Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL HIGH COURT, DURBAN)

Case No: **5612/10**

In the matter between:

CROWIE PROJECTS (PTY) LTD Applicant

and

DURBAN UNIVERSITY OF TECHNOLOGY First Respondent

and 18 OTHERS

JUDGMENT: FRIDAY, 30 NOVEMBER 2012

DESAI J

[1] The applicant is CROWIE PROJECTS (PTY) LTD. It is, in effect, the bid leader of a consortium of several business entities located in and around Durban. The first respondent is the DURBAN UNIVERISTY OF TECHNOLOGY ("the DUT"), a state funded university in KwaZulu-Natal established in accordance with the relevant higher education legislation. The second respondent is the Minister

of Higher Education who is cited in his official capacity but no real relief is sought against him.

[2] The other consortium members have been joined as respondents herein and, it seems, are satisfied with the applicant proceeding on its own accord in pursuit of the relief sought.

[3] In 2007 the DUT issued by way of advertisement a Request for Qualifications ("RFQ") document which called for tenders for the development of a DUT Student Village – essentially the provision of new student accommodation and related facilities for students attending the DUT campus. The project entailed the provision of an estimated 1400 additional beds which was "intended to provide a comprehensive solution to address the issues of capacity, enhanced student experience and the creation of a sustainable eco-environment". This was the rationale underpinning the need for the project in the RFQ briefing document.

[4] The said document expressly stipulated that the DUT reserved to itself the right to terminate the process, or to modify it, without incurring any liability for costs.

[5] In its evaluation of responses to the RFQ the DUT reserved to itself the right to attach special conditions, for instance with regard to the financial strength of the bidding party and its ability to raise the necessary finance for the project.

[6] All prospective bidders were required to affirm their acceptance of the DUT's General and Special Conditions of Contract, with timeous compliance being the essence thereof.

[7] Applicant's consortium submitted a response to the RFQ and was one of the consortia shortlisted for the next phase.

[8] I may mention that the RFQ document also noted that the Request for Proposal ("RFP") response would form the basis for negotiations between the DUT and the candidate.

[9] The consortium's RFP response indicated that it was, *inter alia*, designed to ensure that an appropriate financial package could be concluded to the satisfaction of the DUT and other stakeholders and that a financial risk analysis could only be executed once they had a fuller understanding of the relationship. It also noted that the most legally and financially effective mechanism to implement the project could only take place after the selection of the *preferred bidder*. In other words, it was only after the selection of a *preferred bidder* that the parties could commence negotiations with the objective of agreeing upon the final funding and the legal and commercial terms of the agreement.

[10] The offer of the applicant's consortium was a conditional one subject to the achievement of certain milestones on or before specified dates. For instance, the detailed design and procurement process was to be completed on or before

20 August 2007, construction was to commence by 10 September 2007 and the premises were to be ready for student occupation by 1 February 2009.

[11] Applicant's consortium was eventually selected as the *preferred bidder*. This was on 23 July 2007. This selection was, of course, conditional on a number of issues being negotiated and resolved. Some 13 months lapsed and no consensus was reached on several issues upon which the selection of the consortium, as *preferred bidder* had been undertaken. Deloitte & Touche ("Deloitte") had in the meantime been appointed to undertake the necessary investigations with a view to advising the DUT as to the affordability of applicant's offer and various discussions had taken place between the parties.

[12] On or about 4 September 2008 the DUT agreed to consider a *fourth option* presented by the applicants. This option differed substantially from the earlier proposals by applicant and its consortium. It involved the DUT giving a 25 - 30 year concession to the consortium with it raising the necessary capital expenditure for the 1400 bed facility. This option involved the DUT subsidising the students.

[13] In any event, the latter option involved a drastic reduction of capital expenditure and the financial management costs being reviewed. This had to be done within tight timelines imposed by the DUT. The relevant department at the DUT had to consider Deloitte's report on this option at least two and a half weeks prior to 30 October 2008. These timelines were not met.

[14] On or about 12 November 2008 the consortium indicated to the DUT that it wished to pursue an application to the Department of Education for a capital grant and partially fund the development. The DUT agreed to support such an application for an amount of R40 million.

