IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

22/4/16

Case Number: 19068/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

22/4/2016 .....
DATE SIGNATURE

In the matter between:

AFRI-INFRA (PTY) LTD APPLICANT

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] The applicant seeks the relief set out below on an urgent basis. The relief sought as appears in the notice of motion is as follows:

"2. That the respondent's decision not to appoint the applicant in terms of RTD04-2014/15 –Tender for Framework Contract for Professional Civil Engineering for various projects in Tshwane(as and when required for a (3) year period) is reviewed and set-aside;

3. In addition to the review and setting aside in terms of prayer 2, the respondent be directed to appoint the applicant in terms of RTD04-2014/15-Tender for Framework Contract for Professional Civil Engineering for various projects in Tshwane(as and when required for a (3) year period);

4. In the alternative, and should the above Honourable Court not be willing to grant an order in terms of prayer 3 supra, then and in the event, an order will be sought in the following terms:

4.1 That subsequent to the review and setting aside of the respondent's decision in terms of prayer 2 supra, the matter be remitted back to the respondent for re-adjudication which must be completed within 10 days and in terms of Section 8(1) (c) (i) of the Promotion of Administrative Justice Act 3 of 2000, subject to such conditions that are just and equitable, as may be determined by the above Honourable Court;

5. The respondent is to pay the costs of this application."

[2] The applicant, a company that provides a host of civil engineering services, has been in a "long-standing relationship" with the respondent, in that the applicant by way of tenders granted in its favour, as far back as 2008, has completed a number of projects for the respondent.

[3] The respondent published a tender notice on 27 February 2015 for the supply of professional civil engineering services for various projects in Tshwane as and when required for a period of three years. The bidders who submitted bids timeously and who were eligible, were placed on the respondent's a database. This database would be used by the respondent from time to time when it required the supply of professional civil engineering services.

[4] The applicant was one of those bidders who submitted its bid timeously to be place on the respondent's database. However, it was unsuccessful in its bid to be placed on the respondent's database.

[5] That which follows illustrates how the applicant established that it had not been placed on the respondent's database.

[6] On 16 November 2015 the applicant sent a request to the respondent enquiring if it had been successful in its bid and if not the reason thereof.

[7] On 18 November 2015 the applicant wrote for an extension on the contracts it had already been appointed to in terms of previous successful tenders submitted. Following this correspondence, on 3 December 2015, a request was made by the applicant for the respondent's to respond to its previous requests.

[8] Now on 8 December 2015, Mr Bongani Mntambo, the Head of Supply Chain Management department, wrote to the applicant advising *"that the previous contract will not be extended as there was a tender in place to replace the expired one."* In essence this was a response to the applicant's request to extend their previous contract which was currently in place.

[9] On the very same day the applicant requested the information it had sought in their letter of 13 November 2015. This information covered all aspects of submission and adjudication of the current bid.

[10] On 11 December 2015 the applicant responded to the respondent thanking them for the information received however, it advised the respondent that the information was lacking, in that, the scorecards requested were not attached. The applicant requested the respondent to respond by 18 December 2015.

[11] On 18 December, Mr Graham Gumbo, an employee in the Supply Chain Management unit of the respondent, provided the information sought.

[12] On receipt of the scorecards the applicant wrote to the respondent on the very same day advising that it had been wrongly scored in respect of functionality as it attained a score below 65%, which was required. In the aforesaid correspondence the applicant requested the respondent to respond by 8 January 2016.

[13] The respondent replied on 22 January 2016 advising of the reasons why the applicant's score was below that required and that the calculation thereof was in fact correct.

[14] The reasons inter alia were that the applicant had failed to furnish necessary information and as a result, the evaluation of the applicant was correctly executed. The information lacking pertained to the submission of the required RD.D3 form. Instead the applicant submitted its own form which was purported to be a RD.D3 which differed from the municipality's tender document. In doing so the applicant failed to submit what was required in one column of the applicant's tender document being *'value of work and value of fees'*. The respondent contends that the purported form of the respondent only provided one value instead of two as was required by the tender document. Due to the aforesaid the respondent concluded that the applicant's 'failed *to furnish all the information that was required under the column titled "value of work and value of fees". Therefore, he (sic the) score allocated to your client is accurate.'*

[15] On 1 February 2016 the applicant in reply to the above sent correspondence to the respondent attaching an ISO 9001 Certificate required to qualify on *'Quality Control Procedure'*. It advised the respondent that it should have obtained full marks of 10 in this category as it had submitted its certificate. It also requested a response from the respondent by 5 February 2016. Further correspondence was sent out on 8, 9, 11,12,16,18 and 23, February 2016 requesting a response from the respondent to conduct the necessary adjustment and place the applicants on the database.

[16] On 2 March 2016 the respondent responded stating *'Your client's complaint will be processed through the dispute resolution procedure. A further correspondence will be addressed in due course'*. That being the case the applicant brought this application on an urgent basis.

[17] In my view the applicant was justified in bringing this application on an urgent basis as it did not have a conclusive view from the respondent as regards its position on the data base from which service providers would be elected. This matter is such that begs for finality to be key to proceedings as it hinders the way forward for both parties and those who had been placed on the database.

