



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 1353/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

01/11/13

DATE



SIGNATURE

In the matter between:

NAMBITHI TECHNOLOGIES (PTY) LTD

Appellant

And

THE CITY OF TSHWANE METROPOLITAN

First respondent

MUNICIPALITY

THE CITY MANAGER OF THE CITY OF TSHWANE

Second Respond

METROPOLITAN MUNICIPALITY

DUMISANI J OTUMILE N.O

Third respondent

THE EXECUTIVE DIRECTOR: SUPPLY CHAIN

MANAGEMENT OF THE CITY OF TSHWANE

Fourth Respondent

METROPOLITAN MUNICIPALITY

EOH LIMITED

Fifth Respondent

THE CHAIRPERSON OF THE BID EVALUATION

COMMITTEE OF THE CITY OF TSHWANE

Sixth Respondent

METROPOLITAN MUNICIPALITY

THE CHAIRPERSON OF THE BID ADJUDICATION

COMMITTEE OF THE CITY OF TSHWANE

Seventh Respondent

METROPOLITAN MUNICIPALITY

JUDGMENT

KGANYAGO AJ:

[1] The applicant has brought an application seeking the following orders:

1.1 Reviewing and setting aside the decision of the first, alternatively second, alternatively third, alternatively fourth to appoint the fifth respondent in respect of on and off site SAP support services;

1.2 Reviewing and setting aside the decision of the first, alternatively second, alternatively third, alternatively fourth respondent to cancel tender CB204/2012 for the provision of on and off site SAP support services to the first respondent for a three year period with effect from 1st January 2013,

1.3 That the City of Tshwane must give written notice within five days of this order to all the shortlisted tenderers in respect of CB204/2012, that it will proceed with

the adjudication of tender CB204/2012. That the said notice must inform the tenderers that they are only allowed to adjust their tariffs upwards (to make provision for inflation) or withdraw their tender should they wish to do so and to give notice to the City of Tshwane of their decision within five days of receiving such notice. The City of Tshwane must then proceed to adjudicate the tender within two weeks after the expiry of the five day period;

1.4 That the decision of the first alternatively, second, alternatively third, alternatively fourth respondent to issue tender CB103/2013 be reviewed and set aside.

[2] The applicant was appointed by the City of Tshwane on the 15th July 2009 to provide SAP support services to the City with effect from 16th July 2009 for a period of three years ending 16th July 2012. The parties signed a service level agreement ("SLA") on the 15th July 2009, following the conclusion of the process undertaken by the City to appoint a successful bidder under the advertised tender CB162/2008.

[3] When the three years period expired on the 16th July 2012, the City has not yet finalized the process of appointing a service provider. The parties entered into a further agreement to extend the provision of the SAP support services for a period of six months ending December 2012. The extension was on the same terms and conditions. The

purpose of extending the contract was to allow the City to finalize the process of appointing a service provider without there been any interruptions in services to the members of the public.

[4] During October 2012 the second respondent advertised tender CB204/2012 for onsite and offsite SAP support services. The closing date for the tender was the 12th November 2012. The compulsory information session for tender CB204/2012 was held on the 24th October 2012. The appellant and the fifth respondent submitted their tender for tender CB204/2012.

[5] After the tender had closed, a preliminary report was drafted. What was left was for the Bid Evaluation Committee and Bid Adjudication Committee to complete their evaluation process and appoint a successful tenderer.

[6] On the 5th November 2012, the third respondent was appointed as Chief Information Officer ("CIO") by the City of Tshwane.

[7] On the 23rd November 2012, the Executive Acquisition Committee ("EAC") of the City of Tshwane held a meeting. At that meeting it was recommended to the committee that the SAP support services be offered to the applicant and Baraka Enterprise Consulting on extension until September 2013. However, the committee was concerned

with the lack of planning from the Department and it was resolved that the Department should consider using other SAP entities used by different organs of state for support and maintenance, and appoint them in line with regulation 32 of the MFMA. It was further resolved that the Department should fast track and finalize tender (CB204/2012) within two weeks in order to avoid further complications. The City Manager Janson Ngobeni signed the approved resolution on the 30th November 2012.

[8] On the 7th December 2012, the Bid Adjudication Committee ("BAC") held its meeting. At that meeting the BAC noted a request by the CIO wherein he requested the cancellation of tender CB204/2012 as he was of the view that the tender was not in line with the broader strategy of the Municipality. He also cited the fact that the scope of work in that tender does not address the entire need of the City of Tshwane. The BAC resolved that the tender be cancelled and recommended that it be re-advertised with changed specification that addresses the current needs of the City of Tshwane.

