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Lom Business Solutions t/a Set LK Transcribers/LAD

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 32100/2009

DATE: 10/12/2009

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR: ~~JA~~/NEE.
(2) VAN BELANG VIR ANDER REGTERS: ~~JA~~/NEE.
(3) HERSIEN.
18.2.2010 DATUM HANDTEKENING

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In the matter between

3P CONSULTING (PTY) LIMITED Applicant

and

GAUTENG MEC FOR HEALTH Respondent

JUDGMENT

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20 LAMONT J: The applicant has instituted proceedings against the respondent, seeking a declarator that the services agreement between the applicant and respondent was duly renewed; a direction that the respondent implement the terms of the renewed agreement for payment of certain monies and costs.

During April/May 2007 the respondent published advertisements

calling for proposals by service providers for the drafting and facilitation, as well as the implementation of what was described as a turnaround strategy for the respondent.

Proposed tenderers were required to attend a briefing session. During the briefing session a document was distributed to those persons who attended. As appears more fully from the terms of reference the respondent was faced with challenges regarding efficient, innovative and well coordinated ways of managing facilities and projects so as not only to meet their mandate with insufficient budgets but also to include new benchmarks and associated best practices.

The respondent sought proposals as to how to deal with this matter. The terms of reference were broadly framed and did not stipulate the expected duration of the proposed agreement. What is apparent from the invitation to submit proposals is that the respondent sought to employ particular person who could deal with a variety of problems which were framed in the form of a project. The proposed project was not time based but was project based. For this reason, it seems to me, no time was stipulated. It is apparent that the time contemplated would be the time required to complete the project.

During May 2007 the applicant submitted a proposal to the respondent. On 5 June 2007 the respondent accepted the proposal, subject to the signing of a service agreement. In 2 July 2007 the service agreement was signed. In terms of clause 3 of the service agreement the applicant was required to provide and execute the project, and provide the respondent with such additional services as

were agreed from time to time. The respondent was obliged to provide the applicant with the relevant information it required to enable the completion of the works, access to the relevant equipment and data, and such assistance generally as was needed.

The proposal submitted by the applicant contained a projected timeframe. The projected timeframe was provided with the objective of providing a transparent, complainant, timeously executed project within budget. The proposed timeframe illustrated in its terms the applicant's direct involvement. It stipulated that there would be a large number of variables, and that in the view of the applicant the way in which the maximum possible potential could be achieved was that the project duration be for an initial period of 24 months, renewable for a further period of 24 months. The renewable element was stated to be required to ensure the optimum skill transfer protection of intellectual property and to ensure of continuity.

The proposal anticipated that the entire team would reduce on an annual basis by approximately 20% per annum as the capacity support programmes enabled the internal staff to be trained to appropriate levels. If the staff were to be reduced by approximately 20% per annum it is immediately apparent that the four year term either contemplated an accelerated process at some point, or that the project would take five years. This notwithstanding, what was contained within the offer was a two year initial plus a two year renewal period.

It is further apparent that what was put out to tender was the respondent's need to find a particular person to do a particular piece of

work. The applicant proposed that the work could be done within the timeframe set out in its proposal. The period of two years as an initial period had not been contemplated by the respondent until it was suggested by the applicant. It is apparent from the internal records and workings of the respondent that it referred to the two year period once the applicant had raised this time period. It may be that this was the respondent's shorthand way of referring to the lengthy project timeframe contained as a component of the proposal. It may be that the respondent had, once it saw the proposal, identified two years as the appropriate period.

Whichever the case, at the time the proposal was submitted there was no time period contemplated for the project to be completed. The period of two years is mentioned for the first time in a letter of 5 June 2007 appointing the applicant, and is also mentioned in the respondent's internal document dated 4 June 2007 where it appears against the caption "contract duration". In the submission document dated 4 June 2007 it appears in the caption "request of the GSSC for DAC approval of the award in respect of the request for proposal for the establishment of a project management unit for a period of two years ..." and in paragraph 1 of the letter requesting the approval. It appears also in the Minutes of the departmental acquisition council of 4 June 2007 "6.2 Ref 1/5/3-TA request of the GSSC for health DAC approval of the award in respect of the request for proposal for the establishment of a project management unit for a period of two years ... decision approved".

