

SOUTH AFRICA / JUDGMENT

Fezi Consultants and Auditors (Pty) Ltd v Centlec (SOC) Ltd (1381/2022) [2023] ZAFSHC 325 (15 August 2023) [2023] ZAFSHC 325

COURT

Free State High Court, Bloemfontein

BEFORE

Mbhele, Daniso

CASE / FILE NUMBER

1381/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case

Number: 1318/2022

In

the matter between: -

FEZI

CONSULTANTS AND AUDITORS (PTY) LTD

APPLICANT

and

CENTLEC

(SOC) LTD

1ST

RESPONDENT

MAKOMOTA

INVESTMENT HOLDINGS (PTY) LTD

2ND

RESPONDENT

CORAM:

MBHELE, DJP et DANISO, J

JUDGMENT

BY: MBHELE, DJP

HEARD ON: 15 MAY 2023

DELIVERED ON: 15 AUGUST 2023

- [1] The applicant (Fezi) seeks and order reviewing and setting aside the decision by the first respondent (CENTLEC) to appoint the second respondent (Makomota) as the successful bidder. On 7 May 2021 CENTLEC requested proposals from suitable and qualified service providers to perform the task on behalf of CENTLEC to compile an Infrastructure Fixed Asset Register. Ten (10 Bidders submitted bids including Fezi. Fezi's is one of unsuccessful bidders.
- [2] The following were Technical Specifications for the tender accompanied by a summary of the infrastructure Fixed Asset Register value:

‘4. TECHNICAL SPECIFICATION

- 4.1. Develop the verification and condition assessment methodology (using a sliding scale) which should be submitted to the Management, Auditor General and National Treasury for approval.
- 4.2. Perform a physical verification (and update / include GIS shape files) of all additions of electricity infrastructure assets, per the entity's Fixed Asset Register and updated periodically during financial year under review.
- 4.3. Perform a condition assessment of each item of electricity infrastructure assets listed per the entity's Fixed Asset Register.
- 4.4. The team should be available, after the assignment, to assist in addressing Audit queries based on the valuations that they have performed.
- 4.5. Draft the required adjusting journals to account for changes arising from the asset related process (e.g. Depreciation, Disposals, Work in Progress).
- 4.6. Compile a detailed working paper file with sufficient support for all adjustments make to the Fixed Asset Register.
- 4.7. Summary of the Infrastructure Fixed Asset Register value:

Description Closing balance 2019/2020 Value HV Civil R 160, 656,950.87 HV Conductors R 442,235,069.33 HV Equipment R 131,197,467.90 HV Towers R 894,518,539.90 HV Transformer R 278,802,483.42 Load Control Equipment R 2,896,114.48 LV Conductors R 1,251,126,260.88 LV Service Connections R 28,334,830.20 LV Service Distribution Box R 190,943,127.55 Meter R 68,715,279.25 Poles R 450,906,855.53 Battery Chargers R 29,567,650.85 MV Conductors R 1,130,245,766.67 Load Centers R 332,869,736.84 MV Substation Building R 60,712,986.31 Overhead Line Equipment R 30,861,032.51 Protection Metering Equipment R 33,415,990.25 Quality of

Supply R 1,902,795.72 Street Lights R 75,324,104.62 Switchgear R 749,557,058.60 R 6,344,790,101.00

4.8. The work in progress will need to be inspected and any completed

projects need to be componentized and capitalized as additions.

4.9. Disposals/scrapped assets will need to be identified and ensure that

the correct accounting treatments is applied to these items.'

[3] Paragraph 4.2 above shows that the bidders were required to perform a physical verification and update of all additions of electricity infrastructure assets, per the entity's Fixed Asset Register and update same periodically during financial year under review. One of the conditions of the tender was that the request for proposal contract price shall be for a fixed price and tenderers were required to complete a precast pricing schedule. The precast schedule made provision for four constituencies of services to be rendered as tabulated below:

'7. PRICING SCHEDULES

The contract price(s) shall be a fixed priced.

The pricing should be based on the Annexures attached.

