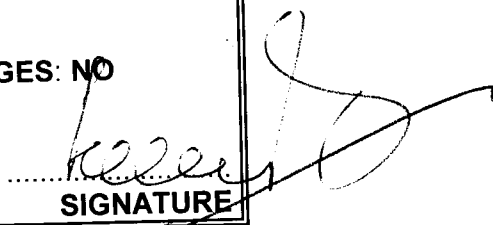


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/07/2013
CASE No. 8895/2013

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
12 July 2013 DATE
 SIGNATURE

In the matter between:-

MAGASANA CONSTRUCTION CC

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

**REKHUDITSE CONSTRUCTION AND CLEANING
SERVICE CC**

Second Respondent

QUEENS BUILDING CONSTRUCTION CC

Three Respondent

MATUKANE CONSTRUCTION CC

Fourth Respondent

**MAWAJA MANAGEMENT & DEVELOPMENT
PROJECTS CC**

Fifth Respondent

BANKUNA ENGINEERING & CONSTRUCTION CC

Sixth Respondent

MOTHEI CONSULTING ENGINEERS CC

Seventh Respondent

SPLISH SPLASH CONSTRUCTION CC

Eighth Respondent

JUDGMENT

.../...

Van der Byl AJ:-

Introduction

[1] This is an application, in addition to a punitive order of costs and incidental relief, for a final order in terms of Part B of the Notice of Motion -

- (a) reviewing and setting aside the decisions of the Municipality's Bid Evaluation Committee, the Municipality's Bid Adjudication Committee and the Municipal Manager;
- (b) declaring any agreement that may have been concluded between the Municipality and the Second to the Eighth Respondents to be invalid;
- (c) remitting the adjudication of tender CB100/2012 to the various Municipal Committees and officials for reconsideration.

[2] On 1 March 2013 when this matter was enrolled for hearing of Part A of the Notice of Motion, an order was granted by agreement between the parties in terms of which, *inter alia*, the First Respondent agreed not to give effect to the execution of Tender CB100/2012 pending the finalization of Part B of the Notice of Motion and the question of costs of Part A, as well as the appearances on 28 February 2013 and 1 March 2013, was reserved.

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[3] The application is not opposed by the Second to Eighth Respondents.

[4] It is common cause -

- (a) that the Applicant and, *inter alia*, the Second to Eighth Respondents submitted bids on Tender CB100/2012 (*"the tender"*) for the Maintenance, Rehabilitation, Upgrading and Installation of Stormwater Systems, Repairs to Paved Surfaces in Regions 3, 4, 5, 6 and 7, if and when required for a three year period;
- (b) that the Applicant's bid was, after, due to some errors made by the Applicant in its tender, having been corrected or adjusted by officers of the First Respondent from R5 553 077,50, for a total amount of R5 833 077,50 per region;
- (c) that the tender -
 - (i) in respect of Region 3 was awarded to the Second Respondent at a total tender amount of R7 281 434;
 - (ii) in respect of Region 4 was awarded to the Third Respondent at a total tender amount of R7 442 204;
 - (iii) in respect of Region 5 was awarded to the Eighth Respondent at a total of R8 324 103;

.../...

(iv) in respect of Region 6 was awarded to the joint venture of the Fourth and Fifth Respondents at a total tender amount of R9 706 870;

(v) in respect of Region 7 was awarded to the Sixth Respondent at a total tender amount of R9 839 634,85.

[5] As provided in regulation 26 of the regulations made under the Local Government : Municipal Finance Management Act, 2003 (Act 56 of 2003), the process of evaluation and adjudication of bids involves at least three steps -

- (a) **firstly**, an evaluation of bids by a bid evaluation committee with the duty, as the name indicates, to evaluate all bids submitted on a tender invitation;
- (b) **secondly**, a bid adjudication committee to adjudicate the evaluation made by the bid evaluation committee and to submit a report with recommendations to the municipal manager;
- (c) **thirdly**, a final decision by the municipal manager.

[6] Both the Bid Evaluation Committee and the Bid Adjudication Committee recommended, and the Municipal Manager approved, that the Applicant be eliminated or disqualified because -

- (a) the Applicant's bid displayed an "*unbalancing of prices*" (**record pp. 67 and 68,**

.../...

