

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D12061/2024

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD

Applicant

and

UMKHANYAKUDE DISTRICT MUNICIPALITY

First Respondent

PK CONSULTING GROUP CC

Second Respondent

ORDER

- a) The decision of the first respondent to appoint the second respondent to provide VAT review and recovery services in respect of Tender S[...] through the sourcing of quotations for a period of 12 months at a rate of 14.25% is declared to be constitutionally invalid and unlawful and is set aside;
- b) Any agreement concluded between the respondents pursuant to the decision described in paragraph 1 of this Order is set aside;
- c) Insofar as the first respondent has made any payment to the second respondent pursuant to the decision described in paragraph 1 of this Order, the second respondent is ordered to repay all such amounts to the first respondent;

- d) The first respondent is interdicted from utilising a quotation process to procure any goods and services that fall within the ambit of Tender S[...];
- e) The first respondent is ordered to perform a point scoring of each of the members of the existing panel in respect of any goods and services that fall within the ambit of Tender S[...], and to allocate work on the basis that preference is given to the highest-soaring tenderer on the panel;
- f) The first respondent is ordered to pay the applicants costs, including the costs consequent upon the employment of Senior Counsel, on Scale C in respect of this application and the matter under case number D9873/2024.

JUDGMENT

SHAPIRO AJ

Overview

[1] In March 2024, the first respondent ("the Municipality") published an invitation to tender, with the following description: "*Bid Number: S[...] Panel of accounting support services for a period of 36 months*". The scope of work for which bidders were to tender included financial statements, preparation and audit support, financial support and business advisory, budget and reporting and "mSOCA" support, assets management, VAT review and recovery (which included reconciliation, review, and recovery of consolidated VAT) and actuarial services. Bidders were informed that the Municipality intended to constitute a panel of service providers, but the bid document did not set out expressly how work would be allocated to successful appointees to the panel. All

bidders were required to tender at an hourly rate for various levels of staff and were required to indicate the rates per hour for each relevant rank for each of the three years of the proposed contract term.

[2] The applicant ("MPR") submitted a bid in respect of the VAT services discipline only. MPR and the second respondent were among 21 bidders who were appointed to the contemplated panel by the Municipality. That decision is not under review.

[3] MPR's review relates to what happened next: despite both it and the second respondent concluding Service Level Agreements with the Municipality, the Municipality then elected to issue an "Invitation for quotations for the value added tax (VAT) review for (the municipality) for a period of 12 months" under the same reference number as the original tender. That invitation was apparently transmitted by email to three members of the panel, including the second respondent. Only the second respondent replied to the Request and provided a quotation.

[4] Notwithstanding this, the Municipality sent a letter to the second respondent on 1 August 2024, informing the second respondent that it had "resolved to appoint (it) for the aforementioned project for the period of 12 months at the percentage of 14,25% starting from the 12 of August 2024". The Municipality recorded that a written Service Level Agreement would have to be concluded between itself and the second respondent.

[5] It is the Municipality's decision to appoint the second respondent as its service provider for VAT services that is under review, together with consequential relief sought by the applicant. The second respondent did not take part in the review, which was opposed by the Municipality only.

[6] It remains unclear how the Municipality identified the three panellists from which to request quotations for the provision of VAT services as no documents in this regard were delivered as part of the Record of Decision. Similarly, it is not clear why the second respondent successfully quoted to provide the services "at the percentage of

14,25%" instead of at the hourly rates required by and contained in the original tender. The potential difference between the rate of remuneration tendered by the second respondent and the percentage-based rate that was later quoted was not disclosed in the Record either.

The applicant's grounds of review

[7] The applicant has argued that the appointment of the second respondent based on the quotation process adopted by the Municipality was expressly prohibited in its own Supply Chain Management Policy and the Municipal Supply Chain Management Regulations and further that the Municipality was obliged to come to utilise a competitive tender process¹. The failure to invite all of the members of the panel to quote for the VAT services was procedurally unfair². The quotation process was alleged to be in breach of the constitutional imperatives contained in section 217 of the Constitution³, and the decision randomly to select three members of the panel to submit quotations was argued to be irrational⁴. Finally, the quotation process was alleged to be in direct conflict with Regulation 19(a) of the Municipal Supply Chain Management Regulations⁵.

The municipality's defence of its decision

[8] The Municipality's submitted that the contractual arrangement between itself and the panel members for the award of work on an "as and when required" basis meant that it had a discretion to award work to different bidders guided by its internal prescripts and that it had followed its Standard Operating Procedures in exercising its discretion to allocate work to the second respondent.

The statutory procurement scheme

[9] The law as it applies to public procurement and how the court should deal with

¹ Section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

² Section 6(2)(c) of PAJA

³ Section 6(2)(i) of PAJA

⁴ Section 6(2)(f)(ii) of PAJA

⁵ Sections 6(2)(a)(i) and 6(2)(e)(i) of PAJA

alleged irregularities in that process is settled⁶.

