

SOUTH AFRICA / JUDGMENT

Xantium Trading 42 (Pty) Ltd v South African Diamond and Precious Metals Regulator and Another (03835/2010) [2012] ZAGPJHC 263 (28 December 2012)

[2012] ZAGPJHC 263**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

03835/2010

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Source record**REPORTABLE****SOUTH GAUTENG HIGH COURT,
JOHANNESBURG****CASE NO: 03835/2010****DATE:28/12/2012****In the matter between:**

XANTIUM TRADING 42 (PTY)
LTDApplicant
and
SOUTH AFRICAN DIAMOND AND
PRECIOUS METALS
REGULATOR.....First
Respondent
RED ALERT TSS (PTY)
LTD.....Second
Respondent

JUDGMENT

SPILG, J:

NATURE OF APPLICATION

The applicant, Xantium Trading 42 (Pty) Ltd (“Xantium”), seeks an urgent interdict against the First Respondent, the South African Diamond and Precious Metals Regulator (“the Regulator”), to prevent it from awarding or appointing, pursuant to tender no. 10/2012/13, any security service provider at its current premises or any new premises pending a review of its decision.

The applicant also seeks an order interdicting the Regulator from terminating what it describes as a “month to month contract” under the tender which immediately preceded the one in issue. The applicant was awarded that tender in August 2011 (tender no.

04/2011/12) and continues to provide security services pursuant to it, the expiry date of which (31 August 2012) was extended from time to time. The applicant de facto continues to provide security services pending the commencement date of the new tender contract. On 6 December 2012 the applicant was reminded that since the last extension was until 31 December 2012 its services would terminate on that date.

The second respondent, Red Alert TSS (Pty) Ltd (“Red Alert”), was also cited as a party to the proceedings. At the time the proceedings were launched the applicant understood that Red Alert were to be awarded the tender. Accordingly the interdictory relief was couched in terms seeking to prevent the Regulator “from awarding and/or appointing any security service provider with regard to tender number 10/2012/13”. Red Alert has not opposed the interim order sought.

In its answering affidavit the Regulator produced an agreement which was allegedly concluded with Red Alert on 11 December 2012. This was on the same day that the applicant had given written notice of its intention to launch this application. It was also the day before the present application was served.

The Regulator sought to make much of the fact that a contract had now been concluded, a fact which the applicant could not challenge. The Regulator accepts that it did not publish the award in the Government Tender Bulletin as required by regulation 6(3) (d) of the Framework for Supply Chain Management Regulations (Gazette no 25767 of 5 December 2003) but explains that the Government Printers were closed. The conclusion of the contract before the application was served cannot alter the outcome of the legal issues raised in the founding affidavit as to whether one or more of the decisions which resulted in Red Alert being awarded the tender is subject to judicial review. All other things being equal, if the applicant’s right has been infringed then it remains entitled to a remedy (*Harris v Minister of the Interior and Another* 1952(4) SA 769 (A) at 781A-B). The signing of the tender contract may however impact on one of the other requirements for obtaining an interim interdict.

The applicant initially sought an order the effect of which would be to declare it the successful bidder. It can no longer do so for reasons that appear later. The conclusion of the new security services agreement which is to come into effect on 1 January 2012 does however impact on whether the applicant is entitled to continue providing security services until the review is finalised. A consequence is that the review proceedings may not be finalised before the expiry of Red Alert's contract, which is for two years commencing on 1 January 2013.

This case was argued intermittently over a three day period during an exceptionally busy urgent court week; some 54 matters were heard, of which over half were opposed and had to be dealt with during a four day week commencing on the Tuesday. I would have preferred more time to prepare this judgment. However the desirability of delivering a reasoned decision as soon as possible outweighs other considerations. The need for expedition arises because the agreement pursuant to the tender is to come into effect on 1 January 2013, a period of only four working days after the final day of argument. My order was given on 24 December and these are the reasons.

THE TENDERS

In September 2011 the applicant commenced providing security services to the Regulator at its premises pursuant to an agreement concluded after its successful tender bid. The agreement was for one year. However no new tender was issued prior to the contract's expiry date. As a result the applicant continues to provide security services to the Regulator pursuant to what has been referred to as extensions of the original tender. In its letter of 9 November 2012 the Regulator mentioned that the original tender was being extended because the new tender was still being finalised. In its answering affidavit the Regulator confirmed advising the applicant, through Mr Matlala who is its Control Protection Officer, that it would continue to provide security services "... until the Second Tender process had been completed".

In July this year the Regulator called for the new tender under tender no. 10/2012/13. The tender notice was brief and appeared in the Government Tender Bulletin of 20 July 2012. Aside from identifying the nature of the services to be rendered and the contract period the document stipulated the following in a column entitled "Evaluation criteria":

"Price = 90

Equity = 10

(Please refer to the BBBEE Equity Points allocation table below)"

The Broad Based Black Economic Empowerment ("BBBEE") Equity Points Allocation Table provides that in cases where a 90:10 ratio applies a full 10 points is allocated to a bidder if the "BBBEE status level of the Contributor " is 1 and two points less for each lower BBBEE status level. Accordingly a level 8 contributor would be allocated only 1 point while a contributor who was not BBBEE compliant would score nil. The reason for placing this information in a separate column and Table was that two other tenders were advertised which had an 80:20, price/equity ratio (the term "equity" denotes the BBBEE Equity Points allocation system).