[9] On the 14th December 2012, the third respondent wrote an email to the applicant reminding them that their SAP contract was ending on the 31st December 2012. He was also notified them that their contract will not be extended beyond that period. He further informed them that the tender will be re-advertised at a later stage.

[10] On the 19th December 2012, the EAC held a meeting. At that meeting the committee agreed to appoint the 5th respondent in terms of Regulation 32 through the City of Johannesburg tender for the provisioning of SAP support services for a period of 6 months, which may be extended on a month to month basis, but not exceeding 12 months.

[11] At that meeting of the 19th December 2012, the City Manager wanted the difference between the 5th respondent and the applicant. The CIO replied as follows:

“Look, of course, it is a case of one contract expiring and bringing in another service provider. But I think for me as a GCIO, it affords me the opportunity to start on a clean slate with a new company. EOH is one of the five companies certified to work on SAP and is one of the five best companies in SA.”

[12] On the 19th December 2012 the applicant and its staff were ordered to vacate the City of Tshwane premises by the 20th December 2012.

[13] The 5th respondent in an undated letter wrote to the third respondent. In paragraph 5 of that letter the 5th respondent said the following:

“EOH resources have been onsite for two days at the City of Tshwane (Tuesday 18 December 2012 and 19 December 2012) as per our agreement, for the purposes of hand over and transitioning services from the current services providers Baraka and Nambithi.”

[14] The City of Tshwane proceeded to re-advertise the tender under tender number CB107/2013. The applicant and the 5th respondent have tendered for that tender. After tender CB107/2013 was closed, the City of Tshwane proceeded to open it with the sole purposes of adjudicating it.

[15] On the 21st June 2013, the applicant obtained a court order wherein the respondents were interdicted from opening and adjudicating tender CB107/2013 pending the review application which was initiated by the applicant during May 2013. However, when that order was obtained, the respondent had already opened the tender.

[16] The applicant contends that there was no legitimate change of objective that warranted the respondents to cancel tender no 204/2012. The applicant is of the view that if the respondents wanted to reduce the three years period, the tender was making provision for amendments, and that could have been negotiated with the successful bidder since the tenderer was required to indicate the price for each year separately. The

applicant submits that tender CB107/2013 has not changed to the extent that it can be said it differs substantially from the cancelled tender.

[17] The applicant is therefore of the view that the decision to cancel tender CB204/2012 is not rationally connected to the factual information that the BEC and BAC had cognizance of.

[18] The applicant further contend that the process that was followed to appoint the fifth respondent was neither fair, transparent, cost effective or ensured open and effective competition. The applicant submits that the respondent's policy states that a competitive bidding process must be followed before an appointment can be made. The applicant is of the view that had tender CB204/2012 been adjudicated, the records show that the fifth respondent would have been unsuccessful in securing tender CB204/2012 based on their pricing.

[19] The respondents contend that tender CB204/2012 was cancelled before the conclusion of the evaluation and the adjudication because the City later realized the fact that the tender was not in line with the broader strategy in that the scope of work did not address the entire needs of the city.

[20] The respondents are of the view that the applicant did not suffer any prejudice as a result of the cancellation of tender CB204/2012 and the appointment of the fifth respondent. The respondents are of the view that the applicant is still in a position to again express its interest to further supply services to the city through the new tender CB107/2013 that carries with it revised specifications that meets the needs of the City.

[21] The respondents submit that if the process of evaluating and adjudicating tender CB204/2012 had proceeded to its finality, the SAP support services in terms of the tender would have commenced on 1st January 2013. The City noted a vacuum in the supply services which would have the effect of incapacitating its ability to manage and administer effectively. That is the reason why they evoked the provisions of Regulation 32 of the Municipal System Act by requesting the City of Johannesburg to participate in the provision of the SAP support system.

[22] The respondents submit that they acted within the law when the City took the two decisions to cancel tender CB204/2012 and appoint the fifth respondent on short term basis whilst specifications for a new tender process were being worked out and before advertising the new tender.

[23] The general principles relating to the test for judicial review of administrative action was laid in the case of **Pharmaceutical Manufacturers Association of South Africa and Another v The President of the Republic of South Africa (CCT 31/99) [2000] ZCC1 At paragraph 85** Chaskalson P said the following:

"It is a requirement of the rule of law that exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement [107]. If it does not, it falls short of the standards demanded by our Constitution for such action."

[24] Regulation 32(1) of the Municipal Supply Chain Management Regulations reads as follows:

"(1) A supply chain management policy may allow the accounting officer to procure goods or services for the Municipality or municipal entity under a contract secured by another organ of the state, but only if:-

(a) the contract has been secured by that other organ of the state by means of a competitive bidding process applicable to that organ of state;

- (b) the municipality or entity has no reason to believe that such contract was not validly procured;
- (c) there is demonstrable discounts or benefits for the municipality or entity to do so; and
- (d) that other organ of state and the provider have consented to such procurement in writing.”

