

SOUTH AFRICA / JUDGMENT

LDM Consulting v South African National Roads Agency Society Ltd (SANRAL) (1490/17) [2017] ZAKZPHC 8 (7 March 2017) [2017] ZAKZPHC 8

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D Pillay

CASE / FILE NUMBER

1490/17

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION,

PIETERMARITZBURG

CASE

NO: 1490/17

In the matter between:

LDM
CONSULTING APPLICANT
and
THE SOUTH AFRICAN
NATIONAL ROADS
AGENCY SOCIETY LTD
(SANRAL) RESPONDENT
ORDER

The following order is

granted:

The
application is dismissed with costs.

JUDGMENT

D. PILLAY J

- [1] The applicant seeks interim relief interdicting the award of a tender on 10 March 2017 for the construction of the respondent's office building pending the outcome of a review to be launched. The singular issue for the court to determine is the interpretation of a condition of the tender contained in the following question and answer referred to as Q14:

'Q – Can the same key person be proposed in different tenders?

A – A key person may only be proposed in different tenders if the person is sub-consulting in each of the tenders and not submitting a tender in his/her own name or the name of his/her company where the person is employed.'

- [2] The applicant included LSG International as a sub-consultant in its bid. Mr D Govender was the key person from LSG in that bid. Unknown to the applicant another entity Aecom Consortium also submitted a bid which included LSG as a member of the consortium. LSG's participation in the Aecom bid was not obvious until the respondent called for clarification. Aecom responded with a letter disclosing that it would enter into a joint venture contract should it succeed in its bid. Aecom SA proposed to be the lead consultants and would include LSG as a consultant for the project. Mr D Govender signed the letter on behalf of LSG as the principal partner.
- [3] The respondent disqualified the applicant and Aecom. By letter dated 7 December 2016 the respondent informed the applicant of its reasons for doing so. The applicant had failed to meet the minimum criteria for quality and consequently the respondent returned its financial offer unopened. By email dated 12 January 2017 the applicant requested reasons for its bid failing to meet the minimum criteria. A few hours later the respondent gave the following reasons:

'The mechanical engineer key position in the LDM tender was sub-consulted to Mr D Govender of LSG International Engineers. However, Mr D Govender also submitted another tender in his own name/name of his company as part of a consortium/JV partnership. As clarified in Addendum 2, this is not allowed and both tenders were declared non-responsive.'

- [4] The applicant challenged the rejection of its bid on the following grounds: Mr Govender did not tender in his own name or in the name of any company in which he was employed. The tender was in the name of Aecom Consortium. LSG which employed Mr Govender was a member of the consortium. Q14 does not prevent a key person from participating in a tender as a sub-contractor and in another tender as the employee of the entity that is a member of a consortium that tenders for the same award.

- [5] Furthermore the applicant had submitted the second lowest tender after Aecom. Therefore it had good prospects of success. Whether the applicant's tender was the lowest was not a consideration when the respondent rejected its tender. Therefore I need say nothing more on this issue.
- [6] The main thrust of the applicant's argument was that the wording of Q14 was ambiguous, irrational and unreasonable. No reasonable person could have understood Q14 to preclude Mr Govender serving as a key person in both tenders. Section 217 of the Constitution requires a tender to be fair, equitable, transparent and competitive.[1] Furthermore the Supreme Court of Appeal stated in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 92 that:
- a. 'the purpose of the tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent cost effective and competitive.'
- [7] Is Q14 ambiguous, irrational and unreasonable? Q14 arose in the context of a question and answer session to clarify the terms and conditions of the tender and the proposed award. It was an impromptu response and does not have all the hallmarks and caveats that characterise conditions of tender. For instance, a comprehensive list of excluded entities does not follow the word 'company'; more specifically, consortiums are not expressly excluded. The word 'company' is used loosely to refer not only to an entity that is registered in terms of company law but to include a partnership or any other entity or association that is not a natural person. To insist on every possible entity being identified would be formalistic, artificial and insensitive to the context.
- [8] The rationale for condition Q14 is to prevent corruption and collusive practices including price fixing. The applicant correctly pointed out that allowing sub-consultants to participate in more than one tender would not preclude them from speaking to one another. However, the primary difference between what is permitted in the first clause and what is prohibited in the second clause of the condition is between sub-consulting and own business tenders. The difference between the position of a sub-consultant and a consultant is that the sub-consultant is one of several influences on the tender price. In contrast a consultant determines the contract price individually or as a participant with other consultants. The emphasis in Q14 is therefore not on the form or structure of the tendering party but the position or level of participation and degree of influence of the key person in the entity submitting the tender.
- [9] In the context of procurement law no one can be in any doubt of the purpose of Q14. In particular the plaintiff who has participated

