

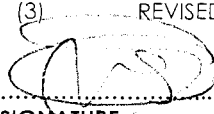
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/16

CASE NO: 73363/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	03/11/2016 DATE

B BRAUN MEDICAL (PTY) LTD

APPLICANT

AND

THE DIRECTOR GENERAL: NATIONAL TREASURY 1st RESPONDENT

ENDOMED MEDICAL AND SURGICAL SUPPLIES CC 2nd RESPONDENT

MULTISURE (PTY) LTD

3rd RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

- [1] This is an application for the review and setting aside of a decision by the first respondent to accept a tender bid by the second and third respondents, for the supply and delivery of ambulance rescue and emergency equipment and accessories to the State for the period 1 March 2015 to 28 February 2017. Details thereof follow below.
- [2] The application is brought in terms of section 7 of the Promotion of Administrative Justice Act, 3 of 2000, (PAJA). Applicant's contention is that the decision to award the tender constitutes administrative action as contemplated in section 1(i) of PAJA.
- [3] The following is sought in the Notice of Motion;
- "1. The decision by the first respondent to award the following aspects of the tender "RT4-2015ME: The supply and delivery of Ambulance Rescue and Emergency Equipment and Accessories to the State for the period 1 March 2015 to February 2017" to the second and third respondents as follows:*
- 1.1. To the second respondent the supply and delivery of safety IV catheters single use disposable, 14 to 24 gauge (item No: RT4-05-120(A)-ME, RT4-05-121(A)-ME, RT4-05-122(A)-ME, RT4-05-123(A)-ME, RT4-05-124(A)-ME and RT4-05-125(A)-ME);*
- 1.2. To the third respondent the supply and delivery of non-safety IV catheters single use disposable, 14 to 24 gauge (item No: RT4-05120(B)-ME, RT4-05-121(B)-ME, RT4-05-122(B)-ME,*

*RT405-123(B)-ME, RT4-05-124(B)-ME and
RT4-05-125(B)-ME); ("the awards")*

and claims an order in the following terms:

- (i) a declaration that the awards by the first respondent to the second and third respondents are invalid and are to be set aside;*
- (ii) costs of the application in the event of any opposition thereto by the party or parties so opposing;*
- (iii) further or alternative relief."*

The Parties

[4] 4.1. The applicant is a company registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa with its principal place of business at 253 Aintree Road, Hoogland, Extension 4, Northriding, Gauteng Province.

4.2. The first respondent is the Director General: National Treasury, established in terms of section 5 of the Public Finance Management Act Act, 1 of 1999, Pretoria, Gauteng Province;

4.3. The second respondent Endomed Medical and Surgical Supplies CC, a close corporation registered and incorporated in accordance with the Close Corporation Act 69 of 1984 with registration number: 1997/048492/23 with its registered address as Unit 10, Boulders Business Park Wiltshire Road, Mariann Ridge, Durban;

4.4. The third respondent is Multisurge (Pty) Ltd, a profit private company registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa with registration

number: 2014/170364/07 with registered address at Unit 1 Wadeville Industrial Village, 6 Crocker Road, Wadeville Extension 6, Gauteng.

[5] The applicant attacks the decision to award the tender from numerous angles;

5.1. that it was taken in circumstances where a mandatory and material procedure or condition prescribed by the empowering provision was not complied with as contemplated in section 6(2)(b);

5.2. that it was taken for a reason not authorized by the empowering provision as contemplated in section 6(2)(e)(i);

5.3. that it was taken in circumstances in which relevant considerations were not considered as contemplated in section 6(2)(e)(iii);

5.4. that it was taken arbitrarily as contemplated in section 6(2)(e)(vi);

5.5. that it is otherwise unconstitutional or unlawful as contemplated in section 6(2)(i) of PAJA.

[6] The application is opposed by the first respondent.

Background

[7] The following necessary background facts which are undisputed, place the matter into better perspective;

7.1. On 29 August 2014 the National Treasury by way of advertisement invited tender bids for the supply and delivery of

Ambulance Rescue and Emergency Equipment and Accessories to the State for the period 1 March 2015 to 28 February 2017. The closing date for the bids was 30 September 2014.