The Minutes reflect that while the DAC approved the case a number of comments were noted for clarity. These comments include a comment made in the following terms:

> "The plan health agency will function in managing high cost assets, resources and leveraging funding sources. Core high level staff will be transferred from the PMU; gradually escalating migration of staff with the view of changing the structure over four years from predominantly external to internal staff."

It is apparent from the internal document that when the approval was given the decision making body was aware of the changing structure which was to be implemented over the four year period, and made that comment as part of the information which was required to be known for clarity.

It is apparent from the internal processes that the respondent was aware of the terms of the proposal made by the applicant, namely that there would be an initial period of two years and a renewal period of two years. The service agreement which was concluded between the applicant and respondent, pursuant to the proposal made by the applicant, and the decision of the respondent to approve the proposal is contained in the services agreement. Paragraph 2.2 of the services agreement provides that the agreement commences on 5 June 2007 and terminates on 4 June 2009 unless extended as contemplated in 2.3 and 2.4 of the agreement. Paragraph 2.3 reads as follows:

"2.3 The department agrees to renew this agreement for a further period of two years on substantially the same terms as this agreement, it being agreed that 6 (six) months prior to 5 June 2009 the parties shall have afforded each other an opportunity to negotiate any matters relating to the renewal referred to herein (except for the renewal itself)."

Although paragraph 2.2 referred to paragraphs 2.3 and 2.4 there appears to be no paragraph 2.4.

Pursuant to the agreement concluded, the applicant rendered the services it was required to perform. This involved the employment of extensive staff, specialist consultants and subcontractors. The applicant further seconded staff to the respondent to assist with various projects. It appears the respondent must have been satisfied with the applicant's performance as during the period October/November 2008 the applicant and respondent entered into negotiations for the renewal of the agreement. On 4 December 2008 the applicant presented the respondent with a proposal for the renewal of the services agreement for a period of three years. The period of three years was proposed primarily because many of the current projects which were then being undertaken required the applicant's expertise and input over the course of the next three years.

The fact that this additional year period might be required was in my view foreshadowed buy what was set out earlier by the applicant in

its proposal, namely that at a 20% reduction of staff the required period would be five years.

It is apparent that at the time when the negotiations for renewal were undertaken that certain projects could only be completed in year number three, and that there was a need for the personnel to mature in their new employment.

On 24 February 2009 the respondent indicated to the applicant that the acquisition centre had approved the extension of the agreement at a meeting on 17 February 2009 but that the approval was subject to certain conditions. The conditions related to internal steps the respondent was required to take in obtaining the approval and implementation of the renewed services agreement. The respondent did take the relevant steps and on 23 March 2009 the respondent wrote a letter to the applicant, approving the applicant's proposal for a period of three years until 31 May 2012.

A variety of submissions were made concerning whether or not the letter of 17 February 2009 was subject to a condition which was not fulfilled. In my view it appears that the condition, if it was required to be fulfilled, was fulfilled, and in any event it appears that the 23 March 2009 letter unconditionally accepted the proposal. In my view there was no merit in this point.

Subsequent to March 2009 the respondent commenced distancing itself from the applicant, and resisting the implementation of the renewed agreement. During April 2009 a new MEC for health was appointed. It became apparent from the respondent's conduct towards

the applicant and other persons that a review of current initiatives was being undertaken and that there was consideration being given to the realignment of commitment having regard to the then political mandate.

On 1 June 2009 the respondent took a decision that the applicant's renewed services agreement be reviewed with the aim of terminating it as a matter of urgency. During June 2009 the respondent commenced refusing the applicant access to premises and patently commenced repudiating the contract.

On 1 July 2009 the respondent evidenced its conduct in a letter. In that letter the respondent states:

> "The tender document indicated to would be tenderers that the project was for a period of two years, which the department could not vary after the award of the tender."

