

SOUTH AFRICA / JUDGMENT

Council for Geoscience v New Resolution Geophysics and Another (61912/2018) [2019] ZAGPPHC 266 (29 May 2019)

[2019] ZAGPPHC 266**COURT**

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

61912/2018

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Source record**REPUBLIC****OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH
AFRICA****GAUTENG DIVISION, PRETORIA****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE NO: 61912/2018

29/5/2019

In

the matter between:

THE

COUNCIL FOR GEOSCIENCE

APPLICANT

and

NEW

RESOLUTION GEOPHYSICS

FIRST RESPONDENT

YBR

INVESTMENT HOLDING PTY LTD

t/a

AEROPHYSX

SECOND RESPONDENT

JUDGMENT**KUBUSHI J****INTRODUCTION**

[1] The applicant seeks, in this application, to review its alleged irregular and unlawful decision to award the tender issued under request for quotation number SAS818 to the first respondent. The application is brought on the basis that the applicant's decision to award the tender is inconsistent with section 217 (1) of the Constitution of the Republic of South Africa ("the Constitution"), and thereby invalid.

THE PARTIES

- [2] The applicant is the Council for Geoscience ("the Council"), an organ of state established in terms of the Geoscience Act 100 of 1993 as amended.
- [3] The first respondent is New Resolution Geophysics ("New Resolution"), a company which has been awarded the tender in question, the decision of which the applicant seeks to be reviewed and set aside.
- [4] The second respondent, YBR Investment Holdings (Pty) Ltd t/a Aerophysx ("Aerophysx"), is cited as an interested party and no specific relief is sought against it.

THE RELIEF SOUGHT

[5] The applicant has approached court for an order in the following terms:

5.1 The applicant's decision of appointing the first respondent for the KDD extension block high resolution airborne magnetic and radiometric

survey for the applicant, awarded under request for quotation dated 14 February 2018 be reviewed and set aside.

5.2 The applicant be authorised to re-evaluate all shortlisted quotes, under request for quotation number SAS818, dated 14 February 2018.

5.3 Costs of the application in the event of opposition.

[6] The first respondent is opposing the application and raises a number of defences in support of its argument that the relief sought by the applicant should not be granted. The second respondent on the other hand, though cited as an interested party is taking part in the proceedings. The second respondent filed its papers late but such were not opposed. The second respondent also filed heads of argument and when the matter was heard it was represented in court and argued the matter in support of the relief sought by the applicant.

BACKGROUND

- [7] The facts of the matter are common cause between the parties unless where specifically stated. On or about 28 July 2015, following an open tender process, the following companies were appointed as service providers ("the service providers") for possible future magnetic/airborne geophysics data acquisition on behalf of the applicant: Geotech Aviation South Africa ("Geotech"); New Resolution Geophysics ("New Resolution"); and YBR Investment Holdings (Pty) Ltd t/a Aerophysx ("Aerophysx").
- [8] On or about 14 February 2018 the applicant issued a request for quotations for services from the service providers, under reference number SAS818, with amongst other requirements, the specification to carry out an airborne magnetic and radiometric survey for lithological and structural mapping of parts of the main Karoo Basin in support of the expanded 10 year mapping Programme in parts of the Western and Eastern Cape Provinces. The quotations were to be evaluated on 80/20 (Price and BEE) preference system.
- [9] The following quotations were received from the service providers:
- 9.1 YBR Investment Holdings (Pty) Ltd t/a Aerophysx at a price of R18 696 819, 20 inclusive of 15% Value Added Tax ("VAT");
- 9.2 New Resolution Geophysics at a price of R18 609 690 inclusive of 14% VAT; and
- 9.3 Geotech Aviation South Africa at a price of R23 859 413, 86 inclusive of 14% VAT.
- [10] The Bid Evaluation Committee ("the BEG") of the applicant met on 2 March 2018 to evaluate the quotations received. According to the summary submitted by the BEC to the Bid Adjudication Committee ("BAC"), the highest scoring bidder was the first respondent, which scored 90 on price only. The second highest scoring bidder was the second respondent with a score of 89.57 on price. Both bidders did not meet the BEE requirements and thus scored zero in that regard. Based on this score sheet, the BEG recommended that the first respondent, with the highest score, be awarded the tender.
- [11] Based on the score sheet provided by the BEG, the BAC resolved to recommend the appointment of the first respondent at the amount of R18 609 690, 60 VAT inclusive. The recommendation of the BAC is stated in its minutes of 8 March 2018 as R16 324 290 exclusive of VAT.
- [12] On 20 March 2018 the recommendation of the BAG served before the Board of the applicant. The Board approved the award of the tender as recommended. Based on the decision of the Board, a letter of appointment of the service provider, which was a communication of the applicant's intention to contract with the service provider, was issued to the first respondent.

