

SOUTH AFRICA / JUDGMENT

Siemens (Pty) Ltd v Eskom Holdings (SOC) Ltd and Another (29841/2019) [2021] ZAGPJHC 128 (16 August 2021)

[2021] ZAGPJHC 128

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

29841/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case No: 29841 / 2019

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE: 16 AUGUST 2021

In

the matter between:

SIEMENS
(PTY)
LTD
Applicant
and
ESKOM
HOLDINGS (SOC)
LTD
First Respondent
SENTA
SQUARE (PTY)
LTD
Second Respondent

JUDGMENT

WILSON AJ:

1 The applicant (“Siemens”) competed, unsuccessfully, for a 36-month contract to perform control and instrumentation maintenance (“the work”) at Camden Power Station in Mpumalanga. The work was put out to tender by the first respondent (“Eskom”). In the end, Eskom chose to award the work to the second respondent (“Senta Square”).

2 The issue in this application is whether Eskom did so pursuant to a lawful tender process. That tender process commenced on 18 September 2018, when Eskom issued an invitation to tender to undertake the work for the 36 months between 1 March 2019 and 28 February 2022. At that time, Siemens had been carrying the work out on Eskom’s behalf for at least 12 years, having itself successfully tendered for the work on four previous occasions.

3 However, at the first stage of the tender process initiated on 18 September 2018 (“the first tender process”), Siemens, together with everyone else who responded to that tender, was disqualified after failing to achieve an adequate technical evaluation score. The reason for Siemens’ low technical evaluation score was apparently that the majority of the documents presented to certify Siemens’ technical capacity were not themselves certified as true copies of the originals.

4 Ostensibly on the basis that no-one was able to meet its technical evaluation criteria, Eskom cancelled the first tender process. On 9 November 2018, it started the process afresh by reissuing an invitation to tender in substantially the same terms as the invitation that initiated the first tender process.

5 Siemens tendered again. This time, it attained a high score at the technical evaluation stage, but was nonetheless disqualified again, apparently because it failed to demonstrate that it had met the “prequalification criteria” specified in the invitation to tender. It is the nature, meaning, and application of these criteria that lie at the centre of this case.

6 Siemens having been disqualified, the work was eventually awarded to Senta Square. Senta Square commenced the work on 1 March 2019. Its contract for the work expires on 28 February 2022.

7 In its founding affidavit, Siemens launched a wide-ranging attack on every stage of the tender process. It sought to review its disqualification from the first tender process (“decision one”), the cancellation of the first tender process (“decision two”), and its disqualification from the second tender process (“decision three”).

8 By the time the matter came before me, however, Siemens had abandoned its attack on decisions one and two. Mr. Wasserman, who appeared for Siemens, instead focussed his fire on decision three.

9 Decision three was assailed on essentially two grounds. The first was that the prequalification criteria which Eskom said Siemens had failed to meet were not, in fact, prequalification criteria at all, or had, at the very least, been wrongly applied if they were. The second ground was that Senta Square had been unfairly advantaged in the second tender process, because its technical score (which was initially very low, and, in any event, much lower than Siemens' score) was irrationally adjusted upwards after it emerged as the strongest performer on various Broad-Based Black Economic Empowerment ("B-BBEE") criteria, against which the parties' bids were also evaluated.

10 On the view I take of this case, it is only necessary for me to address Siemens' first ground. It is, accordingly, to the nature and application of the prequalification criteria in the second tender process that I now turn.

The prequalification criteria

11 The invitation to tender in the second tender process specified that tenderers would be required to meet a series of prequalification criteria. Tenderers were required to have a "stipulated minimum B-BBEE status level"; to be an "exempt micro enterprise" or "EME"; to be a qualifying small enterprise or "QSE"; or to undertake to subcontract at least 30% of the work to EMEs or QSEs in various categories.

12 These prequalification criteria are identical, in all material respects, to the criteria specified in section 4 of the Preferential Procurement Regulations, 2017 ("the Regulations") made in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ("the Procurement Act"). Section 4 of the Regulations requires Eskom, if it intends "to apply pre-qualifying criteria to advance certain designated groups" to specify this in its invitation to tender, setting out which prequalification criteria will govern the types of tenderers who will be permitted to respond to the tender.

13 In other words, if it seeks to impose prequalification criteria, Eskom must say what those criteria are. It must specify whether it will consider proposals from tenderers possessed of a B-BBEE status level, or from QSEs and EMEs, or from tenderers who undertake to subcontract at least 30% of the work to QSEs or EMEs, or, indeed, some rational combination of these categories of potential tenderers.

