/SG

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

DATE: 26/05/2009
CASE NO: 51646/2008

UNREPORTABLE

In the matter between:

STEFANUTTI & BRESSAN EARTHWORKS (PTY) LTD	APPLICANT
And	
THE MINISTER OF THE DEPARTMENT OF WATER AFFAIRS	1ST RESPONDENT
REALEKA INVESTMENTS (SA) (PTY) LTD	2ND RESPONDENT
MASWIKENG PROJECT MANAGEMENT AND CONTRACTORS	3RD RESPONDENT
KAULANI CIVILS (NORTH) (PTY) LTD	4TH RESPONDENT

JUDGMENT

SERITI, J

1. Introduction

This matter came to court by way of motion.

In the notice of motion the applicant is seeking an order in the following terms:

> "1. That the award of the tender in Contract no. W9760 for Dam Safety Rehabilitation: Phase 1: Mashashane Dame to a joint venture between the Second and Third Respondents, known as Maswikeng Realeka JV be reviewed and set aside;
>
> 2. That the aforesaid contract is awarded to the Applicant; alternatively that the First Respondent is ordered to take all necessary steps to effect an award of the tender in the aforementioned contract to the Applicant; …"

2. <u>Founding Affidavit</u>

It was attested to by Mr Russell Crawford the Managing Director of the applicant. He alleges that on 24 January 2008 the applicant submitted its duly completed tender documents to the Department of Water Affairs and Forestry.

Various documents were completed including all other formal requirements called for in the tender process.

The Bid Adjudication Committee of the Department of Water Affairs and Forestry had, in terms of the document which called for tenders, appointed Goba-ARQ Joint Venture as an engineering company which was to oversee the calling for tenders and to act as the department's agent in the tender adjudication process to the extent provided for in the request for proposals.

On 25 January 2008 the tender submission of the tenderers were opened in the presence of their agents.

After the opening of the tenders and prior to a detailed evaluation of the tenders, the tenders are subjected to a "test for responsiveness". The said test requires the following:

(a) compliance with the requirements or conditions of the tender;

(b) that the tender offer has been properly completed;

(c) is responsive to the other requirements of the tender documents.

On 19 February 2008 the applicant received a letter from Goba-ARQ Joint Venture. The said letter reads as follows:

> "Your letter dated 24 January 2008 (LP/im/001) in connection with the above mentioned project has reference:
>
> In this letter you have raised certain qualifications regarding your rates submitted in your tender. Below is our response to these qualifications.
>
> <u>1 – Extension of time</u>
>
> Your requirement is for the extension of time for rain delays to be calculated based upon the critical path method. As indicated in the tender document, there is a formula which shall be used to calculate the number of days per calendar month which can be claimed as

extension of time in case of adverse weather conditions.

2 – Zone 8 Material

The Zone 8 material is gravel surfacing which needs to be sourced from a commercial supplier as described in the Bill of Quantities. The qualification in your letter states that your submission is based on all Zone 8 material to be sourced from site without screening.

This material will definitely not be available on site and will have to imported. It is also imperative that this material complies with the limits as shown on the grading envelope and no variations on this will be accepted.

3 – Site Borrow Material

You qualify that your rates on all gravel and stone material have been based on the material to be available on site without any crushing or screening, except where the BOQ item explicitly states it should be obtained from a commercial source.

We feel the issue around the gravel material is adequately addressed in point no. 2 above as the BOQ states this material should be commercially sourced.

We assume the stone you refer to in your qualification is for rubble masonry concrete.

Please refer to the payment reference below as per the tender document:

> ‘The rates tendered shall cover the procurement, supply or production of all constituent materials, haulage, stockpiling, the mixing of mortar, the delivery of materials to point of placement, the preparation and cleaning of rock/stone plums, the placement of mortar and rock/stone plums to form a dense Rubble Masonry Concrete matrix, the filling with any cavities with mortar and the curing of the surfaces of the final structure.’

4 – Zone 4A; 4B; 5 Material

Your qualification states that your supplier of these materials could not guarantee that the material priced would meet the grading requirements as specified. It is essential that all materials comply with the grading envelopes as specified and no deviation from these envelopes will be accepted.

5 – Bonds

As per the Appendix to Tender the retention on this contract is set at 10% of the contract value with 5% to be released once the site is handed back to the Employer and 5% to be released when the defects notification period of 12 months has expired. Therefore your request to have two equal bonds of 2,5% of the contract value is not according to the requirements under this contract.

