IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No: EL 1544/2012
ECD 3561/2012
Date Heard: 14/12/2012
Date Delivered: 20/12/2012

In the matter between

EVALUATIONS ENHANCED PROPERTY APPRAISALS (PTY) LTD — Applicant

and

THE BUFFALO CITY METROPOLITAN MUNICIPALITY — First Respondent

PRIMELAND PROPERTIES (PTY) LTD — Second Respondent

AND THE FURTHER RESPONDENTS AS PER ANNEXURE "A" OF THE NOTICE OF MOTION

JUDGMENT

REVELAS J

[1] The applicant instituted urgent proceedings, for interim relief pending the outcome of a review application it intends bringing to review and set aside a decision of the first respondent, awarding a certain tender to the second respondent.

[2] The interim relief sought was firstly, for the delivery of certain listed documents which included copies of all the tenders submitted to the first respondent in respect of the contract in question (contract no. 2953) and all service level agreements pertaining thereto. Secondly, the applicant sought to interdict the respondents from implementing any agreement in respect of contract no. 2953, pending finalisation of the review application. An order directing the first respondent for reasons for its decision was also prayed for.

[3] The applicant specializes in the compilation and maintenance of general valuation rolls, and the valuations of municipal properties in South Africa. The applicant employs a number of professional valuers who are registered in terms of section 20(2)(a) of the Property Valuers Profession Act, 2000.

[4] During 2011 or early in 2012 the first respondent called for tenders for the contract no 2953 and invited bids from suitably qualified registered property valuers for the compilation and maintenance of the general (municipal) valuation roll, asset register of municipal properties, supplementary valuation rolls, as well as the supply of other valuation related services in compliance with the Local Government: Municipal Property Rates Act 2004 (Act No 6 of 2004). The date of the valuation

was determined as 1 July 2013 and the date of implementation of the certified valuation roll was to take effect on 1 July 2014.

[5] The applicant and the second respondent were the only two co-tenders who, after a sifting process, became the final competitors for the contract. The second respondent's "contract price" was about R3 million less than the applicant's price. Despite severe scepticism on the part of one of the first respondent's employees about the competence and suitability of the second respondent for the highly specialized task at hand, the second respondent was awarded the tender.

[6] The first respondent did not notify the applicant of the outcome of the bidding, despite the applicant's queries directed at it. Instead, the first respondent relied on a general announcement of the outcome of the bid in the second respondent's favour, it had posted on its website. On the 21 August 2012, the applicant wrote to the first respondent, and said that it had been advised by the Supply Chain for the first respondent that the tender in question had been awarded. In the letter the applicant:

(1) requested (as a matter of urgency) a written response as to whether the award had been made or was still being adjudicated;

(2) urged the first respondent to treat the request as urgent "*as if the tender has already been awarded*";

(3) notified the first respondent of its intention to lodge an objection and recorded it dissatisfaction with the entire tender process;

(4) requested documentation on the entire process, scoring and technical competence of the service provider;

(5) advised the first respondent of its intention to "move an urgent application in the High Court" for an interdict (such as the one under consideration).

[7] The first respondent did not answer or address any of the questions raised above. It only advised the applicant on 11 October 2012 to comply with internal procedures and to complete the correct documentation in connection therewith. On 16 October 2012, in response to a further letter by the applicant, the first respondent advised that: "No Service Level Agreement has been signed yet and the project had not yet commenced". Nothing was said about the second respondent and the applicant was requested to keep litigation in abeyance.

[8] On 8 November 2012, the applicant had cause to write (through newly appointed attorneys) to the respondent requesting *inter alia:*

(1) Confirmation of whether or not the tender has been awarded.

(2) If the tender was awarded, to whom and when.

(3) Whether the service level agreement was signed.

(4) At what stage would the tender be implemented.

(5) A copy of the tender document submitted by the successful tender.

[9] The first respondent's only response to these requests was to insist once again completing the correct forms and follow the correct procedures. More importantly, not a word was said about the second respondent who had already been engaged by this stage. A complaint form was indeed forwarded by the applicant to the first respondent, even though it was not sufficiently completed.

