

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. : 5412/2008

In the matter between:-

MATLAFALANG TRAINING CC First Applicant

LEARNERS INTERNATIONAL CC Second Applicant

and

THE MEC: FREE STATE DEPARTMENT OF First Respondent
PUBLIC WORKS

KATUSHYA SECURITY SERVICES Second Respondent
(PTY) LIMITED

HEARD ON: 20 NOVEMBER 2008

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 11 DECEMBER 2008

[1] This is an application for an interim interdict pending an application to review and set aside the award of a contract by the first respondent to the second respondent, following on a tender procedure. The applicants, who as a joint venture also tendered for the contract, in essence now asks that the execution of this contract by the second respondent be suspended pending the review application. The first respondent opposes the application but the second

respondent does not. Unless indicated otherwise, reference to the first respondent herein must be understood as including the Free State Department of Public Works, Roads and Transport and the officials thereof, in the capacity as such.

- [2] *Inter alia* by advertisement in the press, the first respondent requested proposals from qualified security training service providers to provide training to 137 participants in the Departmental National Youth Service Program. For the sake of convenience the training so to be provided to the 137 participants is referred to simply as “the program”. The document containing the request to tender for the program consists of four sections, namely background, scope of the program, terms and conditions, as well as evaluation criteria. The scope of the program will be dealt with fully below.

- [3] Under the section evaluation criteria all proposals received were to be evaluated in accordance with the 90/10 points system referred to in section 2(1)(b)(i) of the Preferential Procurement Policy Framework Act, 5 of 2000, (“the Act”). See also the Preferential Procurement Regulations published

in terms of the Act in Government Notice R725 in the Government Gazette of 10 August 2001 (“the regulations”). The 90 points were made up of a maximum of 45 points for price and a maximum of 45 points for functionality. The 45 points for functionality were broken down to a maximum of 15 points for compliance with the requirements of the program set out in the sections in respect of scope and terms and conditions of the program, a maximum of 15 points for expertise, a maximum of 10 points in respect of past experience in providing training to security officers and a maximum of 5 points in respect of locality, that is preference to Free State based companies. It is specifically stated in the section in respect of evaluation criteria that tenderers should score a minimum of 40% (18 points) out of the 45 points for functionality in order to be considered further and that tenderers who scored below 18 points for functionality will not be further evaluated, in other words effectively disqualified. The aforesaid remaining 10 points were to be allocated in respect of the promotion of specific goals by contracting with historically disadvantaged individuals and small enterprises (“SMME’s”). Six points hereof were to be allocated in respect of proposals involving contracting with

disenfranchised persons, 1 point in respect of women and 0,5 point each in respect of youths and persons with disability. The remaining 2 points were specified for SMME's.

[4] Three tenders for the program were received and considered. The total tender of the applicants, excluding optional items, amounted to R4 060 680,00, VAT included. The second respondent tendered the amount of R473 937,58. It does not appear from the papers whether this price includes VAT or not. The amount of the third tender does not appear from the papers.

[5] In terms of the first respondent's supply chain management policy of October 2007 ("the procurement policy"), a bid evaluation committee and a bid adjudication committee were established. In broad terms the functions of these committees are in accordance with their names, that is evaluation of the tenders by the bid evaluation committee and adjudication on the evaluation by the bid adjudication committee. It is common cause that the bid evaluation committee awarded 96,38 points to the tender of the

applicants on the basis of a full complement of 45 points for each of the elements of price and functionality and 6,38 points for specific contract participation goals. There is a serious dispute on the papers as to the points awarded to the second respondent in respect of its tender. According to the first respondent the second respondent's tender was awarded 84 points, namely 45 for price, 37 points for functionality and 2 points for specific contract participation goals. The applicants say that according to information received from officials in the first respondent's department, the second respondent scored 0 points for functionality and in total only 25 points out of the possible 100 points. In the result the applicants say that the second respondent's tender should have been disqualified because of the failure to score the minimum of 18 out of 45 points for functionality. How 45 points each for price could have been awarded where one tender was approximately 10 times more than the other, is not easy to comprehend. Be that as it may, it is common cause that the applicants' tender scored the highest points. The bid evaluation committee accordingly recommended that the tender and resultant contract in respect of the program be awarded to the applicants.

[6] The matter then went to the bid adjudication committee. As will be more fully explained later, the bid adjudication committee determined that the tender of the applicants should not have been considered. It therefore came to the conclusion that it was obliged to overturn the recommendation of the bid evaluation committee. In the result it recommended that the tender be awarded to the second respondent. This resulted therein that a contract was entered into in respect of the execution of the program between the first respondent and the second respondent, apparently on 18 August 2008. This application was served on the first respondent, however, on 13 August 2008.

