

SOUTH AFRICA / JUDGMENT

## Mabotwane Security Services v Rustenburg Local Municipality and Another (UM119/19) [2020] ZANWHC 70 (20 August 2020)

[2020] ZANWHC 70

COURT

North West High Court, Mafikeng

BEFORE

M.E. Mahlangu

CASE / FILE NUMBER

UM119/19

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THE

HIGH COURT OF SOUTH AFRICA

MAHIKENG

CASE

NO: UM119/19

In

the matter:

MABOTWANE  
SECURITY SERVICES  
APPLICANT  
and  
RUSTENBURG LOCAL  
MUNICIPALITY  
FIRST RESPONDENT  
ALLY'S  
COUNTER FORCE SECURITY SECOND  
RESPONDENT

### JUDGMENT

MAHLANGU AJ

## INTRODUCTION

- [1] The applicant launched an application in relation to Tender: RLM/DPS/0004/2018/19 (tender) which was issued by the first respondent for the appointment of the accredited service provider for security services for a period of three (3) years.
- [2] The application revolves around the first respondent's split of the tender between the applicant and the second respondent.
- [3] The tender was awarded for a period of three years commencing from the date on which the appointment letter was signed by the applicant, being 19 December 2018. The contract would run until 18 December 2021.
- [4] The applicant was not satisfied about the first respondent's decision to split a tender.
- [5] The applicant launched an urgent application in this Court to have the implementation of the tender and/or contract suspended (Part I) pending Part II, to have it reviewed and set aside.

## INTERIM ORDER

- [6] On 4 March 2019, Kgoele J granted an order in the following terms with regard to Part I:

*"IT IS ORDERED*

- 1. THAT: Dispensing with the rules relating to form, service and time periods, and disposing of this matter in an urgent manner as contemplated by Rule 6(12) the Uniform Rules of Court.
- 2.1 The First Respondent be and is hereby interdicted and restrained from giving effect to, or taking any further steps towards, the award of Tender: RLM/DPS/0004/2018/19
- 3. THAT: The Second Respondent pay costs of the applicant and the First Respondent."

## PART II of the Notice of Motion

- [7] The following relief, as set out in the Notice of Motion, are prayed for in Part II:

*"TAKE NOTICE that no such conditions as the court may determine, and at the time to be arranged with the registrar, the applicant intends to bring under review the first respondent's decision to ward Tender: RLM/DPS/0112/2017/18 to the second respondent.*

TAKE FURTHER NOTICE that the accompanying affidavit of ENOS TSHIPI MALATJI, duly supplemented, with attachments, will be used in support of this part of the application.

TAKE FURTHER NOTICE that if any of the respondent wish to oppose the granting of the relief sought in this part of the application, they are required to:

- notify the applicants' attorney and the registrar of the court, in writing, of their intention to do so within a period of 10 (ten) days from the date of service of this application upon them;

- deliver an opposing affidavit, if any, within a period of 15 (fifteen) days after they have received the applicant's amended notice of motion and supplementary affidavit;
- appoint in their written notice to oppose this application, an address to rule 6(5)(b) at which they will accept notice and service of all documents in these proceedings.

TAKE FURTHER NOTICE that if no notice of opposition is received, this part of the application will be set down, by a separate notice of set down, for hearing, without further notice of such respondents who have not delivered a notice of opposition."

[8] Part II is now before this Court for adjudication.

#### APPLICANT'S SUPPLEMENTARY NOTICE OF MOTION

[9] On 8 March 2019, the applicant served the first and second respondents with a supplementary notice of motion in terms of Rule 53 of the Uniform Rules of Court.

[10] The applicant requested the following final relief against the first respondent:

1. "Declaring the first respondent's award of parts of the Tender: RLM/DPS00112/2017/18 to the second respondent unlawfully and constitutionally invalid;
2. reviewing and setting aside the first respondent's decision to award any part of the Tender: RLM/DPS00112/2017/18 to the second respondent;
3. awarding Tender: RLM/DPS00112/2017/18 in its entirety to the applicant;
4. ordering the first respondent to appoint the applicant to provide security services on the terms and conditions as set out in Tender Document: RLM/DPS/0112/2017/18;
5. ordering the first respondent to pay the costs of the review, and in the event of opposition by the second respondent, that the second respondent be ordered to pay the costs of the review, jointly and severally with the first respondent, the one paying the other to be absolved."

[11] The only party that opposes the relief sought in Part II, is the first respondent because the second respondent did not file any papers.

