FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: A159/2015

In the review between:

THE MEMBER OF THE EXECUTIVE COUNCIL POLICE ROADS & TRANSPORT, FREE STATE PROVINCIAL DEPARTMENT — Applicant

and

RITCOM (PTY) LTD — 1st Respondent
MASS MEASURING SYSTEM (PTY) LTD — 2nd Respondent
TREK SCALE COMPANY (PTY) LTD — 3rd Respondent

CORAM: JORDAAN *et* MOLOI, JJ

JUDGMENT BY: JORDAAN, J

HEARD ON: 19 NOVEMBER 2015

DELIVERED ON: 3 DECEMBER 2015

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[1] The applicant applies for the review and setting aside of the award of a tender for the installation and supply of weighbridges to the department awarded by itself to the first respondent.

[2] After the award of the tender and after it became clear that the applicant refused to enter into a service level agreement to give effect to the award of the tender and intimated that it

cancels the award, the first respondent, in another application, brought an application to compel the applicant to give effect to the award of the tender and to enter into the required service level agreement. Thereafter the applicant brought an application to stay the respondent's application pending the present review application which was filed in the meantime.

[3] By agreement between the parties, all three applications were consolidated and argued before us. It was common cause that the determination of the review application would in all probabilities determine the fate of the other applications as well. In view of that I will deal with the present review application at the outset.

FACTUAL BACKGROUND

[4] It appears that the first respondent at some or other stage and for an unknown reason became aware or thought it fit to make a proposal to the department in regard to the installation and supply of weighbridges for the department. For that purpose representatives of the first respondent met with the MEC of the applicant as well as a panel of several "committee members" during which meeting they explained their proposal. They were told that unsolicited bids cannot be entertained at this stage and that they should await an invitation for proposals. Eventually the department (applicant) invited tenders for the installation and supply of five weighbridges at different venues in the Free State.

First respondent was among the entities that responded to the invitation and submitted tenders. Second and third respondents were also part of the entities that submitted tenders.

[5] After the close of tenders, the tenders were evaluated by the bid evaluation committee (BEC) and after that by the bid adjudication committee (BAC). Both recommended the award of the tender to the first respondent.

[6] Shortly after the recommendation by the BAC, the head of the department, in writing, awarded the tender to the first respondent, subject to entering into a service level agreement between the parties. The award was for a contract price of R19,150 million. The BAC, in the meantime, requested the BEC to elucidate the vagueness as to the amounts involved in the tender of the first respondent in that, in some of the documents the tender price was shown as R1,915 million whilst the report of the BEC reflected the tender amount to be R19,150 million. The letter of appointment by the head of the department was made before any response from the BEC to the queries of the BAC.

[7] Shortly after the first letter of appointment the head of the department issued another letter of appointment to the first respondent indicating that the amount of R19,150 million in the first appointment letter was erroneously mentioned and

that the amount of the appointment letter should, in fact, be R1,915 million. In a further later letter the head of the department purported to cancel the award of the tender to first respondent on the basis that budgetary constraints prevented the continuation of the project. That led to the application by the first respondent to compel the department (applicant) to give effect to the award of the tender and enter into a service level agreement with the first respondent.

[8] As foresaid, the first respondent’s application to compel was opposed by the present applicant, in turn seeking an order staying the application by first respondent pending this review.

ALLEDGED GROUNDS FOR REVIEW

[9] In this application the applicant relies on various grounds for review which boils down to an allegation that the BEC and BAC did not apply their minds correctly, made their recommendations on insufficient ground and for insufficient and irrational reasons and further that the award of the tender and the tender process was as a result of bias and miscalculations in favour of the first respondent and the whole process was not fair, equitable, transparent, competitive and cost efficient.

SUPPLY CHAIN MANAGEMENT POLICY OF APPLICANT

[10] The applicant's supply chain management policy requires the bid specification committees to draft specifications in an unbiased manner to allow all potential suppliers to offer their goods or services in a competitive environment. It requires all specifications to be approved by the accounting officer or his delegate prior to the publication thereof in the invitation for bids.

[11] In regard to site meetings or information sessions the procurement policy prescribes that site meetings and information sessions shall be aimed at enhancing the understanding, for potential service providers, of specific requirements of the department as specified in the bid documentation. Proper minutes of such meetings have to be compiled and would serve as the only formal record of what transpired at the meeting and it expressly forbids any verbal communication to have any contractual standing.