[7] The requirements for an interim interdict are well-known. They are a clear right or a right *prima facie* established though open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, a balance of convenience in favour of the granting of the interim relief and the absence of any other satisfactory remedy for the applicant. In my judgment the applicants did not show a clear right. Consideration of whether a right is *prima facie* established, involves two

stages. The proper approach in respect of the first stage is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether having regard to the inherent probabilities the applicant should on those facts obtain the final relief intended. When, as is the position here, facts are set up in contradiction of the case of the applicant, the second stage of the enquiry comes into play. This entails consideration of whether the facts so set up in contradiction throw serious doubt on the case of the applicant. Where there is such serious doubt the applicant cannot succeed, as the *prima facie* right may only be open to some doubt. See **GOOL v MINISTER OF JUSTICE AND ANOTHER** 1955 (2) SA 682 (C) at 688; **SPUR STEAK RANCHES LIMITED AND OTHERS v SADDLES STEAK RANCH, CLAREMONT AND ANOTHER** 1996 (3) SA 706 (C) at 714; **SIMON N.O. v AIR OPERATIONS OF EUROPE AB AND OTHERS** 1999 (1) SA 217 (SCA) at 228 G – H.

- [8] The applicant will in the principal case seek the review and setting aside of the decision of the first respondent to award the tender in respect of the program to the second

respondent. It is not disputed that this decision constitutes administrative action in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000. See **MILLENIUM WASTE MANAGEMENT (PTY) LTD v CHAIRPERSON, TENDER BOARD: LIMPOPO PROVINCE AND OTHERS** 2008 (2) SA 481 (SCA) at 483 para 4. It follows that the applicants must presently show *prima facie*, even though open to some doubt, that they will succeed with the review of this decision in due course, on the grounds put forward in the application. These grounds must therefore now be considered in accordance with the test set out above.

[9] The applicants say that they believe that the award of the tender to the second respondent was tainted by bias. This allegation, however, is groundless as it is purported to be based on the mere allegation that the second respondent hails from Qwa Qwa and that it is believed that the head of the first respondent's department also originates from Qwa Qwa.

[10] The applicants, however, rely on three further grounds of review. These are that because the applicants were

awarded the most points in terms of the evaluation criteria in respect of the program, it was incumbent on the first respondent to award the tender to the applicants, secondly that the second respondent's tender should have been disqualified because of the failure to score the minimum of 18 points out of 45 in respect of functionality and thirdly that the bid adjudication committee was bound by the recommendation of the bid evaluation committee. On the view that I take of the matter, it is not necessary to deal with the last two mentioned grounds.

- [11] As stated above, it is common cause that the applicants obtained the highest points in terms of the evaluation criteria and also scored significantly more points in respect of specific contract participation goals. The applicants therefore say that there was no valid reason not to award the tender and the contract to the applicants. The response of the first respondent specifically hereto is only to the effect that in terms of the advertisement calling for proposals for the program and the procurement policy a tender would not necessarily be awarded to the tender scoring the highest points in terms of the evaluation criteria. This clearly,

however, cannot signify a boundless and arbitrary discretion. Section 217(1) of the Constitution provides that when an organ of state such as the first respondent and his department contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The first respondent did not see fit to attach the procurement policy to the answering affidavit. It must in my judgment accordingly presently be accepted that the procurement policy complies with the framework set out in the Act, promulgated in terms of section 217(3) of the Constitution.

[12] In this connection section 2 of the Act provides as follows:

“2 Framework for implementation of preferential procurement policy

- (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
 - (a) A preference point system must be followed;
 - (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as

contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

- (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
- (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette 16085 dated 23 November 1994;

- (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
 - (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
 - (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.
- (2) Any goals contemplated in subsection 1 (e) must be measurable, quantifiable and monitored for compliance.”

Section 8 of the regulations provides that the 90 points mentioned in section 2(1)(b) of the Act, may be allowed for functionality and price.

[13] The first respondent did not say that objective criteria in addition to those contemplated in sections 2(1)(d) and 2(1) (e) of the Act justify the award to another tenderer than the

tenderer who scored the highest points. The first respondent's case is that the applicant's tender does not comply with the tender requirements, which will be dealt with below, and that therefore it was obligatory to exclude the applicant's tender from consideration and evaluation. On the facts set out by the applicants together with those set out by the first respondent that are not disputed, the contract should have been awarded to the applicants in terms of section 2(1) (f) of the Act. The conclusion therefore in respect of the aforesaid first stage of the enquiry, is that the applicants should succeed with the review.

[14] The next question therefore is whether the facts set up in contradiction by the first respondent throw serious doubt on the applicants' case. In short, the first respondent says that the applicants' did not tender for what was required. An examination of the scope of the program is therefore required.

