

SOUTH AFRICA / JUDGMENT

Siemans (Pty) Limited v Eskom Holdings SOC Limited and Others (026621/2024) [2024] ZAGPJHC 555 (7 June 2024) [2024] ZAGPJHC 555

COURT

South Gauteng High Court, Johannesburg

BEFORE

Unterhalter

CASE / FILE NUMBER

026621/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

CASE

NO: 026621-2024

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED

DATE:

07 JUNE 2024

SIGNATURE

In

the matter between: SIEMENS
 (PTY) LIMITED
 Applicant
 and
 EKSOM
 HOLDINGS SOC
 First Respondent
 Limited
 GE DIGITAL SOUTH
 AFRICA
 (PTY)
 LIMITED
 Second Respondent
 HITACHI ENERGY SOUTH
 AFRICA
 (PTY)
 LTD
 Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is
 reflected and is handed down electronically by circulation
 to the
 Parties / their legal representatives by email and by uploading it to
 the electronic file of this matter on Case Lines.
 The date of the
 judgment is deemed to be 07 June 2024

JUDGMENT
UNTERHALTER J

Introduction

[1] The applicant, Siemens (Pty) Ltd (‘Siemens’), brings under review a tender, issued by the first respondent, Eskom Holdings SOC Ltd (‘Eskom’). The tender sought bids for the construction of a new Transmission Power System Control and Monitoring System (TPSCM) for Eskom. The tender was divided into two parts: Part A was for the provision and maintenance of a software system; and Part B for the provision and maintenance of front and rear projection systems. Bidders were invited to submit bids for Part A or Part B, or both. The second respondent, GE Digital South Africa (Pty) Ltd (‘GE’), submitted a bid for Part A; Siemens did so for Part A and Part B; as did a third bidder, the third respondent, Hitachi Energy South Africa (Pty) Ltd (‘Hitachi’).

- [2] On 8 January 2024, Eskom published its decision. It awarded Part A of the tender to GE. It made no award in respect of Part B. Siemens was informed that its bid was unsuccessful. Eskom entered into a contract with GE, following the award of the tender. Siemens challenges, by way of judicial review, the decision of Eskom to award the tender to GE. Siemens seeks to set aside the award of the tender to GE, and the contract concluded by Eskom and GE pursuant to the award.
- [3] Siemens brought its application in two parts. In part A, it sought to interdict Eskom from concluding a contract with GE, following the award, and executing any contract that may already have been concluded, pending the determination of its review. Siemens agreed to forego its part A relief, in consideration of an expedited timetable under which the record would be produced, and further affidavits exchanged. This the parties have done with commendable expedition, permitting the review to be heard.
- [4] Though Siemens raised a number of grounds of review in its papers, counsel for Siemens made it plain, in his heads of argument and during oral argument, that the grounds of review relied upon were three-fold. The principal ground of review is as follows. The tender provided for a tender validity period. The tender validity period expired on 31 October 2023. It was not lawfully extended. The tender thus came to an end. The tender could not thereafter be awarded. The award of the tender outside the tender validity period to GE was unlawful, as was the contract that Eskom concluded with GE. I shall refer to this challenge as the validity challenge.
- [5] Siemens does not abandon two further grounds of review, though it presses them with less centrality. First, Siemens avers that Eskom permitted GE to enjoy advantages over other bidders. GE was the incumbent provider of the existing system and thereby secured knowledge and access that placed GE in an advantageous position to the detriment of the two other bidders. This was neither fair, equitable, transparent or competitive, and so rendered the process unlawful. I shall refer to this challenge as the incumbency challenge. Second, Siemens complains that its bid was rejected as non-compliant with the tender requirements on the basis that its bid lacked supporting documents. This, Siemens contends, was not so. It made comprehensive responses to the clarification request of Eskom, and thus no basis existed for the rejection of its bid. I shall refer to this challenge as the disqualification challenge.

[6] I consider first the validity challenge.

The validity challenge

- [7] Eskom's invitation to submit a proposal for the TPSCM is set out in the Request for Proposal (RFP). The RFP provides for a tender validity period. It is framed as follows;

‘The tender validity period is twelve (12) weeks from the Tender closing date and time. NB: While a twelve (12) week Tender validity period has been provided from the tender closing date, the evaluation and adjudication process may take up to six

(6) months. Should the evaluation extend beyond the twelve (12) weeks, Tenderers will be requested to extend their validity beyond the twelve (12) weeks.’ (emphasis appears in the original text).

