

PRETORIA

22/6/2012

1. IS THE INFORMATION IS FOR APPLICABLE
 2. APPLICABLE YES ☒ NO ☐
 3. IS INTEREST TO OTHER JUDGES. YES ☒ NO ☐
 4. DISMISSED. ☒

10/15/61 *Felmin* 22/6/12
 DATE SIGNATURE

VUNA HEALTH CARE LOGISTICS (MPUMALANGA) (PTY) LIMITED Applicant

THE MEC OF HEALTH AND SOCIAL DEVELOPMENT, MPUMALANGA PROVINCIAL GOVERNMENT	First Respondent
SAFARMEX (PTY) LIMITED	Second Respondent
AMALGAMATED LOGISTICS MPUMALANGA (PTY) LIMITED	Third Respondent
BAKONI HEALTH CARE SOLUTION (PTY) LIMITED	Fourth Respondent
ETHELM HEALTHCARE RESOURCES (PTY) LIMITED	Fifth Respondent
PHARMACEUTICAL CONSORTIUM	Sixth Respondent
MPILONDE MEDICAL SUPPLIES	Seventh Respondent

JUDGMENT

FABRICIUS J.

1.

This is an application in which Vuna seeks the review and setting aside of the decision of the First Respondent, taken on or about 2 August 2010, to award the tender to Safarmex.

2.

In addition to this primary relief, Vuna seeks an order declaring that any contract entered into between the Department and Safarmex in consequence of the tender award is null and void, but it is not in dispute that as the result of urgent applications by Third Respondent, the actual contract was not awarded to the second Respondent, and that the relevant services are being rendered on a month-to-month basis, pending a review.

3.

In the final instance, Vuna asks that this court award the tender to Vuna *or in the alternative* that the award of the tender is remitted to the Department and

that the Department be directed to reconsider the tender and to award it anew.

4.

On or about 1 April 2010, the Department advertised the tender. Thus the Department sought to identify an appropriate service-provider to take upon itself the responsibility of managing the procurement, warehousing and distribution of pharmaceuticals and surgical sundries and the supply and management of information relating thereto for and on behalf of the Department.

5.

These services were to be provided within the Mpumalanga Province over a period of three years, which period was to commence on 1 September 2010. Applicant is responsible for rendering similar services in the Limpopo Province on a far greater scale that would be required in Mpumalanga.

6.

On 2 August 2010, Vuna was advised that its tender bid had been unsuccessful. It was not provided with any reasons as to why it had failed. The Second Respondent was the successful tenderer.

7.

In sum, Vuna's present position is as follows:

- 7.1 fundamental irregularities tainted the process by which the Department reached the decision to award the tender to Safarmex, which renders that decision liable to be reviewed and set aside in terms of several subsections of section 6 of PAJA;
- 7.2 in terms both of substance and procedure, the application by the Department of a so-called "*pricing benchmark*" was incorrect, improper and irregular. This particular bench-mark was applied during the adjudication process without notice to any tendering party;
- 7.3 the unwarranted and clandestine application of the so-called "*pricing benchmark*" deprived Vuna of a fair chance to have its tender bid properly adjudicated and, accordingly, ran counter to several of the most fundamental principles underpinning public procurement, namely those of cost-effectiveness or value for money; fairness; and transparency.

8.

Therefore, as appears from the facts pleaded in Vuna's affidavits, the decision by the Department to award the tender to Safarmex was allegedly tainted in all of the following ways:

8.1 First, by failing to comply with a mandatory and material procedure or condition prescribed by the relevant statutory empowering provisions, the Department breached section 6(2)(b) of PAJA. In this regard, in particular, the award of the tender was required to:

8.1.1 promote the efficient, economic and effective use of public resources (section 195(1)(b) of the Constitution);

8.1.2 be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective (section 217(1) of the Constitution);

8.1.3 secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the Department (section 2 of the PFMA);

8.1.4 form part of an appropriate procurement and provisioning system which is fair, equitable,

transparent, competitive and cost-effective (section 38(1)(iii) of the PFMA);

8.1.5 be evaluated, adjudicated and implemented in terms of a preferential procurement policy or framework involving a preference point system in terms of which *inter alia* the lowest acceptable tender must score 90 points for price (section 2(1)(b)(i) of the PPFA); and/or

8.1.6 be evaluated, adjudicated and implemented in terms of a preferential procurement policy or framework involving a preference point system in terms of which *inter alia* the contract must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer (section 2(1)(f) of the PPFA).