Annexure A1);

- (b) the overall value of the Applicant's tender was beneath a pre-determined threshold (**record pp. 67 and 68, Annexure A1**);
- (c) it imposed a unilateral condition in form RDE 2 (**record p. 319**) to the effect that it will not be held "*responsible for damages to any cables if are (sic) not marked on drawings*" of the Municipality (**record p. 67, Annexure A1**).

[7] The decision to eliminate or disqualify the Applicant is now challenged in this application on the basis, as contended in the heads of argument filed on behalf of the Applicant and elaborated upon in argument, that the decision infringed its right to a fair and just administrative process.

[8] The Applicant's challenge is based on what is contained in a report of the various committees submitted to, and approved by, the Municipal Manager (**record pp. 50 to 79D, Annexure A1**).

[9] The report of the Bid Committee (**record p. 52**) in so far as it relates to Tender 4, being the Applicant's tender, reads as follows:-

"Tender 4 of Magasana Construction tender very low for the items in the bill of quantities for Region 3, 4, 5, 6 and 7

1. B001.02 (LI) Locating existing services
2. B002.04.01 Dumpy level
3. B002.04.02 Tachometer

.../...

4. B002.04.03 Survey assistant

Item	Description	Qty	Unit	Tenderer's rate
	Preliminary and general charges			
001.01	01 Fixed charges	-	Amount	R0.00
B001.02	(L1) Locating existing services	12	Per month	R0.00
B002.04	Provision of survey equipment and assistants			
B002.04.01	Dumpy level	5	day	R0.00
B002.04.02	Tachometer	5	day	R0.00
B002.04.03	Survey assistant	10	per person/day	R0.00

Item B001.02 (LI) : Locating of existing services

The bidder put a R0.00 rate and this resulting in unbalancing of rate (Pricing instruction Part C2.2 page C2.1.3). Failure to price the above item transfer the risk to the City Council as the tender did not price for locating of existing service. The item is critical as the overall works entails construction (digging excavation), maintenance and refurbishment of infrastructure and services.

The tender further stated in the form RDE 2 (p. 319 of the record) (Proposed amendments page 33 of 33 : Part T2) that (sic) won't be responsible for damage of services if the services are not in the plan and this statement impose the risk to the City Council, as this item according to Tshwane standard and specifications states that this item includes searching for services and supply or hire and use of specialized

.../...

detecting equipment and drawing up the services found, this means that the contractor is responsible for locating the services which are not indicated or supplied on the drawings.

Tender 4 Magasana Construction has tendered too low for the following items in the bill of quantities for region (sic) 3, 4, 5, 6 and 7

1. **B001.04.05 Provision of personal protective clothing and equipment**
2. **B505.09.02 Interlocking precast concrete block pitching**

Quotations have been obtained to motivate the low pricing in the bill of quantities of tender 4 that of Magasana Construction see table below and **Annexure B**

Item	Description	Qty	Unit	Tenderer's rate	Safety & Overall house
B001.04.05	Provision of personal protective clothing and equipment	1800	per worker per month	R2.00	R592,42

The prices obtained by this section for evaluation purposes are for the materials needed for supplier of Armorflex 180 only. The transport and installation cost still need to be taken into account.

Item	Description	Qty	Unit	Tenderer's rate	Technicrete
505.09.02	Interlocking precast concrete block pitching: Armorflex 180 or similar	2000	m ²	R20.00	R138.00

Conclusion

These prices are reason for the dismissal of the tender 4 because the tender has unbalancing of prices that will impose the risk to the municipality and also the amounts tendered are below the market purchase price of the materials as per attached quotation received from various suppliers and the tender will not be able to do work that form crucial part of the tender.

It is therefore recommended that this tender be disqualified.”.

.../...

[10] These considerations must in my view be seen against the background of a bill of quantities prepared and updated from time to time by the First Respondent (**pp. 2326 to 2378 of the record of the proceedings**).

[11] The bill of quantities is a document which is regularly from time to time updated due regard being had to expansions of townships taking also into consideration inflation.

[12] In this regard the evidence shows -

- (a) that the First Respondent from time to time embarks on a process of supply market analysis which is a technique used to identify market characteristics for specific goods or services so as to develop effective procurement strategies;
- (b) that the supply market analysis also helps to manage risk by identifying and analysing how favourable the supply market is and the probability of supply market failure;
- (c) that for this purpose engineering consultants were appointed to draw up bills of quantities to determine the lowest possible value of the works and the highest possible value of the works;
- (d) that any entity that submits a tender below the lowest threshold or in excess of the highest threshold is as a general policy automatically disqualified.