It is evident that the evaluation criteria referred to in the tender was concerned only with the ratio between the total points allocated to price against the total points allocated to BBEE compliance. It did not purport to deal with any other issues relevant to the assessment of the bid.

The other tender requirements were contained in a bid document, which the bidder was required to complete and sign. This is a comprehensive document entitled “Requests for Bids” although it is usually referred to as the Bid document. The contents are divided into twelve sections comprising the “Invitation of Bids”, the “Terms of Reference”, the “Evaluation Methodology & Mandatory Requirements”, two “Pricing Schedule” chapters, a preference points claim form, certain declaration and certificate requirements and both special and general conditions of contract.

The salient features of the Bid document are;

The bid is expressed to be subject to the Preferential Procurement Policy Framework Act, its Regulations and the General Conditions of Contract as well as any other special contractual conditions that might be imposed.

The bidder was to provide the Regulator, at its premises, with a broad range of security related services. Most significantly the bidder was to ensure the permanent presence of armed Grade D security officers, two on day shift and one on night shift. This was in addition to two other unarmed Grade D security officers on duty during the day shift.

Immediately below the section headed “Evaluation Criteria and Mandatory Requirements” (it was described slightly differently in list of contents) is the first sub-section entitled “Mandatory Requirements”. The sub-section contains a block, describing in the first column of each row a specific requirement with two further columns headed respectively “Comply” and “Not Comply” which the bidder was required to mark appropriately.

The next sub-section is headed “Evaluation Criteria” (not underlined). Below the sub-heading is a block setting out three scores (nil, three and five) based on the extent of information and supporting documentation furnished by the bidder.

There then appears the heading “Element”. It contains five factors each with its own point allocation (described as a weighting) all of which total 100. Immediately below that is another sub-section also headed “Evaluation Criteria” (underlined on this occasion) which sets out the “BBEE Equity Points Allocation Table”. It repeats the 90:10 Price to Equity ratio and the point scoring system contained in the tender notice.

The next substantive chapter after the “Evaluation Criteria and Mandatory Requirements” is entitled “Pricing Schedule”. In this part the bidder must disclose the actual salary, including overtime and night shift rates, it intends to pay employees and others. After a section concerned with declaring any possible conflict of interest the document explains the points system adopted in order to give effect to the preferential procurement policy considerations contained in the Regulations. It consists of a three page explanation and just over a page requesting information which the bidder must provide.

INTERPRETING THE MANDATORY REQUIREMENT PROVISION

It is necessary to consider in greater detail the section headed “Evaluation Criteria and Mandatory Requirements”. The first sub-section is headed “Mandatory Requirements”. Immediately below it the following statement appears highlighted and in part capitalised:

“If the bidder does not comply with ALL MANDATORY requirements below, will be disqualified from further evaluation”

I have already described the block appearing immediately below this statement which lists ten mandatory requirements. Some of the mandatory requirements appear to relate to the levels of performance expected once the tender is awarded, such as “At all times supervisors and security guards must present an acceptable image/appearance which implies inter alia that they may not sit, lounge about, smoke, eat or drink while attending to the public”. It is difficult to appreciate how this can be understood as requiring anything other than an undertaking to subscribe to an acceptable code of conduct if the bid is successful. If the bidder cannot or does not wish to comply with this requirement and ticks the “Not Comply” box then, as one would expect, in terms of the highlighted note already referred to, it’s bid is automatically disqualified

“from further evaluation”.

There may be some requirements which would immediately disqualify a bidder if they are not in place when the tender award is to commence. An illustration is the requirement , “ A neat and clearly identifiable uniform of the company, which will include matching rain coats and overcoats must be worn at all times when on duty” against which the bidder must respond by marking either the “Comply” “Not Comply” column.

In the present case the most significant requirement under this section is that “Tenders must have licensed firearms (hand-gun).” The requirement continues with the following: “This statement will be verified during inspection”.

The Regulator however argues that this should not be considered to be an unequivocal statement because under the technical sub-section section (headed “Elements”) one of the factors which must be considered is the possession of valid firearm licences, with accompanying proof. It is allocated a weight of 15 out of a total of 100.

It is therefore necessary to consider the sub-section in greater detail and how it was dealt with by the two evaluation committees appointed by the Regulator.

Both the initial evaluation committee and its successor proceeded to evaluate non-compliant bidders on the point scoring system as set out in the “Element” section. This section is quite uncomplicated. It sets out five “elements” in respect of which the bidder either scores full marks or no-marks (there are no shades of grey) save for one aspect which relates to experience; there too the scoring is not discretionary but specific with reference to actual years of experience. The only variable is if the bidder does not provide adequate information or substantiation for its replies; a nil score must be entered if no information is furnished, three points if only partial

information or substantiation is provided and five if all the required information is submitted. How this fits into the scoring is not readily apparent and appears to be ignored by both evaluation committees.

The five “elements”, elsewhere described as the “technical” requirements and their weighting (under a column headed “weight”) are;

Locality within the City of Johannesburg with proof: 25

Bidder’s experience (from 5 points to 35): 35

List of three references where similar services

successfully rendered: 20

Proof of registration with Compensation

Commissioner: 5

Firearm licences issued to bidder or its

director with proof: 15

100

Accordingly, save possibly for the additional mark based on the adequacy of the information supplied, scoring is straight forward; a bidder either receives full marks for the element under consideration or nil, except in respect of the points allocated for years of experience where they are allocated progressively from no experience to five and more years.

