



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

CASE NO: D5859/2018

14/6/2018

In the matter between:

MILLING TECHNIKS (PTY) LTD

FIRST APPLICANT

RAUBEX KZN (PTY) LTD

SECOND APPLICANT

and

THE ETHEKWINI METROPOLITAN MUNICIPALITY

FIRST RESPONDENT

AQUATRANSPORT AND PLANT HIRE (PTY) LTD

SECOND RESPONDENT

ORDER

The application for the relief in Part A of the notice of motion is dismissed with costs, including those occasioned by the employment of two counsel.

JUDGMENT

Ploos van Amstel J

[1] The applicants in this matter seek an interdict, pending the outcome of review proceedings, restraining the implementation of the award of a tender to the second respondent.

[2] The first applicant is Milling Techniks (Pty) Ltd, the second applicant Raubex KZN (Pty) Ltd, the first respondent the eThekweni Metropolitan Municipality and the second respondent Aqua Transport and Plant Hire (Pty) Ltd.

[3] The applicants' case, in a nutshell, is that they were improperly disqualified from the tender process, that their bids were the lowest and that the two contracts in question should have been awarded to them.

[4] The bids were 1R – 19359 and 1R –19361 and related to annual contracts for the rehabilitation of various roads located within the northern and southern regions of the municipality, for three years.

[5] The first applicant specialises in road rehabilitation and the second applicant in road surfacing. They both form part of the Raubex Group, although each is an autonomous entity.

[6] The municipality invited tenders for four contracts relating to the rehabilitation of various roads in the northern, southern, western and central regions. The bid documents specified that no tenderer would be awarded more than two of the four contracts.

[7] The first applicant tendered for two contracts and the second applicant for the other two. Both the bid evaluation committee and the bid adjudication committee recommended that the two contracts in question be awarded to the applicants. The Manager: Supply Chain Management Compliance Monitoring of the municipality however questioned the independence of their tenders as neither of them had tendered against the other. The municipality sought legal advice, which led to the applicants' disqualification on the basis of an alleged inaccuracy in the information supplied by them in one of the bid documents.

[8] The document in question is referred to in the papers as MBD 9. It contains a 'Certificate of Independent Bid Determination' which required the bidder to certify certain matters. It recorded that the accompanying bid would be disqualified if the certificate was found not to be true and complete in every respect. Paragraph 5 of the document records that for the purposes of the certificate and the accompanying

bid the word 'competitor' would include any individual or organisation, other than the bidder, whether or not affiliated with the bidder, who could potentially submit a bid in response to the bid invitation, and provides the same goods and services as the bidder and/or is in the same line of business as the bidder.

[9] Paragraph 7 of the document contains a statement that there has been no consultation, communication, agreement or arrangement with any competitor regarding, inter alia, the intention or decision to submit or not to submit a bid.

[10] The applicants admit in the founding papers that the approach of the group was that the first applicant would tender for two of the contracts and the second applicant for the other two. The municipality's stance is that this was an arrangement between two competitors, as defined in the document, regarding the intention to submit or not to submit a bid. As such the failure to disclose this had the result that the certificate was not true and complete in every respect, and it maintains that the applicants were correctly disqualified.

[11] When I asked counsel for the second respondent whether the arrangement between the applicants could be said to amount to bid rigging or collusive tendering, he submitted that the arrangement should have been disclosed to the municipality, and that in any event it may have been in the interests of the municipality for each of the applicants to have tendered for all four contracts, in the knowledge that no tenderer could be awarded more than two.

[12] Counsel for the applicants submitted that the definition of 'competitor' in the document should be interpreted in the context of the provisions of the Competition Act 89 of 1998. There is no evidence in the papers to explain what it means to say that the applicants are in the same group. There is no suggestion that they are wholly owned subsidiaries or constituent firms within a single economic entity. Nor is there any evidence with regard to the identity of their shareholders or directors. On the facts they may well be competitors in the ordinary sense of the word. The question however is whether they fell within the definition of 'competitor' in the certificate to which I have referred. Counsel submitted that if this is the case then the content of the certificate itself is irrational and unconstitutional.

[13] These matters will have to be decided by the court hearing the review and I refer to them only because the applicants' prospects of success in the review is something which I must consider in deciding whether or not to grant an interim interdict.

[14] Both sides before me contended that the balance of convenience favoured them. The applicants say that if they are successful in the review the second respondent will have completed a not insignificant part of the work and if they only take over at that stage they would have lost a substantial amount of money. The municipality contended that it is undesirable for the rehabilitation of the roads to be delayed pending the outcome of the review as it is important that the work be done. The second respondent contended that the applicants' prospects of success in the review are poor, that the contracts were lawfully awarded to it, that it is entitled to start the work and that it will not be in the public interest to delay the maintenance and rehabilitation of the work, which includes the repair of potholes.

[15] I have come to the conclusion that the applicants have failed to establish a sufficient balance of convenience in their favour, and it does not seem to me that their prospects of success on review can tilt the scale in their favour in this regard. The matter may obviously appear different when the record has been supplied and all the papers in the review are in.

[16] The application for the relief in Part A of the notice of motion is dismissed with costs, including those occasioned by the use of two counsel.

PLOOS VAN AMSTEL J

Appearances:

For the Applicants : S Grobler

Instructed by : Peyper Attorneys

c/o Shepstone and Wylie Attorneys
Durban

For the First Respondent : S K Xolo

Instructed by : Nkosi and Associates
Durban

For the Second Respondent : G D Harper SC (together with) T Palmer

Instructed by : Larson Falconer Hassan Parsee Inc.
Durban

Date Judgment Reserved : 05 June 2018

Date of Judgment : 14 June 2018