#### THE FIRST RESPONDENT'S COUNTER APPLICATION

[12] The first respondent opposed the relief sought by applicant and in turn proceeded to launch a counter application against both the applicant and the second respondent, premised on the principle of legality, in which the first respondent requested the following relief:

1. "That the decision of the First Respondent to award Tender RLM/DPS/004/2018/19 (hereinafter "the Tender")

Jointly to the Applicant and the Second Respondent be reviewed and set aside as being inconsistent with the provisions of section 217(1) of the Constitution and the concomitant statutory procurement provisions

contained in the local Government: Municipal Finance Management Act, Act 56 of 2003, the Supply Chain Management Regulations, 2005, the Preferential Procurement Policy Framework Act, 5 of 2000 and the Preferential Procurement Regulations, 2017 (hereafter “the statutory procurement processes and procedures”) and accordingly ultra vires and invalid;

2. That it be declared that the adjudication of the Tender by the First Respondent did not comply with the statutory procurement process and procedures and accordingly that the Tender by the First Respondent and therefore the Tender itself was ultra vires, void and invalid;
3. The costs of the counter application be paid by the Applicant and/or the Second respondent, in the event of any of the said parties opposing the granting of the relief requested in terms of this counter application;
4. Further and/or alternative relief which the Honorable Court may deem appropriate in this matter.”

[13] The only party that opposed the relief sought by the first respondent is the applicant. The second respondent did not file any papers relating to the counter application.

[14] I pause here to state that at the hearing of this matter, the issue of the reviewing and setting aside the first respondent’s decision to award Tender: RLM/DPS/0112/17/18 to the applicant and to the second respondent was not opposed. Both parties agreed that the decision be reviewed and be set aside.

[15] The only issues that this Court was left with to adjudicate on was:

15.1 That the first respondent award the Tender only to the applicant.

15.2 Whether the applicant submitted an “acceptable tender” as defined in section 1 of the Procurement Act and required in terms of the provisions of the Preferential Procurement Policy Framework Act, Act 5 of 2000 (“PPPFA”).

## BACKGROUND OF THE MATTER

[16] The essential chronological background which is common cause between the parties is as follows:

16.1 On 3 August 2018, the first respondent advertised Tender: RLM/DPS/0004/2018/19 for request for the appointment of accredited service provider for security service for a period of three (3) years;

16.2 The closing date and time for the bid submission was 23 August 2018. A compulsory briefing was held on 10 August 2018;

16.3 Following the invitation to bid, 20 entities submitted their bid applications which were considered. After evaluation of the bids, the applicant and the second respondent qualified to move to the next round.

16.4 The applicant and the second respondent's bids then went before the Bid Evaluation Committee ("BEC") for the next evaluation phase. The BEC assessment was to the effect that the tender be split between the applicant and the second respondent.

16.5 The Bid Adjudicating Committee ("BAC") approved the BEC recommendation and also recommended same to the Head of the Municipality who approved the recommendation that the tender be split between the applicant and the second respondent.

16.6 On 5 December 2018, the second respondent wrote to both the applicant and the second respondent advising them that, they are both the successful bidders of the tender.

16.7 It is also common cause that the applicant achieved the highest number of points during the evaluation proceedings.

16.8 The applicant was not appointed on all the sites as per the tender document for which it submitted the bid. The second respondent was appointed for the reminder of the sites which was not clearly stated in the bid document.

[17] The applicant contends that the first respondent's decision to split the tender between itself and the second respondent be set aside. The first respondent on its counter application also sought a relief to review its decision to set aside the decision the tender not only of the second respondent but for both applicant and the second respondent. The decision to review and set aside a tender that was split between the applicant and the second respondent was therefore no longer opposed, at the hearing of this matter.

[18] The remaining issue to be adjudicated in terms of:

18.1 the applicant's final relief is to awarding tender in its entirety to it;

18.2 the first respondent is that it should be declared that the adjudication of the tender by the first respondent did not comply with the statutory procurement process and procedures and accordingly that the tender by the first respondent and therefore the tender itself was ultra vires, void and invalid;

## SUBMISSIONS

[19] The argument for the applicant is that, the tender should either be substituted by another order that the court might see fit or that the tender be entirely awarded to it.

[20] The first respondent's argument is that, the tender be declared invalid as the applicant's tender was not acceptable in terms of section 1 of the Procurement Act. The first respondent's argument was based on the incomplete MBD 4 form submitted by the applicant and also that the current statement of water and electricity of the company were not attached to bid documents submitted by the applicant.