DESCRIPTION ELECTRICAL INFRASTRUCTURE ASSETS Unit of Measure Price in Rand
(Excluding VAT) Year 1 Price in Rand (Excluding VAT) Year 2 Price in Rand (Excluding VAT) Year 3
Verification of additions Condition Assessment per asset •GPS co-ordinate per asset Per Asset 10
Identification of assets: Barcode assets per CENTLEC requirement Per Asset Accounting Journals
for all adjustment relating to the assets in line with the applicable GRAP standards Once off
Record all assets in the Fixed Asset Register of CENTLEC as per current componentisation Once
off

Table 3 – Pricing Schedule

[4] From the above table it is clear that bidders were required to quote fixed prices according to the price schedule provided i.e. rand and cents. Under item 4 of the pricing schedule, which item required a once off amount, Fezi quoted that price in rand is included in the price per asset. This is the item in terms of which bidders were required to record all assets in the Fixed Asset Register per componentisation. Item 1 and 2 of the bid required verification and identification of assets. As per the bid specification, only additions to the Fixed Asset Register required verification and identification.

[5] Fezi's bid was disqualified at the second stage of evaluation (Price and BEE stage). The main reason advanced was that Fezi did not quote a fixed price for the task of recording all assets in the Fixed Asset Register.

- [6] Fezi submits that it should have been awarded the tender and contends that CENTLEC elevated form over substance when it evaluated its tender in that its bid was the most cost effective and would have saved public funds. Fezi further submits that the technology it uses would, in the natural course of executing the other components of the deliverables, automatically generate the required register of assets. It submits that it would not charge CENTLEC for item 4 as it would have been covered in price per asset charged under item 2.
- [7] CENTLEC's case is that Fezi's entire bid pricing is predicated on the wrong notion that bidders had to compile a Fixed Asset Register from scratch. CENTLEC submits that items 1 and 2 of the pricing schedule do not relate to the total number of the current assets, they relate to additions to the Fixed Asset Register while item 4 relates to both additions as well as total number of current assets.
- [8] The applicant's grounds of review as predicated on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are that the impugned decision -:

8.1 was taken arbitrarily or capriciously;

8.2 was taken because irrelevant consideration was taken into account and/or because relevant consideration was not taken into account;

8.3 is not rationally connected to the purpose for which it was taken, treason (sic) given for it by the administrator.

- [9] Fezi's calculation of bid pricing was based on verification and identification of 1 030 501 assets provided by CENTLEC as per its existing Fixed Asset Register. The above is more apparent from the comments on the footnote of Fezi's pricing schedule where the following was said:

'Note:

The pricing schedule provided in the bid tender document and the number of assets provided by Centlec do not match, therefore, should Fezi be successful in the awarding of this request the alignment of the factors can be negotiated as provided in Municipal Financial Management Act.

*Number of Assets for Year 2 and Year [sic] was not provided, however for the purpose of bidding processes we assume the number of assets will remain constant

.

**Year 2 and year is based on a flat rate, however due to the uncertainties of the of the economic [sic] can be increased based on the real interest rates [sic].'

- [10] The above comment is a clear indication that Fezi's bid did not meet the requirements set out under technical specifications. As a result of the wrong premise from which Fezi calculated its pricing on items 1 and 2 it became difficult to quote for year 2 and 3. Fezi's response on item 4 is also not in line with the bid instructions. CENTLEC, further submits that Item 4 of the pricing schedule required of the successful bidder to update the existing

Fixed Asset Register and make sure it is compliant with the GRAP standards. This exercise would require the successful bidder to produce a GRAP compliant register which would account for depreciation for each asset as well as disposals.

[11] Section 217(1) of the Constitution[1] provides that an organ of state contracting for goods or services must do so in accordance with a system which is fair, equitable,

transparent, competitive and cost-effective. Section 1 of the Preferential Procurement Policy Framework Act[2] (PPPFA) defines an acceptable tender as any tender which, in all respects, complies with the specifications and conditions as set out in the tender document.