- 7.2. The first respondent received positive response from various companies. The applicant was one of the companies that submitted its bid timeously. Its bid was submitted on 22 September 2014.
- 7.3. In the weeks that followed, particularly on 24 to 27 November 2014, the first respondent through its Bid Evaluation Committee met to adjudicate over the tender. According to the first respondent the bids were adjudicated in accordance the Preferential Procurement Policy Framework Act, 5 of 2000 as well as the Special Conditions of Contract for purposes of verifying the bidder's B-BBEE status.
- 7.4. On 23 to 24 February 2015 a recommendation was made by the Bid Evaluation Committee to award the bid to the second and the third respondents. Flowing from the recommendation, a memorandum was prepared and tabled to the Bid Adjudication Committee.
- 7.5. The results of the bid were subsequently published. The applicant then caused a letter to be written to National Treasury, at first enquiring if all the tender specifications were taken into consideration when the decision to award the tender was made. In responding to the enquiries, first respondent stated that the evaluation was in accordance with the Special Conditions of Contract and further that the highest scorer had complied with all the criteria of the bid.
- 7.6. On 1 June 2015 the legal representative of the applicant launched

a formal request for information in terms of PAIA. The main thrust of the request was to establish if the tender bids by the second and third respondents met certain criteria in particular, whether certain medical equipment that had been tendered for by the second and third respondent had US, FDA certification or approval.

- 7.7. When there was no positive feedback and after the applicant had been requested to and had obliged by paying the requisite fees, applicant launched an internal appeal. As these proceedings were time barred, the applicant then launched current proceedings.

Issue

- [8] The tender related to the supply of safety and non-safety IV catheters. In its reading and interpretation of the bid request, applicant understood it to mean the catheters must be approved for use on humans by the United States Food and Drug Administration, (US, FDA). The contention by the applicant is that the products supplied by the second and third respondent only had European Conformity (CE) certification, whereas their products were compliant and carried or had US, FDA certification, therefore that the first applicant deviated from the peremptory requirements of the bid.
- [9] On its part the first respondent contends that there was no deviation from the peremptory requirements and that in so far as quality is concerned what was required was certification from any of the listed accredited or recognized institutions and that the CE was one such institution or body. The first respondent goes further to state, in the alternative, that in the event of a deviation, such deviation was not

material.

[10] The issues to be determined therefore can be summarized as follows;

10.1. Was it a peremptory requirement of the bid that the catheters be approved for use on humans by the US, FDA;

10.2. Did the second and third respondents comply with the requirements;

10.3. Was there a deviation from the peremptory bid specifications, and if there was, was such deviation material.

Discussion

[11] The applicant relies in the main on what the tender request listed as requirements in respect of the catheters. The Special Conditions of Contract provided that the bids and contract from the tender would be subject to Treasury Regulations published in terms of the Public Finance Management Act, Act 1 of 1999. The Special Conditions of Contract in relation to quality stated thus;

"23. QUALITY

21.1. *Where specific specifications and/or standards are applicable on materials and supplies, the quality of products shall not be less than the requirements of the latest edition of such specifications and/or standards.*

21.2.

21.3. *Where specifications and/or standards eg. SABS, SANS, EU, ADA, CKS, BP, BPC, USP, USNE, EP, ISO or DIN, are*

applicable on ,ate rials and supplies, the quality of products shall not be less than the requirements of the latest edition of such specifications and/or standards."

[12] Clause 32.1 of the Special Conditions of Contract reads as follows;

"32.1. It is a condition of bid that equipment which requires safety standard testing must meet, comply with and be certified by an accredited or recognized institution. A valid certified copy of the documentation in respect of certification must be submitted with the bid by closing dat and time of bid. Failure to submit the certificates for the relevant items will invalidate the bid. Examples of these institutions are as follows;.....

.....

....."

