SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2009/12600

Date:02/04/2009

In the matter between:

KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD	First Plaintiff
LUDONGA CONSTRUCTION CC	Second Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF PUBLIC TRANSPORT, ROADS AND WORKS OF THE GAUTENG PROVINCIAL GOVERNMENT	First Respondent
MOSEME ROAD CONSTRUCTION CC	Second Respondent
LONEROCK CONSTRUCTION (PTY) LTD	Third Respondent

MEYER, J

[1] This is an urgent application for an interim interdict. The first and second applicants seek relief preventing the first respondent from authorizing or permitting the second and third respondents, and the second and third respondents from performing, any further work under contract no. 1514/10/2008, which is a construction contract that involves the construction of a double carriage way on part of Beyers Naude Drive, pending the final determination of an application reviewing and setting aside the decision of the first respondent to award the contract to the second and third respondents.

[2] I am satisfied that the requirement of urgency has been established. The applicants only became aware of the reasons why their tender was disqualified on 17 March 2009. This application was issued on 24 March 2009, and enrolled for hearing and heard on Tuesday, 31 March 2009.

[3] The facts are largely common cause or undisputed.

[4] On about 14 November 2008, the Gauteng Department of Public Transport, Roads and Works ('the Department'), published a Tender Notice and Invitation to Tender in various newspapers. Tenders were invited for the construction of Beyers Naude Drive to a dual carriage way between Peter Road and Juice Road. The stipulated evaluation criteria were the 'CIBD level 8CE PE or 9CE 90:10 point system'. 'Price = 60 points, Functionality = 30 points, Preference RDP Goals (10 pts) HDI = 4, Gender = 3, Youth = 2 and Disability =

1'. The 30 points allocated for 'Functionality' were stipulated to be: Skills 10 (Key staff relevant to the project (Quantity Surveyor and Professional Registration Certificate)), Experience 10 (Previous projects – minimum Completion Certificates), and Project Plan 10 (Time allocations; milestones; cost projections; resources (Human and Plant). The Tender Notice and Invitation to Tender also stipulated that '[t]he Department is committed to the maximization of labour intensity on all construction projects. We adhere to all relevant Acts, including the Black Economic Empowerment Act, No 53 of 2003, Preferential Procurement Policy Framework Act, No 5 of 2000 and Employment Equity Act, No 55 of 1988.' It also stated that "[t]enders will be awarded on the basis of the principle that work will be fairly or equitably distributed amongst contractors/entities that have not been awarded contracts." Tender documents could be obtained from 14 November 2008, a compulsory site meeting was set for 21 November 2008, and the tender closing date was 10 December 2008.

[5] A contractor's capital, turnover, and general technical ability determines its CIBD level rating in terms of its registration under the provisions of the Construction Industry Development Board Act 28 of 2000. Such registration and grading are prerequisites for contractors wishing to tender for State work. At the relevant times to these proceedings, a level 8CE contractor would ordinarily not be entitled to tender for a contract with an estimated value in excess of R100 million beyond which only level 9CE contractors were permitted to tender, which is the highest category of registration. An exception is the entitlement of a level

8CE PE contractor to tender for a contract with an estimated value in excess of R100 million. The first applicant was graded an 8CE contractor and the second and third respondents grade 9CE contractors.

[6] The first applicant obtained a copy of the tender documents on 17 November 2008. The Tender Notice and Invitation to Tender incorporated in the tender documents differed from the one published in the media. The evaluation criteria were referred to as the 'CIBD level 8CE or 9CE 90:10 point system' and not as the 'CIBD level 8CE PE or 9CE 90:10 point system'. The first applcant's managing director, Mr Louis van Iddekinge, attended the site meeting on 21 November 2008, where the Department's Mr BN Mhlanga presented the scope of work. Iddekinge enquired whether an 8CE contractor qualified to bid. Mhlanga indicated that "[o]nly those contractors who qualify according to the CIBD grade of 8CE or higher are eligible to tender. On 2 December 2008, the Department's Transport Infrastructure issued an addendum that was to be signed and submitted with the other tender documents by all tenderers. This addendum *inter alia* provided that '[o]nly contractors who are CIDB registered in the grade 8CE or 7CE PE or higher should tender.'