[15] At its council meeting on 22 November 2008 the Executive Management ("EXCO") of DUT was asked to ensure that the terms of reference under which the consortium had been selected as *preferred bidder* had not changed and that the integrity of the tender process had not been compromised.

[16] The consortium prepared the motivation for a capital grant in the amount of R60 million and the Minister approved this on 31 July 2009 on condition, *inter alia*, that the DUT was able to meet its share of the costs of such a project and that a dedicated Project Management Team was appointed in consultation with the Department of Education to ensure the successful delivery of the project.

[17] At the EXCO meeting on 19 February 2009, it was noted that the consortium had initially committed itself to funding the entire project but subsequently asked the DUT to make an application for the capital grant which had been approved but it involved the DUT making a co-payment of R13 million to R14 million in accepting the grant. Moreover the terms of reference had deviated substantially from the original offer to warrant calling for a fresh tender. EXCO accordingly resolved that the project should go out to tender again subject to a proper examination of all the documentation and legal advice being obtained.

[18] At about this time a report was received from Deloitte complaining that the consortium had failed to provide all the necessary information for them to perform their review effectively, the final financial offer had not been submitted as agreed and, in the light of this, they had been unable to "adequately perform a meaningful review of the financial viability of the Student Village".

[19] On 14 March 2009 the council of the DUT approved the recommendation of the EXCO.

[20] Its legal opinion indicated that in the light of the consortium's failure to comply with its obligations, the DUT was entitled to rescind the selection of the *preferred bidder* on the basis that the negotiations had not been satisfactorily concluded on the financial model and viability of the project offered by the consortium. The so-called *fourth option* differed materially from the original tender proposals and left the DUT open to legal challenges by other rival bidders. In these circumstances the consortium was called upon to make representations why the DUT should not withdraw the provisional selection of the consortium as *preferred bidder*. They were to be advised that the DUT would then make a decision whether or not to confirm the cancellation of the provisional award.

[21] Following a letter to the above effect, the consortium requested the opportunity to make a presentation of its financial offer on 8 June 2009. At the said presentation serious concerns were raised with regard to the viability of the consortium's offer. The DUT's Chief Financial Officer was of the view that a

financially viable model had not been presented, more especially with regard to the level of subsidy which the DUT was expected to make based on the consortium's projections. It appeared that neither the government nor the DUT were subsidising student housing. There were also doubts as to whether the proposed financial offer was affordable for the DUT. Finally, there were conflicting responses with regard to the query as to who would bear the risk in the event of the rooms not being fully occupied.

[22] In a letter dated 11 June 2009 the consortium indicated that the deal structure would only work if the institution concluded a lease for the full quota of beds (1490). The DUT noted in its response that this suggestion was inconsistent with the presentation that had been made, which seemed to indicate that the consortium would bear the risk of full occupancy.

[23] The council of the DUT met on 13 June 2009. It was fully aware of the facts and circumstances surrounding the earlier resolutions regarding the project. These have been set out, albeit briefly, in the preceding paragraphs. Council accordingly resolved to set aside the selection of the consortium as *preferred bidder* and resolved further that the project was to be re-tendered. It is that decision which applicant initially sought to impugn in these proceedings.

[24] The relief initially sought by the applicant reads as follows:

i. Reviewing and setting aside the decision of the first respondent reflected in its letter dated 6 August 2009 in which it informed the applicant that it had withdrawn and cancelled the applicant's status as *preferred bidder* in respect of first respondent's "Student Village Project".

ii. Reviewing and setting aside the decision of the first respondent in its letter dated 6 August 2009 in which it informed the applicant that it "will shortly re-tender the Student Village Project".

iii. ...in the *alternative*, declaring that the applicant is to be compensated for its out-of-pocket expenses incurred in tendering for the Student Village Project and in developing the tender proposal as the preferred bidder...