8.2 Second, by framing and accepting the untested assumption that Vuna's tender price was not "*realistic*" or not "*possible*" and, in consequence of that assumption, disqualifying its bid without investigating whether that was in fact so, the Department breached sections 3(1) and 6(2)(c) of PAJA, both of which guarantee the right to procedural fairness. This is plainly the more so since the Department refrained from inviting Vuna to address this fundamental and far-reaching but erroneous "*pricing*"

benchmark" assumption and refrained, in response to correspondence directed to it by Vuna which sought to question aspects of the point-scoring system under the tender, from pointing out that this assumption underpinned the evaluation and adjudication processes.

8.3 Third, by taking account of and giving weight to wholly irrelevant considerations (which included the monthly price it *erroneously supposed* it was then paying to Third Respondent for rendering the services), the Department breached section 6(2)(e)(iii) of PAJA and, in fact, improperly closed its mind to Vuna's tender bid.

8.4 Fourth, by failing to take account of pertinently relevant considerations, which included the body of expertise and experience acquired by Vuna in similar contracts in other provinces the Department deprived itself of the chance fairly and realistically to appraise the ability of Vuna to provide the services at its tender price, thereby breaching section 6(2)(e)(iii) of PAJA.

8.5 Fifth, by disqualifying the three best tender bids on the strength of an untested and clandestine so-called "*pricing benchmark*", the Department breached section 6(2)(e)(vi) of PAJA by acting arbitrarily and/or capriciously. This is made all the more starkly apparent by the fact that the Department elected to award the tender to Safarmex, which had received a *negative score* for

price and had finished a *distant fourth* in the evaluation and adjudication processes conducted under its aegis.

8.6 Sixth, the Department's decision bore no rational connection to the purpose it sought to achieve through the award of the tender since the very essence of a tender process is to obtain the most cost-effective service, which goal the Department directly flouted. The fact that the Department thus breached section 6(2)(f)(ii) of PAJA could not be plainer: irrationally, it rejected the tender of a tendering party which not only had a vast body of accumulated experience and expertise in the rendering of the services, but also offered to provide the services at the cheapest price.

8.7 Seventh, since, in the circumstances, the decision of the Department to award the tender to Safarmex was so unreasonable that no reasonable person could have exercised the relevant power and/or performed the relevant functions, the Department breached section 6(2)(h) of PAJA.

8.8 Finally, the Department's decision breached the principle of legality and was, moreover, unconstitutional in that it ran counter to the principle of fairness underpinning the Bill of Rights and, in the context of public procurement, enshrined in section 217 of the Constitution.

9.

At the outset, it must be emphasised, that in the tender process conducted by the Department in terms of the bid specifications as articulated in the Invitation to Bid document, Vuna emerged as the victor. In fact, it finished *far ahead* of its nearest rival, namely Amalgamated the Third Respondent. In its turn, Safarmex trailed distantly behind Vuna, Amalgamated and PharmCon.

10.

Once the invitation to bid had closed at noon on 14 May 2010, the Evaluation Committee which was entrusted with the task of evaluating the submitted tender bids under the aegis and control of the Department, compiled a report. This report was to be presented to the Adjudication Committee. Upon the basis of the results recorded in the report, the Adjudication Committee was to decide which compliant tendering party would be awarded the tender.

11.

This report indicates the following:

11.1 Vuna obtained the highest points for price. While Vuna attained 92 points (which translated into 40 out of a possible 40 points), Amalgamated attained 40.73 points (which translated into

23.43 out of a possible 40), PharmCon attained 22.15 points (which translated into 22.59 out of 40), and Safarmex attained minus 33.78 points (which translated into 16.68 out of a possible 40 points).

11.2 Under the rubric of functionality, marked out of a total of 60 points, the Evaluation Committee appraised the four leading tendering parties as follows. Amalgamated were awarded 54.33 points; PharmCon, 52 points; Vuna, 51.33 points; and Safarmex, 50.33 points.