[7] The first applicant formed a joint venture with the second applicant and they submitted a tender for the Beyers Naude road construction contract. The second and third respondents also submitted a tender. The Department received seven tenders in total.

[8] The tenders were evaluated and it was recommended to the Department's Departmental Acquisition Council ('DAC') that the contract be awarded to the applicants. Their tender was the lowest acceptable tender amount and scored the highest points. The applicants' tender was for the amount of R112, 074, 252.34 and they were awarded 82,8 points by the consultants, Nchebe Consulting, who undertook the evaluation for the Department. When the matter was put before the DAC, it took a different view and disqualified the tender of the applicants. The tender price of the second and third defendants was R116, 280, 366.64 and they were allocated 77,49 points. They had a CIDB grading of 9CE, which complied with the required evaluation criteria published in the media. Their tender was accepted. On 9 February 2009, they received a letter from the first respondent in which the acceptance of their tender was confirmed with a contract period of 87 weeks for the execution of the works. The contract was concluded on 18 February 2009.

[9] A Court's approach in a matter for an interim interdict pending the finalisation of an action or application for final relief and the requirements that need to be established by an applicant for the interim interdict, was thus formulated in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973 (3) SA 685 (A), at p 691C-G:

> 'The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes

JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227. In general the requisites are-

(a) a right which, "though *prima facie* established, is open to some doubt";

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and the probabilities…'

[10] The approach in deciding whether the applicant for an interim interdict pending final relief has established a *prima facie* right, especially where there are disputes of fact, is as follows according to Webster v Mitchell 1948 (1) SA 1186 (W), at p 1189:

'The proper manner of approach I consider is to take the facts as 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 could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he cannot succeed in obtaining the temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

The criterion for the first branch of the enquiry was considered too favourable towards an applicant for an interim interdict in Gool v Minister of Justice and Another 1955 (2) SA 682 (C), at p 688E, and accordingly qualified to

> 'should (not could) the applicant on those facts obtain final relief at the trial.'

[11] The first respondent is an organ of State and subject to the provisions of the Constitution relating to such bodies. In terms of s 217 of the Constitution of the Republic of South Africa 108 of 1996, the first respondent is required to procure goods and services pursuant to a process which is fair, equitable, transparent, competitive and cost effective. The tender process implemented by an organ of State constitutes 'administrative action' and is subject to the provisions of s 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act 3 of 2000. See Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA), para 5; Millenium Waste Management v Chairperson, Tender Board 2008 (2) SA 481 (SCA); Chairperson, STC and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA), at p646I - J. The evaluation of a tender is thus subject to the requirement of lawful and procedurally fair administrative action including the principle of legality. See Minister of health and Another NO v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC), paras 92 – 105; Affordable Medicines Trust and Others v Minister of Health and others 2006 (3) SA 247 (CC), paras 48 – 49.

[12] The applicants rely on the provisions of the Preferential Procurement Policy Framework Act 5 of 2000. S 1 of this Act defines an 'acceptable tender' as one 'which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. This Act provides for the determination by an organ of State of its preferential procurement policy and for its implementation thereof within the framework prescribed in s 2 thereof, which framework includes the following of a point system and for a contract to be awarded to the tenderer who scores the highest points, unless objective criteria in addition to certain others contemplated in that section justify the award to another tenderer. Regulations 4(4) and 8(8) of the Preferential Procurement Regulations, 2001 provide that '[o]nly the tender with the highest number of points scored may be selected.' Regulation 8(9) provides that a contract may be awarded to a tenderer that did not score the highest number of points only on reasonable and justifiable grounds. The applicants aver that their tender complied in all respects with the specifications and conditions of tender as set out in the tender document, they submitted the lowest tender, were awarded the highest points, and qualified in all respects.

