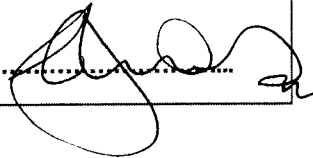


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15
CASE NO.: 93389/15

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
15/12/2016	
	

In the matter between:

THE LASER TRANSPORT GROUP (PTY) LTD

First applicant

GIN HOLDINGS (PTY) LTD

Second applicant

and

THE MINISTER,
INTERNATIONAL
COOPERATION

DEPARTMENT:
RELATIONS
AND

First respondent

Second respondent

ELLIOT MOBILITY (PTY) LTD

NEO THANDO/ELLIOT MOBILITY (PTY) LTD

Third respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. To grant a tender and to whom, that is the vexed question in this application.
2. The applicants aver that the first respondent did not get it right, hence this review application.

3. In tender invitation document DRCO:05-2015/2016, the first respondent invited tenders or a service provider based in South Africa to provide services for the removal, packing, storage (in South Africa) and insurance of household goods and vehicles of transferred officials, to and from missions abroad, and domestic moves within the RSA, of the Department of International Relations and Cooperation (DIRCO) for a period of four years.
4. The applicants, as a Joint Venture, responded as well as the second and third respondents, as a Joint Venture too. The second and third respondents were ultimately successful. I shall refer to the second and third respondents as the respondent Joint Venture (RJV).
5. When the applicants were advised that their bid was unsuccessful, they launched an urgent application in which relief was sought in a Part A and Part B scenario. The urgent application was refused for want of urgency. No decision was made in respect of the merits. Thereupon, the applicants amended their notice of motion in respect of the Part B scenario and proceeded with the relief claimed in the amended notice of motion.
6. The applicants *inter alia* seek that the first respondent's granting of the tender to RJV be reviewed and set aside in terms of the provisions of the Promotion Administration of Justices Act, 2000 (PAJA) and that the tender be awarded to the applicants.
7. The grounds relied upon by the applicants in this regard are:
 - (a) The award of the tender to RJV contravenes a law in terms of the provisions of section 6(2)(f)(i) of PAJA, namely section 2(1)(f) of the Preferential Procurement Policy Framework Act, 2000 (PPPFA);

- (b) A mandatory or material procedure or condition prescribed by an empowering provision was not followed as required in section 6(2)(b) of PAJA;
 - (c) The decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered as required in section 6(2)(h) of PAJA;
 - (d) It is unreasonable in terms of section 6(2)(h) of PAJA.
- 8. Five potential bidders submitted bids in respect of the invitation for the services mentioned earlier. In the first phase, three of the bidders were considered not responsive and their tenders were rejected. Only the applicants and RJV were considered responsive. Their respective bids were then subjected to the remaining phases of the tender process.
- 9. In respect of the second and third phases, both the applicants and RJV remained as contenders for the tender. Both scored above the required threshold of 65 points. Both these phases related to functionality assessment.
- 10. The fourth and fifth phases involved the assessment of the respective bids on the basis of price and the bidders' BBBEE status.
- 11. In this regard the following is of importance:
 - (a) The ZA Rand value of the contract exceeded the prescribed maximum and the bids were to be evaluated on the 90/10 basis referred to in section 2(1)(b)(i) of the PPPFA;
 - (b) In terms of the provisions of section 2(1)(f) of the PPPFA, *"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”.

12. In respect of paper-evaluation the applicants scored the highest points (66 out of 70) and in respect of BBBEE, the lowest (27 out of 30). RJV scored the lowest in respect of paper-evaluation (62 out of 70) and the highest in respect of BBBEE (28 out of 30). Hence, in respect of the second and third phases, the applicants were awarded 93 points and RJV 90 points respectively.
13. The price and BBBEE comparison (90/10) saw that the applicants being awarded 95 points as opposed to 73 of RJV. The margin being 22 points.
14. It follows that in terms of the provisions of the PPPFA, the applicants were to be awarded the tender. This did not happen for what follows.
15. The Bid Ajudication Committee (BAC) was not satisfied when the Bid Evaluation Committee (BEC) recommended that the applicants and the third respondent together be awarded the tender. The BAC referred the matter back to the BEC allegedly seeking clarity on the method used to evaluate the bid prices, certain alleged discrepancies in the applicants' pricing and the BBBEE shareholding of the bidders. The BEC reverted with a revised recommendation that the award be granted to the third respondent.
16. The BAC awarded the tender to RJV on the alleged basis of re-assessing the estimated pricing schedule in order to confirm the reasonableness of the bid. In achieving this re-assessment, all that was done was to determine a mean by adding all the bids, including those of the bidders who were considered non-responsive, and divided it by five. This method is illogical, contrary to the stipulated requirements and without merit. Either a bid is rejected for want of responsiveness and consequently is of no consequence during the