[13] This policy has at all times been followed in order to avoid the following problems once a contractor has been appointed -

- (a) that a contractor cannot complete the works due to cash flow problems because where the contractor is to provide goods and render services at a rate which is not financially sustainable;
- (b) that a contractor delivers substandard goods and services to increase his profit margin;
- (c) that the contractor compromises on labour costs to compensate for the low profit margin on other aspects of the works which may lead to labour unrest;
- (d) that if a contractor cannot comply with the terms of the agreement which often leads to the cancellation of the agreement and the procurement process will have to start afresh to appoint a replacement.

[14] The market analysis pegged the value of this contract at an average of R8 838 575 per region (**pp. 2340 to 2378 of Record of Proceedings**) which is for obvious reasons not beforehand made known to prospective tenderers.

[15] Because of this value of the contract it is in terms of the Construction Industry Development Regulations, 2004, rated, as is apparent from the tender documents (**record p. 247**), as a tender falling under Category 6CE which means that no contractor

.../...

not falling under that rating is entitled to tender ***Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd 2010 (4) SA 359 (SCA) at 361H, para [3]***.

[16] Although not accepted as a hard and fast rule the First Respondent accepted the CIDB value range, being a value between R6 500 000 and R13 000 000 as the range within which it was prepared, as a tool or yardstick, to consider all tenders received.

[17] The following appears from this bill of quantities in relation to the disputed items, namely -

- (a) Item B001.02 - (L1) Locating existing services - R1 500 per month (total R18 000 per month) as opposed to the R0.00 rate quoted by the Applicant;
- (b) Item B002.04.01 - *Dumpy level* - R50 per day (total R250 per day) as opposed to the R0.00 rate quoted by the Applicant;
- (c) Item B002.04.02 - Tachometer R50 per day (total R250 per day) as opposed to the R0.00 rate quoted by the Applicant;
- (d) Item B002.04.03 - Survey assistants R50 per day (total R500 per day) as opposed to the R0.00 rate quoted by the Applicant;

.../...

- (e) Item B001.04.05 - Provision of personal protective clothing and equipment R540 per worker per month (Total R972 000 per month) as opposed to the R2.00 rate quoted by the Applicant;
- (f) Item 505.09.02 - Interlocking precast concrete block pitching: Armorflex R320 per m^2 day (total R640 000) as opposed to the R20.00 rate quoted by the Applicant.

Applicant's case

[18] Notwithstanding voluminous and various sets of papers and annexures, consisting of a record of some 4 081 pages, filed in this matter in which numerous allegations are made criticising the basis for the decision as set out in the report quoted above, it would appear, as is apparent from the heads of argument filed on behalf of the Applicant and elaborated upon during argument, that the Applicant's case is based, generally, on the contention that the disqualification of its tender violated its right to procedural fairness and, particularly, on two grounds and, perhaps, a third ground, on which the Applicant was disqualified.

[19] These grounds in effect relate to -

- (a) **firstly**, the contention that the Applicant imposed a unilateral condition in form RDE 2 (**record p. 319**) to the effect that it will not be held "*responsible for damages to any cables if are (sic) not marked on drawings*" of the Municipality

.../...

(record p. 67, Annexure A1);

- (b) **secondly**, the contention that the Applicant's bid displayed an "*unbalancing of prices*" (record pp. 67 and 68, Annexure A1);
- (c) **thirdly**, the contention that the overall value of the Applicant's tender was beneath a pre-determined threshold (record pp. 67 and 68, Annexure A1).

[20] I deal *seriatim* with each of these grounds.

Firstly, the alleged imposition of a unilateral condition in Form RDE2

[21] This issue in actual fact goes hand in hand with the First Respondent's objection against the Applicant's indication of a R0,00 rate in, particularly, item B001.02 (LI) in respect of "*locating of existing services*" (record p. 355).

[22] On this issue the Applicant -

- (a) on the one hand, contended that it had no intention of charging the First Respondent anything for such services because, regard being had to paragraph 001.02 of the Standard Specifications of the tender (quoted below), it, having previously been the successful tenderer in regions 1 and 2, already had the necessary detecting equipment; and

.../...