[25] It was only at the hearing itself that Ms A Annandale SC, who appeared with Mr M Du Plessis on behalf of the applicant, eventually conceded that review was not an appropriate remedy in the peculiar circumstances of this matter. It was not possible for her to demonstrate that the applicant and the first respondent would ever have come to an agreement on all the matters which were subject to negotiation. In other words, the parties had ... agreed to conclude another agreement (see Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4 SA 413 SCA at [35] – [39]). What remains of the applicant's case is the proposed claim for out-of-pocket expenses. In this regard, the applicant seeks a declaratory order only and not an order quantifying its claims.

[27] As Mr V Gajoo SC, who appeared with Mr V Voormolen on behalf of the first respondent has pointed out, the applicant's claim for out-of-pocket expenses must fail at the first hurdle, namely, the contractual exclusion thereof. The agreement was recorded in the RFQ as follows:

"**All costs (of whatever nature) incurred by Respondent Consortia, Relevant Entities, or any other person <u>in relation to any stage of the procurement and/or negotiation process in respect of this Project</u> are for such Respondent's, Relevant Entity's, or other person's account alone.** The DUT is not obliged to accept any response to this RFQ or to pre-qualify any Respondent(s). Although this RFQ describes the process, program and anticipated timetable relating to the Project and the current requirements of the DUT, the **DUT reserves the right to terminate the process, or to modify any of these matters from time to time without incurring any liability for costs to any person.**"

[28] The applicant accepts that any expenses incurred by it prior to its appointment as *preferred bidder* cannot be recouped as it submitted the tender at risk and the RFP made clear that any expenses incurred by bidders in the tender process were not something for which the DUT would under any circumstances be held responsible. It, however submits that the order for out-of-pocket expenses should relate to all those expenses incurred from the date of its appointment on 23 July 2007 until such time as the impugned decision was conveyed to it on 6 August 2009. Applicant's counsel argued that this is so because once it was appointed as *preferred bidder*, the applicant was contractually obliged to take the project forward and incur expenses until its status was terminated.

[29] Applicant's counsel further contended that the so-called "disclaimer" is not of limitless ambit and sought to confine the DUT's exposure only during the procurement and negotiation stages. The disclaimer in the RFP, they argued, sought to limit the DUT's liability only in respect of costs incurred by bidders in the preparation of bids in response to the RFP, not beyond that date. It follows, according to them, that the RFP does not exclude the claim for out-of-pocket expenses.

[30] The paragraph from the RFQ quoted in paragraph 27 *supra* is a contractual term which must be interpreted like any other term. In other words, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document (see **Cooper & Lybrandt v Bryant 1995 (3 SA 761 (A) at 761 E to 768 E**). The actual words used do not allow for the limited interpretation suggested by the applicant.

[31] The RFP document refers to <u>any</u> costs incurred by any candidate or consortia in this procurement process. The question which arises is whether upon a proper interpretation of the RFP, the parties intended to limit the exclusion to something less than what was contained in the RFQ. This is the interpretation which applicant contends for. Such an interpretation is inconsistent with the language used and most improbable. A more likely and more acceptable interpretation, as Mr Gajoo suggests, is that the disclaimer in the RFP is an addition to the exclusion contained in the RFQ.

[32] The next major aspect pursued by Ms Annandale relates to first respondent's alleged or perceived bad faith. She argued that just as "fraud unravels everything" a party to a contract cannot contract out of fraud. She contended that the disclaimer cannot serve to insulate the DUT from liability in respect of its own bad faith in the conduct of negotiations following upon it conferring the status of *preferred bidder* upon the applicant. In effect, it was argued, that the DUT cannot escape the consequences of its own bad faith by relying on the disclaimer.

[33] Although electing to use the term "bad faith", applicant, or rather applicant's counsel, seem to equate the decisions by the DUT with a fraud.

[34] The allegation of bad faith is premised largely upon the different reasons given for terminating negotiations with the consortium. That in itself cannot be evidence of bad faith. It is not uncommon that more than one default leads to a breakdown in negotiations. It is settled law that, in a contractual setting, an innocent party who purported to cancel on inadequate grounds, may afterwards rely on any other adequate ground which existed at the time of the cancellation (see **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2 SA 284 SCA at 2991 F**).