[13] Sometime, late in June 2018, it came to the attention of the Board that there was an irregularity in the decision to award the tender. The irregularity came about in that when evaluating the bids, the BEC and subsequently the BAC missed the fact that the bidders did not use the same VAT rate. It was discovered that of the three bidders whose bids have been shortlisted, Geotech and New Resolution's prices were calculated on a 14% VAT rate whereas Aerophysx's price was calculated

on a 15% VAT rate. After some investigation and confirmation of the irregularity it was resolved that the award be cancelled. The

applicant has approached court consequent to the said cancellation.

[14] It is worthy to state that early in February 2018, the Minister of Finance had announced a 1% VAT increment that was to come into effect on 1 April 2018. VAT was to increase from 14% to 15% with effect from 1 April 2018. The tender was advertised before the new VAT increment came into operation, and at the time of the close of the submission of the tender/quotations the VAT increment had already been gazetted.

ISSUES

[15] There are two issues for determination. The first issue is whether the applicant's decision can be reviewed and set aside. The second issue is whether, in the event the applicant's decision is reviewed and set aside, the matter should be remitted to the BEC for a re-evaluation of the bid or the process should be started de novo.

I deal with the two issues separately hereunder.

IS THE DECISION TO AWARD THE TENDER REVIEWABLE?

The Applicant's Case

[16] The complaint by the applicant is that the recommendation by the BEC was made in error as the bidders' prices were quoted using different VAT rates.

[17] According to the applicant, a closer look and consideration of the quotations revealed that, in pricing their respective quotations, the first respondent and Aerophysx, used 14% VAT and the second respondent used 15% VAT. The first respondent's quotation is, thus, inclusive of 14% VAT, which VAT rate was not going to be applicable at the time of the execution of the works tendered for because of the VAT increase of 1% that would have come into effect from 1 April

2018. On closer scrutiny, the effect is that when the VAT is excluded from all the quotations, the highest bidder with the lowest base price appears to be the second respondent with a base price of R16 258 103, 65, which was lower than the first respondent's base price by R66 186, 60. This differentiation was missed and/or ignored by the BEC and the SAC and resulted in the quotations being treated as if

they had the same VAT percentage.

[18] In the circumstances, the applicant's submission is that the decision of the BEC and the BAC to recommend the first respondent is clearly irregular, and therefore unlawful. Had the BEC and the BAC applied their mind properly to all the bid prices exclusive of VAT, it would have become clear that the highest scoring bidder is the second respondent and not the first respondent. Hence the decision should be reviewed and set aside. The Committees should also have noted that different VAT rates were used.