[15] Section 2 in respect of the scope of the program in the request for proposals commences with paragraph 2.1 which provides the following:

“The security training service provider is expected to provide training to 137 security administration / management participants. The training program should be in line with the Safety and Security Sectoral Education and Training Authority (SASSETA) new grading system in terms of skills program 1, 2, 3, 4 and 5 as follows;”

- [16] Then follows under the heading New SASSETA Grading, skills program 1, 2, 3, 4 and 5, each consisting under the heading SAQA Unit Standards of a number of specific unit standards. Skills program 1 is worth 36 credits consisting of four unit standards, namely protection of premises and assets under all conditions (18 credits), effecting a lawful citizens arrest (10 credits), use and maintain basic security equipment (6 credits) and care for customers (3 credits). Skills program 2 is worth 28 credits and made up of the following unit standards, namely ensure access control through access and egress control (10 credits), safe and secure escorting of valuables, people and assets (6 credits) and identify, handle and defuse security related conflict (12 credits). Skills program 3, worth 22 credits, contains three unit standards namely attend and give evidence in court (6 credits), manage own performance and work as part of a

team (10 credits) and receive, report and react to customer complaints within a security environment (6 credits). Under the heading SAQA Unit Standards next to each of skills programs 4 and 5 is stated “Still need to be developed by SASSETA”. Then follows paras 2.2 and 2.3:

“2.2 In addition to the unit standards as prescribed by the new SASSETA grading system, service providers are required to propose a range of other supplementary unit standards in line with the learners’ curriculum to suite their unique work environment and objectives of the program as outlined in paragraph 1 above.

2.3 Service providers should compile and submit a comprehensive training material booklet. It should include amongst others; the fundamental unit standards as per the SASSETA requirements, as well as the supplementary unit standards.”

[17] The applicants’ tender for the program was based thereon that upon successful completion of the program the participant will obtain the National Certificate: General Security Practices. A minimum of 124 credits in terms of the National Qualifications Framework is needed for this

certificate. The applicants, however, recommended and tendered for a total of 130 credits consisting of 20 unit standards including the 10 unit standards set out above. The applicants' tender did not contain a separate or ascertainable price for only the said 10 unit standards in respect of skills programs 1, 2 and 3.

[18] The first respondent says that a tender was called only for the said 10 unit standards in respect of skills programs 1, 2 and 3. The first respondent says that the applicants should only have tendered for such a program and that that is what the second respondent did.

[19] It is not at all clear to me that this is correct. It is correct that it is stated that skills programs 4 and 5 at the time still needed to be developed by SASSETA. However, in paragraph 2.1 quoted above, it is stated clearly that the training program should be in line with the SASSETA new grading system in terms of skills programs 1, 2, 3, 4 and 5. In paragraph 2.2 quoted above, it is stated that in addition to the unit standards as prescribed by the new SASSETA grading system, again *prima facie* including skills programs 4

and 5, service providers are required to propose a range of other supplementary unit standards in line with the learners' curriculum to suit their unique work environment and the objectives of the program as outlined in the background section of the request for proposals. In paragraph 2.3 quoted above it is stated that the comprehensive training material booklet that service providers must compile and submit, should include amongst others the fundamental unit standards as per the SASSETA requirements, as well as the supplementary unit standards.

[20] In the circumstances I do not think that the first respondent's allegation throws serious doubt or more than some doubt on the applicants' case for the review of the decision award of the tender. It furthermore appears to me that there is much to be said for the view that the scope of the program was set out so ambiguously that it was not possible to decide thereon in a fair, equitable, transparent, competitive or cost-effective basis.

[21] The applicants in my view correctly accept that in the event of the review succeeding, the matter will in all probability be

referred back to the first respondent for reconsideration. In the result the applicants cannot in respect of the other requirements for an interim interdict rely thereon that the contract will be awarded to them. What they can rely on, in my view, is that by the time the review is ultimately successful, the program may have been completed in full or to such an extent that the review would serve no useful purpose. In my judgment this objectively constitutes a reasonable apprehension of irreparable harm if the interim relief is not granted. By the same token I believe that there is a balance of convenience in favour of the applicants. No suitable alternative remedy commends itself. It is clear from what is stated above that the applicants cannot sue for damages, as was suggested on behalf of the first respondent.

[22] The following orders are granted:

1. The award of the contract under proposal 19: Security training to be provided to 137 participants on the Department National Youth Service Program for the Department of Public Works, Roads and Transport, by the first respondent to the second respondent and the

execution thereof, are suspended pending finalisation of the review application to be launched by the applicants for the review and setting aside of the award of the contract.

2. The applicants are ordered to launch the proposed review application referred to in par. 1 above, within 30 days from date of this order.
3. The first respondent is ordered to pay the costs of the application.

C.H.G. VAN DER MERWE, J

On behalf of the applicants: Adv. S. Grobler
Instructed by:
Van Deventer Thoabala Inc.
BLOEMFONTEIN

On behalf of the first respondent: Adv. M.T.K. Moerane SC
With him:
Adv. L.H. Adams
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