the tenderer's methodology, approach, plan, etc – score reduced from an average of 3 to 2.

These reductions are fully motivated with the reasoning set out. The effect of the reductions was to reduce the score of Aqua by thirteen percent, thus disqualifying it from stage three.

[28] These were all areas which the BAC felt should be re-assessed by the BEC. There can be no question that the BAC was obliged to consider the BEC's decision, and not merely to rubber-stamp it. In a memorandum from Delta setting out the details of how the bids were dealt with, it is recorded that in terms of the Codes of

Conduct for Bid Adjudication Committees issued by National Treasury, the BAC is required to ensure that scoring has been fair, consistent and correctly calculated and applied. In the event that the BAC was of the view that the BEC's decision was, for any logical reason to be questioned, it was obliged by its oversight function to refer the matter back to the BEC, in order to have its concerns addressed. This is exactly what it did. Dube has set-out in detail in its affidavits how the scores of each member of the BEC were re-assessed and why. The fact of the rescoring itself (and not all the scores of all the members of the BEC were adjusted), does not lend credence to any suggestion of impropriety. Any such impropriety would have to have involved all the members of the BEC because any dissenting scores would have been evident from the scoring sheets. No such allegations are made. I do not agree with the assertion that the only reasonable conclusion is that the reconsideration was fuelled by 'ulterior motives'.

The final award of the tender:

[29] Mr *Kemp* submitted that Aqua was entitled to challenge the award of the contract to Rokwil. This was on the basis that at stage three, the award should have been made to Sisonke Joint Venture ('Sisonke'), but that was not done. He submitted that a Risk Assessment Review by a firm of Quantity Surveyors, Rubiquant Construction Consultants ('Rubiquant') had been decisive in this regard, because it had highlighted the fact that Rokwil posed less risk of causing reputational damage to Dube in the event that the contract was not able to be completed, either timeously, or at all. Mr *Kemp* submitted that that award was unlawful because the result was contrary to the 90/10 system and contrary to the provision of the Constitution, the Public Finance Management Act, 1999, the Promotion of Administrative Justice Act, 2000, the PPPFA, and the Supply Chain Management Policy of Dube.

[30] There were, in fact, two Rubiquant reports, one on the 2nd March 2017 which was rejected, and a further more detailed report. This latter report considered:

- (a) The final construction drawings which had become available, but which were not part of the original tender requirements; and
- (b) A reassessment of bids to determine the capabilities of the bidders to deal with 'hard rock material'.

Rokwil was ultimately chosen as the contractor which presented the lowest risk.

[31] Aqua complained that this effectively changed the criteria set out in the tender document, and decided the bids according to criteria which was not available to the bidders. Once again, this is not a case of additional requirements being added to the tender document without advising the bidders thereof, but rather a thorough examination of the purported compliance by the bidders with the tender requirements, and the probability that any one of them, if successful, would fail in completing the contract. Tenderers were treated equally in having their bids re-evaluated. The rules of the game were not changed. Dube simply ensured that the bids were properly considered. The assessment of the bids by Rubiquant was reasonable and rational because:

- (a) Dube sought to ensure that it appointed a tenderer who posed the least risk of failure of the project.
- (b) The specialist staff of Rubiquant were able to identify risk factors and assist in assessing them.

[32] As pointed out by Mr *Broster*, Regulation 7(1) of the Preferential Procurement Regulations, GN R502 (GG) 34350, 8 June 2011, provides that the contract may be awarded to a tenderer who did not score the highest total number of points, but only in the accordance with the provisions of s 2(1)(f), of the PPPFA which provides:

'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;...'

[33] Those objective criteria are to be found in the Rubiquant report. The decision of Dube to award the contract to Rokwil is supported by the fact that Sisonke appealed against the decision of Dube which was dismissed. Sisonke have accepted that finding. Mr *Broster* submitted that their conduct is consistent with an acceptance that the process by which their bid was dismissed, was in accordance with Dube having followed the correct steps and applicable legislation.

[34] In my view, Dube, acting on the basis of the Rubiquant report applied objective criteria in deviating from the 90/10 principle and making the award to Rokwil. The aspects of the internal appeals procedure, of which Aqua complained, have been overtaken by time, and are no longer relevant. They were not pressed in argument before me.

[35] Given the conclusions at which I have arrived, there is no need to deal with the submissions of Mr *Madonsela* with regard to the standing of Aqua to complain about the third stage award to Rokwil. Suffice it to say that I agree with his submission that this matter falls within the dicta of *Cameron J* in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others* 2013 (3) BCLR 251 (CC), paras 29-35, and *Areva NP Incorporated in France v Eskom Holdings Soc Ltd & another* 2017 (6) BCLR 675 (CC). In addition, it is significant that Sisonke chose not to pursue the dismissal of their appeal. Had they viewed the procedural steps taken or the substantive result as unfair, they would, no doubt, have sought to review that decision. There is nothing reviewable about the decision of Dube, either with regard to the referral back to the BEC of the second stage deliberations, or the final decision to replace Sisonke with Rokwil.

[36] With the regard to the question of costs, there can be no doubt that the applicant improperly made allegations of impropriety on the part of Rokwil and/or Dube. The affidavits and the heads of argument are replete with nouns and adjectives designed to impugn the integrity of both of them in their conduct regarding the award of the tender. That those allegations have no merit is contained in the

withdrawal by Mr *Kemp* at the outset of the hearing. That, however, is not the end of the matter. In my view it is both unfair and undesirable that reviews are brought to court on the basis of spurious allegations of impropriety, without the facts to back them. As set out above, it was no doubt those initial allegations which led to the prosecution of the application. When matters became clearer, and it was obvious that there was no impropriety, the applicant continued nonetheless, despite the apparent apologies. Papers issued in matters such as this one, are matters of public record. The suggestion that is conveyed in the founding papers is that Rokwil and an outsourced consultant were connected and they contrived with Dube to have the contract awarded to Rokwil. Withdrawing those allegations at the outset of the argument does not easily undo the taint of suspicion created by the affidavits. If those allegations were reported, the reputational damage to all three entities may be enormous. Without evidence to back up those allegations, the entities are left in an untenable situation. They cannot defend themselves. It is no apology to purport to withdraw allegations of impropriety, but then continue to suggest that Aqua will continue to rely on improprieties as evidenced by the conduct of the parties, as will emerge in the debate! In those circumstances I am of the view that the applicant should bear the costs of the application, and on an appropriate scale to express this court's disapproval at the conduct of making such unsubstantiated allegations.

[37] In all the circumstances I make the following order:

- (a) The application is dismissed.
- (b) The applicant is directed to pay the costs of the three respondents, calculated on the scale as between attorney and client, and such costs to include those consequent upon the employment of two counsel, and the costs reserved on the 5th July 2017.

Dates of hearing:	16 th March 2018.
Date of Judgment:	21 st May 2018.
Counsel for the Applicant:	Mr <i>K J Kemp</i> SC, with Ms <i>S Pudifin-Jones</i> (instructed by Naicker & Naidoo Attorneys).
Counsel for the 1 st and 2 nd Respondents:	Mr <i>T G Madonsela</i> SC, with Mr <i>B S Khuzwayo</i> (instructed by S D Moloi & Associates).
Counsel for the 3 rd Respondent:	Mr <i>L B Broster</i> SC, with Mr <i>MZF Suleman</i> (instructed by M B Pedersen & Associates).