We trust you find the above response to your qualifications in order and request that these qualifications be withdrawn.”

The applicant responded to the said letter by confirming the applicant's acceptance of the conditions in the tender document and also adjusted its rates as a consequence of the sourcing of the relevant material other than from on site.

The appointed evaluation panel consisted of three persons and the scoring that was to be followed in respect of the tender evaluation was the 90/10 preference point system.

After the evaluation process the panel had to make recommendations to the department in respect of the preferred bidder for appointment.

In accordance with the tender process the tenders were considered for responsiveness and the three tenders of the applicant, the second and third respondent as a joint venture and the fourth respondent respectively were all found to be responsive.

The initial and adjusted tender prices of the three tenderers were as follows:

Tenderer	Initial Tender Price	Adjusted Tender

		Price
Applicant	R10 192 982.46	R12 844 446.86
4th Respondent	R14 946 554.34	R14 946 604.34
2nd and 3rd Respondents	R15 463 705.10	R15 463 390.09

The panel, using the 90/10 scoring according to the preference point system allocated the following score to the tenderers:

– The applicant scored 90 for price and 1 for preference totalling 91 points;

– The fourth respondent scored 76 for price and 3.6 for preference totalling 79.6;

– The second and third respondent scored 72 for price and 6 for preference totalling 78.

The applicant was recommended as it had achieved the highest score during the evaluation process.

The recommendations of the panel were referred to the "Branch Bid Evaluation Committee" of the department which apparently considered the matter and recommended the second and third respondents' bid for approval to the "Department Control Committee" of the department.

The "Branch Bid Evaluation Committee noted *inter alia* as follows:

> "3. Recommendation
>
> The end user recommends acceptance of the bid as follows:
>
> The third lowest bidder with the second highest points: Bid No. 2
>
> Messrs Maswikeng Realeka Investments Joint Venture …"

In a letter dated 24 June 2008 the first respondent advised the Realeka Maswikeng Joint Venture that the latter's bid had been accepted and that the acceptance of the contents of the said letter constituted a binding contract between the first respondent and the second and third respondents respectively.

On 30 June 2008 the first respondent advised the applicant that the latter's bid was unsuccessful.

After several correspondence was exchanged between applicant and first respondent, applicant launched an urgent application on 23 July 2008. In the application the applicant applied for an order whereby the respondents are interdicted pending finalisation of review application, from commencing and/or continuing with any execution of the aforesaid contract, including, but not limited to site establishment and further works.

The order prayed for in the urgent application was granted 19 September 2008.

3. Supplementary Affidavit

After receipt of the record of the proceedings from the first respondent, the applicant served and filled a supplementary affidavit. It was attested to by Mr Russell Crawford. He dealt in details with the "Bid Adjudication Report" prepared by Goba-Arq Joint Venture. He pointed out that the said report recommended that the contract should be awarded to the applicant.

The abovementioned recommendation was overridden by Mr L S Moloi, Chief Director in the employment of the first respondent. Mr Moloi, in a note that he wrote, stated that:

"– There seems to be too many qualifications from sand B.

– To avoid any VO's due to low P & G rates and a program of five months instead of nine months, I recommend Maswikeng Realeka.

– This will also help us achieve our BEE targets in the DSRP."

On 28 April 2008 Mr Hardus Muller an employee of the Department of Water Affairs and Forestry, when responding to the abovementioned remarks by Mr Moloi said that there is no justifiable motivation why the applicant should not be appointed.

Mr Moloi appended notes to the said document, persisting that the applicant is not recommended. He further said that:

> "… in the interests of sharing the DSRP pie more widely, it makes sense to appoint Maswikeng despite the R2.1 million premium.
>
> – That we have not worked with them before makes it even more critical to appoint them.
>
> – Monopolising the DSRP to S & B at all costs is not acceptable."

At a meeting of the Branch Evaluation Committee on 29 May 2008, which Mr Moloi also attended, Mr Moloi recommended the Maswikeng Realeka JV and advanced following reasons for not awarding the tender to the applicant:

> "… S & B made many qualifications to their tender and their P & G's are unreasonably low;
>
> – In the interest of sharing the DSRP it makes more sense to award the tender to Maswikeng Realeka despite the R2.1 million premium."