[8] The RFP must be read together with Eskom’s Standard Conditions of Tender. Clause 2.13 reads as follows:

‘Hold the tender(s) valid for acceptance by Eskom at any time within the period after the deadline for tender submission. Extend the validity period for a specified additional period if Eskom requests the tenderer to do so. A tenderer agreeing to the request will not be required or permitted to modify a tender. If contracts have not been concluded and the tender validity period has not been extended (as prescribed in the Eskom PSCM 32-1034) and lapses; then the tenders are deemed to be invalid and the procurement process cannot continue. A new procurement process will have to be initiated.’

I shall refer to this provision as the ‘drop-dead provision’.

[9] The drop-dead provision references Eskom PSCM 32-1034. That is a reference to Eskom Procurement and Supply Chain Management Procedure. (PSCM). Clause 14.7.8.1 of the PSCM, in relevant part, contains the following:

‘Tenders are required to remain valid until such time that the relevant DAA awards tenders, but within the validity of the timeframe stipulated in the enquiry or any extensions.

Procurement Practitioners are required to extend the validity of all tenderers until the final contract has been concluded.

..... The extension of a tender validity period means that the tenderer maintains its original pricing and all other terms and conditions as tendered.

.....If a tenderer cannot maintain the original tender (including prices) during the tender validity extension period of the tender. Then the tender may not be considered for further evaluation, and the supplier therefore cannot be awarded a contract. Extension of the validity period is not an invitation to the tenderer to amend the tendered price, scope and/ or the delivery period. NB: Tenders cannot be extended after tender validity had expired. Tender validity can ONLY be extended while the tender is still valid.’

(emphasis appears in the original text) I shall refer to these provisions as the ‘extension provisions’.

[10] The facts as to the extension of the validity period are not in dispute. The tender closing date was extended on a number of occasions. Eskom sought successive extensions of the tender validity period from Siemens, GE and Hitachi. The tenderers granted extensions until 31

October 2023. Siemens further extended the validity period to 31 January 2024; and GE did so to 24 December 2023. However, Hitachi did not grant an unconditional extension for a period after 31 October 2023. It was only willing to do so under a proviso that acceptance by Eskom of Part B of its tender was contingent on acceptance of Part A. This conditionality was unacceptable to Eskom. And it is common ground that Hitachi did not consent to the extension of the validity period beyond 31 October 2023.

- [11] The central question that arises is this: what is the consequence of the fact that Hitachi did not agree to extend the validity period beyond 31 October 2023? The parties offered different answers to this question. Siemens submits that the valid extension of the period beyond 31 October 2023 required all the bidders to consent to such extension. Hitachi did not do so. The tender validity period thus expired on 31 October 2023; the tender came to an end on that date; the tender could not be awarded; and consequently, the award of the tender to GE on 21 December 2023 took place after the validity period had expired, and it was thus awarded unlawfully. For like reasons, so too was the contract concluded between Eskom and GE unlawful.
- [12] Eskom takes a different position. The effect of Hitachi's decision not to extend the tender validity period was that its bid was no longer open for acceptance by Eskom beyond 31 October 2023. Siemens and GE agreed to extend the period. Their bids remained open for acceptance within these periods. Eskom award the tender to GE on 21 December 2023, within the period of extension granted by GE. That Hitachi did not extend the tender validity period did not preclude Eskom from awarding the tender to those tenderers that had granted extensions, provided the award took place within the periods of extension granted. To hold otherwise, Eskom submitted, would allow a bidder to collapse the tender process, and that is not a business-like interpretation to place on the tender.
- [13] GE advances a distinctive submission. Eskom's technical evaluation report dated 11 September 2023 sets out that Hitachi's bid had failed, in respect of Part A, to meet what is described in the RFP as 'technical gatekeepers'. These gatekeepers specify certain requirements that must be met. If they are not, then the RFP provides as follows; 'Failure by the Tenderer to meet the above technical gatekeepers will lead to disqualification and their bids will not be evaluated further'. GE contends that Hitachi's bid for Part A was judged non-responsive and was disqualified. Accordingly, by the time that the extension was sought from Hitachi for a period beyond 31 October 2023, Hitachi's bid for Part A was ineligible for acceptance, and Hitachi's failure to agree an extension of the validity period was of no consequence in respect of Part A. While Hitachi's bid for Part B remained eligible for consideration and further evaluation, as at 31 October 2023, Hitachi's failure to extend beyond that date made no difference because Eskom made no award in respect of Part B, as it was entitled to do. GE places reliance upon Aurecon[1] which found that a request for the extension of the validity period in a tender need not be made to bidders found to be ineligible.