(1) TENDER FORM MBD 4 WAS INCOMPLETE

[21] Advocate Vorster, on behalf of the applicant argued that the applicant is a close corporation. The invitation to bid specifies, with reference to the MBD 4 form, that in case of joint ventures or multi-directors, separate MBD 4 forms in respect of each director must be completed and submitted. He further argued that, nowhere in the MBD4 document or the remainder of the tender it is stated that a separate declaration of interest should be signed by each member of the close corporation, the MBD 4 form always refers to directors but not members.

[22] Adv Vorster further argued that, the first respondent's argument that the applicant's MBD 4 form is incomplete is not sustainable.

[23] Advocate Laubscher for the first respondent argued that, the court had to determine if the applicant's tender application was "acceptable" as defined and required in terms of the provisions of the Preferential Procurement Policy Framework Act, Act 5 of 2000 ("PPPFA") specifically section 2(1)(f) read with 11 of the Preferential Procurement, 2017 ("PPR").

[24] "Acceptable tender" in PPPFA 'means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

[25] The first respondent argued that MBD 4 form is designed to achieve compliance with Regulation 44 of Supply Chain Management Regulations, 2005 ("SCMR"), which states that the supply chain management policy of a municipality must, irrespective of the procurement process followed,

state that the municipality may not make any award to a person (a) who is in the service of the state; (b) if that person is not a natural, of which any director, manager, principal shareholder or stakeholder is a person in the service of the state; or (c) who is an advisor or consultant contracted with the municipality.

[26] The tender document issued by the Department stated that: "PLEASE READ AND FOLLOW INSTRUCTIONS ON EACH PAGE OF THE FOLLOWING FORMS AND FILL THEM AS INSTRUCTED NB: FAILURE TO ADHERE TO THE BELOW MENTIONED POINTS WILL INVALIDATE THE TENDER AND RESULT IN DISQUALIFICATION".

[27] The first respondent argued that, failure by both members of the applicant to complete the MBD 4 form was non-compliance with the requirements of the tender document and therefore, the tender awarded to the applicant was to be declared invalid as it did not constitute an "acceptable tender".

(ii) CURRENT MUNICIPAL RATES AND TAXES WERE NOT ATTACHED

[28] Regulation 28(1)(c) of SCRM states that the Bid evaluation Committee must check, in respect of the recommended bidder, whether the municipal rates and taxes and municipal services charges are not in arrears.

[29] The tender conditions also state in a peremptory fashion that:

*“Current statement for water and electricity for the company’s address appearing on the CK document must be attached: or*

Valid lease agreement if the company is leasing premises;

Original letter from tribal authority not older than three (3) months if the company operates from a tribal land;

If the rates and taxes account are not in the names of the company the attached statement must be accompanied by either of the following:

The original affidavit from the property owner whose names are reflecting on the Municipal rates and taxes account, to confirm that the company operates from their property;

The original affidavit if the address of the company on the CK is different from the address on the rates and taxes submitted clarifying the difference in the address.”

[30] The applicant argued that, its registered address according to the CK document is 46 Main street, Witfield, Boksburg. It was argued that this is the address of the applicant’s accountant. The applicant does not operate from the abovenamed address. For the purposes of operation, applicant leases a building situated at Office 24, Bradlows Building, 49 Steen Street, Rustenburg. An affidavit explaining the reasons why the applicant’s registered address differs from its business address is attached to the CK document. Further, the applicant attached a lease agreement to the tender document.

[31] The applicant further submitted that, it has two members and each of the members has submitted their municipality rates and taxes.

[32] The first respondent, in reply to the applicant’s argument, argued that, the tender conditions require that: “Current statements of water and electricity for the company’s address appearing on the CK document must be attached....’ He further argued that the applicant did not submit the current statements of water and electricity of the applicant and therefore the applicant’s tender did not constitute an “acceptable tender” and thus could have been rejected at the bid evaluation stage.

[33] The first respondent argued that, the address indicated in the applicant’s CK document being ‘46 Main Street, Witfield, Boksburg’ is not the same address to which the municipal rates account statement is reflected being ‘ 3 Eastgate Lane, Brakpan, Germiston. The first respondent therefore argued that, the applicant did not submit the current statement for water and electricity for the company’s address appearing on the CK document as required

by the tender document. The applicant therefore submitted that, based on the failure by the applicant to attach the current statement of water and electricity to the bid document, the tender does not constitute an “acceptable tender” and as such, the applicant’s tender bid could have been rejected.

## THE LAW

[34] The legal principles applicable to the award of a tender are trite and well established. Section 217(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides that:

1. When an organ of the state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

2. Subsection

(1) does not prevent the organs of state or

institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in allocation of contracts;

(b) and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented”.