[35] When the consortium was selected as the *preferred bidder*, a number of issues needed to be resolved, including the financial model and affordability. It could not have been contemplated by the parties that these issues would be allowed to drag on indefinitely. The timeline proposed by the consortium itself

envisaged that the student residence would be ready for occupation by 1 February 2009.

[36] It is apparent from the documentation that one Mr Udesh Ramsunder, the DUT's Senior Manager, Finance Operations and Accounting, in a letter to Deloitte indicated that the consortium was unable to put an affordable model on the table for students and the DUT. The applicant met with Mr Ramsunder shortly thereafter with regard to his concerns of the affordability of the projects but did not in fact furnish the outstanding information.

[37] Other members of the DUT staff also wrote to the consortium with regard to the feedback from Deloitte that they were unable to complete the affordability model in respect of the proposed student village. In a response dated 30 July 2008 the consortium indicated that the actual cost had to be reviewed, that they had engaged with several financial institutions and were refining a detailed financial offer. This led to their request to make a presentation to the DUT, which presentation took place on 4 September 2008. On 23 September 2008 the consortium was advised of the time deadlines in order to make it possible to make a presentation or seek approval from the council of the DUT in respect of the student village. These deadlines were not met. The applicant brushes off the long delays, from the time of its selection as *preferred bidder* until the status was terminated. It argues that the delays were "condoned" because a further opportunity was presented to the consortium to provide information. This approach is quite clearly untenable. Cancellation due to delay by its very nature requires an examination of the entire delay.

[39] On or about 12 November 2008 the consortium was confident that it was close to presenting an affordable solution to the institution in due course. It in effect means that by date an affordable solution had not yet been found.

[40] The council meeting of 22 November 2008 took place before the application for a grant from the Department of Education had been made, and long before the DUT learnt that the application had been successful. This destroys the applicant's "bad faith" theory – the theory that when the DUT learnt that the application for a grant had succeeded, it decided to abandon the consortium.

[41] In the light of the above the EXCO of council provisionally decided that the Student Village Project should go out to tender again. Their decision was subject to several qualifications, in particular the relevant documents being carefully examined and legal advice being obtained.

[42] The applicant's case is to the effect that the members of EXCO of council were engaged in a fraud. As Mr Gajoo correctly pointed out, this is an unlikely conclusion to be drawn from the facts. One cannot lightly presume that the officials who sit on the EXCO of a university would act, or were acting, fraudulently. In all likelihood their genuinely held views were expressed in the minutes of the meeting. Whether these views were ultimately right or wrong does not matter in a claim for out-of-pocket expenses. Provided that they did not act in

bad faith, there is no room for holding the DUT liable for the expenses of the consortium.

[43] The applicant also suggests bad faith on the part of the DUT in that they did not inform the consortium of the outcome of the grant. In view of the applicant's role in presenting the model it is most unlikely that the consortium did not monitor the outcome of the application, which in any event was a matter of public knowledge that could be easily ascertained.

[44] On 16 April 2009 the DUT received a legal opinion from independent attorneys which I do not propose to re-state, save to indicate that it concludes by stating that the DUT may withdraw the provisional bid on the basis that the negotiations had not been satisfactorily concluded. Mr Gajoo submits in this regard that it cannot be seriously suggested that the attorneys who gave that legal advice were party to any deception or fraud or acted in bad faith.

[45] When DUT's council ultimately concluded that the procurement process had been flawed, it did so both on the strength of the legal opinion received and upon discussions by the members of council. This is another indicator that the decision was not made in bad faith.

[46] The applicant's contention that there are "exceptional circumstances" in this case which warrant the granting of its out-of-pocket expenses is based both on the bad faith argument and on the allegation that the DUT has "taken points" without any merit, especially in regard to the condonation application.

[47] I do not propose dealing with the "bad faith" argument again. With regard to the condonation aspect, Mr Gajoo has pointed out that the applicant's grounds for seeking condonation were superficial and did not contain an explanation of the delay, let alone a reasonable explanation. I agree.

[48] **THE APPLICATION IS ACCORDINGLY DISMISSED WITH COSTS, INCLUDING ALL RESERVED COSTS AND THOSE CONSEQUENT UPON THE EMPLOYMENT OF TWO COUNSEL.**

DESAI J