- [14] My analysis must commence with the terms of the tender itself. These terms were determined by Eskom and accepted by the bidders. They must be interpreted according to the well-established triad of text, context and purpose. I have set out above the relevant provisions of the tender that bear upon the validity challenge. These provisions make plain a number of matters.
- [15] First, as appears from clause 2.13 of the RFP, the tender validity period is to permit Eskom to undertake the process of evaluation and adjudication. Its extension is to complete this process. The period is specified and precise. Beyond the twelve weeks from the closing date and time, tenderers will be requested to extend the period. A request connotes choice: tenderers may decide whether to grant the request or decline to do so. Their decision has entailments for the tenderers. The drop-dead provision requires that, if a tenderer agrees to the request for extension, then it may not modify its tender. The extension provision spells this out. The extension of the tender validity period means that the tenderer maintains its original pricing and other terms and conditions, as tendered. This plainly has important commercial consequences. If input costs are rising, then agreement to an extension is detrimental to the tenderers and advantageous to Eskom. And hence, tenderers may choose whether to extend. They are certainly not required to do so.
- [16] Second, there can be no extension of the tender validity period after the period has expired. Extension can only take place before the expiration of the tender validity period. This accords with authoritative case law.[2]The drop-dead provision is clear: if the tender validity has not been extended, as prescribed in the extension provision, the tenders lapse; they are deemed invalid, the procurement process cannot continue, and a new tender has to be initiated.
- [17] Third, the validity period of the tender is important for a further reason specified in the introductory sentence of the drop-dead provision. During the validity period, the tenders are held valid for acceptance by Eskom. Within the period, Eskom is at liberty to accept the tenders. Outside of the period, the process ends, and the tenders are no longer held open for acceptance.
- [18] While it is clear then that a tenderer has an election to make if Eskom requests an extension of the tender validity period, the central question to be answered in this case is this: if a tenderer does not extend, does that simply end its bid or does it end the tender process? Eskom contends for the first consequence, and Siemens for the second.
- [19] The drop-dead provision requires that the extension of tender validity takes places as prescribed in the extension provision. The extension provision is not formulated with precision. The RFP states that tenderers will be requested to extend. How that occurs is set out in the extension provision. Eskom's procurement practitioner must seek permission from a senior manager to seek an extension. This is so because frequent extensions may be detrimental to the efficiency of the evaluation process, as the extension provision observes. If the required permission is given, then the procurement practitioner requests an

extension from the tenderers.

[20] The following sentence that forms part of the extension provision bears repetition:

‘Procurement Practitioners are required to extend the validity of all tenderers until the final contract has been concluded’. This provision requires some interpretative

dexterity because the procurement practitioner cannot require extension but can only request it. However, as best I can understand

this provision, the procurement practitioner must (‘is required’) to seek from all the tenderers the extension of the

validity period. Such a request may be declined, and if it is, what then? There are two interpretative pointers of some value. The first is textual. The procurement provision contains the following sentence: ‘If a tenderer cannot maintain the original tender (including prices) during the tender validity extension period then the tenderer may not be considered for further evaluation, and the supplier therefore cannot be awarded a contract’ (my emphasis). A tenderer is required to maintain the terms of their offer during an extension period. But if they cannot do so, then they fall out of consideration. This regulates what is to happen to a particular tender during the validity extension period. That is to say, during a period when the tender process enjoys validity, a tenderer that cannot maintain its tender will suffer exclusion. No equivalent provision is to be found that specifies a similar outcome when a tenderer is requested to give an extension and declines to do so. Nowhere does the extension provision state that a tenderer who does not extend is eliminated as a tenderer, but the process continues on the basis of the extensions granted by other tenderers. If that was the consequence, it is reasonable to suppose that this would have been stated, given what is expressly provided for in the case of a tenderer that cannot maintain its original tender in a tender extension period.

[21] The second consideration rests upon the purpose of requesting all the tenderers to extend, and, by so doing, maintain their tenders. Given that one of the constitutional requirements of a tender system is that it must be competitive and cost effective, the request to all tenderers to extend is to maintain the competitive rivalry of the tender process. It is the contestation of rival bids that secures procurement outcomes that serve the public good. The request to all seeks to secure the competitive rivalry upon which the integrity of the tender depends. If, as in this case, a tenderer does not give its consent, two types of harm may result. If

the ongoing validity of the merger depends on the consent of all tenderers, a veto power vests in each tenderer. And each tenderer may then collapse the process, perhaps well advanced, and require that a new tender process commences. This is wasteful.