[35] The Local Government: Municipal Finance Management Act 56 of 2003 (“MFM”) provides in section 2 that:

*“The object of the Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal*

entities by establishing norms and standards and other requirements for:

(a) Ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;

(f) Supply Chain Management; and

(g) other financial matters”.

[36] Section 11 of PPR provides that:

*“Award of contracts to tenders not scoring highest points:*

11(1) A contract may be awarded may be awarded to a tenderer that did not score highest point only in accordance with section 2(1)(f) of the Act.

(2) If an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents”.

[37] In conducting a competitive bidding process the first respondent must ensure compliance with the Constitution, SCRM, PPR and MFMA.

[38] The first respondent referred the court to the matter of Consensus Computing (Pty) Ltd v Rustenburg Local Municipality & another, North West Division of the High Court, Mahikeng case no UM27 in which it was stated that:

*“[24] Furthermore, one of the instructions on the application form, which relates to the MBD4, is that “... In case of Joint Venture or multi-directors, separate MBD4 forms in respect of each director must be completed and submitted”. [It is further stated at the face of the application form and bolded in red and capital letters that: “NB! FAILURE TO ADHERE TO THE BELOW MENTIONED POINTS WILL INVALIDATE THE TENDER AND RESULT IN DISQUALIFICATION”.*

[25] It is evident from the contents of this form that it is imperative for both directors to declare their interest for the purpose of considering their tender documents. Point 2 of the declaration of interest form provides that it is required of the bidder or their authorized representative to declare their interest. In clause 4. (p.41) of the form, the full details of directors are required. Visser omitted to include the particulars and the details of his co-director.

[26] Visser does not submit that this requirement is unconstitutional, nor does he submit that this threshold requirement is immaterial or unreasonable. And besides, Visser did not explain in the bid documents, as to why he omitted to include the particulars of the other director on the MBD4 form. He instead made a note that the requirement was not applicable”.

[39] The Supreme Court of Appeal in the matter of Dr J S Moroka Municipality & others v Betram (Pty) Ltd & Others 2014(1) All SA 545 (SCA) (Dr J S Moroka) the following is said in paragraph

[15] to [16]:

*“[15] This argument cannot be accepted. The clause relates to bids “validly submitted” and, as is indeed stated in clause 2.5.5 of the standard terms and conditions of bid, only tenders submitted “in the prescribed manner may be accepted as valid bids”. That clause merely states the obvious. 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 sapele Electronics. On this basis the appellants were perfectly entitled to disqualify the first respondent’s tender as they did.”

[40] In the Dr J S Moroka case, the question before the SCA was whether a municipality was justifiably entitled to disqualify a tender supported by a copy of a tax clearance certificate when the invitation to tender had called for an original certificate to be provided. The court a quo held that the municipality had erred in disqualifying the tender for that reason alone. The SCA found that the terms and conditions of the tender document stated that an original tax clearance certificate is required and accordingly reversed the court a quo’s decision.

[41] In the matter of Superintendent-General:North West Department of Education and another v African Paper Products (Pty) Ltd and others, North West Division; case no M282/14 Judgement delivered on 24 October 2014 (Superintendent-General Case), the following was stated:

*“[55] the proper legal approach to cases of this nature was enunciated in the leading case of AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Agency, and others 2014 (1) sa 604 (CC) (herein referred to as AllPay 1) as follows:*

(a)The suggestion that ‘inconsequential irregularities’ are of no moment conflates the test for irregularities and their import, hence an as independent of the outcome of the tender process.

(a) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(b) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(c) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of administrative Justice Act.

(d) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement

process aside.”

[42] In Superintendent-General case supra it was stated that:

*“[98] However, this discretion does not arise where the non-compliance relates to requirements enacted in the public interest, such as BBBEEE requirements, the duty to provide accurate information and the like-See: paragraph 18 of the case of Dr J S Moroka Municipality*

quoted above.

[99] permitting or condoning non-compliance in such circumstances would offend the principle of legality: See: Moroko supra.

[100] I echo the same sentiments in this matter. Any prejudice to the first and second respondents which is alleged cannot and should not usurp the right and duty of the Department to ensure it adheres to a lawful procurement process, the rights of other tenderers and the overriding public interest in a lawful and transparent tender process. Courts must provide effective relief for infringements of Constitutional rights.”