4. First Respondent's Answering Affidavit

It was attested to by Ms Zandile Mathe, Chief Director for Financial Management in the Department of Water Affairs and Forestry.

She explained the process that was followed to evaluate the three tenders which were found responsive. She further alleges that the Chief Director: NWR1 Operations, after having considered the recommendation of the appointed panel found that the applicant who was recommended for appointment had a non-responsive tender offer which should have been rejected and not evaluated with the other tenders.

In particular, the applicant's tender offer did not comply with the tender specifications and had qualifications which materially had an effect on the competitiveness, fairness and transparency of the tender process.

The panel's recommendation was overruled by the Programme Manager and the next qualifying tenderer was recommended to the Branch Evaluation Committee, which in turn made a recommendation to the Bid Evaluation Committee. She further alleges that the letter of the applicant dated 24 January 2008 which was the covering letter attached to the applicant's tender document raised various qualifications regarding their rates. In the said letter the applicant sought condonation for non-compliance with the tender specifications. Other tenderers were not aware of the correspondence between applicant and Goba-Arq JV.

The applicant was allowed by the panel to increase its original tender price with an amount of R3 022 668.73. This aspect alone materially affects the competitiveness of the tender process and fly in the face of the constitutional imperative that a procurement process of a state organ should be fair, competitive and transparent.

The recommendations of the panel were referred to the branch bid evaluation committee of the Department, which considered the bid and made certain recommendations to the control committee of the department which was under her chairmanship.

The branch bid evaluation committee recommended that the second and third respondents tender be accepted and that the applicants tender be rejected due to deviation from specification in that the latter had qualified its tender on too many items, that the construction period of five months will not be adequate to complete the project without further extentions, variation orders and that their rates for preliminary and general items were unreasonably low and that the required cost breakdown of various items specified were not provided.

The Departmental Bid Adjudication Committee, in their minutes dated 4 June 2008, noted, *inter alia*, the following:

> "Recommendation
>
> The end-user recommends acceptance of the bid as follows:
>
> The third lowest bidder with the second highest points: Bid No. 2
>
> Messrs Maswikeng Realeka Investments Joint Venture …"

She further alleges that the tender was intended to be issued for an estimated period of nine months due to financial considerations. The second and third respondents had already commenced with the project and have incurred expenses for which the department is liable.

5. Applicant's Replying Affidavit

It was attested to by Mr Russel Crawford, Managing Director of the applicant. He alleges that the tender of the applicant was not found to be non-responsive up to the time the second and third respondents' joint venture was awarded the tender.

At no stage did applicant request for deviation from the standard tender procedure.

The contract specific tender data allows for adjustment of prices pursuant to a correction of rates. The adjusting of the applicant's tender price falls within the contract specific tender data and was so accepted by both the first respondent and the engineering team appointed by it.

At all relevant times, both prior and after the adjustment of its prices, the applicant's tender was the cheapest. The applicant was and remains the front-runner in regard to pricing. No other tenderer was prejudiced by the adjustment of the applicant's prices.

He further alleges that on 4 June 2008 Mr Moloi signed the recommendation of the NWR1 Branch Bid Evaluation Committee, recommending that the tender be awarded to Messrs Maswikeng Realeka Investments Joint Venture. On 5 June 2008 he forwarded this recommendation to the Chairperson of the Department Control Committee.

On 6 June 2008 Ms Mathe as Deputy Chairperson approved the document to serve at the Departmental Bid Adjudication Committee. On 11 June 2008 Ms Mathe as Chairperson of the Departmental Committee approved the recommendation for the appointment of the second and third respondents as successful bidders.

He further alleges that Ms Mathe in the answering affidavit has failed to deal with the merits of the applicant's tender as set out by the panel of engineers in their Bid Adjudication Report.

6. Findings

It is common cause that on 21 December 2007, the first respondent invited tenders for the provision of Dam Safety Rehabilitation Programme at Mashashane Dam, Limpopo Province.

The applicant together with four other tenderers submitted their bids timeously. The applicant's bid was accompanied by a letter dated 24 January 2008.

The Bid Adjudication Committee of the Department of Water Affairs and Forestry appointed Goba-ARQ Joint Venture to oversee the calling for tenders and to act as the department's agent in the tender adjudication process.

After the opening of the tender documents, there were certain correspondence exchanged between the abovementioned agents and some of the tenderers.