[10] The alleged irregularity in the procurement process should be identified and if the court evaluates that the alleged irregularity amounts to a cognizable ground of review, the decision or award falls to be set aside.

[11] The Preferential Procurement Policy Framework Act⁷ was enacted to give effect to the constitutional imperatives of fairness, equity, transparency, competition and cost effectiveness contained in section 217 of the Constitution. The Municipality was obliged to determine a preferential procurement policy in terms of which the contract was awarded to the tenderer who scored the highest points in circumstances where (depending on the value of the contract) either 80 or 90 points out of a possible 100 points was awarded for price⁸.

[12] Price is effectively paramount, and cost effectiveness is conditional upon competition. Competition, in turn, demands transparency and accountability - both for the sake of the organ of state concerned and the bidders competing to procure work from it.

[13] The integrity of the procurement process does not end with the awarding of a bid.

[14] Section 116 of the Municipal Finance Management Act⁹ deals with contracts and contract management. Whilst it permits a contract procured through the SCM policy of a municipality to be amended by the contracting parties, this may only occur after the reasons for the proposed amendment have been tabled in the municipality's council and the local community has not only been given reasonable notice of the intention to amend the contract but has also been invited to submit representations to the municipality.

⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at paras [22], [27], [28] and [43]

⁷ Act 5 of 2000

⁸ Sections 2(1)(b) and 2(1)(f) of the PPPFA

⁹ Local Government: Municipal Finance Management Act 56 of 2003

[15] The Municipal Supply Chain Management Regulations¹⁰ set out minimum requirements with which a municipality must comply when procuring goods and services. Regulation 19 requires that a SCM policy must specify that goods or services above a transaction value of (in this case) R200,000 inclusive of VAT may be procured by the municipality only through a competitive bidding process and that no requirement for goods or services above the estimated transaction value may deliberately be split into parts or items of lesser value merely for the sake procuring the goods or services, otherwise than through a competitive bidding process.

[16] It is beyond dispute that the contract value of the tender published by the Municipality exceeded R200,000.

The Municipality's internal policies

[17] Given the nature of the Municipality's defence of its decision, it is necessary to consider its internal Supply Chain Management policies.

[18] The Municipality adopted a Supply Chain Management policy in terms of section 111 of the Municipal Finance Management Act.

[19] In terms of clause 14, goods and services could only be procured by way of formal written price quotations for procurement of a transaction value up to R200,000 including VAT and a competitive bidding process was required for procurement having a transaction value above that threshold and for the procurement of long-term contracts. The prohibition on splitting contemplated in Regulation 19 is repeated in clause 14(2).

[20] Clause 16 sets out the requirements in respect of a list of accredited prospective providers of goods and services and how prospective providers can apply for evaluation and listing. In terms of clause 18, quotations must then be obtained in writing from at least three different accredited providers and if it is not possible to obtain at least three

¹⁰ Municipal Supply Chain Management Regulations, published under GenN 868 in GG 27636 of 30 May 2005

quotations, reasons for this must be recorded and approved by the supply chain management manager or the chief financial officer of the municipality if the transaction value exceeds R 30,000. Clause 20 makes clear that goods and services above the threshold may only be procured through a competitive bidding process and splitting into parts "for the sake of procuring the goods or services, otherwise than through a competitive bidding process" is not permitted.

[21] Clause 25 permits negotiations with preferred bidders arising out of the conclusion of a competitive tender process, providing that such negotiation neither permits the preferred bidder a second or unfair opportunity, nor is to the detriment of any other bidder nor leads to a higher price than the bid originally submitted.

[22] The Municipality has also adopted a Supply Chain Management Standard Operating Procedure.

[23] Clause 5. 1 of the policy is entitled "Sourcing of Quotations and clause 5.1.2 reads as follows:

'5.1.2 From an appointed Panel

The nomination process has to follow a rotation method as per agreement.

Applicable preferential point system 80/20 or 90/10 should be stipulated and specific goals...where applicable.

- (i) Verify if the panel is still valid;
- (ii) The invitation for Quotations (RFQ) form will be drafted by an SCM Official, which must have a cover page with all the conditions of the quotation; specifications/TORs and a pricing schedule;
- (iii) Invite quotations from the minimum number of service providers as per terms of the Panel;
- (iv) Once quotation has been received, pricing must be checked against the unit price/rate as stipulated in the Panel...'.

[24] The Municipality argues that it complied with these provisions in awarding the 12-month VAT review contract to the second respondent and that its decisions to select

three of the panellists and then to award the contract to the second respondent were lawful.

Could the municipality apply the quotations procedure?