11.3 Upon these two scores being added together to total a score out of 100, the four leading tenderers fared as follows. By attaining no more than a total of 67.01%, Safarmex trailed behind Vuna, Amalgamated and PharmCon. PharmCon and Amalgamated were placed close together, scoring 74.59% and 77.76% respectively. Vuna's total score was far ahead of all three its rivals. It scored 91.33%.

11.4 While the scores for functionality attained by the four leading tendering parties were relatively close, the central reason for Vuna's emerging as the victor was that it would provide the services at a price of R2,593,000.00 per month. This price was approximately R1.5 million below the price proffered by its closest rival, Amalgamated, which quoted a monthly price of

R4,089,000.00. On the other hand, the weakest of the four leading tendering parties, namely Safarmex, quoted a significantly greater monthly price of R6,217,000.00.

12.

However, in spite of the fact that Vuna's tender thus clearly emerged as the most cost-effective one, and indeed in spite of the fact that both Amalgamated and PharmCon also beat the Safarmex's tender by a large margin, the Evaluation Committee stated in the report that the tender prices offered by Vuna, Amalgamated and PharmCon were not "*realistic*" and that, for that reason, they should fall out of the tender process.

13.

In making these recommendations, the Evaluation Committee laboured under the assumption that the price which the Department was paying for the services before the award of the tender was a cognisable benchmark for all tendering parties, and that any tender bid priced below such benchmark was unrealistic.

14.

Moreover, in the report, the Evaluation Committee was of the view that the monthly amount then expended on the services by the Department was

R7.1 million.

15.

Subsequently, on or about 25 June 2010, once the report had been submitted, the Adjudication Committee directed a letter to the Evaluation Committee in which it called for further documents and in which it directed that further inquiries be undertaken.

16.

Among other instructions, the Evaluation Committee was in this letter required *"to do the market research to determine the baseline for pricing"*. On or about 30 June 2010, the Evaluation Committee submitted its response to the aforementioned request.

17.

In respect of the instruction that the Evaluation Committee undertake market research to determine the *"baseline for pricing"*, the Adjudication Committee was simply referred to a recordal in the Evaluation Committee's report that *"[c]urrently the Department of Health is paying R614,852 million total expenditure per annum and R51,238 million which is an average payment per month"* and to a *"Vulindlela report"*.

18.

In responding to the Adjudication Committee's instruction in this manner, the Evaluation Committee reneged on its task to conduct proper market research, and in consequence, neither the Evaluation Committee nor the Adjudication Committee came to be apprised of accurate, reliable data relating to the Department's then-current expenditure for the services.

19.

Nonetheless, despite the deficiency of the "*research*" undertaken by the Evaluation Committee, at a meeting convened on 1 July 2010, the Adjudication Committee purported to use as a yardstick for evaluating the tenders the Department's alleged then-current expenditure for the services. The Adjudication Committee also "*used the current expenditure by the department of R7.1 million on the service under consideration as a baseline for final determination of realistic pricing.*"

20.

This figure of R7.1 million was reached in the absence of any supporting documentation. It was without foundation and was, quite simply, wrong. In fact, at that time, Amalgamated, which was the holder of the previous tender for the provision of the services, charged R4.4 million per month for the

services.

21.

In its answering papers in the urgent application under case number 51356/10, and in its answering affidavit in this application, the Department has sought *ex post facto* to justify or rationalise the figure of R7.1 million per month in a markedly different way. However, at no point has the Department addressed the fact that both the Evaluation and Adjudication Committees were in the course of the tender process plainly of the opinion that the Department was then spending R7.1 million per month on the services.

22.

In this *ex post facto* explanation, the Department's then-current monthly expenditure on the services was no longer R7.1 million. Yet, this attempt at an *ex post facto* explanation on the part of the Department indicates that the figure of R7.1 million (together with the calculation that produced it) is itself baseless and irrational.

23.

The Department committed a fundamental error of reasoning by, upon predicting what its total monthly expenditure might be, apportioning 10% of that figure to the services. Without any rational basis for this position, the

Department states as follows: "*The services tendered for and which are the subject of enquiry in this application, are accepted by the [Department] as 10% of the total medical expenditure per annum.*" The Department fails to provide any basis for its accepting an *a priori* figure of 10% of its total expenditure for the services in this manner.

24.

It used past figures in order to predict a future benchmark without debating whether there was a rational basis for using past figures in this way.

25.