The tender process is sometimes not well understood by those called on to draft its terms and the criteria to be met. It is also apparent that the structuring of the Bid document is sometimes confused. An example is the two “Evaluation Criteria” headings where the last one deals only with the weighting of the BBBEE equity points in relation to price, thereby allowing a fully BBBEE compliant enterprise the ability to still remain competitive even though its bid price may have to be more than a non-equity compliant competitor. But that is clearly not the only part of the “Evaluation Criteria” since locality and experience in the industry are to be scored and they are not mandatory requirements.

Confusion however exists where one of the mandatory requirements is also contained in the point scoring evaluation section. Nonetheless it is difficult to interpret the other mandatory requirement that “Proof of registration with PSIRA must be attached with the bid response” in any way other than that factual non-compliance will disqualify the bidder “from further evaluation”. Registration with the industry’s oversight body, the Private Security Industry Regulatory Authority (“PSIRA”), is a sine qua non for qualifying to the evaluation stage. It is also evident that the disqualification provision can only be intelligibly understood if the evaluation committee is responsible for determining questions of compliance and is in fact the body which disqualifies a bidder that does not comply with a mandatory requirement. Disqualification is a

clearly understood term. It results in a non compliant bidder being excluded from any further participation in the tender process.

It is accordingly difficult to appreciate how any evaluation body can proceed to score a bid where the bidder is disqualified because it fails to meet an express mandatory requirement that must be in place at least at the time the evaluation process commences. This is the only rational interpretation of the provision which excludes a non-compliant bidder from further participation in the evaluation process. It also is consistent with the evaluation processes' sequence set out in the Bid document. In my view it is therefore axiomatic that the evaluation committee is required to determine compliance before proceeding to the scoring (ie; evaluation) phase.

Mr Machaba argued that the word "all" before the term "mandatory requirements" indicated that the bidder must fail every requirement before it can be disqualified. If regard is had to the ten mandatory requirements then the context in which the pronoun is used is clear; "all" means "each one". If it was otherwise then glaring absurdities would arise. A simple illustration should suffice; if a bidder is not a member of the industry body PSIRA then it will not be disqualified unless it fails to comply with every other mandatory requirement including not providing its staff with identifiable matching rain coats. See generally *Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) per Joubert JA at pp 767E-768E

Despite the inelegant wording, it is evident from the heading to the section that a distinction is drawn between "evaluation criteria" and "mandatory requirements". The former relates to the method of scoring in order to produce a properly weighted result that will also give effect to preferential procurement legislation. The latter on any ordinary meaning relates to those requirements which must be met as a sine qua non for the bid to proceed to the scoring stage of the evaluation process. This is beyond cavil when the peremptory wording is considered regarding disqualification if there is non-compliance with a self evident mandatory requirement.

As already indicated this case is concerned with the requirement in the mandatory section of the Bid document which reads: "Tenders must have licensed firearms (hand-gun). This statement will be verified during inspection". In my view this cannot be misconstrued to mean that it is not a mandatory prerequisite or that a bidder who does not have the necessary firearm licences can either tick the box to claim that it is compliant, or otherwise avoid disqualification if it does not produce the licences to the evaluation committee. The tender requires the presence of two security officers who must be armed during the day shift and another one armed during the night shift throughout the period of the award. Another mandatory requirement is that, if successful, the bidder must be able to commence immediately after acceptance of tender. The bidder is required to signify whether it can or cannot comply with this stipulation. Accordingly these requirements must be in place in good time.

The Regulator further submits that it can award the tender to a bidder who does not possess a firearm licence even after the evaluation and adjudication process as long as it is made a condition of the tender award that the successful bidder obtains the licences before the contract actually commences. I disagree. The Bid document envisages that the firearm licence must be in

existence at the time of the bid, with the necessary documentary proof produced by the latest at time of inspection before the evaluation process is completed. I have already set out some of the reasons. Further reasons are set out in the following paragraphs.

Firstly, the Regulator was at great pains to clearly distinguish between the “evaluation” phase and the subsequent “adjudication” phase. If that is so then there can be no doubt that the failure to have a firearm licence when the bid is submitted is fatal. The requirement of possessing a valid firearm licence is treated seriously as is demonstrated by the verification process. This is hardly surprising considering that the tender was to be implemented at short notice and, as stated earlier, on every day of the week three different employees of the successful bidder would have to be licensed to carry a firearm in order to carry out the tender obligations.

I do not read the Bid document otherwise, nor at a practical level could a tender expect that the second highest bidder must incur the cost of keeping adequate manpower and other resources on standby for 1 January 2013 should the successful bidder not produce the firearm licences by then. If the second highest bidder does not or is unable to provide for such a contingency then is the third highest bidder to be awarded the contract? The proposition only has to be stated for it to be rejected. The Bid document and its operational and implementation requirements cannot be interpreted in such a way that the mandatory requirement of possession and subsequent production of firearm licences, at least by the evaluation stage, will not result in disqualification. More than enough time is afforded to produce the documentation if it exists..

The sanction for non-compliance, being the disqualification of the bidder from further evaluation, remains clear and unambiguous when the entire sub-section. The intention of the sub-section is also consistent with the balance of document read as a whole. Not only is a distinction drawn between evaluation criteria and mandatory requirements but it is also difficult to appreciate how any bid can be considered if the bidder does not possess the necessary firearm licence at the time of submitting the tender. Why else would there be the added note that a claim of compliance would have to be verified during inspection and that non-compliance would result in disqualification “from further evaluation? This fits in well and is consistent with the other mandatory requirement that the successful bidder must be able to commence duties

immediately the tender is awarded.