[25] Both the statutory scheme and the Municipality's own SCM Policy and Standard Operating Procedure distinguish between the process to be followed for the procurement of goods and services under R200,000 and those that exceed this amount.

[26] In the tender under review, the Municipality initiated a competitive bidding process. This was because the value of the services to be rendered over the contract term¹¹ exceeded the threshold. Logically, the quotation process could therefore not be used to procure the accounting and VAT services that the Municipality required. The Municipality was obliged to comply with the law and its own policies in evaluating the bids, scoring them and so on.

[27] The Municipality has failed to provide real answers to the following questions:

- a) why did it decide to award a contract for 12-months instead of the 36-month period that it, itself, had sought in the tender?
- b) if the VAT services were going to be discharged completely in the first year, why were those services included in the scope of work contained in the tender to be rendered over 36 months?

[28] The Municipality sought to justify its conduct by saying that the VAT services required for the 12-month period (and that justified a request for quotations) were different to that contemplated in the tender. However, this is not the case. The tender sought bids for services which included "*VAT review and recovery: Reconciliation, review, and recovery of consolidated VAT*". The Request for Quotations was expressed to be for "*The Value Added Tax review*" for the Municipality. While the required services may have been itemised in more detail in the Request for Quotation, they remained

VAT review services.

[29] If new and previously unanticipated services or needs arose in respect of VAT between March 2024¹² and July 2024¹³, the Municipality was obliged to say so and explain what occurred. That it did not demonstrates that there was no difference in the services contemplated.

[30] There is no indication in the Record from the Municipality about why it was deemed necessary to seek a quotation for the provision of services for 12 months, when a few months before it had sought bids for the provision of services for 36 months, whilst requiring stipulated hourly rates for each year. Likewise, the Municipality did not quantify the value of the services ostensibly to be rendered during the 12-month service period and gave no information about how the accepted rate of 14.25% of recoveries quoted by the second respondent was to be calculated to determine whether it fell under the threshold or not.

[31] On the evidence before me, contained in the Record disclosed by the Municipality, there is nothing that militates against the conclusion that the contract was "deliberately split into parts... for the sake of procuring the services, otherwise than through a competitive bidding process".

[32] In any event, the Municipality did not obtain three quotations from accredited suppliers – even if the second respondent was somehow accredited by being appointed to the panel¹⁴, the Municipality obtained only one quotation. Compounding matters, there was no evidence of the “minimum number of service providers as per terms of the Panel”¹⁵ and the price received from the second respondent (being a percentage-based recovery fee) could not be “checked against the ... rate as stipulated in the Panel”.

¹¹ According to the Municipality, a budget of R2 million had been allocated.

¹² The closing date for the tender was 11 March 2024.

¹³ When the Municipality requested quotations from the three members of the panel, including the second respondent

¹⁴ Which I do not accept, and in respect of which no evidence was tendered

¹⁵ There was no evidence of any stipulation or decision about how many members of the 21-member panel constituted a minimum number of service providers.

[33] The Municipality ignored the provisions of its own Policy and procedure.

[34] It follows that the Municipality was not permitted to make use of the quotation process in respect of the provision of VAT services under the Tender and then to appoint the second respondent¹⁶, and its decision to do so was unlawful.

Could the municipality allocate work to members of a panel at its own discretion?

[35] In principle, there is nothing objectionable about a municipality appointing a panel of service providers in respect of goods to be supplied or services to be rendered. Doing so may well increase efficiency and service delivery as a municipality will not be required to go out to tender each time it requires a specific service to be rendered, or if the successful bidder is unable to perform or the services exceed its capacity.

[36] There is also nothing objectionable about service providers being appointed on an "as and when required" basis and if the bidders tender for work on that basis, they can have no grounds to complain.

[37] However, a municipality cannot absolve itself of compliance with the statutory public procurement scheme for reasons either of efficiency or because it determines that its internal policies permitted to do so. If a practice is permitted where tenders are awarded not on the basis of cost effectiveness, competition or transparency, but instead on opaque, internal decisions, then a system designed for fairness and accountability collapses. Organs of state will be able to pay lip service to section 217 of the Constitution and the peremptory provisions of the procurement laws and nevertheless award a tender to a bidder whose bid otherwise would have failed.

[38] Neither municipal policies nor standard operating procedures can expressly or by implication condone non-compliance with the law. Cost effectiveness, transparency and competition cannot be sacrificed on the altar of efficiency or convenience. These imperatives can coexist, but this must occur lawfully. Otherwise, the door to corruption

is forced open.

[39] Therefore, and even if a panel of service providers is appointed by an organ of state, that entity must nevertheless comply strictly with the provisions of the public procurement laws when awarding bids or allocating work. Even if bidders are appointed to a panel, the respective bids must still be assessed in terms of the PPPFA and ranked accordingly. Depending on the value of the contract, either 80 or 90 points must continue to be allocated for price, and the remaining points must still be allocated in accordance with statutory transformation and empowerment imperatives.