[19] In support of the aforementioned submissions, the applicant proffered the following grounds to found its argument, namely:

19.1 The applicant's right to review its decision:

The applicant's contention is that the Constitutional Court confirmed the right of an organ of state to review its own decisions which are inconsistent with the Constitution under the principle of legality. As a result, the applicant contends that in this instance, the contentious decision should be reviewed for illegality because it was not rationally connected to the information before the BEC and the BAC. I was, in this regard, referred to the judgments in *State Information Technology Agency Soc Limited v Gijima Holding (Pty) Ltd*,^[1] and *The Business Zone 1010 CC tis Emmerentia Convenience Centre v Engen Petroleum Limited and Others*.^[2]

19.2 The applicant's lack of power to reverse an administrative decision:

The applicant's submission on this ground is that it is trite that once an administrative decision is reached, it becomes binding until set aside by a court of competent jurisdiction. In this regard, the decision to award the tender once made, became binding on the applicant and could only be set aside by a court of competent jurisdiction. The applicant had, thus, to approach court for the decision to be reviewed, so it was argued. In support of this argument, the applicant is relying on the judgment in *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd*.^[3]

19.3 The imperatives of section 217 (1) of the Constitution:

The further argument by the applicant is that section 2 of the Constitution read with section 217

- (1) of the Constitution enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution. The contention being that public contracts that have been found to have been awarded irregularly have in terms of the said sections, been declared invalid by our courts. The applicant submitted further that:
 - (a) if the applicant's award was unlawful, it is invalid, thus, the applicant was duty bound not to submit itself to an unlawful contract;

- (b) the applicant was entitled to raise the invalidity of the decision of the award of tender to the first respondent and seek to have it set aside. and where invalidity is proven, as is the case in the current matter, the court has no discretion but to set the award aside, no matter how harsh, or unfair the consequences are to the first respondent. The applicant referred to the judgment in *Contractprops*[4] in support of its argument.

The Second Respondent's Case

- [20] By agreement between the parties, the second respondent, who supported the relief sought by the applicant, was allowed to argue before the first respondent. The second respondent's argument is that:

20.1 Firstly, in accordance with *Gijima*,[5] the applicant as an organ of state is entitled to review its decisions under the legality review. The principle of legality, so it is argued, is applicable to all exercises of public power and not only to administrative action as defined in Promotion of Administrative Justice Act.[6]

20.2 Secondly, the first respondent's bid does not show that it was to absorb the 1% VAT difference. The argument is that at face value it is not clear what the bullet point (which the first respondent alleges indicates its intention to absorb the 1% VAT difference) on the first respondent's bid, means. There are no express words to explain the VAT difference and what the bullet point does is to create ambiguity in the bid. The first respondent's desire to waive the 1% differentiation, confirms the ambiguity.

20.3 Thirdly, it would have been fundamentally unfair and unlawful for the applicant to have negotiated with the first respondent to waive the 1% VAT difference. Such negotiations, it is argued, would have invalidated the whole process as it would not have been transparent.

20.4 Lastly, the BEC evaluated the bids using the old Preferential Procurement Regulations instead of the new Preferential Procurement Regulations of 2017.

The First Respondent's Case

- [21] The reasons provided by the first respondent for the variation in the VAT rate are stated in paragraph 28 and 29 of its answering affidavit as follows:

"28. The reason for the variation arises from the change to the VAT rate which would have become effective on 1 April 2018, as announced in the National Budget Speech on 21 February 2018. This according to the first respondent is the reason why in the body of the quotation reference is made in one of the bullet points to the fact that as at 1 April 2018 a VAT rate of 15% will apply. However, in terms of the actual figures stated in the quotation, the rate of 14% VAT was utilised because the tender commenced in March 2018 as it was supposed to, the first respondent's first invoice to the applicant would have included a VAT rate of 14% not 15%. Thereafter, from 1 April 2018, as envisaged at the foot of the quotation, the VAT rate of 15% would be applicable. Thus it is apparent that - given the difficulties of having to deal with pricing during periods of time with variable VAT rates - the first respondent envisaged that it would have to

absorb the cost of the extra 1% VAT that would be payable from 1 April 2018.

29. In amplification of what I have said above about the fact that the tender would have had to have commenced in March 2018, I say the following. If one has regard to the request for quotation, it provides for a time period of 8 months with the final product delivery by 30 November 2018. . . . The first respondent had calculated that in order to comply with this time period the first respondent would have had to have commenced its operations in March 2018 and the first respondent would have had to have performed the work and generated an invoice during March 2018 when the VAT rate was still at 14%."