Accordingly the contention of the respondent was that the extension of the services agreement for the additional period constituted an arbitrary extension and a failure to take into account relevant considerations such as the provisions of the law and the expectations of other potential service providers. These matters were actually set out within the letter.

The respondent further claimed that the renewal of the services agreement was wrongful and irregular, and reviewable by a court of competent jurisdiction. The respondent then clearly set out the position it held:

> "The department will no longer perform in terms of

the purported extension of the contract."

A clearer repudiation of the contract would be difficult to find. The claim made by the respondent that the tender documents indicated to would be tenderers that the project was for a period of two years was incorrect. The tender document set up no period for the performance of the work. Indeed what the tender document set up was the requirement of a person to perform a particular project and no timeframe within which the project was to be completed.

The claim that the respondent had acted arbitrarily and failed to take into account the relevant considerations, including law and expectations of service providers I will deal with more fully below.

In my view insofar as the conclusion of the initial contract for the period of two years incorporating the period of the additional two years' renewal is concerned, the parties concluded a valid and binding contract. The respondent followed the normal decision making process and approved the contract. It was submitted that the respondent had, to the knowledge of the applicant, only had authority to approve the contract for a period of two years. Reliance was placed upon the letter dated 5 June 2007 as substantiation for this submission.

As I have set out above it is apparent that the period over which the project was to be concluded was a period which had been defined and created by the applicant in the proposal. Prior to that time there had been no time period stipulated. The respondent, when it considered the matter, was aware of the fact that it was considering the particular contract which it was to approve if it so decided, and the

terms of that contract, which in itself had contained the extension period. This is apparent from the comment also to the decision which I have cited above.

In addition the respondent could not unilaterally vary the terms of the offer made by the applicant. In my view the respondent however, neither intended to vary those terms nor did it. It intended to, and did conclude the contract on the terms contained within the writing. In my view as far as the authority was concerned, there is ample evidence that the respondent's officials were properly authorised to contract on the basis of the writing. Accordingly, in my view, there is no merit in the lack of authority submission. The respondent's attack on the validity of the contract based on authority accordingly must fail. The respondent's attack on the contract at an administrative level must, in my view, also fail on the basis that the administrative action was properly taken. Inasmuch as I have considered the administrative action, it is not necessary for me to deal with the other arguments during which submissions were made that I should not even reach that point. I will deal with those other arguments below.

The respondent's case in the answering Affidavit, based on the invalidity was based primarily upon the alleged invalidity of the services agreement. The second submission concerned the renewal of the services agreement which was legally flawed, so it was submitted.

I have dealt with the considerations concerning the conclusion of the original services agreement. Insofar as the renewal of the services agreement is concerned the renewal was in terms of the

original tender, and the original approval as contemplated by the contract. It was for an additional period of one year (originally in the contract two years were provided for, and in fact three years was awarded). A submission was made that because the period of three years had been agreed in the renewal, that the renewal of the services agreement was invalid as the required competitive processes had not been followed. The respondent relied on Section 217(a) of the Constitution and Section 38(1)(a)(iii) of the PFMA which provides for an organ of state contracting for goods and services to do so in accordance with a system which is fair, equitable, competitive and cost effective.

All that Section 217 of the Constitution, and Section 38 of the PFMA require is that the public procurement body procures in accordance with a system which is fair, equitable, transparent, competitive and cost effective. The treasury regulations promulgated under Section 76 of the PFMA expressly provide for an exemption from the competitive bid requirement which must usually accompany all public procurement where it is impractical to engage in a competitive tendering process. Regulation 16(A)(6.4) provides as follows:

> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting

officer or accounting authority."