- (b) on the other hand, relied on paragraph 3.2 of the pricing instructions contained in the Tender documents (**record p. 132**) which reads as follows:

"A price or rate is to be entered against each item of the Bill of Quantities, whether the quantities are stated or not. An item against which no price is entered or where a word or phrase such as 'included' or 'provided elsewhere' will be accepted as a rate of nil (R0.00) having been entered against such items and covered by the other prices or rates in the Schedule (my underlining).

Any work executed to which such a pay item applies, shall be measured under the appropriate items in the Bill of Quantities and valued at a rate of (R0.00). The rate of nil shall be valid irrespective of any change in the quantities during the execution of the contract."

- [23] Relying, particularly, on the words "*and covered by the other prices or rates in the Schedule*", in the paragraph the contention is that the disqualification on the ground that the line item is priced for "R0.00" is incorrect and could not have been done.

- [24] Furthermore, reliance is also placed on paragraph 001.02 of the Standard Specifications of the tender relating to "*locating of existing services*" (**record p. 202**) which reads as follows:

"001.02 Locating existing services

Lump sum

The tendered lump sum shall include full compensation for the supply or hiring of specialized detecting equipment, for the use of such equipment and for drawing up plans of the located services as specified. Alternatively an approved specialist firm may be employed to carry out the work."

- [25] In relation specifically to the unilateral imposed condition, it is submitted by the

.../...

Applicant -

- (a) that the First Respondent is, relying on clause 35.1 of the contract data (**record p. 114**), obliged to take out insurance for "*those eventualities*";
- (b) that any services not indicated in the plans would be illegal;
- (c) that neither the insurer nor the First Respondent will be bound to pay for damage to such services.

[26] I fail to see how the First Respondent's refusal to accept the unilaterally imposed condition by the Applicant indemnifying itself against damages caused in the exercise of its contractually imposed duty to search for existing services, can be held to be an infringement of the Applicant's right to procedural fairness.

[27] Similarly, I fail to see on exactly what the Applicant's reliance on paragraph 3.2 of the pricing instructions contained in the Tender documents that a tenderer is entitled to enter in respect of an item a zero rate if a rate is covered by the other prices or rates in the tender is based.

[28] I have two difficulties with this submission.

[29] **Firstly**, the words in this paragraph relied upon are in my view read out of context. In my opinion the words relied upon cannot be read in isolation. Those words

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obviously relate to items against which no price is entered in cases where a word or phrase such as '*included*' or '*provided elsewhere*' appears. It is only in those cases that a zero rate will be accepted, but only if the price or rate covered by other prices or rates in the Schedule. It is obvious from the tender document that no words or phrases, such as, "*included*" or "*provided elsewhere*" are included in any of the items where the Applicant elected to insert zero rates.

[30] **Secondly**, and in any event, there is no indication in the Applicant's tender document that a price for the locating of existing services has been included elsewhere in the tender document and counsel who appeared on behalf of the Applicant was also unable to show me where such a rate could have been inserted.

[31] Instead an attempt was made to persuade me, as I have already indicated, to accept that the Applicant intended not to charge the First Respondent any price for its duty to locate existing services.

[32] According to the First Respondent -

- (a) a successful contractor was in terms of the tender and associated documents required to search, in the execution of the contract requiring on an "*if and when*" basis maintenance, rehabilitation, upgrading and installation of stormwater systems and repairs to paved surfaces, for existing services (such as, eg., electricity, sanitation, Telkom, Escom, Rand Water cables and pipes, etc) using specialized detecting equipment and was to do so whether or not such services

.../...

are shown on any drawings (and also, having located such services, to draw up plans of the services so located);

(b) that the Applicant made no provision for costs associated with locating of such services and instead sought to indemnify itself from any liability which may arise as a result of damage to such services which are not contained in any drawings;

(c) that only if prices are included as requested that the prices included in the First Respondent's updated bill of quantities can be assessed with reference to the supply market analysis so as to establish whether the amount so included is in accordance with market tariffs.

[33] The First Respondent's approach in this regard does not in my view constitute any procedural unfairness.

[34] The First Respondent's requirements in this regard applied equally to all tenderers, and it would seem, on face value, that at least the successful tenderers all complied with these requirements.