[18] Now having made a request for the orders it sought in the notice of motion the respondent in its answering affidavit acceded to the alternative relief sought by the respondent's. They did so in their answering affidavit dated 24 March 2016 where they explain the reason for the delay in supplying their answering affidavit. In the main the reason was that *'the City took advice to settle the matter by agreeing to the relief sought in paragraph 4 of the applicant's notice of motion'.*

[19] In the circumstances above the respondent capitulated to the applicant's case in respect of its alternative prayer in paragraph 4 of the applicant's Notice of Motion.

[20] In addition the respondent conceded that the errors made during the adjudication of the bids warrant the grant of the order as set out in paragraph 2 of the Notice of Motion.

[21] These two concessions to my mind put to bed this entire dispute and they are orders duly sought by the applicant itself in its Notice of Motion. However I have to deal with why the alternative order (Para 4) should be granted as opposed to the order sought in paragraph 3 of the Notice of Motion.

[22] The respondent argues that the order sought in paragraph 3 of the Notice of Motion is not competent in law. That it seeks to violate the basic principles of separation of powers in its request for the Court to appoint the applicant as opposed to the Court directing the respondent to so appointing the applicant.

[23] Usually a Court in administrative review proceedings will remit a matter for reconsideration however a Court does have the power to grant a substitute order in an exceptional case, in terms of section 8 (1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The cases of an exceptional circumstance are where it's a foregone conclusion, where bias or competence has occurred in the adjudication process and where the Court is in a good enough position as an administrator to make the decision. See *Trencon Construction v Industrial Development Corporation 2015 (5) SA 245 at 256 para [38] to [40]; Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2)SA 72(T)at 76D-G.*

[24] Let us for one minute not lose sight of the fact that on any given day the Court would remit to the administrator as they are in a better position to adjudicate rather than substitute make the decision, there has to be something extraordinary for a Court to do so.

[25] The applicant argues that it has complied with the requirements of the tender and as such it should be awarded the points that would allow it to be appointed to the database panel. It further argues that this Court with the facts before it is in a position to grant a substitute order as it's a forgone conclusion that it should have been appointed.

[26] On the other hand the respondent's argue that even in the face of their concession of the wrong points allocated, there is still an evaluation that needs to be conducted in respect of technicality, *'NB" Only those tenders who score a minimum of 65 points in respect of the following criteria are eligible to be technically evaluated.'* This appears at the foot of the scorecards.

[27] I concur with the argument posed by the respondent that even if the applicant's gained the requested 65%, this was merely an entry to the following stage of being evaluated. The following stage being on a technical evaluation. The score cards, in my view, are instructive as regards this next phase of evaluation. In the circumstances no room, in my mind, is afforded for a Court to use its discretion and proceed to evaluate a bidder on the technical requirement necessary. In any event as the applicant did not even proceed to this technical evaluation level, the applicant was not evaluated at all on this aspect. That being the case the applicant has to have been evaluated for this Court to substitute the outcome of the evaluation conducted to allow it to be appointed to the database.

[28] In the circumstances set out above would this court be in a good enough position as the administrator to make a decision on the technical evaluation, with the applicant having not been evaluated, would a foregone conclusion be established, would the applicant be able to illustrate bias or incompetence on an evaluation not conducted as yet and lastly, would the appointment of the applicant without the technical evaluation being conducted be just and equitable to the respondent and other bidders who can to undergo such an evaluation? My conclusion to all that is

suggested above in this paragraph is a resounding no. See *Trencon para [44] to [47]; Bata Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490(CC) at [40].*

[29] In conclusion prayer 3 in the Notice of Motion sought by the applicant is indeed not competent in law and as such falls to be dismissed. It is prudent, just, equitable and proper in these circumstances to review and set aside the said decision to exclude the applicant from the respondent's database, coupled with an order to remit the matter for re-adjudication and consideration to be completed within 10 days in terms of section 8(1)(c)(1) of PAJA.

[30] With regards to the issue of costs the process to which the respondent capitulated to after the issuing of this urgent application reflect in my mind that the applicant was successful to an extent.

[31] When the respondent made the concessions that it did the applicant should have taken same as these were orders sought by the applicant, however the applicant dug its heel and for this, I am of the view, that they should forfeit the costs occasion for the hearing of the matter for two days, as it could have been concluded prior to the hearing of the matter in court.

[32] In the circumstances the respondent is ordered to pay the costs of the applicant for bringing this urgent application such costs are to exclude the appearance in court for the two days.

[33] Consequently the following order is made:

[33.1] The matter is urgent and the Rule 6 (12) (a) of the Uniform Rules of Court are dispensed with;

[33.2] The respondent's, CITY OF TSHWANE METROPOLITAN MUNICIPALITY, decision not to appoint the applicant, AFRI-INFRA GROUP (PTY) LTD, in terms of RTD04-2014/15 –Tender for Framework Contract for Professional Civil Engineering

for various projects in Tshwane(as and when required for a (3) year period) is reviewed and set-aside;

[33.3] That the applicant's order sought to be appointed in terms of RTD04-2014/15 –Tender for Framework Contract for Professional Civil Engineering for various projects in Tshwane(as and when required for a (3) year period), is dismissed;

[33.4] That subsequent to the review and setting aside of the respondent's decision in terms of prayer 2 supra, the matter be remitted back to the respondent for re-adjudication which must be completed within 10 days and in terms of Section 8(1) (c) (i) of the Promotion of Administrative Justice Act 3 of 2000; and

[33.5] The respondent is ordered to pay for the costs of this application excluding the costs for appearing in court for the hearing of the application for two days.

W. Hughes
Judge of the High Court Gauteng, Pretoria

Delivered: 22 April 2016