In the present case the three year renewal of the services contract, in my view falls squarely within the ambit of the regulation. The original contract for a period of two years plus two years' renewal contemplated the completion of a project. The tender contemplated the identification of an appropriate person to enter into the contract and perform the work, and complete the project. That person was identified in the form of the applicant. The applicant commenced the work, and in the course of commencing it identified that, as was foreshadowed in the original contract, the two plus two year period might need to be extended. In fact it was required to be extended to a three year period. The only person reasonably possible to perform the works is the applicant, which was integrally involved with the completion of the project, having been engaged in it for the initial period of two years. The applicant over the period had developed strategies and tactics by which the project was to be completed.

These strategies and tactics had been implemented to the satisfaction of the respondent over the period. The only person who, in my view, logically and properly could complete the works as contemplated either by the original contract or by the exception provided for in the regulation is the applicant. There was accordingly, in my view, a proper compliance with a fair, equitable, transparent, competitive and cost effective system. The treasury regulation is valid, remains in force, and is constitutionally acceptable, and remains unchallenged.

In my view accordingly there is no administrative law objection to the renewal of the contract for the three year period. It is apparent from the contract concluded between the applicant and the respondent that the applicant was appointed to the conclusion of the contract contractually. That the period was anticipated to be a two plus two year period but that the situation developed into being a time frame comprising a two plus three year period.

When the respondent indicated that it would renew the contract, it wrote in its letter of 3 March 2009:

> "Please be advised that on submitting information satisfying the conditions of this approval, only then can the conditional approval be fully applicable. The programme management office requests this process is done speedily and seamlessly so that cession of contracts is not ended in any way. While the process is being concluded the department requests the work proceeds unhindered in the interests of service delivery."

The submission was made that the extension is subject to a condition which was not fulfilled. In my view there are two answers to this submission. (1) The condition is not suspensive. The respondent required that the work proceed in the interim, and pending the fulfilment of the condition. It was at best a resolutive condition. (2) The extension was unconditionally approved. The respondent's letter dated 23 March 2009, unconditionally approves the extension.

The submission was made that the renewal was contractually unenforceable for a variety of reasons. A submission was made that the term of the renewal is so vague as to be unenforceable. That may be so. There is no need to investigate the history of the matter however. The right of renewal has been overtaken by events. There was an actual renewal on actual terms which were agreed. It was submitted that the renewal provided for two years in the original contract yet the actual renewal was for three years. The solution to the problem is similar in my view, history has overtaken events. Whatever the contract provided was superseded by the later contract (this is not in any way intended to mean that there are separate contracts).

On this point it is necessary to deal with a peripheral submission made, which I understood to be that if the renewal was not competent in terms of the original contract, and/or exceeded the original right of renewal, and/or contains terms other than those contemplated by the original renewal, then the first contract was a contract disconnected from the renewal, and that accordingly the fresh tender process would be required. The simple solution is that the original contract envisaged a project which would be completed an anticipated time. There was room for the time to change in my view if the project required a longer period. This would not result in a new contract but merely an amended original contract in my view. The renewal was not separate and divisible from the original contract. The original contract contemplated there would be a renewal. The original contract determined the person who would perform the works and the initial phases of the works. The

subsequent phases, as they were to take place, and various other matters within the contract which required negotiation could be negotiated, and particularly costs and charges could be negotiated. The one thing which could not be negotiated was the fact of the extension. The process, in my view did not remove the renewal subsequent the renewal and the works to be performed pursuant to it, from the ambit of the original project.

It is not necessary to deal with the issue whether or not the terms agreed upon by the parties were sufficient, and whether or not they were so vague as to be unenforceable. It is not necessarily so that the if all terms are not agreed immediately, that there is no contract or that some invalid or vague and unenforceable contract has come into being. Parties frequently agree terms and leave other terms to be decided later.

This matter is however not one which I need to embark upon investigating. It appears to me accordingly that on a contractual level the original contract and the extension thereof resulted in binding contracts coming into being. Insofar as the administrative law issue is concerned, for the reasons which I have set out earlier there is no objection to the conclusion of the contract.