[35] I can see no reason why the Applicant would be entitled to a different treatment.

[36] Various other submissions were made by counsel on both sides on this and the other issues and I mean no disrespect to any of them by not referring to those submissions in any detail, but will do so should the occasion arise.

.../...

[37] In this regard I can, *inter alia*, refer to the following -

- (a) the First Respondent's contention that the Applicant's unilateral indemnification against damages caused in the process of excavation of existing services after having located such services, would nullify the First Respondent's standard way leave indemnity;
- (b) the Applicant's contention that the First Respondent is in any event, regard being had to clause 35.1 of the contract data, covered by its insurance against such damages;
- (c) the Applicant's contention that services in respect of which no drawings exist must be regarded as being illegal so that neither the Applicant nor the First Respondent can be held liable for damages to any such services.

[38] I am for these reasons unpersuaded that it has been shown that the First Respondent in awarding the tender, in any way acted procedurally unfair to the Applicant.

[39] This brings me to the Applicant's following ground for its contention that its rights to procedural fairness were infringed.

Secondly, the alleged overall value of the Applicant's tender

.../...

[40] This ground of review relates to the First Respondent's reliance on its updated bill of quantities and the respective thresholds based on a CIDB rating according to which the Applicant's overall tender for R5 833 077,50 per region is lower than the lowest threshold of R6 500 000.

[41] This approach by the First Respondent is challenged on at least two grounds, namely -

- (a) that the approach is contrary to instructions of the National and Provincial Treasuries contained in Circular 29 from the National Treasury dated 31 January 2006 (**record p. 663, Annexure R1**); and
- (b) that in any event, relying on regulation 2 of the CIDB regulations, if VAT is added to the Applicant's tender amount, the tender amount exceeds that threshold.

[42] I am not persuaded that any of these grounds render the First Respondent's approach in this matter as procedurally unfair.

[43] As far as I could determine the circular referred to which purports to refer to the Local Government : Municipal Finance Management Act, 2003, does not have the force of law in that its issue has been authorized by any provision of that Act. In terms of that Act municipalities are required to ensure that their supply chain management is fair, equitable, transparent, competitive and cost-effective. The circular does not discourage

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the determination by way a bill of quantities, updated from time to time, to identify market characteristics for specific goods and services and to, in so doing, develop an effective procurement strategy. As I have already indicated, referring to the judgment in the ***Moseme Road Construction case, supra***, the Construction Industry Development Board Act, 2000, provides for a national register of contractors so as to categorize contractors in a manner that facilitates public sector procurement and promotes contractor development, I cannot imagine that the circular in question envisaged a situation to detract from the provisions of that Act. It would in any event appear not to have been the intention to use the threshold range determined in terms of the CIDB regulations as a disqualification as such. As already indicated the First Respondent merely used that threshold as a tool or guide to determine whether a contract worth on average R8,8 million can be duly executed by a tenderer that tendered almost R3 million below that average. This is a guideline applied to all tenderers and I cannot see how it can be held that the First Respondent, in having done that, acted procedurally unfair towards the Applicant.

[44] I am also unpersuaded that the Applicant's reliance on regulation 2 of the CIDB regulations can find any application in this matter. The regulation reads as follows:

"The rand value, tender value, tendered price, contract value or project value, wherever it appears in these Regulations, includes value added tax levied under the Value-Added Tax Act, 1991 (Act 89 of 1991). (My underlining)"

If regard is had to the underlined words, the regulation was designed for purposes of those regulations and I can see no reason why it should find application in the tender

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in this matter. As a matter of fact in terms of the tender tender prices are to be provided excluding VAT and there is no basis on which VAT can now be added to the tender price as that would not be a true reflection of the tender price.

[45] It is in my view apparent from the papers that the First Respondent was not prepared to consider a tender of which the overall tender price was, regard being had to its own market price analysis, patently too low which in my view is obviously a fair consideration applied across the board to all tenderers.

[46] I am accordingly not persuaded that the Applicant's application can succeed on this ground.

[47] This brings me to the third and last attack on the First Respondent's decision.