The fact that the Bid document proceeds to allocate a weighting, under the evaluation criteria, for the possession of firearm licences demonstrates rather a failure by the compiler to appreciate the unequivocal nature of the disqualification sanction in respect of non compliance with a self evident mandatory requirement. The failure by the compiler to appreciate the import and consequences of the mandatory requirements as opposed to the scoring criterion of compliant bids is part of a broader lack of comprehension evidenced by other anomalies such as how the scoring regarding the adequacy of information supplied and the total calculation of points and weight are to be assimilated.

Accordingly, if a bidder wishes to provide security services that require the deployment of armed guards then irrespective of pricing, locality, professed experience and other credentials the bidder must ensure that it possesses the necessary firearm licences. The Bid document requires it and, with respect, nothing could be more obvious as a condition precedent to be eligible for consideration in the tender process.

THE TENDER PROCESS

The first evaluation committee appears to have consisted of four members. It deliberated on 18 and 19 September. At that time the pre-existing tender that had been awarded to the applicant in 2011 was extended through to the end of October 2012. This much is common cause. It is also evident from the papers that an award was expected shortly after the evaluation committee presented its recommendations and in time for the successful bidder to commence duties at the beginning of November. Mr Dube of the applicant claimed to have had various discussions with Mr Matlala which reinforce this conclusion. Mr Matlala is the Regulator's Control Protection Officer and was also a member of the first evaluation committee.

The Regulator challenges these discussions. Despite Mr Matlala's affidavit containing a bald affirmation of the contents of the answering affidavit filed by the Regulator's Acting CEO, the statement by Mr Dube in his founding affidavit that at a meeting on 16 October 2011² Mr Matlala expected the tender award to be finalised on the following day is consistent with the other objective facts and is not expressly denied even in the Acting CEO's affidavit. To this limited extent the statement by Mr Dube is accepted for present purposes.

This becomes an issue because of the admitted official silence regarding the tender process and the failure to announce the successful bidder for another three months after the initial evaluation committee compiled its recommendations. This is at odds with the need to appoint a new security service by 1 November 2012. The failure to do so resulted in the applicant's pre-existing tender of 2011 being extended by formal letter dated 9 November for another two months effective from 1 November to 31 December

2012. It is therefore also evident that the Regulator had decided not to engage whoever might be the successful bidder until 1 January 2013.

The reason for this has not been disclosed although it might be significant from a compliance perspective since the second bid evaluation committee had already concluded its deliberations by 30 October 2012. This is more than a month after the first evaluation committee sat and effectively over a month and a half before the Red Alert was awarded the contract. The concern arises because Red Alert never complied with the firearm licence production requirement even at the time of the conclusion of the second evaluation. It also failed to produce to the second evaluation committee references to demonstrate that it had successfully provided similar services in the past.

Leaving aside all other issues, the failure to meet the mandatory requirement regarding the production of valid firearm licences lies at the heart of the matter and is relevant to how the various elements determinative of whether to grant the relief sought are to be considered. The failure to produce the references is also linked to this; while not mandatory it is logically associated with the successful bidder's failure to demonstrate that it possess valid firearm licences and should have raised serious concerns, as it did with the first committee.

It is necessary to return to the deliberations of both the first and second evaluation committees in order to demonstrate that Red Alert had not complied with the firearm licences requirements despite ticking the box under the mandatory requirement section claiming compliance. This also provides an opportunity to deal with other relevant factors in the tender process.

The applicant obtained an unsigned copy of the written recommendations prepared by members of the initial Bid Evaluation Committee ("BEC"). It is written on the Regulator's letterhead, is unsigned, undated and is addressed to the Bid Adjudication Committee ("BAC"). The Regulator admits its authenticity but asserts that it was only a draft which was never finalised by the initial BEC. The author of the document is identified as Ms Tshebi who is described as the Financial Intern. The other members of the committee were Mr Manaka the Deputy Manager, Mr Matlala the Administration Officer and Mr Motalaota the Legal Service Administrator.

The purpose of the document is expressed to be a recommendation to the BAC on the appointment of a service provider for the tender. The document proceeds to set out the procedure adopted and identifies two evaluation phases. The first phase was to consider whether each bidder met what was referred to as the "evaluation criteria". The other phase was to score the "responsive bidders". The first phase had regard to the "Element" section of the Bid document consisting of the five factors totalling a weight of 100 mentioned in paragraph 19 above.

The initial evaluation committee paid no regard to the mandatory requirements contained in the Bid document. It however required a bidder to obtain at least 70 out of the possible total of 100 in what it termed the "technical" phase before being eligible to proceed to the second phase. A bidder was disqualified if it did not attain the 70% threshold. Four bidders were disqualified on the ground that they did not produce the necessary documents; ARM Security failed to produce a tax clearance certificate while the other three, which included Nationwide Security, did not provide proof of locality. A further eight bidders were disqualified because they did not attain 70%. Red Alert was amongst them. This left only the applicant eligible to progress to the second phase and the first evaluation committee therefore recommended it as the only surviving bidder. The applicant's BBBEE status level was 3 and its tender price was R1 483 156.05 which made it the fourth highest bidder.