The adjudication panel consisted of three people two of whom are engineers and one a project manager.

After evaluating the bids, the panel wrote a detailed report wherein they dealt *inter alia* with compliance with the tender requirements, qualifications, price, experience of tenderers, preferential procurement procedures, tender programme, recommendations, etcetera.

Under the heading "Tender Programme" the panel noted, *inter alia*, "The Engineer's opinion is that a five months construction period is realistic especially if the construction will take place during the winter months when rain is not likely to interfere with the construction programme”. The panel allocated following points to the tenders they evaluated:

Applicant – 91.0

Kaulani Civils – 79.6

Maswikeng Realeka JV – 80

There was a calculation error in the points allocated to the Maswikeng Realeka JV. Total points should be 78 and not 80.

Panel recommended that the tender should be awarded to the applicant. The above report is dated March 2008.

On 3 April 2008, Mr Hardus Muller, apparently an Acting Director: Strategic Asset Management addressed a memorandum to the chairperson: Department Bid Adjudication Committee. He alluded to the panel’s report in the said memorandum. In the said memorandum he analysed the panel’s report and concluded by stating that the applicant should be awarded the tender.

Ms L S Moloi who is apparently the Chief Director in the employment of the first applicant, did not agree with the recommendations of the panel and Mr Muller and he noted the following at the bottom of Mr Muller's memorandum:

> "– There seems to be too many qualifications from S & B;
>
> – To avoid any VO's due to low P & G rates and a program of five months instead of nine months, I recommend Maswikeng Realeka;
>
> – This will also help us achieve our BEE targets in the DSRP."

On 21 April 2008 Mr Muller addressed another memorandum to Chief Director: Infrastructure Operations Management. In the said memorandum Mr Muller again attempted to motivate why the applicant should be awarded the tender. He stated, *inter alia*, that:

> "4. That adjudication of these tenders was done strictly in accordance with the guidelines of the Department and where the tenderers did not

> meet the required criteria the tenderer was regarded as non-compliant or non-responsive to the tender … but that both the tenders of Stefanutti and Maswikeng were compliant and responsive …
>
> There is therefore no justifiable motivation why S & B should not be appointed.”

Mr Moloi again made notes at the foot of the last page of the memorandum and the said note read as follows:

> “I do not recommend appointing Stefanutti because of their many qualifications and unreasonably low P & G’s and other rates.
>
> In the interest of sharing the DSRP pie more widely, it makes sense to appoint Maswikeng despite the R2.1 million premium.
>
> That we have not worked with them before makes it even more critical to appoint them.

> Monopolising the DSRP to S & B at all costs is not acceptable."

In the answering affidavit the two memoranda written by Mr Muller and the notes made thereon by Mr Moloi are not dealt with.

Ms Zandile Mathe, Chief Director for Financial Management alleges that "In particular, the applicants tender specifications and had qualifications which materially had an effect on the competitiveness, fairness and transparency of the tender." The quoted statement is made by her despite the contrary view contained in the detailed report of the panel which evaluated the bids and without in any way commenting in full on the panel's report.

She further said "It is worth highlighting that the department has got its own team of experts which include engineers that are qualified to consider recommendations made by the panel applying their technical knowledge and thus provide a meaningful and informed recommendation to the adjudication committee to either accept or reject the panel's recommendations."

Except the above quoted statement, there is no report from the alleged experts nor has she disclosed the identity of the alleged experts. There is also no confirmatory affidavit from any of the alleged experts.

The allegations made by Ms Mathe mentioned above are not helpful at all.

In his heads of argument, the first respondent’s counsel submitted that the Bid Adjudication Committee of the first respondent rejected the tender of the applicant for non-compliance with specifications, qualifying its price on other matters and the price adjustment. It is further stated that the applicant’s tender was thus found to be non-responsive.

The panel of experts, in their detailed report dealt *inter alia* with qualifications of the tenders. They stated that the applicant qualified their tender on a number of issues. They further stated that after clarification was sought on the said issues a number of the qualifications were waived and two remained. They also mentioned how the two remaining qualifications relating to materials were dealt with.

Paragraph F2.17 of the "Standard Conditions of Tender" which is applicable in this matter allows clarification to be sought from a tenderer. It further states that no change in the total of the prices or substance of the tender offer is permitted.