[22] But there is a second risk of harm. Assume that two of three tenderers decline the requested extension, leaving Eskom with but one tenderer that remains in contention. The continuation of the tender process under these conditions could be uncompetitive and might privilege the least competitive bidder. That is a risk not readily countenanced, given

what the constitution requires of a tender process. And it is very difficult, when setting the terms of a tender, to know in advance who will give extensions, at what point in the process, and with what consequence for the competitiveness of the tender. For this reason, securing the consent of all tenderers to an extension is the more compelling rule of general application to secure the competitiveness of a tender. I do not thereby suggest that it is an invariable rule. A tender could create a regime under which not all tenderers must grant extensions, subject to some careful assessment of the resulting competitiveness of the tender. But, as here, absent such a provision, the residual rule that enjoys interpretative primacy is the one that is constitutionally indicated, that is, to keep all tenderers in the process or end the process.

- [23] The text of the relevant provisions of the tender does not state that a tenderer that does not grant an extension is simply eliminated as a bidder. The text does so provide if, during the tender validity period, a tenderer cannot maintain its tender. If Eskom had wanted to specify that the consequence of declining a request to extend is self-elimination, it could, and likely would, have formulated the tender in these terms. This textual consideration is consistent with a purposive perspective. The point of securing the extensions of bidders is to maintain their bids so as to permit Eskom to complete its evaluation with the full competitive benefit of the submitted tenders. Such a regime is also fair to the tenderers. There is commercial risk that attaches to maintaining a tender over time. That is why the RFP is specific about the anticipated time for evaluation, and its extension. It would not necessarily be advantageous to Eskom to allow for a situation where the most competitive bidders drop out because they can't maintain their bids, while less competitive bidders remain. And it is also fair to tenderers that their bids are evaluated on the merits of the bids submitted, rather than on the basis of the tenderers that have the greatest staying power. For these reasons, I consider the interpretation proposed by Eskom to be insufficiently availing, and I reject it.
- [24] I turn to consider GE's interpretation of the tender. That interpretation, to recall its central elements, holds that Hitachi's tender was no longer eligible for consideration in respect of Part A, at the time the extension was sought from it in October 2023, because it had failed technical gatekeeper evaluation. The RFP stipulated that such failure led to disqualification. The extension of tender validity in respect of Part A cannot depend upon the agreement of a tenderer already disqualified from further consideration as to Part A. The extension was given by Siemens and GE. And as to Part B (where Hitachi remained a bidder), Part B was not awarded, and so the fact that Hitachi did not extend the tender is of no relevance.
- [25] The factual premise of GE's submission is that Hitachi had failed to meet the technical gatekeeper evaluation in respect of its Part A bid, and that the RFP then stipulated that Hitachi was disqualified as to Part A. The record contains Eskom's technical evaluation report ("TER") dated 11 September 2023, compiled some five months after Eskom's technical gatekeeper evaluation report ("TGE"), authorised on 17 April 2023. The TER in its executive summary references the evaluation of the tenders, as to both Part A and Part B, and in a table 'summarizes the responses that were evaluated after the conclusion of the technical

gatekeeper evaluation' (my emphasis). The TER reports the results of these technical evaluations. It is clear from the TER that the evaluation undertaken after the technical gatekeeper evaluation, reported upon in the TGE, did not include any further evaluation of Hitachi's tender in respect of Part A. The TER is an evaluation of GE's and Siemens' bids in respect of Part A, and Hitachi's and Siemens' bids in respect of Part B. Eskom, as the TER states, considered Hitachi's bid for Part A to be non-responsive, as a result of the gatekeeper evaluation, and therefore warranted no further evaluation, as the RFP stipulated.