[13] What is clear from the above is that General Conditions of Contract issued by treasury are to be read with the Special Conditions of Contract. What is further clear, and that much is stated in Clause 1 of Section A of the Special Conditions of Contract, is that in the event of a conflict between the two, the Special Conditions of Contract will prevail. It is not any of the litigants' contention that there was a conflict in this bid, between the General Conditions and the Special Conditions of Contract. Nor is the contention about whether or not the quality requirements of the products were in terms of the latest edition of specifications and/or standards. The contention is that the catheters needed to be approved by the US, FDA as safe for use on humans. The applicant makes the point that where specific approval or certification is required, that much is stated in the Special Conditions of Contract.

- [14] The item specific specification for the catheters are listed in page 186 of the paginated papers. Item 9 and 10 of the specifications read respectively as follows;

"9. Must have US, FDA approval for use on humans.

10. Quality certificates must be attached as part of the bid document."

In its bid, the applicant complied with both 9 and 10 in that in the bid prepared and submitted to the first respondent, applicant submitted certificates to show that the catheters it tendered to supply were approved for use on humans by the US, FDA. The first respondent does not dispute that the second and third respondents did not provide US, FDA certification in the stead they supplied CE certification. While CE is an accredited or recognized institution for purposes of quality standards, along with US, FDA, it was not the accredited or recognized institution for purposes of the catheters. The US, FDA was. It seems self evident that if it had been the intention of the drafters of the Special Conditions of Contract to convey that any accredited or recognized institution would, for purposes of quality assurance, suffice, they would have stated so in the Special Conditions of Contract. While not taking issue with CE approval or certification, the contention that it was sufficient for purposes of the bid is unsustainable. It is simply not what was required, at least on a clear reading of the Special Conditions of Contract.

- [15] In ***Steenkamp NO v Provincial Tender Board, Eastern Cape the Court 2007 (3) SA 121 (CC)***, at para [33] the following observation is stated;

"Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ

of State in any of the three spheres of government, if authorized by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in sec 33 and the basic values governing public administration in s 195(1)."

- [16] In ***Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*** [2005] 4 All SA 478 (SCA) the Supreme Court of Appeal held that;

"The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost effective'. In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values. "

- [17] I find that US, FDA approval for the catheters was a specific condition of tender and that the bid of the second and third respondents did not meet such specification. It follows that awarding of the tender to the second and third respondent falls to be set aside.

- [18] The first respondent proffered an alternative contention, namely, that even if the court were to find that there was a deviation from the peremptory requirements of the bid, that such a deviation was not material. First respondent makes a further point to the effect that the

purpose for requiring certification of the products tendered for was to ensure that they are safe for use on humans, and that the applicant does not contend otherwise and further that the applicant does not dispute that the body that issued the certificate, EC, was an accredited body.

- [19] The following passage from ***Premier, Free State and Others v Firechem, Free State (Pty) Ltd 2000 (4) SA 413 (SCA)*** where the Supreme Court of Appeal was dealing with the award of a tender which fell outside the applicable legal framework, forms the basis for my view that there ought to be transparency, fairness and equal treatment of bids;

“One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. . . . That would deprive the public of the benefit of an open competitive process.”

- [20] In ***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 para [22] it was emphasized that the tender process must itself be fair and lawful, independent of the

outcome of such process. At para [27] it was held that;

"[27] In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."

[21] Part of a transparent, fair and equitable process entails the potential bidders knowing before hand if there will be a deviation and the extent thereof. Bolton in ***The Law of Government Procurement in South Africa*** at 182 states:

"Tenderers prepare their tenders based on the specifications laid down in a call for tenders. As a general rule, therefore, an organ of state should not be allowed to make changes to tender specifications after a call for tenders has been advertised. It is in the interests of fairness and transparency (and also competitiveness) for organs of state to abide by the tender specifications initially provided."

The learned author continues:

"To depart from tender specifications in any event gives one tenderer an unfair advantage over the other tenderers, who will have relied on the standard practice in submitting their own tenders, the amount of which will be based on the actual tender specifications." (My emphasis).