The Department failed to provide any rational basis for the projected increase of 22% it built into its *ex post-facto* explanation of the so-called benchmark price of R7.1 million. At least a component of this figure is attributable to the increase in the cost of medical supplies, which cannot rationally affect the cost of *inter alia* distributing or warehousing such items. Accordingly, the so-called "*pricing benchmark*" was, on at least two distinct grounds, fatally flawed and fundamentally deceptive. While the Evaluation and Adjudication Committees plainly considered R7.1 million to be the Department's then-current monthly expenditure, the explanation provided by the Department after the fact fails to provide a rational basis for its application in appraising the tendering parties' bids.

26.

Not only did the Department breach several statutory and regulatory provisions by conducting the tender in the manner that it did, notably by applying the untested “pricing benchmark” of which no mention is made in the Invitation to Tender, but this tainted and rendered fundamentally unfair the process by which the tender was awarded. This was therefore the crux of Applicant’s case in my view and reliance was placed on a number of decisions, contextually relevant. Reference was made to: ***Du Bois v Stomdrift-Kamanassie Besproeiingsraad 2002(5) SA 186 C at 194 E-195 G.***

I must however point out that Griessel J, quite correctly in my view, also held that the requirement of procedural fairness must be contextual and relative. In ***Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 SCA*** it was, also in that context, held that representations by compliant tenderers should have been invited before a final decision regarding the outcome of the tender was taken.

27.

Traditionally, procedural fairness comprises two components, namely *audi alteram partem* and *nemo iudex in re sua*. The former maxim, which embodies the notion that a party should be granted the opportunity to be heard, is relevant here and dovetails with the requirement addressed above, ie. that the invitation to bid must set out the basis upon which tender bids would be evaluated and adjudicated. See also ***Minister of Environmental***

Affairs and Tourism v Bato Star Fishing 2003(6) SA 407 SCA at 436, and Steenkamp v Provincial Tender Board, Eastern Cape 2007(3) SA 121 CC at 136C.

28.

This is so because a basis of evaluation or adjudication that is kept hidden deprives a tendering party of its right to address it, and to show the Organ of State why or how it plays to the tendering party's strengths. In other words, it deprives the tendering party of its right to be heard. This, as I have said, was Applicant's main argument, and I agree with it and the reasoning behind it. The mentioned authorities make this clear and it is also contained in s3(2)(ii) of PAJA.

29.

In the instant case, Vuna was not granted an opportunity to explain its figures which, in light of the clandestine "*pricing benchmark*", the Department considered to be unrealistic. Had Vuna been afforded such an opportunity, it would have had the chance to set out the reasons for its pricing and dispel the doubts of the Department. In doing so, Vuna could, for instance, specifically have been able to indicate to the Department that its notably low proffered price was a product of its extensive body of accumulated experience and expertise in the pharmaceutical industry and, more crucially, in the provision

of substantively identical services in neighbouring provinces

It is apparent from Applicant's affidavits that, it is currently providing very similar services in the Limpopo Province:

29.1 In the Limpopo Province, Vuna provides services to the appropriate government department that are identical in nature to the services. The Limpopo tender requires Vuna to service 45 hospitals and approximately 500 clinics. This it does for a price per month of approximately R2.8 million.

29.2 The tender requires the service-provider awarded it to service 32 hospitals and approximately 325 clinics.

29.3 Accordingly, while the tender is markedly smaller in scope than Vuna's Limpopo tender, it requires Vuna to have a pre-packaging unit, which requirement is absent from the Limpopo tender.

29.4 Nevertheless, it is plain that the tender and Vuna's Limpopo tender are broadly comparable in scope. Accordingly, since the applicant is, in terms of the Limpopo tender, able to deliver services at a similar price to a significantly greater number of hospitals and clinics than is encompassed in the tender, the Department's conclusion that Vuna's monthly pricing is

“unrealistic” cannot be sustained merely on the say-so of the Adjudication Committee, and/or the Evaluation Committee.

30.

Respondents, however, relied on the unreported decision of Wagley J. in ***Mhonko's Waste and Security Services CC and Others v Transnet and Others Case No. 9137/2006 of 7 March 2007***. Transnet had also applied a bench-mark which had then not been communicated to the tenderers. The learned Judge found this process not to have been unfair for that reason. He gave no reasons for that conclusion, nor did he deal with any contextual argument or relevant authorities. I am therefore constrained to disagree with it. It is not in line with the authorities that I have mentioned, nor in line with s3 of PAJA.