BID SPECIFICATIONS

[12] In the request for proposals and in the bid documents the specifications and requirements are set out in paragraphs 1.2 and 1.3 thereof. What was required is set out as follows:

> "**Specifications:**
>
> The design, construction, supply and commissioning of five (5) heavy duty road weighbridge specified as follows:-

Deck/Platform size:	22m x 3m consisting of four (4) platforms each measuring 3m; 6m; 7m; 6m; consecutively
Capacity	80 000kg
Point Loading:	Maximum of three axles @ 1375mm centres with a maximum of 10 ton per double wheel axle
Division size:	0 – 14 ton = 20kg
Type of design:	Full Electronic Sixteen (16) load cell design – four (4) load cells per deck
Profile:	300mm
Type of installation:	Above surface, low profile, fitted with side rails
Instrumentation:	Model KI-100 digital indicator : Personal Computer : Laser Jet printer :Standard Weighbridge Data Processing Software package (Info Weigh) compatible to Windows : Surge Protection System Optional Extra: 1kVA UPS Special Paint Finish for harsh environments
Warranty:	A full warranty must be inclusive together with the calibration cycles within the warranty period

FOUNDATIONS

Civil design, bending schedule and fixing, form work and casting of concrete to house the above mentioned weighbridge.

1.3 APPOINTMENT OF THE SERVICE PROVIDER

The service provider with the relevant product & SLA in line with the law enforcement need will be appointed for the procuring of multi deck weighbridges.
The service provider must install the multi-deck weighbridges, calibrate and maintain them
Training of Traffic Officers must be conducted on the new multi deck weighbridges."

FIRST RESPONDENT'S TENDER

[13] The tender of first respondent can best be described in the words used by the deponent on behalf of the respondent:

> "In this regard it is apposite to point out that the first respondent provided a one stop solution, covering not only the building of state of the art weighbridges but also the provision of all the software, management of the weigh-in and also offered solutions regarding the offloading and ensuring proper road safety during the offloading and rectification of incorrect loads taking place. Provision was made for satellite tracking as well as the proper procurement of evidence for the purpose of enforcing the fines to be imposed in criminal court and/or any institution created for the enforcement of traffic fines."

[14] First respondent's stance is further described as follows:

> "From experience in tendering for contracts it is clear that a party inviting a tender may not have the entire process or solution in mind. Therefore, it is advisable that parties and especially

> people like the first respondent with the specific skills set include in their proposal as a response to the invitation to tender, proposals as to what would be a more successful solution for the problem that government or the public body is confronted with and as in this case to limit capital expenditure from existing funds and providing for the income generated by the project itself to pay for the full development of the project to its optimal capabilities."

[15] First respondent describes its tender as an "alternative option" to government than merely have a contractor supply weighbridges without the successful party having the responsibility to also successfully manage and ensure that the purpose for which it was build is brought to fruition.

[16] First respondent continues to state that:

> "The proposal made by the first respondent offered a solution that was not even contemplated by all of the other parties and in my humble opinion forms part and parcel of the responsibility of potential tenderers in order to provide a better solution than that initially anticipated by the authors of the bid document."

[17] First respondent is of the opinion that their bid opened up:

> "A new way of thinking that might not only be to the benefit of the Free State Province but hopefully to the larger South Africa in ensuring that overloading of trucks, which is a large contributor to road accidents and the deterioration of already under pressure South African road network, to be properly addressed."

[18] First respondent describes it tender as having a "competitive edge." The deponent on behalf of the first respondent points out that it tendered for managing the whole project for a period of 5 years but was awarded the tender for only a period of 3 years. In that regard it alleges that it indicates the rationality of the decisions because it cuts away a large portion of the profit of the first respondent (which it would have made had the 5 year period been granted).

[19] In summary the first respondent tendered not only for the supply and installation of the weighbridges or the calibration thereof and training of staff but for the whole project to be managed by the first respondent after installation of the bridges. The tender foresaw that first respondent would manage the actual weighing of loads at a price of R210 per weigh and specified a minimum liability towards first respondent of 50 weighs per weighbridge per day. It becomes clear that first respondent's way of the proposed dealing with the tender would entitle it to a vast amount of profit, exceeding the tendered amount by far. In this regard, after the applicant refused to continue with the project, the first respondent approached the Free State Government with an offer of settlement which recorded that the first respondent's loss amounted to somewhere in the vicinity of R180 million over the 3 year period. First respondent calculated that amount by the expected numbers of weighs

per day per weighbridge which according to them amounted to about 200 weighs per day and multiplied by 5 weighbridges over the period of the tender would amount to approximately R180 million. In the settlement offer they proposed being paid R17,55 million as damages.