Something needs to be said about the 70% threshold requirement adopted by the evaluation committee. If regard is had to the applicable table produced earlier in paragraph 19 then it is evident that the 70% threshold ought to be readily attainable. The threshold would not be attained if the bidder only had one year of experience, or less than four years experience and could not produce proof of registration with the Compensation Commissioner. Another

permutation is the exclusion of a bidder because it is not located within the Johannesburg metropolitan area even though it has been in the industry for over five years. Even if the evaluation committee was entitled not to disqualify a bidder from the evaluation process for want of firearm licences then that failure together with either a failure to provide proof of having engaged successfully in similar contracts or non registration with the Compensation Commissioner would result in the bidder not attaining the 70 % threshold determined by the initial evaluation committee. It is for this reason that Red Alert did not attain the 70% threshold. Although its score does not appear in the draft recommendations of the first committee it is the score returned by the re-constituted evaluation committee.

If it is permissible to impose a threshold then it is unlikely that a court would second guess a decision to peg it at 70%. At face value it does not appear irrational if regard is had to the exercise just conducted.

However the Regulator claims that the evaluation committee incorrectly disqualified most of the bidders as a consequence of which there would have been a contravention of the tender criteria imposed by the Treasury Regulations. The Regulator does not explain in what respects the decision to peg the threshold at 70% or the factual base for disqualifying others for want of relevant documentation was problematic. Nonetheless the Regulator's Finance Manager, Mr Mandlazi, expressed concern about the manner the evaluation process was conducted and also its outcome. His reason was that the applicant's tender price was said to be way higher than many of the other bidders, a factor he contended "could also have disqualified it". It is difficult to appreciate this as a basis for disqualification as it does not appear in the extensive documentation provided regarding the proper bid procedures. Moreover there were nine bids lower in value than the applicant's, the lowest one can be safely discounted as it is at least R350 000 lower than the next lowest bid, leaving eight lower bids of which one is only R7000 lower per annum and another two are less than 2.5% cheaper. There are three higher bids the closest being some R100 000 higher.

Nonetheless it is for these reasons only, according to the Acting CEO's answering affidavit, that a replacement evaluation committee was constituted. She describes this process in paragraph 33 of the answering affidavit as a "Re-evaluation of the entire process to cure those defects". On 18 October 2012 a letter was written to the BAC advising that as a result of a Bid Evaluation Committee query the Supply Chain Management Unit indicated that there must be a re-evaluation of the bid process "according to the evaluation criteria that is stipulated in the bid document". The letter was approved by Mr Mandlazi

After receipt of the replying affidavit the Regulator sought leave to submit a supplementary affidavit. In it another ground for constituting the replacement committee was added and a document prepared by this committee evaluating the bidders was also introduced. The applicant did not object and the affidavit was received.

The new ground for setting aside the deliberations of the initial evaluation committee and constituting a new one with a number of different members related to Ms Tshebi participation on the initial committee. Firstly she was only an intern and “not competent to deal with quotations and the regulated, mandatory and discretionary factors including point allocations in a tender evaluation”. I have already pointed out that the scoring process is straight forward and the only scoring error that can be pointed to is of no consequence because the applicant was the only bidder in contention and instead of using the point scoring system of five because the applicant’s BBBEE status level was three the status level number was used. More pertinently, nowhere is it contended that the other three members differed yet both the most senior member, Mr Manaka, and the legal services member, Mr Motalaota were again appointed onto the reconstituted evaluation committee.

Of the four members of the new committee there were only two new faces; Mr Mandlazi, the Finance Manager who had expressed unhappiness with the results of the initial committee and Mr Mashalane, a Senior Protection officer, who appears to be subordinate to Mr Matlala in the Protection division. No explanation is tendered as to why Mr Matlala was replaced. Although the reconstituted committee is said to comprise four members, only three appear to have attended the technical evaluation process.

The next complaint concerning Ms Tshebi is that she repeatedly left the deliberations to seek guidance from Mr Mlonlo, while he was at another meeting, on how to execute her evaluation committee functions. No affidavit could be obtained from Mr Mlonlo as he was on leave. However Mr Mandlazi could attest to these events as he was at the meeting with Mr Mlonlo when Ms Tshebi interrupted them and was asked by Mlonlo to sort out the apparent confusion. The difficulty with this ground is that, if correct, Mr Mandlazi was alive to the problem but did nothing until after the outcome of the first evaluation committee’s deliberations. If he did indeed have any concerns about the propriety of Ms Tshebi’s conduct, and whether it was more than seeking clarification of required processes, then it could have been attended to immediately. In the event, the committee deliberated over two days and was comprised of senior personnel and an in-house legal adviser who should have been tainted with the same brush yet they remained to serve on the reconstituted committee.

Finally it is averred that the initial committee incorrectly disqualified bidders on a criteria not specified in the Bid Document, namely the disqualification of a bidder who did not attain 70% in respect of the technical evaluation criteria. I have already indicated that if there is not a threshold requirement in respect of the technical evaluation criteria then the committee would be acting outside its powers in disqualifying a bidder on that basis. Nonetheless there appears to be an accepted basis for applying a threshold qualification. The reconstituted committee with Mr Mandlazi present itself applied a percentage threshold disqualifier. In its recommendations to the BAC the reconstituted committee stated that in the second phase of the evaluation;

“bidders were expected to score above 65% to be qualify (sic) for a final evaluation place. The criteria were determined by the committee during the considerations of the proposals and the magnitude to (sic) service to be delivered.