[40] It may occur that an organ of state reserves the right not to award a tender to the cheapest bidder because of transformation and empowerment imperatives, but this decision too must satisfy the lawfulness and rationality test if it is to survive a challenge.

[41] In the ordinary course however, an organ of state remains obliged to award a tender to the bidder who achieves the highest score and, if that party cannot supply the goods or render the services required in the time required, the organ of state then must award the bid to the party with the next highest score, and so on. A rotation process cannot be used mechanically and while ignoring these prescripts.

[42] Regulation 25 of the Municipal Supply Chain Management Regulations does not assist the Municipality either¹⁶. Regulation 25 permits supply chain management policies to permit a two-stage bidding process in limited circumstances, which include large complex projects, projects where it may be undesirable to prepare complete detailed technical specifications or long-term projects with a duration period exceeding three years. If such a process is permitted, technical proposals on conceptual design or performance specifications are to be invited in the first stage, subject to technical as well as commercial clarifications and adjustments and in the second stage final technical proposals and priced bids are invited.

¹⁶ cf Sections 6(2)(b), (d) and (f)(i) of PAJA

¹⁷ Regulation 25 has been reproduced in the Municipality's SCM policy as clause 26

[43] There is nothing in either the tender or the Record that would indicate that a two-stage process was contemplated or required. To the contrary, priced bids were sourced in a standard form tender (at the first phase) and the contract period did not exceed three years. Requiring bidders to tender on price for the provision of identified services and thereafter seeking quotations from certain identified bidders to the exclusion of the rest, does not constitute the two-stage bidding process contemplated in Regulation 25.

[44] I accept that a contrary conclusion was reached by Djae AJP in *Maximum Profit Recovery (Pty) Ltd v Naledi Local Municipality*¹⁸. I respectfully differ with the conclusions reached in that case and decline to follow them. The Municipality did not call for technical proposals in the first stage and pricing at the second stage of the process, even if the sourcing of accounting services identified in the tender fell within the ambit of Regulation 25 – which, to my mind, it did not. Pricing was required in the tender and bids were required to be firm for 90 days because SLA's were to be (and were) concluded based on those prices.

[45] Further, and if the two-stage process was properly to be invoked, priced bids would still have to be evaluated in terms of the scheme set out in the PPPFA and other statutory instruments.

[46] Organs of state cannot craft a separate system of awarding contracts that runs contrary to the law, and which is open to abuse. Quotations cannot be sourced if the value of the service to be rendered exceeds the stipulated threshold, and the threshold is to be determined by reference to the total transaction value that informs which procedure (quotation or competitive bid) is invoked at the commencement of the process.

[47] In these circumstances, it is appropriate that orders be granted which prohibit the Municipality from using the quotation process to procure any goods and services falling within the tender and directing it to comply with the statutorily required scoring of the

panel members and the concomitant allocation of work to the appropriate members of the panel.

Conclusion

[48] The applicant has therefore successfully established that the decisions taken by the Municipality were unlawful and constitutionally invalid and fall to be set aside.

[49] There is no reason why costs should not follow the result. I am not persuaded that a punitive costs order is merited especially as there was a previous judgement that endorsed the Municipality's actions.

[50] I am satisfied also that the urgent application that was launched by the applicant under case number D9873/2024 and which interdicted the Municipality and the second respondent from implementing their agreement was necessary and that the applicant should be entitled to its costs in that respect as well.

Orders

[51] I make the following orders:

- (a) The decision of the first respondent to appoint the second respondent to provide VAT review and recovery services in respect of Tender S[...] through the sourcing of quotations for a period of 12 months at a rate of 14.25% is declared to be constitutionally invalid and unlawful and is set aside;
- (b) Any agreement concluded between the respondents pursuant to the decision described in paragraph 1 of this Order is set aside;
- (c) Insofar as the first respondent has made any payment to the second respondent pursuant to the decision described in paragraph 1 of this Order, the second respondent is ordered to repay all such amounts to the first respondent;

¹⁸ (M214/2022) [2023] ZANWHC 167 (15 September 2023) at paras [18] to [23]

- (d) The first respondent is interdicted from utilising a quotation process to procure any goods and services that fall within the ambit of Tender S[...];
- (e) The first respondent is ordered to perform a point scoring of each of the members of the existing panel in respect of any goods and services that fall within the ambit of Tender S[...], and to allocate work on the basis that preference is given to the highest-soaring tenderer on the panel;
- (f) The first respondent is ordered to pay the applicants costs, including the costs consequent upon the employment of Senior Counsel, on Scale C in respect of this application and the matter under case number D9873/2024.

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Appearances

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