[12] In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics and Others*[3] the Supreme Court of Appeal had this to say about an “acceptable tender”:

“An 'acceptable tender' in turn is defined in s 1 as meaning 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. It is well established that the legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. The acceptance by an organ of State of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement.

... What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of the work itemized in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all the work itemized in the schedule of quantities is to be performed. Whether work may later be omitted is of no consequence. What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and almost certainly also to the detriment of the public purse since he is likely to load other items to the detriment of the employer. Such a tender offends each of the core values which s 217 (1) of the Constitution seeks to uphold. It would not be a tender which is ‘acceptable’ within the meaning of the Preferential Act.”

[13] In *Sapela* above one of the tenderer’s bid was found to have been unresponsive because the tenderer misunderstood 2 items in the schedule as it is the case with the current matter. Tenderers are expected to comply with the set criteria for the tender in order to promote fairness, competitiveness, equity and transparency. The Bid evaluation committees are not at liberty to deviate from the conditions of a tender and the law governing procurement in their quest to accommodate mistakes committed by competing bidders. See also *Dr JS Moroka Municipality & Others v Bertram (PTY) Limited & Another* [4] where it was said:

‘A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid ‘validly

submitted'. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; second, the evaluation of all bids 'validly submitted' as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be accepted. The fact that all bids validly submitted are to be taken into consideration as set out in clause 3.1 affords no discretion to condone and take into account bids not validly submitted but disqualified.

[16] In these circumstances it is clear that there was no discretion to condone a

failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the Procurement Act and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside – as was held by this court in *Sapela Electronics*. On this basis the appellants were perfectly entitled to disqualify the first respondent's tender as they did.

[17] As a last line of defence, so to speak, the first respondent argued in the alternative that for reasons of public policy its tender ought not to have been disqualified but should have been evaluated. This argument was founded essentially on the fact that it was lower than that of *Eldocrete* and the statement in *Millennium Waste Management* that: '(O)ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose favour the provision was enacted (*SA Eagle Insurance Co Ltd v Bavuma*)'.

[18] The first respondent's argument on this issue faces a fundamental difficulty. The decision in *SA Eagle Insurance Co Ltd v Bavuma*, referred to as authority for the proposition in the dictum in *Millennium Waste Management* quoted above that condonation can be granted where it is not inconsistent with public policy, related to a statutory provision enacted for the specific benefit of an individual or body. It was held that such a benefit may be waived by that individual or body provided that no public interests were affected thereby and that it was not open to another person, whom the statute was not intended to benefit, to insist that the provision be observed. In my view, that does not support the proposition that, if it is not inconsistent with public policy, non-compliance with a peremptory requirement of a tender can be condoned so that a tender which is 'unacceptable' as envisaged by the Procurement Act may be accepted. Not only is such a proposition inconsistent with the decision of this court in *Pepper Bay* – a decision regularly followed and approved, including in *Millennium Waste Management* – but it also offends the principle of legality, as emphasised by this court in *Sapela Electronics*. Accordingly, in my respectful view, insofar as the judgment in *Millennium Waste Management* may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.'

[14] Having regard to the tender documents and bids submitted it is clear that Fezi misunderstood the requirements of the tender hence its non- responsive pricing. Fezi has failed to meet the set pre-qualifying criteria and its bid was thus correctly rejected. There was nothing ambiguous with what bidders had to comply with. Makomota submitted a bid that is in compliance with the set requirements. The application ought to fail. There is no reason to deviate from the general rule that costs follow the event.

[15] Therefore the following order is made:

1. The application is dismissed with costs.
2. Costs to include that of counsel

N.M. MBHELE, DJP

I concur

N.S. DANISO, J

Appearances: Counsel for the Applicant: Adv. W.A. Van Aswegen Instructed by : Symington and De Kok Attorneys BLOEMFONTEIN Counsel for the First Respondent: Adv. D.R Thompson Instructed by: Raynard & Associates INC. BLOEMFONTEIN

[1] Constitution Act No, 108 of 1996.

[2] Act No, 5 of 2000.

[3] 2008

(2) SA 638 (SCA) para 11 &14.

[4] [2014] 1 All SA 545 (SCA) para 15 -18.

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