[25] It is not in dispute that the City of Johannesburg and the fifth respondent has consented in writing to the fifth respondent been contracted to the City of Tshwane.

[26] With regard to whether the services of the fifth respondent was secured by the City of Johannesburg by means of a competitive bidding process, raises a lot of questions than answers. The draft minutes of the meeting of the committee appointing fifth respondent reads as follows:

“The Committee raised the following concerns, comments and queries:

1. That the proposal should not be awarded based on price but it should be awarded based on rates quoted by the service provider.
2. That the Bid Evaluation Committee should quantify the number of hours they expect the service provider will offer during the period.

3. That the Committee is not comfortable making the award with EOH's price ceiling, that the user department should make a proper estimate and provide an amount.

4. That a contract is based on the estimate of hours over a period of time.

The chairperson proposed that the item be approved subject to the contract price be reduced by 5% over a period or whichever comes first."

[27] It seems as if the City Council of Johannesburg has afforded the fifth respondent to augment its tender without giving the other competitors an opportunity to do so. The question is whether that was fair or not. However, I am not called upon to review the decision of the City of Johannesburg to award its tender to the fifth respondent.

[28] The applicant was not challenged in their contention that even with 2% discount that the fifth respondent has given to the City of Tshwane, the fifth respondent's price was still higher compared to what they (applicant) were charging the City of Tshwane. That in itself is an indication that there were no demonstrable discounts or benefits for the City of Tshwane.

[29] The EAC took a resolution to appoint the fifth respondent at a meeting held on the 19th December 2012. However, as per the letter from the fifth respondent to the third respondent; the fifth respondent has been on site from the 18th December 2012 a day before the meeting of the EAC. The question is how did they know that the EAC will resolve to appoint them. The fifth respondent in that letter specifically state that he had been on site from the 18th December 2012 based on the agreement he had with the third respondent. This gives credence to the applicant's suspicions that the EAC had merely rubber stamped the recommendation of the third respondent.

[30] Therefore, under circumstances, in my view, the applicant was justified in attacking the decision of the respondents to appoint the fifth respondent in terms of Regulation 32.

[31] In the case of **Chairperson Standing, Tender Committee and Others v JFE Sapela Electronics (pty) Ltd and Others [2008] 2 SA 638 (SCA)** at paragraph 28, the learned Judge said the following:

"In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administration act."

[32] The appointment of the fifth respondent was for a period not exceeding 12 months and we are now in the 10th month. If I set aside the appointment with the full period not yet having run its course, such order will have serious and prejudicial results to the members of the public, more so that they are left with two months before it expires. That will interrupt the services that should be given to the members of the public.

[33] Therefore in my view, even though I find the decision to appoint the fifth respondent warrant to be set aside, I am not inclined to do so.

[34] With regard to the cancellation of tender CB204/2012, Regulation 10(4) of the Preferential Procurement Regulations, 2001 reads as follows:

"An organ of state may, prior to the award of a tender, cancel a tender if-

- (a) Due to changed circumstances, there is no longer need for goods or services tendered for; or
- (b) Funds are no longer available to cover the total envisaged expenditure; or
- (c) No acceptable tenders are received."

[35] The fifth respondent in cancelling the tender, had relied on regulation 10(4)
(a).The changed circumstances which they are referring is that tender CB204/2012 is

that the tender was not in line with the broader strategy of the Municipality. The changes which they want are that they no longer require offsite SAP support service and that the three year term for the tender should be reduced to two years.

[36] All these queries were raised at the Bid Adjudication Committee meeting of the 7th December 2012. At that meeting they took a resolution that tender CB204/2012 should be cancelled. By that time tender CB204/2012 was already opened, and what was left was to adjudicate and appoint the successful tenderer. Seven days (30/11/12) prior to the cancellation, the City manager Jason Ngobeni has approved and signed a resolution which required the relevant committee to fast track and finalize tender CB204/2012 within two weeks in order to avoid further complications. Instead of complying with the resolution, they took another resolution to cancel the tender.

[37] Clause 5 of the tender CB204/2012 reads as follows:

"SCOPE OF WORK & REQUIREMENTS

The scope of work for SAP support to COT is as follows:

1. COT will determine and assess the on/off site resources allocation based on the services required"

[38] From the reading of this clause, the respondents were not compelled to allocate resources for offsite support. They will allocate as and when required. Therefore in my view, this was not a good ground to have the tender cancelled and rely on changed circumstances.