[22] There are three defences raised by the first respondent in opposition to the applicant's claim that the decision to award the claim should be reviewed and set aside, namely:

22.1 In the first place, it is the first respondent's contention that it had always intended to absorb the 1% VAT variation.

22.2 Secondly, the first respondent argues that upon taking service of the present application, it made a formal tender to waive the 1% VAT differential to ensure that the overall VAT inclusive bid price would remain exactly the same. This, it is suggested, would have resulted in the overall VAT inclusive bid price remaining the lowest price with the result that the first respondent continues to score the highest number of points.

22.3 Thirdly, the contention is that the first respondent's bid was responsive in all respects including price and as such constituted an acceptable tender. The argument being that the tender/quotation was compliant, alternatively substantially compliant with the bid conditions and was, as such, fully responsive on all accounts.

22.4 The last submission is that in terms of the Bid Conditions, the applicant had the power to raise any discrepancy in regard to the VAT rate difference and to negotiate with the first respondent in that regard both before and after the bid process had closed and the first respondent's bid had been accepted. It being contended that since the first respondent's tender was successful and as it was placed on the applicant's list of preferred service providers, the bid conditions were applicable to it and to any subsequent requests for bids or quotations as between the applicant and the first respondent which also included the request

for quotation in respect of the present project.

DISCUSSION

[23] It is trite that under the principle of legality, an organ of state like the applicant has the right to review its own irregular decisions. It is also trite that an organ of state like the applicant lacks the power to reverse its own administrative decision. This is so because once an administrative decision is reached, it becomes binding until set aside by a court of competent jurisdiction. However, for the various defences it has raised, the first respondent's submission is that the decision to award the tender in the circumstances of the present matter is not reviewable and should not be set aside.

- [24] It is common cause that the BEC and the BAC did not realise and/or ignored that the first respondent had used a VAT percentage of 14% to calculate its VAT inclusive price and that the second respondent used a VAT percentage of 15%. This resulted in the first respondent's overall VAT inclusive amount included as a VAT component of R2 285 400 whereas in fact the VAT component should have been R2 448 643, 50, and the total VAT inclusive amount became R18 609 690, 60 instead of R18 772 933, 50.
- [25] As such, there is no dispute that an irregularity occurred during the evaluation of the bid. I say that the irregularity is common cause, because on a closer reading of the first respondent's answering affidavit and heads of argument, it is clear that the first respondent concedes that there was an irregularity in the process, which it seeks to correct by forgoing the 1% VAT amount.
- [26] Even though the irregularity is admitted, it is the first respondent's proposition that the award should not be reviewed because firstly, the irregularity is immaterial; secondly the first respondent can absorb the 1% VAT difference to ensure that the bid price remains the same; lastly, in terms of the tender conditions the applicant was obliged to enter into negotiations with the first respondent in respect of the VAT difference.
- [27] As regards the materiality of the irregularity and/or condition that price must be VAT inclusive, it is the applicant and not the court that must decide what should be the prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an unacceptable tender under the Preferential Procurement Policy framework Act;^[7] unless those conditions are immaterial, unreasonable or unconstitutional.^[8]
- [28] I am of the view that the first respondent's supposition that the irregularity is immaterial and ought to have been overlooked by the applicant is unsubstantiated. Although the differential appears to be a minor difference of 1% it is, however, material in the sense that it is determinative of which entity is the highest bidder. It is apparent that when the base prices of the bidders are considered the first respondent was able to quote a lower price because it used a low VAT rate. For instance, even though the first respondent's quote of R18 609 690, 60 appeared to be lower than the second respondent's quote of R18 696 819, 20, it was in fact not so. The second respondent's quotation contained the lowest base price of all bids received in the amount of R16 258 103,
65. This was lower than the first respondent's base price of R16 324 290 by a price of R66 186, 35.
- [29] The issue of the irregularity is material and that it induced the applicant to have the decision revisited is correct. I, thus, find the first respondent's argument of materiality to have no substance and should be rejected.