further phases of the evaluation process, or it is to be clearly stated in the bid invitation and in the Terms of Reference that all bids would be considered, despite being found non-responsive, when assessing the responsive bids. In the present instance, the invitation to bid and the Terms of Reference are silent in this regard. In any event, the invoking of a determination of a mean to consider the reasonableness of a pricing component is contrary to the stipulated provision in the PPPFA that the tender is to be awarded to the bidder who gains the highest points. The determination of the “reasonableness” of the pricing component is not a requirement in the PPPFA or in the Terms of Reference.

17. The “reasonableness” of the pricing component has no logic, nor statistical or commercial foundation. It is irrational. Per definition, a lowest pricing bid, which translates into the highest points allocation, would always be below a “mean”. The very object of a tender system is to achieve procurement at the best price, a policy endorsed in section 2(1)(b) of the PPPFA. In terms of the provisions of the PPPFA, there is no room for any “re-assessment of bids”. The approach adopted by the BAC appears to have been plucked from the air to justify the awarding of the tender to RJV.
18. The PPPFA is clear that awarding the tender to the bidder with the highest points can only be thwarted should objective criteria exist to upset such award.¹
19. In this regard, the first respondent alleges “*the question of objective criteria being a value judgment will differ from person to person.*” There is no merit in that statement. The very essence of objective criteria is the antithesis of a value judgment that per definition is subjective.

¹ Section 2(1)(f) of the PPPFA; cf. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Limited et al* 2015(5) SA 245 (CC) at [62] and [65]

20. The alleged “objective criteria” of value judgment applied, are:
- (a) A desire to distribute the work;
 - (b) RJV having a better BBBEE shareholding than the applicants.
21. There is no merit in the first respondent’s aforesaid contentions. Had the first respondent intended that there is a desire to distribute the work, such requirement was to be stipulated in the Terms of Reference, which in the present instance it was not. Applying such requirement constitutes irrelevant and impermissible methodology.
22. Furthermore, the respective BBBEE status rating is a separate criteria already included in the assessment process. It can only be invoked once as per the requirements of section 2(1)(f) of the PPPFA read with section 2(1)(d) of the PPPFA.
23. Even if there were concerns relating to the BBBEE status of the applicants, such did not render their bid non-responsive, but would merely attract a zero point rating on the points-table applicable. Applying a zero point rating in respect of BBBEE status for the applicants would not deter from the applicants’ point-scoring as they would still hold the highest points allocation. There is no merit in that contention either.
24. There is no merit in the other considerations that the first respondent seeks to rely on for justification of its decision to award the tender to RJV. Those considerations are irrelevant, do not fall under any of the Terms of Reference and are extraneous to the provisions of the PPPFA.
25. It follows that the applicants should have been awarded the tender.

26. There remain two issues raised by the applicants relating to RJV's bid. These relate to the requirement of providing a guarantee for a specified amount for a stipulated period and the requirement that all items are to be completed in respect of the pricing schedule as contained in the Terms of Reference.
27. The requirement in paragraph 5.1.4 of the Terms of Reference relating to the providing of a guarantee reads as follows:

"Submission of a bank guarantee or guarantee from a reputable 3rd party of ZAR15 million for the duration of the contract."

28. The duration of the contract is a period of four years.
29. RJV provided a letter from Standard Bank, which at best can be described as a pat on the back. That letter reads as follows:

"LETTER OF GOOD STANDING: ELLIOT MOBILITY (PTY) LTD

Elliot Mobility (Pty) Ltd, herein referred to as Elliot Mobility, has banked with our institution for many years and their accounts are well conducted.

We hereby express our financial support for Elliot Mobility as a bidder for the RFP issued by the Department of International Relations and Cooperation under the reference: DIRCO 05/2015/16. This is limited to a maximum of Fifteen Million Rands and is subject to credit approval.

We are of the opinion that Elliot Mobility is creditworthy and we therefore accord a Bank Rating Code "C".

This letter is given in confidence without any responsibility or obligation on the part of the Bank or any of its officers. It does not constitute an expressed or implied offer of funding."