31.

I do however agree with respondent's argument herein that the setting of a bench-mark is not in itself impermissible during an adjudication process. It would be in line with the provisions of s2 of the Preferential Procurement Policy Framework Act 5 of 2000, and it would be a policy-laden issue. See: ***Logbro Properties supra at par. 21***.

32.

Also, if there is a good reason, i.e. an objectively justifiable reason, it would in any event not be arbitrary or irrational in terms of the relevant provisions of s6 of PAJA.

33.

A bench-mark properly set could also contribute to an Organ of State achieving or obtaining the best value for money under the given circumstances, depending on the facts. I agree with the contention that the lowest bid by price would not necessarily be the most meritorious bid in all circumstances. Cost effectiveness ought to be related to risk involved on any given facts. Organs of State have a broad discretion in determining the factors that they take into account. A Court is not an Organ of State which has been empowered to act according to legislation applicable to it, subject to the principle of legality of course. See: ***Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 CC and Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 CC.***

Where such discretionary power is exercised lawfully (and fairly), the Courts will not, or ought not, readily interfere with it. See: ***Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs 2004 (4) SA 490 CC par 48.***

34.

On the facts before me I therefore have no hesitation in finding that:

- 34.1 the setting of a bench-mark for price during an adjudication of a tender is not per se unlawful in terms of s217 of the Constitution, the Public Finance Management Act 1 of 1999, the Preferential Procurement Policy Framework Act 5 of 2000 or the Preferential Procurement Regulation 2001 published under the latter Act;
- 34.2 depending on the context, such bench-mark may be unfair, if not communicated to tenderers together with an invitation to (at least) make representation in request of it (at least in writing).

35.

On the facts before me, the actual bench-mark was arrived at without a proper reasoned determination of its necessity and the actual water-mark. It ought to have been communicated to the tenderers with an invitation to make representations. Accordingly, the application for review must succeed.

36.

As I have said, the relevant contract has not been finally concluded with Second Respondent as a result of previous orders of this Court involving Third Respondent. It follows that I am of the view that considerations of pragmatism and practicality do not stand in the way of setting the award of the tender aside. See: ***Chairperson, STC, v JFE Sapela Electronics 2008 (2) SA 638 SCA at 650 B-D.***

37.

I must accordingly make an order that is just and equitable, in compliance with the provisions of s8(1) of PAJA. Section 8(1)(c)(i) is appropriate herein. There are also no exceptional circumstances present which would empower me to award the tender myself to Applicant. A Court is not a tender board, liquor board or licensing board, and it must leave administrators to comply with their duties and exercise their functions, lawfully and fairly of course.

The following order is therefore just on the facts before me:

1. The award of tender No. HEAL/024/10/NP by First Respondent to Second Respondent is set aside.
2. The tender is remitted to First Respondent for re-consideration which must include a factual determination of a bench-mark, if such bench-mark is required for purposes of determining the appropriate price.

3. If a bench-mark is required and determined in respect of price, each interested party is to be informed thereof, and the reasons adopted in respect of it, and be invited to make at least written representation in respect of it.
4. Any such representations are to be considered by First Respondent before the tender is awarded.
5. First and Second Respondents are ordered to pay the costs of this application, including costs of two Counsel.

22 June 2012



H J FABRICIUS J
JUDGE OF THE NORTH GAUTENG
HIGH COURT

Case number: 5948/2011

Counsel for the Applicants: Adv. S. du Toit SC
 Adv. J.J Meiring

Instructed by: Cliffr Dekker Hofmeyer
C/O Friedland Hart Solomon & nicholson First Floor
Block 4- Monument Office Park
79 Steenbok Avenue
Monument Park
Pretoria

Counsel for the First Respondent: Adv. P.J.J de Jager SC
 Adv. H.C. Janse van Rensburg
Counsel for the Second Respondent: Adv. Wesley

Instructed by: The State Attorney
15th Floor, Saau Building
cnr Schoeman and Andries Streets
Pretoria
And
Fluxmans INC
C/O Jacobson & Levy INC
215 Orient Street
Arcadia
Pretoria

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