- [26] It does not appear that this evaluation of Hitachi's bid as to Part A was conveyed by Eskom to Hitachi. Rather, Eskom on 24 October 2023 e-mailed Mr Kaye of Hitachi and requested Hitachi to extend tender validity for its tender, both as to Part A and Part B. Mr Kaye's response was to make any extension contingent upon the linkage of Part A and Part B. He wrote: 'we would not be able to participate in further negotiations on Part B alone.' Plainly then, Hitachi still considered itself to be a tenderer for Part A. Eskom's affidavits do not suggest otherwise.
- [27] The results of Eskom's evaluation had plainly concluded that Hitachi did not meet the technical gatekeeper requirements for Part A. The RFP stipulates the consequence of such failure: disqualification. The RFP was accepted by the tenderers as the basis upon which their bids would be determined. And therefore, once Hitachi had failed the technical gatekeeper evaluation for Part A of its bid, as an objective matter, the RFP determined that its bid for Part A was disqualified. That Hitachi did not know this to be the case on 24 October 2023 does not alter that determination. That an Eskom official sought an extension from Hitachi in respect of Part A also does not change what the RFP regulated. In other words, that an Eskom official and Hitachi thought that Hitachi remained a tenderer in respect of Part A, did not make it so. The RFP determined the status of Hitachi's bid for Part A.
- [28] Once that is so, in October 2023, Hitachi was no longer a tenderer as to Part A, it was disqualified by operation of the RFP. If it was not a tenderer for Part A, as I find, then there was no duty upon Eskom to request Hitachi to extend the tender validity period in respect of its bid for Part A. The RFP requires that Eskom seeks extensions from tenderers. The only tenderers for Part A in October 2023 were GE and Siemens. They gave the requested extensions. Hitachi remained a tenderer for Part B. It did not extend the tender validity period as a Part B tenderer. On the reasoning set out above, that ended the tender's validity in respect of Part B. But that is of no consequence because Eskom made no award of Part B. I should add, parenthetically, that I am doubtful that Aurecon entrenches a principle of general application to all tenders. But I am spared having to decide that question.
- [29] It follows that the validity challenge must fail.

The incumbency challenge and the disqualification challenge

[30] Siemens complains that its bid was rejected for non-compliance or partial non-compliance, when Siemens responded to Eskom's clarification request in a comprehensive fashion, with relevant references. Eskom however sets out a detailed account of its evaluation of Siemens' tender. It instances a lack of supporting references or motivation that was required. The TER also provides an evaluation of Siemens' tender for Part A and Part B. The tender was found not to meet the overall technical scoring threshold for Part A and Part B. The scoring allocated to Siemens' bid was not simply a function of its incompleteness, but its low

scores on other criteria. I cannot find, on the evidence, that Eskom's evaluation was not undertaken by recourse to relevant

criteria, objectively applied. The disqualification challenge therefore cannot succeed.

[31] Siemens complains further that GE had access to and knowledge of Eskom's existing system, and hence GE enjoyed the advantages of an incumbent, not available to other bidders. So too, it is alleged that Eskom assisted GE to rectify the shortcomings of its bid, and this too was unfair, inequitable, lacking in transparency, and detrimental to the competitiveness of the tender.

[32] Eskom denies that it afforded GE any advantage over other bidders. GE's engagements with Eskom in respect of the existing system were limited. Eskom sets out the basis upon which all bidders were given the same information, and bidders were not given access to Eskom's generation information system. Eskom in its answering affidavit sets out the exposure GE had to this system. On this version, I cannot find that GE enjoyed asymmetric access to information so as to skew the tender and give GE a material advantage. Nor is there sufficient evidence to warrant the conclusion that Eskom sought to assist GE to the detriment of other bidders. The assessment of the tenders is evidence before me. On that assessment, it appears that the bids succeeded or failed on their merits. And there is no showing that GE's incumbency had any systemic causal impact upon the content of the tenders or their ultimate assessment. For these reasons the incumbency challenge also cannot succeed.

Conclusion

[33] I find, for the reasons given, that the grounds of review relied upon by Siemens cannot prevail. I do not consider that there is warrant to impose a punitive costs order. Siemens advanced certain grounds of review that it did not ultimately pursue. They were not recklessly raised. Litigants should not be dissuaded from determining that certain grounds of review have been answered or ultimately hold less promise than initially expected.

In the result the following order is made:

The application is dismissed with costs, which costs include the costs of the application for interim relief, on Scale C, inclusive of the costs of two counsel.

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, GAUTENG DIVISION,

JOHANNESBURG

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DATE OF HEARING:

31 MAY 2024

DATE OF

JUDGMENT:

07 JUNE 2024

[1] Aurecon South Africa (Pty) Ltd v Cape Town City 2026

(2) SA 199 (SCA) at [23]

[2] Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC & Others 2023

(1) SA 44 (SCA) paras [6] – [15] and there referenced.

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