- [30] The contention by the first respondent that it had intended to absorb and/or waive the 1% VAT difference appears unfounded as well. The record shows that the first respondent submitted a quote based on a VAT rate of 14% and a higher base price of R16 324 290. The footnote to the first respondent's quote, to which the first respondent seeks to rely on, reads that only a VAT rate of 15% will apply as of 1

April 2018. It does not say that the first respondent will absorb the VAT increase - there is no such wording on the quotation and it cannot be read in. Therefore, when the BEC met to evaluate the bid it had no knowledge that the first respondent intends to absorb the 1% VAT increase. As per its own evidence in the answering affidavit, the first respondent concedes that it only offered to absorb the 1% VAT increase on being served with the founding papers in this application. Even so, the reduction of the VAT by 1% was never a jurisdictional requirement of the bid. The requirement was that price must be VAT inclusive.

- [31] My view is that at the time of compiling the quotation, the first respondent had no intention at all to absorb the VAT increment. This was an afterthought when it realised that it had used a wrong VAT rate. Besides, if the applicant would allow the first respondent to absorb the 1% VAT, it would have been obliged to allow all the other bidders to do the same in order for the bid to be transparent. Thus, there is no factual basis on which it can be said that it was the intention of the first respondent to absorb the 1% VAT increment. More importantly, as already stated, there was no requirement to absorb the 1% VAT. Allowing it would have resulted in

the amendment of the bid conditions. Such amendment would have been in contravention of the prescripts of section 2 (1) (e) of the Preferential Procurement Policy Framework Act,[9] which provides that "any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit tender" and Regulation 11.1.1 of the Procurement Regulations which provides firstly that, the evaluation of bids must be done in terms of the evaluation criteria embodied in the bid document; secondly that, the amendment of the evaluation criteria after the closure of the bid is not allowed as this may jeopardize the fairness of the process.

- [32] Similarly, I find the first respondent's contention that the applicant was obliged to enter into negotiation with it before approaching court to review its decision, to be superfluous. The reliance by the first respondent on the conditions of tender, quoted in its papers, which empowers the applicant to negotiate, does not assist its case. In actual fact the first respondent's argument misses the point. The irregularity complained about is not in the respondent's tender documents, but is inherent in the process of evaluation. I accept that the first respondent's bid was responsive or compliant, alternatively substantially compliant, that is why it was not rejected. However, the issue herein, as I have stated, has to do with the irregularity that happened during the process of evaluation. In essence, the irregularity complaint of does not have anything to do with the first respondent and/or its tender documents. The irregularity was occasioned by the conduct of the applicant's officials during the evaluation process. They failed to note the different VAT rates and evaluated the bids as if the VAT rate used by all the bidders was the same. Once it came to the attention of

the applicant that an irregularity, occasioned by its officials, occurred, there was no need to negotiate with the first respondent. Of importance is that, that the first respondent had used a 14% VAT rate in its price calculation was not in itself an irregularity and that is why I say that there was no need for the applicant to enter

into negotiations with the first respondent. The irregularity affected all the shortlisted bids and was inherent in the process of evaluation.

[33] Negotiations in such circumstances would have amounted to the applicant affording the first respondent and opportunity to amend its quotation. By implication negotiations under such circumstances, would have been tantamount to the applicant allowing the first respondent to amend its tender to comply with the jurisdictional requirements of the bid without allowing the other tenderers to do so. Such conduct would have been contrary to the provisions of section 217 (1) of the Constitution which requires all tender processes to be fair, equitable, transparent, and competitive.

[34] The first respondent's grounds for opposing the application are, therefore, meritless and should be rejected.