It was submitted to me by Mr Chaskalson that it was not necessary for me to embark upon the facts and matters upon which I have embarked as it is a requirement that the decision made be reviewed prior to any relief on the administrative level becoming relevant. He relied upon the *Oudekraal* case (*Oudekraal Estates (Pty)*

Limited v City of Cape Town and others 2004 (6) SA 222 (SCA)).

A submission was made to me on behalf of the respondent that if the decision which had been taken did not comply with the procedures with which it was obliged to comply, that whatever came from that decision was void, and reliance was placed upon the matter of *Qaukeni Local Municipality v FW General Trading CC* [2009] ZASCA 66.

Qaukeni's case held that administrative action which is reviewable need not necessarily be reviewed if the public body seeks to avoid the contract it has concluded in respect of which no other party has an interest (paragraph 26). The underlying rational for the finding is that if a contract is concluded in breach of the provisions (in the present case Section 217 of the Constitution and internal rules and regulations) so as to ensure a transparent cost effective and competitive tendering process in the public interest, that act would be invalid and would not be enforced (see *Qaukeni* paragraph 16).

If the public body has acted irregularly it should bring proceedings to set aside the irregularity (*Qaukeni* paragraph 23). In *Qaukeni's* case the public body was the respondent, and in its Affidavits it set out its grounds of opposition, and indeed it launched a counterapplication. The court held that in those circumstances the failure to formally seek a review could not deprive the respondent from seeking relief. This may explain the apparent tension between *Qaukeni's* case and *Oudekraal's* case, which held that administrative action remains valid until set aside (paragraph 31). If *Qaukeni's* case

dealt only with the way in which the review took place as opposed to the need for it to take place then there would be consonance in the decisions. It is not necessary for me to decide this tension in light of the findings which I have made above.

It remains to consider the financial aspects of the claims. The applicant sought a directive that the respondent pay certain amounts which it claimed were due, owing and payable, and remained unpaid. Those amounts form the subject matter of a variety of invoices which were listed together with an interest payment. In my view there are disputes relating to whether or not these amounts are payable, and I accordingly decline to make any order in respect of this portion of the applicant's claim.

The applicant naturally is free to pursue whatever rights it believes it has in an appropriate forum. This judgment and order which I make pursuant to it, in no way precludes the applicant from taking those steps. It is merely so that on the papers which are before me the relevant case is, in my view, not established, particularly in that the variety of documents which may have been required to accompany invoices did not so accompany them.

It follows that in my view the applicant is entitled to relief which it claims in terms of paragraphs 1, 2 and 4 of the Notice of Motion. I accordingly make an order in terms of paragraphs 1, 2 and 4 of the applicant's notice of motion.

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2009/32100
P/H NO: 0

JOHANNESBURG, 10 December 2009
BEFORE THE HONOURABLE JUDGE LAMONT

In the matter between:-

3P CONSULTING (PTY) LIMITED ***Applicant***

and

GAUTENG MEC FOR HEALTH ***Respondent*** 10

HAVING *read the documents filed of record and having considered the matter:-*

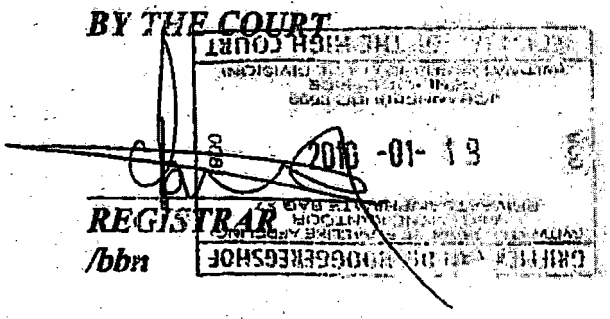
THE COURT GRANTS THE FOLLOWING ORDER:-

1. *It is declared that the services agreement between the Applicant and the Government of Gauteng dated 2nd July 2007 was duly renewed by an agreement between the parties on 23rd March 2009 for a further period of three years.*

2. *The Respondent is to implement the renewed services agreement and to allow the Applicant to do so.*

3. *The Respondent is to pay the Applicant's costs.*

BY THE COURT 20



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