[20] First respondent justifies the way in which it tendered for management of the whole project in the following way:

> "26.1 The contents of the site visits and the disclosures that were made as to what the purpose of the weighbridges were, has not been included in the record of decision.
>
> 26.2 The minutes of all meetings and the clarification meetings have not been included.
>
> 27.1 From this it would have been clear that the department was looking for more than just a building weighbridge.
>
> 27.2 What the government wanted was a solution for the law enforcement of overloading was proposed in the tender document by the first respondent and proved as such when tender was awarded to first respondent." (sic)

In continues to state that:

> "A request for proposal includes any expansion or development of the tender as was done by the first respondent."

[21] It alleges that during the clarification meetings and the briefing sessions the real requirements of the department

were expanded upon and fitted with the proposals that were finally submitted by the first responded.

[22] On the strength of the BEC evaluation report that was submitted to the BAC, the first respondent alleges that the second respondent also envisaged a one stop solution alleging that that is apparent from paragraph 4.1.1 of the BEC's report. First respondent alleges that it appears from the said paragraph that the second respondent also provided for prosecutions that were foreseen and constituted a portion of their quote, but which was not measurable on the basis that it was provided for in the tender.

WAS THE SPECIFICATION EXTENDED?

[23] It is significant that the first respondent does not explicitly state what the alleged expansion consisted of. What it states is that it would have been clear from the minutes of the clarification meetings that the department was "looking for more than just a building of weighbridges". One would expect that, if the specifications required were extended or amended, specific requirements would have been spelled out instead of a general allegation that the department was looking for more than just the supply of weighbridges.

[24] Secondly, it appears that no minutes were held of the aforesaid clarification meetings which are compulsory according to the procurement policy of the applicant. What

is more, such minutes would, in terms of the procurement policy, be the only admissible evidence of what transpired.

[25] Thirdly, the reliance on paragraph 4.1.1 of the BEC's evaluation report is totally misplaced. It states that Mass Measuring System (second respondent) did not clearly specify a loading charge. The fact is that the tender of the second respondent did not specify any loading charge for the simple reason that it did not tender for any participation in the weighing of loads or participation in the management of the weigh bridges once they were installed. The reference in the BEC's evaluation report to the amount of R47 600,00 per magisterial district (which the BEC regarded as applicable to 66 magisterial districts or courts) were not tendered for by the second respondent on the basis of taking part in the obtaining of evidence or prosecution at all. What was referred to in the said tender was described as optional items for the supply and installation of a section 56 prosecution system and secondly the loading of charge codes for each magisterial districts for the prosecution module on the software. It explicitly stated that the amount of R47 600,00 is only applicable to such magisterial district in which the weighbridge is located. It is clear that only 5 five districts were involved. The remark by the BEC that the tender of second respondent contains hidden costs is totally misplaced. The optional items referred to above were quoted for on a once off basis. On the contrary, the hidden costs were indeed contained in the tender of the first

respondent as clearly appears from its allege claim for damages in the amount of R180 million.

If first respondent wished to rely on an expansion of the project and specifications, much more specific allegations and convincing argument were required. I am not persuaded that the specifications as required and set out in the bid documents were extended or amended in any way.

LEGAL REQUIREMENTS

[26] The legal principals applicable to matters of this kind has been restated in the decision of **Allpay Consolidated v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC). As far as it is or may be applicable to this matter the following can be stated:

> "If a ground for review is established, then the decision under review must be declared unlawful and set aside." (page 614 para [25])

[27] Deviations from a fair process may in themselves be systems of corruption or malfeasance (page 615, para [27]).

[28] The system used to evaluate tenders must be, in compliance with section 217 of the Constitution, fair, equitable, transparent, competitive and cost effective. (page 616, para [31])

[29] An "acceptable tender" is a tender which in all respects complies with the specifications and conditions of tender as set out in the bid documents. (pase 617, para [34])

[30] Tenders must be comparable: competitors must be treated equally in that they all should be able to tender for the same thing. (page 619, para [39])

<u>DISCUSSION</u>

[31] As already alluded to, the tender of the first respondent went way beyond the required specifications. It was therefore not comparable to the tenders of competitors at all and made it impossible for competitors to be treated equally. First respondent's tender was not an acceptable tender because it did not in all respects comply with the specifications and conditions of the requirements set out in the bid documents.