THE REMEDY

[35] Another relief sought by the applicant is an order authorising it to re-evaluate all shortlisted quotes, under request for quotation number SAS818, dated 14 February 2018.

[36] The applicant's submission is that the appropriate remedy, should I find that the BEC and the BAC did not properly apply their mind to the bid, is that the matter has to, in justice and fairness, be remitted back for reconsideration and the court should not interfere with the applicant's duty to render just administrative decisions and/or usurp its functions by substituting the decision with its own decision as there are no exceptional circumstances and justification for the court to do so. I was referred to the unreported judgment in Macrovest 102 (Pty) Ltd t/a Business and Mazizi v The Municipal Manager: Nelson Mandela Bay Metropolitan Municipality and 4 Others, Case Number 46712012.

[37] The basis of the applicant's argument is that the contentious decision is only unlawful to the extent of the decisions of the BEC, BAC and the applicant's Board. As such, it ought to, in justice and fairness, be remitted back for consideration first to the BEC to commence the evaluation process afresh; and then through the remainder of the procurement decision making process. I is further submitted that the procurement process was above board to the point of submitting bids. The irregularity is only with the evaluation and adjudication of the bid, which resulted in the applicant's Board taking a wrong decision, so it is argued.

[38] It is, however, the first respondent's argument that in the event the court finds that the decision should in fact be reviewed and set aside, as I have in this instance found, the tender process should be started afresh and commenced de novo. It should not simply involve re-evaluation of all shortlisted quotes. The problem with the re- evaluation

approach, according to the first respondent, is that the applicant believes that it would not be entitled to give the first respondent an opportunity to clarify and/or amend its bid. It is, thus, likely that the first respondent will be excluded from the re- evaluation process by the applicant. Fairness and justice dictates that the commencement de novo would be more fair and transparent for the first respondent and the other parties that put in their bids.

Alternatively, if the re-evaluation approach is followed the first respondent should be allowed to clarify and/or amend its bid in order to deal with the VAT variation issue, so the argument goes.

- [39] The second respondent's submission is in support of the relief sought by the applicant to refer the matter back for evaluation by the BEC as there is no reason to interfere with the order sought by the applicant. According to the second respondent, if it is the applicant's view that the matter will be best addressed by remittance back to the BEC for re-evaluation, it must be allowed to do so.
- [40] I am not in agreement with the argument by the first respondent that the tender process should be started de novo. As I have already indicated, the first respondent misses the point of contention. It is the first respondent' submission that it's tender was responsive or compliant, alternatively substantially compliant. I have, also accepted this proposition. I have also made a finding that the irregularity complaint about herein does not, in reality, have anything to do with the first respondent's tender, but it is inherent in the process. The first respondent's bid having been accepted as responsive, forms part of all the other tenders shortlisted as responsive for evaluation, hence there is no need to start the process afresh as the first respondent's tender is not being rejected.
- [41] I am in agreement with the submission made by the applicant that the procurement process was above board to the point of submitting bids; and that the irregularity is only with the evaluation and adjudication of the bid, which resulted in the applicant's Board taking a wrong decision. There are bids, including the first respondent's bid, that have passed master until up to the point of submission and are awaiting to be evaluated. The first evaluation process having being marred by irregularities, it follows that the shortlisted bids must be evaluated afresh.

CONCLUSION

- [42] The Supreme Court of Appeal in *Pepcor Retirement Fund and Another v Financial Services Board and Another*,^[10] held that if an administrative act has been performed irregularly - be it as a result of administrative error, fraud or other circumstances - then, depending upon the legislation involved and the nature and functions of the public body, it may not only be entitled but also bound to raise the matter in a court of law, if prejudiced. That court explained as follows at para 47 of the

judgment:

"In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of inter alios the functionary who made it - even though the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*, *Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly i.e. on the basis of true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires."