The following bidders were disqualified based on the above criteria:

(emphasis added)

Nine of the thirteen bidders were disqualified on this basis. Those remaining were the applicant, the second respondent, Nationwide Security and ARM Security. Should there be a review of the Regulator's tender award to Red Alert then the last two mentioned bidders must also be joined.

The re-constituted evaluation committee proceeded to score effectively on the same basis as the first but adopted a threshold requirement of 65. Whether it could change the tender evaluation rules ex post facto and if so whether this is enough to create a perception of bias or improper motive will be touch on later. Nonetheless the Bid document does not provide a 65% threshold for disqualification and does not provide for “disqualification” at that stage.

However Mr Mlanzi who was present professes to be experienced in tender procedures and he sat with both a very senior official and the in-house legal advisor, all of whom were satisfied that the committee could disqualify a bidder if it did not attain a particular threshold percentage in the technical evaluation phase.

It is also significant that the last two mentioned members sat in the initial committee and also applied a percentage threshold disqualifier albeit 5% higher. The concern I have with this alleged irregularity is that, regard being had to the same disqualification process being applied by the reconstituted committee, the only point of departure between the two committees is a threshold differential of 5%. A further unease is that two of the members sat in both committees yet in the one applied the 70% requirement and in the other 65%. There is no explanation offered as to why they changed the threshold requirement, which is determined by the committee in session as appears from the earlier cited extract contained in reconstituted committee's recommendation report.

Perhaps most disconcerting is that the threshold was lowered ex post facto. The effect was to qualify Red Alert as all the other bidders who were not disqualified scored over 75%. In passing no reference was made to whether or not Arm Security had submitted a tax clearance certificate. The only other point of departure is that the initial committee disqualified simply on the basis of the bidder not operating within the Johannesburg Metropolitan area whereas the reconstituted committee allocated a nil score. The effect was that a bidder such as Nationwide could still attain 75% because of its length of experience in the industry although it was not locally based.

The scores received by Red Alert indicate that it did not possess valid firearm licences and could not produce three references to confirm that it had successfully rendered similar services (it scored nil for both). The failure to provide references for any previous similar contracts and the inability to produce firearm licences raises further questions.

The reconstituted committee only deliberated on the 29th and 30th Octobers yet according to the answering affidavit at paragraph 37 had forwarded its recommendations already on the 28th October. The recommendation read:

“... Red Alert be appointed ... subject to the positive/favourable verification of the valid firearm ad (presumably “and”) reference of similar service rendered. “

It is also clear from this that Red Alert had still not complied with the mandatory firearm licences requirement in the Bid document despite being afforded ample time to produce the necessary proof.

The need to distinguish between the two scoring phases is clear: The first is used to evaluate what both committees refer to as the technical ability of the candidates (the “Element” section of the Bid document) which then is used to eliminate bidders that do not meet a minimum threshold. The threshold appears

to be determined by the committee in advance. Those that are not eliminated are then scored on the relative competitiveness of their prices when weighted against their BBEE equity points allocation.

However both committees failed to appreciate that there are in fact three stages in the process, not two. This is also borne out by their use of the term “disqualified” instead of “eliminated” when describing bidders who did not score the threshold percentage in the technical phase.

The three stages are;

Firstly the mandatory requirements compliance section. A bidder who does not comply or indicates that it will not comply is immediately disqualified;

Secondly the technical assessment stage. In this phase those who were not disqualified in the first stage are then scored on the five technical or physical attributes termed “elements”. This is an elimination phase where the committee determines the threshold percentage to be attained for eligibility to the final

evaluation round;

The final phase determines which, out of those who attained the required percentage points, will be recommended by the evaluation

committee as the successful bidder. The committee considers both price and BBBEE equity status in the predetermined ratio stipulated

in the Bid document.

THE ISSUES

The Regulator challenges urgency. Insofar as a prima facie right must be demonstrated, the applicant contends that it is entitled to review the Regulator on a number of grounds. These include the contention that the reconstitution of the evaluation committee is invalid as the committee had already deliberated and was functus officio.

Mr Nxumalo on behalf of the applicant further argued that Red Alert's failure to produce firearm licences was fatal and should have

disqualified it. He contended that there was an improper motive in reconstituting the committee. I do not consider it necessary to go through the many other grounds raised, some of which fell away when the Regulator made its decision to award the tender to Red Alert.

The Regulator contends that it was legitimately entitled to consider the flaws in the initial committee's deliberations and avert its consequences by reconstituting that body. In so doing it avers that it did not act out of improper motive but was motivated by a genuine attempt to cure a defect. Insofar as the failure to produce valid firearm licences is concerned, the Regulator contended that this simply resulted in the bidder being marked down, and did not amount to a ground for disqualification. It was also argued that the licence could be procured after the evaluation committee had concluded its deliberations. I have already dealt with some of these issues.

Although the first respondent did not claim that the relief is final in effect I consider it advisable to deal with that since the agreement concluded between the Regulator and the second respondent (pursuant to it being declared the successful tenderer) expires in two years time.

The Regulator also disputes that the balance of convenience favours the applicant and disputes that the applicant does not have an adequate alternative remedy. These requirements are more difficult to meet in cases where a tender has already been awarded and where the various factors comprising the public interest should not be ignored.

URGENCY

Mr Machaba on behalf of the Regulator submitted that urgency was self created as the applicant knew as far back as 9 November that its services would terminate and it could not bank on being the successful tenderer.