The "Tender Data (Contract Specific)" document contains certain clauses which are applicable in this matter. Paragraph F2.17 thereof reads as follows: "Clarification of Tender Offer after submission:

For this contract the employer may, after clarification with the tenderer, agree to amend the total of the prices stated by the tenderer in his tender offer."

In the introductory part of the "Tender Data" it is provided that "The Tender Data shall have preference in the interpretation of any ambiguity or inconsistency between it and the Standard Conditions of Tender."

The contract specific allows the amendment of the total price after clarification was sought and it takes precedent over the "Standard Conditions of Tender" on this point.

The submission by first respondent's counsel that the applicants was not entitled to adjust its price is without any basis.

The second submission by the first respondent's counsel mentioned above is that the applicant's tender was not responsive and should have been rejected at the evaluation stage.

Paragraph F3.8 2A of the Standard Conditions of Tender reads as follows:

> "A responsive tender is one that conforms to all terms, conditions and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer's opinion, would:

(a) detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work;

(b) change the Employer's or the tenderer's risks and responsibilities under the contract; or

(c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified."

The applicant's tender was not found to be non-responsive by the panel of experts and consequently same was not rejected. There is no evidence that the tender of the applicant will have any negative impact on the scope and quality of the work, nor that it will change the employer's risks nor affect the competitive position of other tenderers.

In the answering affidavit Ms Mathe staed that in accordance with the tender process the tenders were considered for responsiveness and all three tenders were found to be responsive.

In fact, the panel of experts recommended that the tender be awarded to the applicant, which is a clear indication that the said panel did not find the applicant's tender to be non-responsive.

The reasons advanced by Mr Moloi, in the notes he made on the two memoranda prepared by Mr Muller does in no way suggest that the tender of the applicant was found to be non-responsive. Some of his reasons for holding the view that the applicant should not be awarded the tender have been adequately dealt with in the panel's report and some of them are totally irrelevant.

In his memorandum dated 21 April 2008, Acting Director: Strategic Assets Management, Mr Muller stated *inter alia*:

> "4. The adjudication of these tenders was done strictly in accordance with the guidelines of the Department and where the tenderers did not meet the required criteria the tenderer was regarded as non-compliant or non-responsive to the tender."

From the above, it is clear that the submission that the applicant's tender was non-responsive is without any basis and should also be rejected.

I cannot find any justification for the failure of the first respondent to follow the recommendations of the panel of experts and their Acting Director Mr Muller. The applicant should have been awarded the tender.

The applicant's counsel, submitted, among others that there is no justification for the referral of the tender award process back to the first respondent as the court is in as good position as the first respondent. Any referral of the tender award to the first respondent will cause further delays.

On the other hand, the first respondent's counsel submitted that if the court awards the tender to the applicant, the first respondent might not have the funds for the project.

In the answering affidavit, it was stated amongst others, that the court, if it sets aside the award of tender made by first respondent, court should not award the tender to the applicant as the court will not be privy to all material considerations that are relevant to the reconsideration of the tender.

I do not agree with the first respondent’s view. All the relevant factors are contained in the documents filled in this cased. The first respondent did not mention the alleged relevant factors that this court might not be privy to.

In a document marked annexure ZM4 attached to the answering affidavit, there is a stamp dated 8 June 2008 which indicates that sufficient funds are available for this project.

The submission by the first respondent’s counsel that the first respondent might not have funds for this project does not accord with the facts of this case.

There are no objective facts which suggests that this court should not award or cause the awarding of the tender to the applicant.

The court therefore makes the following order:

1. The award of the tender in Contract no. W9760 for Dam Safety Rehabilitation: Phasw 1: Mashashane Dam to a joint venture between the second and third respondents, known as the Maswikeng Realeka JV is set aside.

2. The first respondent is ordered to take all necessary steps to effect an award of the tender in the aforementioned contract to the applicant.

3. The first respondent is to pay the costs of this application.

4. The first, second and third respondent, jointly and severally are to pay the costs of the application in case no: 35153/08.

W L SERITI
<u>JUDGE OF THE NORTH GAUTENG HIGH COURT</u>

51645/2008/sg

Heard on:	20 May 2009
For the Applicant:	Adv N Davis SC
Instructed by:	Friedland Hart & Partners, Pretoria
For the Respondents:	Adv M Mphaga & M Mojapelo
Instructed by:	The State Attorney, Pretoria
Date of Judgment:	