30. The respondents allege that the term "guarantee" is not defined in the Terms of Reference and hence the first respondent has a discretion as to the format thereof.² There is no merit in that contention. The format does not prescribe the substance. The latter requires a formal assurance that certain conditions will be fulfilled or providing financial security.³
31. The aforesaid letter in no way constitutes a guarantee in its normal English meaning.⁴ It is subject to two conditions precedent; credit approval and not constituting an expressed or implied offer of funding. The latter is clearly indicative of the non-guaranteeing of a specified amount for a fixed period. The letter read purposively and contextually constitutes nothing more than a letter of good standing.
32. It follows that RJV's bid does not meet the requirements set for the first and second phases. It further follows that RJV's bid should have been regarded as non-responsive.
33. The applicants further allege that RJV did not complete the pricing schedule in respect of a specific item in respect of the port of Suva. In view of my finding on the issue of the guarantee that was to have been provided, I do not intend dealing with this issue.
34. The respondents did not seriously contend that the "guarantee" provided by RJV in the circumstances complied with the requirement set out in the Terms of Reference and in my view correctly so.

² cf. *SA Defence and Aid Fund v Minister of Justice* 1967(1) SA 31 (C) at 34H-35C

³ cf. The South African Concise Oxford Dictionary: *guarantee*

⁴ *ibid.*

35. It follows that the decision of the first respondent to award the tender to the third respondent stands to be reviewed and set aside.
36. The issue of the further relief that is sought, namely that the tender be awarded to the applicants requires consideration.
37. The applicant contends that in the particular circumstances of the present matter, the court is in as good a position to award the tender as the first respondent.⁵ They further contend that the court can order a substitution premised upon the provisions of section 8(1) of PAJA. The applicants further contend:

- (a) In the judgment of *Trencon*,⁶ the Constitutional Court held that:

"[35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution.

...

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is

⁵ *Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika* 1976(2) SA 1 (A)

⁶ at [35]

whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”

- (b) The applicants’ bid was extensively assessed and evaluated through a five phase bidding process that found the applicants are able to perform the services at the lowest bid price and were allocated the highest points.
 - (c) In view of the applicants having submitted the only responsive bid, the award of the tender is a foregone conclusion. If RJV’s bid is not regarded as non-responsive, the applicants obtained the highest points and the award remains a foregone conclusion.
 - (d) It would serve no purpose to remit the matter back to the first respondent for re-adjudication.⁷
38. The first respondent’s submission that the matter be remitted back to it to do the re-adjudication is without merit. None of the premises raised have any bearing. It relies in this regard on the submissions made in the second and third respondents’ heads of argument.
39. There is no merit in the second and third respondents’ contentions regarding the alleged inadequacies of the applicants’ bid. On the objective facts before court, the first respondent was satisfied that the applicants’ bid complied with the requirements set in the Terms of Reference and by the PPPFA. Even if the criticism of the applicants’ BBBEE status is to be accepted as dealt with above.

⁷ cf. *Gauteng Gambling Board v Silverstar Development Ltd* 2005(4) SA 67 (SCA) at [28] and [41]

40. Furthermore, all the phases post the responsive determination, were conducted in the manner prescribed and in accordance with the Terms of Reference, but for the award determination.
41. I am satisfied that exceptional circumstances, referred to in the *Trentcon-matter, supra*, exist in the present instance. This court is in as good a position as the first respondent to award the tender and to substitute the applicants as the successful bidder.
42. It follows that the applicants are entitled to a substitution order.

I grant the following order:

- (a) The award of tender "DIRCO 05/2016/17" for the procurement of services for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles of transferred officials, to and from missions abroad, and domestic moves within South Africa for a period of 4 years to the third respondent, is hereby reviewed and set aside;
- (b) The award of tender "DIRCO 05/2016/17" for the procurement of services for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles of transferred officials, to and from missions abroad, and domestic moves within South Africa for a period of 4 years to the third respondent, be awarded to the applicants;
- (c) Contracts already concluded with the third respondent in respect of services for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles of transferred officials, to and from missions abroad, and domestic moves within South Africa that are pending are to be honoured.

- (d) All new contracts to be concluded from the date of this order are to be concluded in accordance with prayer (b) of this order;
- (e) The respondents, jointly and severally, be ordered to pay the applicants' costs, including the costs of two counsel where applicable.


 C J VAN DER WESTHUIZEN¹
 ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants:
Instructed by:

W R E Duminy SC
Webber Wentzel

On behalf of First Respondent:

B R Tokota SC
Z Z Matebese
State Attorney

Instructed by:

On behalf of Second and Third Respondents:
Instructed by:

M Nowitz
Nnochumsohn & Teper