other tenders must have been acutely sensitive to the anti-corruption aims that the conditions of tender seek to achieve.

Consequently all interested persons must adopt a purposive interpretation to clauses of the conditions of tender and the rules

for procurement. Adopting a purposive interpretation to Q14 and one that has greater prospects of limiting the scope for corruption and collusion should always be preferred than one that has little or no such prospects. The applicant's interpretation has no such prospects whatsoever.

- [10] Q14 is not sufficient on its own to safeguard the integrity of the tender process. Amongst other conditions tenderers have to certify that they did not collude with any competitors. The certification could be strengthened if it was made under oath. Still it is a deterrent against contaminating the integrity of the tender.
- [11] As evidence of the alleged ambiguity Counsel for the applicant submitted that the applicant as an experienced company in the construction

industry, Mr Pillay and Aecom could not all have misinterpreted Q14. Their opinion of whether the condition is ambiguous carries little if any weight. They are not independent. Mr Pillay has a compelling financial interest in securing work either as a sub-consultant or as a consultant; he would therefore seek to place an interpretation that best favours his personal position. He had a duty to disclose his participation in both tenders to both the applicant and Aecom. It is his participation in Aecom as a consultant that disqualified him from also sub-consulting for the applicant. The respondent has to adopt a consistent approach to all tenders. Hence it applied Q14 not only to the applicant and also to Aecom.

- [12] Whether there was collusion or corruption is not an enquiry I need to make. However assuming in favour of all parties that they had no plans to engage in any prohibited practices the task of the respondent is to apply the ground rules for the procurement strictly, consistently and consequently predictably with the primary aim of achieving a corruption and collusion free tender process.
- [13] It follows that the onus rests on every participant in every tender to observe the terms and conditions of the tender strictly. Furthermore in the case of ambiguity or doubt tenderers must err on the side of caution and adopt an interpretation that assures of a sanitised tender process rather than one that opens itself to the slightest doubt about its integrity.
- [14] If the applicant had any doubt about the interpretation of Q14 it had seven days before the closing date for the tender to seek and obtain clarification. It did not do so. Mr Govender in particular should have sought such clarification because of his position in both tenders.
- [15] A court must be slow in striking down a term or condition of a tender as irrational or unreasonable. That primary discretion rests upon the tribunal or administrative organ, unless it fails to show that the rule or condition as a means cannot serve the ends for which it was intended.[2]

[16] In conclusion I find that Q14 is not ambiguous, irrational or unreasonable. The respondent's reason for rejecting the applicant's tender is reasonable and justified on the limited information in this application before me for urgent relief.

[17] Order :

D. Pillay J

APPEARANCES

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Date of Hearing

: 6 March 2017

Date of

Judgment

: 07 March 2017

[1] GVK Siya Zama Building Contractors (Pty)Ltd v Minister of Public Works & Others [2007] JOL 20439 (D); Haw and Inglis Civil Engineering (Pty) Ltd v MEC of Police, Roads & Transport (Free State Province) [2010] ZAFSHC 51; Minister of Social Development v Phoenix Cash & Carry

[2007] SCA 26 [2]

[2] Dr J.S Moroka Municipality & Others v Bertrum (Pty) Ltd & Another 2014 (1) ALLSA 545 SCA para 10

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