[39] The applicant was not challenged when they stated in paragraph 27 of the second supplementary affidavit that on the cancelled tender CB204/2012 the fifth respondent was much more expensive in price than the applicant. This was also confirmed by Peter Erasmus in his confirmatory affidavit. The applicant was further not challenged in paragraph 32 of the applicant's second supplementary affidavit when they stated that in terms of the tender, the tenderer was requested to indicate the price for each year separately. The applicants is therefore of the view that if the tenderer was required to indicate the price for each year separately, the reduction of the tender period from three years was not a ground to cancel tender CB204/2012. I agree with their view. They could have negotiated with the successful tender that the appointment will be for two years.

[40] The applicant contends that tenderers in tender CB107/2013 have adjusted their rates from the information they obtained from the cancelled tender CB204/2012 when it was opened. The applicant further submits that the fifth respondent has also

adjusted its rates. The respondents in answering the applicant does not dispute that tenderers under tender CB107/2013 has adjusted their rates, but state that specifications have changed and differ from the cancelled tender, and that resulted in rates changing.

[41] I am not persuaded by the respondents' submissions. The changes under tender CB107/2013 are minimal. The tenderers who were present when tender CB204/2012 was cancelled, had the opportunity of seeing the tender prices of other tenderers, and it was going to be easy for them to adjust the prices in the new tender CB107/2013. That in itself will give them an unfair advantage over the other tenderers. It would seem the tender was cancelled in order to give other favoured tenderers to adjust their tender prices even though the price is not the only factor to be taken into consideration in awarding a tender. However, price still plays a major role.

[42] In the case of **Metro Projects CC and Another v Klerksdorp Local Municipality and Others (602/2002) [2003] 2ASCA 91** the learned Conradie JA at paragraph 12 said the following:

"There is another reason that the tender procedure of a local authority must be fair. Invitations to tender by organs of state and the avoiding of tenders where it is done in

the exercise of public power is an administrative process (see **Logbro Properties CC v Bredderson No and Others 2003 (2) SA 640 (SCA)** at 465-466C where the leading cases are collected). Section 3(2) (a) of the Promotion of Administrative Justice Act 3 of 2000 requires the process to be lawful, procedurally fair and justifiable. But primarily, in the case of a local authority, the process must be fair because s10G (5) (a) of the Local Government Transition Act 1993 requires it.”

[43] Fairness must be decided in the circumstances of each case. In this case on the 30/11/12, the City Manager signed and approved a resolution that requires the relevant department to fast track and finalizes tender CB204/2012 within two weeks in order to avoid further complications. Seven days later the tender is cancelled citing flimsy reasons for the cancellation. On the 18th December 2012 the fifth respondent is on the site even before it was confirmed that they are appointed. The new tender that was advertised had minimal changes which could have been dealt with the successful tenderer. In my view, all these make the cancellation of tender CB204/2012 to be unfair.

[44] Taking into consideration the totality of the evidence and argument before me, I have come to the conclusion that there were no justifiable reasons to cancel tender

CB204/2012, and that it was unfairly cancelled. The applicant was justified in attacking the decision of the respondent by way of review.


[45] After tender CB204/2012 was cancelled, the respondents advertised tender CB107/2013. After it was closed, it was opened, and that is when they were interdicted from adjudicating on it. Now the question is whether I should set aside the resolution to cancel tender CB204/2012 or should I allow tender CB107/2013 to be adjudicated. Both applicant and fifth respondent have tendered for both tenders.

[46] As I have already held in paragraph 41 above that the information that other tenderers have gained from the cancelled tender CB204/2012 have given them unfair advantage, it will be unfair to allow tender CB107/2013 to be adjudicated. Setting aside the resolution to cancel tender CB204/2012 will not result in any prejudicial and serious results since the tender has not yet been adjudicated and awarded.

[47] In the circumstances, I do not find any reasonable justification why the resolution to cancel tender CB204/2012 should not be set aside. It is my findings that the applicant's application hereby succeeds.

[48] The following order is made:

1. The decision of the respondent to cancel tender CB204/2012 for the provision of on and off support services to first respondent of a three year period with effect from 1st January 2013 is hereby reviewed and set aside.
2. The City of Tshwane must give written notice within ten days of this order to all the short listed tenderers in respect of CB204/2012. The said notice must inform the tenderers that they are only allowed to adjust their tariffs upwards (to make provision for inflation) or withdraw their tender should they wish to do so and to give notice to the City Of Tshwane of their decision within ten days of receiving such notice.
3. The City of Tshwane must proceed to adjudicate tender CB204/2012 within two months after the expiry of the ten days period.
4. The fifth respondent to be allowed to honour the contract until the 31/12/13 when it expires.
5. The respondents jointly and severally are to pay the applicants costs including the employment of the two counsel.


MEKGANYAGO
ACTING JUDGE OF THE HIGH COURT