[13] Adv S du Toit SC, who appeared with Adv Q Leech for the applicants, submitted that by disqualifying the applicants' tender the first respondent acted unreasonably, was materially influenced by an error of law, took into account irrelevant considerations, acted arbitrarily, and its decision was not rationally connected to the information before it.

[14] The Tender Notice and Invitation to Tender published in the media only called for tenders from CIBD level 8CE PE or 9CE contractors. The DAC formed the view that to accept the tender of the applicants, who are CIBD level 8CE contractors, would be discriminatory against those other CIBD level 8CE contractors who did not attend the site meeting on 21 November 2008 due to the fact that only 8CE PE or 9CE contractors were invited to tender. In taking its decision the DAC also referred to this exclusion of other potential 8CE contractors and an award of the tender to the applicants as 'unfair competition'. The DAC accordingly disqualified the applicants' tender and awarded the tender to the second and third respondents who had a CIDB grading of 9CE, which complied with the required evaluation criteria published in the media.

[15] The Chairperson of the DAC, Mr Noxolo Maninjwa, states in the first respondent's answering affidavit that the Department's Directorate Infrastructure Capital Projects ("DICP") identified the project and estimated a budget of about R100 million for it. Representations in support of the approval of the project accompanied by a proposed advertisement to be published in the media were submitted by the DICP to the Department's Directorate Supply Chain Management ("DSCM") for its approval. The undisputed evidence of the Department's Director of DSCM, Mr Molefi Mollo, is that he considered that the project amount could be more than R100 million as estimated by the DICP and he accordingly changed the CIBD grading to one of 8CE PE or 9CE. The

proposed advertisement to be published in the media was accordingly changed to reflect such higher grading. The advertisement ultimately approved by the DAC was the one that was published in the media on 14 November 2008, and a CIBD grading of 8CE PE or 9CE was therein stipulated. The tender documents ought to have been amended to reflect the published grading requirement, but it was inadvertently not done. The CIBD grading contained in the Tender Notice and Invitation to Tender that was published in the media *inter alia* served to inform prospective tenderers whether they qualify to tender and therefore whether they should obtain tender documents and submit tenders.

[16] S 217 of the Constitution requires the tender process to be 'fair'. In the as yet unreported judgment of The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd & Kwanda Ferro-Alloy African Resources (Pty) Ltd (WLD Case No. 07/27391, delivered on 14 May 2008), Blieden J in paras 17 and 18 said that '[t]he overriding consideration that applies to every tender process is that of fairness.' and '[t]he fair procedure is not a matter of secondary importance; it goes to the very heart of the administrative process.' In Chairperson, STC and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA), at p 646J, it was said that '[w]hat is fair administrative process 'depends on the circumstances of each case' (s 3(2)(a) of PAJA).' In Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 (1) SA 16 (SCA), para 13 it was held that '[w]hatever is done may not cause the process to lose the attribute of fairness …' To have accepted the applicants' tender, would, in my

view, have caused the tender process 'to lose the attribute of fairness'. The invitation to tender that was published set as a minimum qualifying criterion contractors of an 8CE PE or 9CE CIDB grading. All other contractors were excluded. Those disqualified who did not attend the site meeting would not have known of the lowering of the qualification criterion.

[17] Adv du Toit SC submitted that the first respondent should have invited tenders afresh when it became aware of the irregularities. It should not have disqualified the applicants and awarded the contract to the second and third respondents instead. Iddekinge, however, was aware of the discrepancy between the evaluation criterion stipulated in the Tender Notice and Invitation to Tender that had been published and the one stipulated in the Tender Notice and Invitation to Tender contained in the tender documents. This is why he asked at the site meeting whether a CIBD graded 8CE contractor could qualify to bid. The statements by Maninjwa in the first respondent's answering affidavit that the applicants had participated in tendering processes before the one in issue and had known or ought to have known that Mhlanga did not have the authority or could not lawfully lower the CIBD qualification criterion at the site meeting after the call for tenders had been advertised, were not disputed by the applicants.