[43] In *State Information Technology Agency v Gijima Holdings*[11] the court had this to say:

"[41] ... Section 217 of the Constitution insists on a system of public procurement that complies with certain factors. It provides that '(w)hen an organ of state . . . contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost effective'. It therefore seems reasonable for this court to infer that, in awarding the contract, Sita acted contrary to the dictates of the Constitution. Based on *Fedsure*, this was at odds with the principle of legality and liable to be reviewed and possibly set aside. Indeed, we have previously held that the principle of legality would be a means by which an organ of state may seek the review of its own decision. This was in *Khumalo*.[12]"

[44] And, in *Contractprops*, above, the court at paragraphs [8] and

[9] thereof held as follows:

"[8] . . . to eliminate patronage or worse, in awarding of contracts, to provide members of the public with opportunity to tender to fulfil

[government's) needs, and to ensure the fair, impartial, and independent exercise of the power to award [government] contracts. If contracts were permitted to be concluded without any resultant sanction of invalidity, the very mischief which [procurement

regulations] seek to combat could be perpetuated".

"[9] . . . Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case."

- [45] It is common cause that the first respondent used a VAT percentage of 14% instead of 15%. It is also not in dispute that it was always the intention of the BEC and the BAC to recommend the bidder with the highest score to be awarded the tender. That is, the intention was to contract with the service provider with the lowest quoted price. In this instance, the first respondent's quoted price was not the lowest.
- [46] It is, thus, undoubtedly so that there was an irregularity in the awarding of the tender to the first respondent and the applicant was not only entitled but bound to approach court to review such irregularity. The court is said to have no discretion in such circumstances but to review and set aside the contentious irregularity no matter how harsh or unfair the consequences may be to the first respondent.
- [47] I conclude, therefore that for all the aforementioned reasons the applicant has been able to show that it is entitled to the relief it seeks in the papers.

COSTS

- [48] The applicant and the second respondent are successful in the application. In the ordinary course, they would both be entitled to costs of suit. However, in the circumstances of this matter my view is that each party should pay its own costs. Such a ruling is arrived at on the basis that the first respondent finds itself party to this litigation through no fault of its own. Even though it is the applicant's submission that the first respondent should not have opposed the application, I hold, however, that the first respondent was entitled and had all the right to oppose the application if it so desired. The second respondent on the other hand, was cited in the papers as an interested party and no specific relief was sought against it. It, thus, entered the fray at their own volition and cannot be heard to insist on payment of their costs. In light of this, it would, therefore, not be fair or just to award costs against the first respondent.

ORDER

- [49] As a result I make the following order:

1. The applicant's decision of appointing the first respondent for the KDD extension block high resolution airborne magnetic and radiometric survey for the applicant, awarded under request for quotation dated 14 February 2018 is reviewed and set aside.
2. The applicant is authorised to re-evaluate all shortlisted quotes, under request for quotation number SAS818, dated 14 February 2018.
3. Each party to pay own costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant

: Adv. I. Magano

Instructed by

: Madiseha Attorneys

Counsel for First Respondent

: Adv. C. Cutler

Instructed by

: Gillian & Veldhuizen

c/o Roy Suttner Attorneys

Counsel for Second Respondent

: Adv. G. Solik

Instructed by

: Morkel De Villiers Attorneys

c/o Riaan Bosch Attorneys

Date heard

: 06 December 2018

Date of judgment

: 29 May 2019

[1] 2018 (2) SA 23 (CC) para 38- 41.

[2]

[2017] ZACC 2, para 66.

[3]

(2014) ZACC 6, para 64--65 .

[4] Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd [2001] 4 All SA 273 (A).

[5] Para 35.

[6] Act No . 3 of 2000.

[7] Act No. 5 of 2000.

[8] See *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Or JS Moroka Municipality* (937/2012)

(2013) ZASCA 186 (29 November 2013) para 10.

[9] Act 5 of 2000.

[10]

(2003) 3 All SA 21 (SCA) para 10 .

[11] 2018 (2) SA 23 (CC) para 41.

[12] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC).

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