Thirdly, the alleged “unbalancing of prices”, being the shifting of part of the cost of work for one element of the work to another element of the work

[48] As I have already indicated, the Applicant inserted in respect of the following rates reflected in the First Respondent's bill of quantities a zero rate in the tender -

- (a) Item *B001.02* - (L1) Locating existing services - R1 500 per month (total R18 000 per month) as opposed to the R0.00 rate quoted by the Applicant;
- (b) Item *B002.04.01* - *Dumpy level* - R50 per day (total R250 per day) as opposed

.../...

to the R0.00 rate quoted by the Applicant;

- (c) Item B002.04.02 - Tachometer R50 per day (total R250 per day) as opposed to the R0.00 rate quoted by the Applicant;
- (d) Item B002.04.03 - Survey assistants two at R50 per day (total R500 per day) as opposed to the R0.00 rate quoted by the Applicant;
- (e) Item B001.04.05 - Provision of personal protective clothing and equipment 1800 at R540 per worker per month (Total R972 000 per month) as opposed to the R2.00 rate quoted by the Applicant;
- (f) Item 505.09.02 - Interlocking precast concrete block pitching: Armourflex 2 000 at R320 per m^2 day (total R640 000) as opposed to the R20.00 rate quoted by the Applicant.

[49] The question was raised and argued whether this state of affairs constituted what is called an unbalancing of prices.

[50] It would appear that an unbalancing of a bid is the shifting of part of the cost of work for one element of the work to another element of the work.

[51] On behalf of the First Respondent it was submitted that in public sector contracts an unbalanced bid is objectionable and significantly problematic so as to warrant the

.../...

rejection of the bid because it -

- (a) constitutes an advance payment;
- (b) may not ultimately prove to be the best offer;
- (c) is detrimental to the concepts of competitive bidding.

[52] Furthermore, so it was contended, the degree to which an unbalancing of a bid is accomplished is either mathematically unbalanced or materially unbalanced.

[53] A mathematically unbalanced bid seems to be one in which each bid item or breakdown of scheduled values in a lump sum contract fails to carry its proportionate share of the overhead and profit in addition to the necessary costs for the item which results in understated prices for some items and enhanced or overstated prices for others. An example of such enhanced or overstated prices is what is called "*front end loading*" wherein activities scheduled to be performed early in the project have values encumbered with an excessive proportion of planned overhead costs and anticipated profit. If excess funds are paid at an early stage of the contract the potential exists for an inadequate amount to properly complete the project and protect the municipality's interests. It can also give rise to a further problem to the effect that it will be difficult to establish a cost basis for equitable adjustments when contract quantities or work is changed.

[54] A materially unbalanced bid is one shifting not only a disproportionate amount of overhead and profit, but also some portion of the actual cost of elements of work.

[55] In applying these considerations to this matter, the contention is that the understatement of a price significantly less than the actual cost of that work will give rise to an overstatement of prices for other aspects of the work or that where no price is stated in respect of certain work it will give rise to a later complaint by a contractor that it can not be fairly compensated for the understated line items of work it had performed and in so doing creates a potential for disputes and claims for increased costs.

[56] I was unable to find any South African authorities on this issue (and I was also not referred to any such authorities), but I was in argument on behalf of the Applicant referred to what appears to be a Staff report submitted by the Auditor General to an audit committee of the City of Toronto entitled "*Improving the Procurement Process - Unbalanced Bids*". At p. 2 of the report the following is stated:

"There are a number of reasons why a bidder may unbalance its prices in a bid including the likelihood of receiving large payments at the beginning of a contract (front end loading). Secondly, a bidder may submit an unbalanced bid in order to maximise his profits. The bidder is able to do this by overpricing bid items he believes will be used in greater quantities than estimated in the tender bid document and underpricing items he believes will be used in significant lesser quantities."

The report then goes on and shows by way of two hypothetical examples as to how one contractor can be awarded a contract on having submitted a lower overall bid, but, because of having made an unbalanced bid in having front loaded the first stage of the

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bid, in actual fact its original bid is higher than the other bidder whose bid was properly balanced over the two stages of the bid.

[57] Counsel who appeared on behalf of the Applicant was at great pains to demonstrate that the Applicant's tender, in so far as it quoted zero rates in respect of the various items to which I have already referred to, did not have the effect of an unbalancing of prices as is evident from the Toronto report.

[58] I am not persuaded that this address the real problems the First Respondent experienced in this regard.