[18] However, it may ultimately in review proceedings, once these issues are more fully canvassed and considered, be held that fairness under all the circumstances required the tender process to have been started afresh, and I am

therefore prepared to accept, for the purposes of determining this application, that the applicant has established the requisite of a *prima facie* right.

[19] Adv Khoza SC, who appeared with Adv Nxumalo for the first respondent, submitted that the decision to award the contract to a tenderer that did not score the highest number of points was taken on reasonable and justifiable grounds and was objectively rational. In Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa 2000 (2) SA 614 (CC) 709, para 90, it was held:

> 'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of its functionary and as long as its functionary's decision viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.'

[20] The decision to disqualify the applicants' tender and to award the contract to the second and third respondents appear to me to be founded on reasonable and justifiable grounds and was objectively rational, but again these are issues that will ultimately be decided in the review proceedings. In the present application for an interim interdict these considerations open the applicants' *prima facie* right to doubt.

[21] The applicants have, in my judgment, established a *prima facie* right, but it is, at the very least, open to 'some doubt'. There is not 'mere contradiction or unconvincing explanation' on the part of the first respondent.

[22] I accept, without deciding, that the applicants have satisfied the requirements of no other satisfactory remedy and of an actual or well grounded apprehension of irreparable loss if the interim interdict is not granted.

[23] I now turn to the requirement whether the balance of convenience favours the granting of the interim interdict. In assessing the balance of convenience, a court is required to weigh the prejudice which an applicant will suffer if the interim relief is not granted against the prejudice which a respondent will suffer if the interim interdict is granted. See Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, And Another 1973 (3) SA 685 (A), at p 691C-G. Moreover, s 8 of PAJA requires a court to make an order that is 'just and equitable'. In Millenium Waste Management v Chairperson, Tender Board 2008 (2) SA 481 (SCA), para 22, Jafta JA said that '[t]his guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other.'

[24] The final resolution of the review proceedings that the applicants intend to institute may potentially take a considerable time to complete even if I were to

abridge the time limits for the institution of the proceedings and the filing of subsequent affidavits as was suggested by Adv du Toit SC in argument. Once the review application is heard the decision of the first respondent may or may not be set aside. If it is set aside then the tender process is likely to start afresh. There is also the potential of appeal proceedings.

[25] It is common cause that the commencement and execution of the works are urgent. The contract has to be completed within 18 months, i.e. by the middle of 2010. Iddekinge states in the applicants' founding affidavit that it had been made clear at the site meeting that the major section of the road construction had to be completed before the 2010 World Cup.

[26] The contract with the second and third respondents is already in existence. The conclusion of the contract with the second and third respondents was acted upon almost immediately and was followed by further contracts concluded by them in executing the contract. Employees have been employed and others were relocated. Site establishment and preliminary earthworks have begun. Various other actions in executing the contract have been taken. It was submitted by Adv West, who appeared for the second and third respondents, that they were 'innocent tenderers'. The undisputed facts support this submission.

[27] It is stated in the applicants' founding affidavit that they are prejudiced since 'equipment has been earmarked for this project and personnel is being

held available for it.' The applicants, however, have never been awarded the contract. They remain at liberty to institute their intended review proceedings for final relief whether or not this interim interdict is granted. The court reviewing the first respondent's administration action is empowered to make an order that is 'just and equitable' in all the circumstances. See Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd (358/08 [2009] ZASCA 8 (13 March 2009).

[28] The balance of convenience, in my judgment, does not support the interim relief sought.

[29] In the result the following order is made:

1. The application is dismissed.
2. The applicants are ordered to pay the first respondent's costs of this application, jointly and severally, which costs include the costs attendant upon the engagement of the services of two counsel, one of whom a senior counsel.
3. The applicants are ordered to pay the second and third respondents' costs of this application, jointly and severally.

P.A. MEYER
JUDGE OF THE HIGH COURT

2 April 2009