Aside from only becoming aware officially on 6 December that its services would be discontinued at the end of the month, and therefore the writing was on the wall, the applicant, on its version, had been given assurances by Mr Matlala that it was the successful bidder and that the tender contract would be signed with it. The draft recommendation of the first evaluation committee reveals as much and nothing appears to have occurred for over a month save for these assurances the applicant alleges it received from Mr Matlala. Aside from being on the initial evaluation committee Mr Matlala is also a senior official of the Regulator,

An alternative argument was advanced that the application was premature and should not have been brought as a matter of urgency because the applicant was still obliged to request reasons for the decision. This is incorrect. A person who is otherwise entitled to urgent interim relief in order to to interdict the award of a tender does not have to wait until reasons are requested or furnished. The entitlement to reasons is a right and an applicant is entitled to forego that advantage. Compare *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; 1993(1) SA 649 (AD) at 660 E-H.

I accordingly find that the matter is urgent.

NATURE OF RELIEF SOUGHT - INTERIM OR FINAL IN EFFECT

The Regulator accepted that the relief sought was interim both in nature and effect. In this jurisdiction opposed motion proceedings are concluded within a relatively short space of time. A court seized with review proceedings would be open to consider issues of early finalisation should referrals to evidence be sought and would be in a better position to deal with issues of that nature once the full record of the proceedings sought to be set aside is produced.

However, being mindful of the possible delay over the festive period should the provisions of Rule 53(3) be adhered to, I have qualified the method of producing the record to the applicant for the purposes of triggering the commencement of the ten day period provided for sub-rule (4) to enable it to amend or otherwise vary its application and the grounds for relief. This appears to be a distinct possibility in view of the facts revealed for the first time in the answering and supplementary affidavits of the Regulator.

PRIMA FACIE CASE

The points of departure between the parties in regard to whether the decisions of the Regulator are subject to review come down to three issues; first, whether the Regulator could replace the initially appointed evaluation committee with a new one; second, whether the appointment of the new evaluation committee was otherwise irregular (or devised to alter the outcome) or whether it was a bona fide attempt to remedy an error that had arisen due to the failure to appoint a suitably qualified member to the first evaluation

panel; and finally whether Red Alert should have been disqualified because it was unable to produce valid firearm licences.

At face value there appears to be no reason why a tender body cannot reappoint a panel, without the need to re-advertise the tender, if there is a valid reason for believing that the process was compromised by the original panel members. If the deliberations of the panel were fatally flawed then it might be contended that its decision was a nullity which it or a superior body within the tender process can set aside. This might be a response to the *functus officio* point. Of course the tender body faces the risk, as in the present case, of a challenge as to the true motive for re-constituting the panel. I prefer to leave the issue open since an urgent decision must be given and no case law has been provided nor is there sufficient time to fully research the issue.

The applicant also contends that its right to fair administrative action has been infringed. Although a number of grounds under section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) have been raised it is sufficient to deal only with three, namely that the Regulator’s decision to reconstitute the evaluation committee was procedurally unfair, was taken for an ulterior purpose or motive and that the reconstituted committee failed to follow a prescribed mandatory and material procedure or condition.

The explanations given as to why the initial evaluation committee’s proceedings were set aside are unconvincing. Nonetheless the initial committee was not entitled to disqualify some of the bidders simply because there was no proof of locality. The Bid document does not make locality within the Johannesburg metropolitan area a mandatory requirement. Moreover the scoring system provides both for a failure to produce information and a score of nil on an overall weighted basis if the locality is not in the Johannesburg region. Despite other features that may create the perception of bias they remain untested and if this was the only ground I would be constrained either not to find that a *prima facie* case has been demonstrated or to exercise a discretion in relation to the balance of convenience and not grant an interim interdict.

I turn to the last ground that appears to require consideration. The applicant contends that the Regulator was obliged to disqualify Red Alert because it had failed to meet the mandatory requirement of demonstrating that it possessed the necessary firearms licences.

I have dealt in part with the Regulator’s arguments. I am satisfied that the firearm licences must be demonstrated to exist at the evaluation committee stage and that in terms of the Bid document the evaluation committee is to then disqualify a non-compliant bidder from further participation in the tender process.

The question of whether any committee or senior official involved with the tender process can exercise a discretion not to disqualify a bidder that is unable to produce the necessary firearm licences is answered by the Supply Chain Management Policy document. The document was relied on by the Regulator because it “ refers to the guiding principles when sourcing through competitive bidding as was the case herein”

Clause 33 of the Policy document includes the following two provisions;

“a. Bids can only be evaluated based on the criteria stipulated in the bid document.

- b. Amendment of evaluation criteria during the evaluation is not allowed as this will jeopardize the fairness of the system

(Emphasis added)

A not dissimilar provision is contained in the National Treasury Regulations (Guide for Accounting Officers and Authorities) which was relied upon by Mr Mandlazi in the letter of 18 October to the Bid Evaluation Committee expressing the need to re-evaluate the bids. The following extract was quoted in the letter;

“.. bids should only be evaluated in terms of the criteria stipulated in the bid document. Amending the evaluation criteria after close of the bids should not be allowed, as this would jeopardize the fairness of the system”

Accordingly Mr Mandlazi who sat on the reconstituted evaluation committee was alive to the consequences if not adhered to. This is a factor that will also be weighed when considering the balance of convenience.

I am satisfied that a very strong prima facie right has been shown.