[10] As foreshadowed in the letter of 8 November, the first respondent's failure to deal with any of the applicants requests listed above by 13 November 2012, caused the applicant to bring the current application.

[11] The respondents challenged the application on several grounds. These were:

1. Urgency, in that the applicant knew on 21 August 2012 already that the tender had been awarded, but waited until the end of November to bring this application.
2. The applicant's failure to comply with internal procedures.
3. The prejudice of granting an interdict to the second respondent. Mr Baleni, who *de facto,* is the second respondent, had relocated from Johannesburg, opened offices, purchased furniture and equipment, and entered into two-year contracts with service providers.

[12] The main argument in respect of urgency was that the applicant was supine, the author of its own urgency, and therefore not entitled to the urgent relief it seeks. I disagree.

[13] Whereas the applicant perhaps could have been more pro-active in placing the first respondent on specific terms, the correspondence between the parties strongly suggests that the first respondent was most uncooperative by not adhering to a single request made by the applicant, (the only other tenderer). The respondents relied *ex post facto,* and repeatedly on the applicant's knowledge of the outcome of the tender award as early as 21 August 2012. It was not open to the first respondent to rely on its website announcements to attribute specific knowledge to the applicant in the circumstances where the applicant had been asking for detailed information and documentation about the tender.

[14] The first respondent, simply stonewalled the applicant by deliberately withholding crucial documentation and insisting on the completion of forms, when the information requested in the first place, was crucial to complete the forms sensibly. The documentation sought by the applicant was only made available before Mr Beningfield for the applicant, commenced his argument in court.

[15] The work envisaged to be done in terms of contract no 2953 is very important. It is in the public interest that the valuers who perform the functions in question for a municipality, are suitably qualified and have the best work-related experience possible. The second respondent also relied on the extensive experience of an individual who would assist it with the work, but who was not part of the tender process, to meet the tender criteria.

[16] *Prima facie*, in my view, there appears to be merit in the proposition that the second respondent was not sufficiently suitable for the work. The lower contract price does not necessarily cure that. Any benefits achieved by opting for the cheapest tender could easily be eradicated if the work in terms of the tender is performed by under-qualified personnel. The scathing criticism of the second respondent's suitability and qualifications, along with certain other factors, may very well persuade a reviewing court to set aside the tender. Even if the municipal employee who wrote the scathing critique of the second respondent's suitability was not a member of the relevant committee responsible for evaluating the co-tenderers, his views should not be discarded out of hand.

[17] The prejudice to be suffered by the second respondent could have been avoided, if the first respondent was less determined in its stance of tolerating no inference in its awarding the contract to the second respondent. It ought to have played open cards with the applicant. The

first respondent would have strengthened its case considerably if it had just furnished the information as requested. Its insistence on correct procedures would then have appeared less contrived and swayed the balance of convenience in its favour. Co-operation may very well have averted this present application. The prejudice to the second respondent presents no bar to the applicant to persue its constitutionally enshrined right to fair administrative action.

[18] In my view, the applicant has made out a *prima facie* case for the relief it seeks, except for paragraph 2 (delivery of the documents). The period of five days in paragraph **5** ought to be extended. Even though the second respondent also opposed this application, it was the first respondent's conduct which necessitated this application and the latter should be liable for the costs of the application.

[19] In the result I make the following order:

1. An order in the terms set out in Part A, paragraphs **1, 3, and 5** of the applicant's notice of motion is granted.
2. The first respondent is ordered to furnish reasons, as envisaged in the Uniform Rule 53, in respect of contract no 2953 to the respondent, by no later than 11 January 2013.
3. The first respondent is ordered to pay the applicant's costs of this application,

4. This order shall lapse on Friday 18 January 2013, at 12h00, if the applicant has not filed its application for review by that date.

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E REVELAS
Judge of the High Court

Counsel for the Applicant, Adv Buchanan and Adv Benningfield, instructed by Conlon & Associates Inc.

Counsel for the First Respondent, Adv de La Harpe, instructed by The Buffalo City Metropolitan Municipality.

Counsel for the Second Respondent, Adv Quinn, instructed by Primeland Properties (Pty) Ltd.

Date Heard: 14 December 2012

Date Delivered: 20 December 2012