[32] I have already pointed out that the BEC's appraisal of the second respondent's tender was totally misconceived. In the evaluation of the financial proposal it is stated that the proposals were "interpreted" as to the amounts set out in paragraph 5 of the report. It then specifies that the first respondent's bid amount amounted to R19,150 000,00 whilst that of second respondent amounted to R8 644 288,66. The BEC then commented that the committee noted that the highest points scored for price is 98 points making the first respondent the highest in terms of

the 90/10 principle. The committee does not even state what points were awarded to the second respondent whose bid amount was clearly less than half of that of the first respondent. On that score, first respondent could never have scored the highest points for the financial proposal.

[33] After the initial award of the tender to first respondent and in reply to the enquiries of the BAC, the BEC submitted a further report on the 14 August. In that report it has suddenly split up first respondent's financial proposal into 3 years resulting in a first year amount of R5 240 000,00. The committee then referred to the second year and third year's costs according to the first respondent's tender and concluded that the financial proposal were again interpreted to reflect first respondent's financial proposal to be an amount of R5 973 600,00 and that of second respondent the amount of R8 644 288,66. In effect the BEC did not compare the total bids of the two respondents but only the first year's bid of the first respondent and the full amount of the second respondent's bid. The inference is irresistible that that was done in order to favour the first respondent and biased in favour of first respondent.

[34] The aforesaid way in which the BEC dealt with the comparison between the two respondents was obviously not fair, equitable, transparent or competitive. The two respondents were obviously not treated equally.

[35] Taking into account the evidence as a whole, it is also almost an irresistible inference that the unsolicited bid of the first respondent even before proposals were invited led to the invitation for proposals and secondly to a biased evaluation of proposals in favour of first respondent.

[36] The process and the award of the tender to first respondent is obviously contrary to various prescripts of the Promotion of Administrative Justice Act, no 3 of 2000. There is at least a reasonable suspicion of bias as meant in section 6(2)(a)(iii) of the Act. The decision was taken by considering irrelevant considerations and failing to consider relevant considerations as required and meant by section 6(2)(e)(iii) of the Act. It was also obviously taken arbitrarily by purposely not comparing the full tender amount of first respondent with the full tender amount of second respondent. The decision was obviously not rationally connected to the information before the BEC and BAC as meant in section 6(f)(ii)(cc) of the Act.

CONCLUSION

[37] In view of the aforesaid I have no doubt that various grounds for review were established. The award of the tender to first respondent has to be set aside. In my view it is not necessary to set aside the recommendations of the committees that preceded the award of the tender since that is of no legal effect as far as any of the respondents are concerned. It would be sufficient to set aside only the

award of the tender. It is also evident from the applicant's papers that it does not wish to continue with the project at this stage and there is no reason to remit the matter to the applicant for reconsideration.

[38] The application for review was brought well out of time and at a late stage for which purpose the applicant sought condonation. That was not contested by first respondent in argument before us. In view of the obvious success on the merits, condonation should be granted.

[39] As far as the application by first respondent to compel applicants to enter into a service level agreement is concerned in application number 683/2015, it obviously had no merit in view of the findings above and has to be dismissed with costs. The application by the applicant under case number 4160/2015 to stay the aforesaid application was obviously well founded and although no specific order has to be made at this stage, the costs thereof have to be decided. In view of the fact that the said application was obviously well founded, there is no reason not to award the costs of that application to the applicant as well.

[40] In relation to the different applications, they were from time to time postponed by agreement and agreed that costs should stand over. In some instances costs orders were made against the party requesting postponements which

does not have to be dealt with again and remains unaffected by this order. Counsel for both parties were in agreement that costs should follow the result in all of the applications and no specific argument was raised as to costs that stood over. On behalf of the applicant it was prayed that any costs orders should include the costs occasioned by the employment of two counsel. No objection was raised against this request and I am convinced that the employment of two counsel was justified.

[41] Subject to my learned brother concurring, the following orders are granted:

A. In the review application number A159/2015:

1. Prayers 1 and 3 are granted, and the award of the bid to first respondent is set aside.
2. The first respondent is ordered to pay the costs of the application, including any reserved costs and including the costs occasioned by the employment of two counsel, where employed.

B. In application number 683/2015:

1. The application is dismissed with costs including all reserved costs and the costs occasioned by the employment of two counsel, where employed.

C. In case 4170/2015:

1. The respondent is ordered to pay the costs of the application including any reserved costs and

including the costs occasioned by the employment of two counsel, where employed.

A. F. JORDAAN, J

I concur.

K. J. MOLOI, J

On behalf of the applicant: Adv. N. A. Cassim SC
With C. Georgiades
Instructed by:
State Attorney
BLOEMFONTEIN

On behalf of the first respondent: Adv. G. J. Scheepers
Instructed by:
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