BALANCE OF CONVENIENCE AND NO ALTERNATIVE REMEDY

There is no complaint regarding the manner in which the applicant has fulfilled its obligations under the earlier tender. Indeed it is common cause that the applicant continues to provide the Regulator with cash-in-transit services from time to time under a different arrangement. Moreover the evaluation committee was aware that the criteria contained in the Bid document had to be followed; it was not an oversight. A party cannot expect the court to exercise a favourable discretion, all other things being equal, where it was fully alive to the requirements that had to be applied.

The question of the taxpayer footing the bill appears to be neutral. If the review is unsuccessful then the taxpayer will have to compensate Red Alert for its loss of profits in addition to paying the applicant for its services. So too the converse if an interim interdict is not granted and the applicant is ultimately successful with a damages claim on the grounds that it should have been awarded the tender.

There is furthermore the public interest which must be considered. In the present case it appears to be a legitimate and essential consideration, where rights and duties dealt with in the Constitution have been allegedly infringed. See for instance *Ferreira v Levin* NO; *Vryenhoek v Powell* NO 1995 (2) SA 813 (W) per Streicher and Heher JJ (at the time) at 817J-818A and 841E-842C respectively.

The public interest is multifaceted and at times conflicting; there is the interest in the continued provision of services, the cost to the fiscus and therefore the public at large through both direct and indirect taxation and also the regularity of the tender processes.

I have already dealt with the first two issues. There is a significant amount of legislation, both original and delegated, directed at ensuring the regularity of State tender processes. Some have already been mentioned. The provisions of the Public Finance Management Act, 1 of 1999 (“PFMA”) and the Framework for Supply Chain Management regulations (Government Gazette no 25767 of 5 December

2003) were explained by the Regulator as the rationale for replacing the initial evaluation committee. These regulations rely heavily on the provisions of the PFMA. In *Gama v Transnet Ltd and others* [2009] ZAGPJHC 75 at para 27 after citing *South African Association of Personal Injury Lawyers v Heath and others*

[2000] ZACC 22; 2001 (1) BCLR 77 (CC) at para [4] I was of the view that;

“.... the purpose of the PFMA is similarly to hold accountable both the Board and officers (such as Executive Management) of State-owned

corporations and other government controlled entities. I also refer to sections 195(1) and (2) (b) of the Constitution which require

public administration to be accountable and to meet high standards of professional ethics.”

I am mindful that courts are reluctant to remove a successful tender bidder once it commences with its duties under the award even if the award is successfully reviewed. In the present case the successful bidder has not commenced, an unsuccessful bidder is legitimately now on site and has been entitled to remain until the outcome of the award. The public interest in the regularity of State tender awards cannot be understated and finds expression in the provisions of the Constitution.

I am also satisfied that damages is not an adequate alternative remedy for much the same reasons. A damages claim does not answer the fundamental issues raised in a matter of this nature, concerned as they are with also substantive and fundamental rights issues and the proper operation of state institutions.

ORDER

It is for these reasons that the following order was made on 24 December 2012;

The application is urgent.

The First Respondent is interdicted from;

implementing the tender award under tender number 10/2012/13 (the “2012 tender award”); and
implementing the terms of the agreement signed by it on 11 December 2012 with the Second Respondent pursuant to the 2012 tender award;

in respect of the rendering of any security services with regard to both the First Respondent’s current premises or any new premises it might move to (collectively referred to as “the premises”) pending the finalisation of review proceedings under Part B of the application.

The First Respondent is furthermore interdicted from terminating the Applicant’s contract for the provision of security services with regard to tender number 04/2011/12 in respect of the premises pending the finalisation of Part B of the application.

The hearing of Part B of the application, calling on the Respondents to show cause why the First Respondent’s decision to award tender number 10/2012/13 (the “2012 tender”) to the Second Respondent for the provision of security services to the First Respondent for a period of twenty four months should not be reviewed and corrected or set aside, is postponed sine die.

All the documents referred to in Uniform Rule 53(1)(b) are to be dispatched within 15 days from the date of this order to the

Registrar and also served by the First Respondent on the Applicant

Should it so wish to avail itself, the Applicant shall comply with the requirements of Rule 53(4) within 10 days from date of service upon it by the First Respondent of the record referred to in the previous paragraph or the Registrar making available under Rule 53(3) the record dispatched, whichever occurs first.

Nationwide Security and ARM Security are hereby joined in Part B of the proceedings as the Third and Fourth Respondents respectively and the papers filed to date and this order are to be served upon them by the Sheriff no later than Monday 31 December 2012 .

If the Second Respondent, Nationwide Security or ARM Security intends to oppose the granting of the prayers sought in Part B such party is to deliver within 15 days of service of the documents referred to in paragraph 7 (or in the case of the Second Respondent a copy of this order with attention specifically drawn to this paragraph) notice to the Applicant of its intention to so oppose and shall in such notice appoint an address for acceptance of notices and service of all processes as contemplated in Rule 53(5)(a) and the further time limits provided for in the Rule 53(5)(b) as modified by paragraph 6 shall apply.

Costs are to be in the cause of the review proceedings under Part B.

DATES OF HEARING: 19, 20 and 21st December 2012

DATE OF ORDER: 24 December 2012

DATE OF JUDGMENT: 28 December 2012

DATE OF REVISION: 30 December 2012

LEGAL REPRESENTATION:

FOR APPLICANT: ADV S NXUMALO

MABUZA ATTORNEYS

FOR 1st RESPONDENT: ADV T MACHABA

MKHABELA HUNTLEY ADEKEYE INC

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Prepared on 13 October 2026 · Esheria