[43] In AllPay supra at paragraph [27] it was emphasized that compliance with bid requirements is necessary (a) as a means of ensuring treatment of all bidders, (b) to ensure fairness to participants in the bid process (c) as a means of enhancing efficiency and optimality in the outcome and (d) as a safeguard against a process skewed by corruptions.

[44] In the matter of VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others) [2013] 2 All SA 489 (WCC) it was held that:

*“[25]Implementation of the procurement policy of any organ of State, including a municipality, is required to occur within the framework provided in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (“the PPPFA”). This means that only “acceptable tenders”, as defined in the said Act may be scored. An “acceptable tender” is “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”*

[45] In the African Public Procurement Law Journal titled Legal Consequences of Non-Compliance with Bid Requirements by Peter Volmink (Volmink), it was stated that:

*“2.1 What is an “acceptable bid”?*

The Preferential Procurement Policy Framework Act 2000 (South Africa) PPPFA employs the term “acceptable bid” instead of “responsive bid”. An “acceptable bid” is defined as a bid which in all respects complies with the terms and conditions of the bid document. In Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others, the sca ruled that organs of state are only allowed to evaluate bids which may be registered as “acceptable”. Consequently, acceptance of a bid that is not “acceptable” within the definition provided in the PPPFA amounts to an invalid administrative act which will be set aside on review. “Acceptability”, like “responsiveness”, is thus a threshold requirement for the evaluation and award of bids.

The determination of acceptability thus involves not only a consideration of responsiveness to bid formalities but also compliance with the substantive constitutional requirements outlined in section 217(1). Consequently, a bid which is perfectly responsive to bid formalities may nevertheless fail the test of “acceptability” in terms of the PPPFA.”

#### APPLICATION OF THE LAW TO THE FACTS

[46] The main issue before this Court is whether some of the conditions of the tender documents submitted by the applicant were non-compliant and whether such non-compliance with such conditions results in such a tender not to be an ‘acceptable tender’.

[47] The first respondent’s contention as far as non-compliance are concerned is that, the tender should comply with regulation 44 of the SCMR and regulation 11(1) of PPR. The applicant does not dispute that the MBD 4 form was not complete but contends that, the MBD 4 form only refers to directors of the company and not members of the close corporation.

[48] The applicant did not comply with a peremptory “gateway” bid condition that each member must sign and complete a separate MBD 4 declaration of interest. Only one member signed the applicant’s bid documents.

[49] As mentioned above, the applicant did not dispute that the MBD 4 form was completed by one member. His argument is that, the MBD 4 form does not make mention of the word members and that it only refers to directors. The SCMR does not differentiate between ‘directors’ and ‘members’. Without each member completing the MBD 4

form, the requirements of regulation 44 of SCMR would not have been met. One of the members did not provide the first respondent with his declaration of interest. This argument is therefore not helpful to the applicant.

[50] The first respondent’s second contention was that the applicant did not submit the municipal statement of the address that appears on the CK document being 46 Main Street, Witfield, Boksburg. The first respondent’s bid document as mentioned above, required that: ‘Current statement for water and electricity for company’s address appearing on the CK document must be attached...’. It is contended by the first respondent that this was not done by the first respondent. Therefore according to the first respondent, this will also not constitute an ‘acceptable tender’.

[51] The applicant argued that, for the purposes of operations, the applicant leases the business premises situated at Office 24, Bralows Building, 49 Steen Street, Rustenburg. The lease agreement and an affidavit to confirm that the applicant uses the above premises were submitted together with the bid documents. According to the specifications of this tender: Current statement for water and electricity for company’s address appearing on the CK document must be attached.... According to the first respondent’s argument, failure to provide the municipal account of the applicant does not constitute that tender to be ‘acceptable tender.’ Therefore the applicant’s tender ought to have been rejected.

## CONCLUSION

[52] It is clear from the above that the tender was not properly adjudicated from the bid evaluation phase and that resulted in the subsequent appointment of the applicant and the second respondent which transgressed the provisions of section 217(1) of the Constitution and the applicable provisions of MFMA, the SCRM, the PPPFA and the PPR.

[53] It is clear that the tender process had irregularities at almost every level of the process from the selection processes, the evaluation and the adjudication of the bids. I find that the first respondent was correct in concluding that the applicant did not present an ‘acceptable tender’.

## ORDER

[54] Consequently, the following order is made:

- (i) The applicant did not submit an “acceptable order” and as such its review application is dismissed with costs;
- (ii) The first respondent’s counter application is granted is granted with costs.

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M.E. MAHLANGU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

APPEARANCES:-

DATE OF HEARING

: 31 JULY 2020

DATE OF

JUDGMENT

: 20 AUGUST 2020

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