14 There was some debate during argument about whether Eskom could rationally require a tenderer to meet all of these criteria cumulatively. Ms. Govender, who appeared for Eskom, submitted that the Regulations could appropriately be read to allow Eskom to require a tenderer to have an acceptable B-BBEE status level, and to be an EME or a QSE, and to undertake to subcontract at least 30% of the work to other EMEs or QSEs.

15 I am not convinced that this is the correct interpretation of the Regulations, but that is not, ultimately, an issue that I have to decide.

16 This is because Eskom itself expressed the prequalification criteria disjunctively in its invitation to tender. It stated that tenderers would only have to meet one of the three prequalification criteria in order for their bids to be considered. This is plain from the insertion of the words “and/or” between each of the prequalification criteria specified at paragraph 3.11 of the invitation to tender.

17 Mr. Wasserman spent some time trying to persuade me that the prequalification criteria were never really applicable at all. His argument was not without merit. Eskom’s invitation to tender is far from a model of clarity. Page 3 of the invitation states that tenders would be evaluated by reference to the prequalification criteria “if applicable”. Clause 3.11 at page 8 of the invitation sets out the prequalification criteria, but the words “not applicable” appear in square brackets alongside them.

18 At page 13 of the document, however, the prequalification criteria reappear. Confirmation that they have been met is classified as a “mandatory returnable”. If evidence that they have been met is not submitted, it is declared, in boldface red ink, that “the tenderer will be disqualified”. Page 55 of the invitation states that Eskom may cancel any contract flowing from the tender process if it turns out that a tenderer’s “B-BBEE status level” has been “claimed or obtained fraudulently”. Page 5 of the invitation declares that a “tender that fails to meet any prequalifying criteria stipulated in the tender documents is an unacceptable tender”. That statement refers back to section 4 (2) of the Regulations. Furthermore, a “Target Setting Report”, which accompanied the invitation, requires the submission of a letter of intent that demonstrates a commitment to subcontracting 30% of the work to an EME or QSE which is “at least 51% owned by black people living in rural or under developed areas or townships”.

19 Notwithstanding the sometimes confusing nature of the tender documents, when evaluated as a whole, they appear to me to evidence Eskom’s intention to apply the prequalification criteria set out in clause 3.13. The words “not applicable” in square brackets are best explained as a formatting error, and the words “if applicable” at page three of the invitation do not specifically preclude the inference that the prequalification criteria are, in fact, applicable.

20 Although it was open to Mr. Wasserman to argue that the tender process should be set aside for vagueness (*Allpay consolidated Investments v Chief Executive Officer, SASA 2014 (1) SA 604 (CC)* (“Allpay”), para 87), he did not do so. I think that was wise. On a fair reading of the documents as a whole, the fact that Eskom intended the prequalification criteria to apply to the tender is clear enough.

21 Accordingly, Siemens had to meet the prequalification criteria, as they appeared on the invitation to tender. It follows that, on Eskom’s own disjunctive construction of how those criteria would apply, if Siemens can demonstrate that it met any one of the three pre-qualification criteria, then it was incorrectly disqualified from the second tender process.

Did Siemens meet the prequalification criteria?

22 There is no dispute on the papers that Siemens met at least one of the three prequalification criteria – the requirement to commit to subcontract 30% of the work to qualifying QSEs and EMEs. This is recorded in Eskom’s Supplier Development and Localisation Evaluation Report, which was compiled as part of the tender evaluation process. The relevant part of this report is quoted at paragraph 6.8.4 of Siemens’ supplementary founding affidavit, to which the report is itself attached. There, Eskom accepts that Siemens “does commit to subcontracting” at least 30% of the work to qualifying QSEs and EMEs. Nonetheless, the report concludes, Siemens’ “B-BBE status and level” does not “allow them to tender for this work”.

23 At paragraph 242 of its answering affidavit, Eskom baldly admits these allegations.

24 It follows that Eskom accepted that Siemens had met at least one of the three prequalification criteria.

25 Eskom nonetheless concluded that this was insufficient to meet the criteria as they were set out in the invitation to tender. But that was erroneous.

26 There was some debate in argument about whether the subcontracting commitment had to be embodied in a special letter of intent, which, it was contended, Siemens had not submitted. It is true, as Ms. Govender argued, both that a letter of intent was referred to in the tender documents, and that Siemens did not submit a document that styled itself as a letter of intent. But this could hardly be material, given that the purpose of the letter of intent was to satisfy Eskom that Siemens really had committed to the requisite level of subcontracting. Eskom flatly admits on the papers that it was satisfied of this fact. It is in any event far

from clear on the invitation to tender that the letter had to follow a specific format, or be submitted separately and independently from other tender documents, much less that the failure to do so could reasonably have been treated as fatal to an otherwise compliant tender.