[59] The First Respondent's difficulties in relation to the quotes inserted in respect of the respective are in principle the following -

- (a) tenderers were directed to price all items in the absence of which incomplete sections will not be considered (**para 3.9 of tender documents, record p. 353**);
- (b) if all items are not priced or priced at a reasonable rate it may give rise to a situation where either substandard equipment may be utilized or no proper protective clothing will be provided to workers or the contractor will simply not be able to do the work or somewhere along the line other items may be loaded to make up for any loss of profits.

[60] I am for these reasons unable to hold that the Applicant was in any way been

.../...

treated unfairly.

[61] As a matter of fact I am satisfied that the First Respondent's considerations are reasonable and that there were rational reasons for having acted as it did.

[62] This brings me to the question of costs.

Costs

[63] The Applicant seeks, whatever the outcome of this application, an order of costs, including the costs reserved on 1 March 2013, against the First Respondent on the scale as between attorney and client.

[64] The order so sought is based on some indignation expressed by the deponent to the First Respondent's first answering affidavit in which she indicated that the documents annexed to the Applicant's founding affidavit are documents to which only the Bid Adjudication Committee, the Executive Committee and the City Manager have had access at the time the urgent application was launched. Not even any of the successful tenderers or even she herself, as Executive Director: Transport and Roads have had any sight to any of the documents.

[65] It is from this state of affairs that the deponent seems to have drawn an inference that the Applicant could have obtained the documents "*in a corrupt or fraudulent manner*".

.../...

[66] In its replying affidavit the Applicant explains that the "*contract management, supply chain management department*" received the resolution from the City Manager's office on 4 February 2013 and the Applicant was informed on the same date that its tender was not successful, whereupon, the relevant documentation was "*obtained legally, validly and through the proper process*".

[67] In a supporting affidavit filed by the Applicant's attorney of record he on 8 February 2013 attended at the offices of the First Respondent to obtain a copy of the minutes and resolution of the various committees where he approached Ms. Trix Azenha who holds the position of Chief Accountant in the First Respondent's Contract Management Department. She, however, informed him that she was not authorized to provide him with the requested documents and referred him to the Executive Director, Mr. Mahobane. In view thereof that he had no appointment with Mr. Mahobane he waited for him outside his office for about two hours. At some stage a certain Mr. Graham Gumbo approached him and asked him whether he could assist. Having explained that he required copies of the relevant documents, he was, after Mr. Gumbo made a few telephonic enquiries, requested to submit a letter on Monday, 11 February 2013 describing the documents he needed which he did. He was, thereupon taken back to Ms. Azenha where he was, after having paid the costs to make copies. provided with the documentation.

[68] Having read the papers I am satisfied that the deponent was truly and honestly not aware of the decision taken before the Applicant launched its application and that it was unnecessary to have expressed her suspicions in such derogatory terms.

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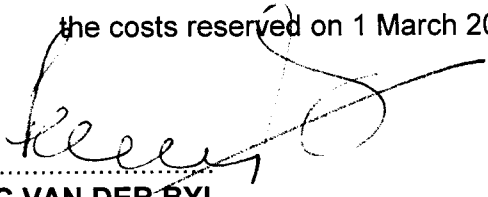
[69] However, having also taken note of various allegations made by the deponents to the Applicant's papers which can equally be regarded as scandalous, I think this is a matter where the pot is calling the kettle black.

[69] In my view this is a matter where the costs should follow the result.

Order

[70] In all the circumstances, and for the reasons given, I make the following orders:-

1. **THAT** the application be dismissed.
2. **THAT** the Applicant be ordered to pay the First Respondent's costs, including the costs reserved on 1 March 2013.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV M SNYMAN

On the instructions of

FRIEDLAND HART SOLOMON & NICOLSON
4-301 Monument Office Park
79 Steenbok Avenue
PRETORIA
Ref : Mr Brauer/Mr Bowles/GM/294198
Tel : 012 424 0200

ON BEHALF OF FIRST RESPONDENT

ADV A VORSTER

On the instructions of

HUGO & NGWENYA INC
102 Central Towers

.../...

286 Pretorius Street
PRETORIA
Ref : Mr Hugo/MP/zlr/ts392
Tel : 012 665 2997/8

DATE OF HEARING

28 May 2013

JUDGMENT DELIVERED ON

12 July 2013