I refrain from expressing an opinion about whether or not acquisition of US, FDA, approval is much more costly than CE certification. For purposes of this application it is sufficient to state that while both bodies are accredited, if a product sourced from one approved body is more expensive than one sourced from the other, then there would be an obvious impact on the tender pricing. A bidder that sourced the less costly product would be unfairly advantaged in the pricing if scoring is to have regard to a less costly product.

- [22] There are several decisions from the Supreme Court of Appeal which emphasize that for fairness tenders must be evaluated equally. I have referred to these above. See (***Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics 2008 (2) SA 638 SCA*** para 19). Contractors should be treated equally. (See ***Premier Free State, and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 SCA*** para 30). The following dicta from ***Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others (10075/13) [2014] ZAKZDHC 18 (2 June 2014)***, in my view best sums up the approach and the legal position;

"To summarise the principles from the above authorities, fairness, equity and transparency stand out universally as uncompromising qualities of public procurement. This is so because the process is a competition for the most cost effective bid in the public interest. Whether strict or substantial compliance is required is a matter of interpreting the tender requirements. Consequently, procuring authorities have a public duty to ensure that the text of their invitations to tender is clear and precise, indicating expressly whether

requirements are peremptory or directory. As far as possible, documentation and processes should be standardised to cultivate procedural certainty and minimise recourse to the discretion of the administrative authority. Ultimately, it's the discretion of the authority not the court as to what the prerequisites for a valid tender should be. The clearer the invitation to tender the better the prospects of the process being fair and adhered to; and the less the chances are of challenges by losing and non-compliant bidders. Even less are the chances of a court interfering in the authority's decision."

[23] I am compelled to conclude that the awarding of the tender to the second and third respondents is invalid and falls to be set aside. To the extent that the first respondent contends that the deviation was not material, it is my considered view, in light of the above decisions, that the deviation was material in that it disadvantaged other tenderers, particularly the applicant. As a result, the deviation brought about an unfair evaluation process.

Remedy

[24] I would be remiss if I do not comment about the remedy and the time lines. Right from the onset this matter was going to be under time pressures. This is so because the contracts that were awarded were for a period of two years. Although the applicant did not waste time in instituting current proceedings, it was always going to be difficult, in this Division of the High Court, to have the matter heard expeditiously. The practical difficulty is that as at the hearing of this review application, the

contracts had only six months left to run. Despite those time lines, an illegality can not be allowed to stand. Justice however, is an imperative that must be seen through. In this regard I am reminded by what was said in **Steenkamp** , *supra*, by Moseneke DCJ;

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. . . . Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

[25] The order I propose to make, I believe will strike a balance between the interests of the public, the administrative body, the unsuccessful tenderer and the successful tenderers.

[26] I therefore make the following order;

1. The decision by the first respondent to award the following

aspects of the tender "RT4-2015ME: The supply and delivery of Ambulance Rescue and Emergency Equipment and Accessories to the State for the period 1 March 2015 to February 2017" to the second and third respondents as follows:

- 1.1. To the second respondent the supply and delivery of safety IV catheters single use disposable, 14 to 24 gauge (item No: RT4-05-120(A)-ME, RT4-05-121(A)-ME, RT4-05-122(A)-ME, RT4-05-123(A)-ME, RT4-05-124(A)-ME and RT4-05-125(A)-ME);
- 1.2. To the third respondent the supply and delivery of non-safety IV catheters single use disposable, 14 to 24 gauge (item No: RT4-05120(B)-ME, RT4-05-121(B)-ME, RT4-05-122(B)-ME, RT405-123(B)-ME, RT4-05-124(B)-ME and RT4-05-125(B)-ME); ("the award")

is reviewed and set aside;

2. The order of invalidity in 1 above, is suspended for a period of four weeks whereafter it will take effect;
3. The first respondent is directed to pay the costs of this application which cost are to include costs consequent upon the employment of two counsel, where applicable.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 24th August 2016

Date of judgment : 3rd November 2016

Applicant's Counsel : Adv. Mundell, SC

First respondent's Counsel : Adv. Notshe, SC