Review under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)

27 Siemens assailed its disqualification from the second tender process on a wide range of grounds specified in section 6 of PAJA. However, it is only necessary for me to mention two of these grounds.

28 Section 6 (2) (b) of PAJA empowers a court to set aside administrative action taken despite non-compliance with a “mandatory and material procedure or condition” specified in an empowering provision. It is clear, because the Constitutional Court tells us so, that an invitation to tender forms a critical part of the empowering framework within which tender awards are made (Allpay, para 58). Non-compliance with a material condition in an invitation to tender is accordingly an irregularity in the tender process itself.

29 Here the non-compliance is clear. The invitation to tender required that only one out of the three B-BBEE prequalification criteria had to be met. Siemens met one out of three of those criteria, but was disqualified for failing to meet at least one of the other two. This is at odds with the conditions set in the invitation to tender itself.

30 For that reason, the decision to disqualify Siemens lacked, in addition, the necessary rational connection to the purpose for which it was taken. This is contrary to 6 (2) (f) (ii) (aa) of PAJA. The decision to disqualify Siemens was ostensibly taken to conform to the prequalification criteria. But, on their face, those criteria did not bear the meaning that Eskom ascribed to them. There was accordingly no basis on which the criteria could rationally justify Siemens' disqualification from the tender process.

31 There can be no doubt that these irregularities were material to the second tender process. They involve the proper application of critically important social transformation goals. When Eskom invites a tender, it does so not on its own behalf, but on behalf of the public at large (Allpay, para 56). The public has a right to expect that public procurement social transformation goals embodied in B-BBEE criteria are clearly stated, and rationally and lawfully applied. In this case, that did not happen.

Remedy

32 Siemens' disqualification from the second tender process was accordingly unlawful. That tainted the tender process as a whole, and rendered Senta Square's appointment unlawful and invalid.

33 However, that is not the end of the matter. There is a fairly sharp separation in law between the legality of the decision to award the contract to Senta Square, and the remedy that ought to be granted for that illegality.

34 Given the present fragility of South Africa's power distribution system, I am loath to simply set aside the tender process without some sense of what effect, if any, that would have on Camden Power Station and its productive capacity. I am alive to the fact that the contract awarded to Senta Square pursuant to the tender has only just over six months left to run. I need to know how, on the facts, that might affect any order I make to require the tender process to be rerun.

35 I also am sensitive to the fact that Senta Square has not, to date, participated in these proceedings. This is no doubt because of the identity of its interests with those of Eskom, and the fact that Eskom was clearly better placed than Senta Square to defend the tender process. However, now that the tender process has been found to have been unlawful, Senta may well have a renewed interest in participating in these proceedings. It should clearly be given an opportunity to be heard at the remedy stage.

36 Both Mr. Wasserman and Ms. Govender accepted that there is very little on the papers as they stand that would assist me in crafting a just and equitable remedy. They accepted that, if I were to find for Siemens on any of its grounds of review, further argument and evidence would be necessary to determine a such a remedy.

37 Accordingly, I will issue an order declaring the award of the tender to Senta Square to have been unlawful. However, I will suspend that declaration pending the determination of a just and equitable remedy under section 8 of PAJA. The effect of this order is accordingly that, pending the determination of that remedy, Senta Square and Eskom must continue to perform on the terms of their agreement to carry out the work. How, if at all, that will change before the expiry of the agreement must await my judgment on the remedy to be granted.

38 For all of these reasons, I make the following order –

1. It is declared that the first respondent's award of the tender for control and instrumentation maintenance at Camden Power Station in Mpumalanga between 1 March 2019 and 28 February 2022 to the second respondent was unlawful.
2. The declaration made in paragraph 1 of this order is suspended, pending the determination of a just and equitable remedy.
3. The parties are directed to furnish factual information on affidavit, and further written submissions, on the just and equitable remedy to be granted in light of this judgment, by no later than 3 September 2021.
4. The application is set down on 13 September 2021 for a further hearing on the determination of a just and equitable remedy.
5. The first respondent is directed to pay the applicant's costs to date.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 16 August 2021.

HEARD ON: 20 July 2021

DECIDED ON: 16 August 2021

For the Applicant:

J Wasserman SC

Instructed by Pinsent Masons Inc

For the Respondent:

T Govender

Instructed by FY Renqe Inc

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