

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

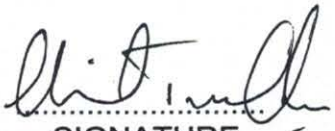
CASE NO: 92959/2015

In the matter between:

CONTOUR TECHNOLOGY (PTY) LIMITED

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<u>11/08/17</u> DATE	 SIGNATURE

CHAIRPERSON OF THE BID ADJUDICATION

COMMITTEE: MODIMOLE LOCAL MUNICIPALITY

First Respondent

MODIMOLE LOCAL MUNICIPALITY

Second Respondent

CIGICELL (PTY) LIMITED

Third Respondent

ITRON METERING SOLUTIONS SA (PTY) LIMITED

Fourth Respondent

JUDGMENT

Tuchten J:

- 1 The applicant (Contour) seeks to review and set aside a decision of the second respondent to award a tender to the third respondent (Cigicel). The tender was for the supply of a pre-paid vending system for electricity. In what follows I shall refer to the first and second

respondents jointly as the Municipality unless the context requires me to be more specific.

- 2 The application is brought under the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). In addition to the request to set aside the decision, Contour asks that the court exercise the power vested in it by PAJA to substitute the court's decision rather than sending the matter back to the Municipality for reconsideration. Contour does however ask in the alternative that the matter be remitted.
- 3 The application for review was opposed only by Cigicell. The Municipality has given formal notice that it will abide. The Municipality did however oppose an earlier urgent application for interim relief pending the review. The urgent application was dismissed, I was told, for want of urgency. Cigicell seeks in the present review application to rely on what was said on behalf of the Municipality in the urgent application. I shall deal with this below.
- 4 At the time the tender was adjudicated, Contour had been supplying the Municipality since 1 May 2011 with a prepaid electricity vending system. That system enabled consumers to buy vouchers for electricity from the Municipality itself and other third-party vendors for use in pre-paid electricity meters.

5 Under the tender subject to scrutiny in this application, the Municipality invited tenders for the supply of a prepaid electricity vending system. The closing date for tenders was 5 February 2015.

6 Under s 2(1) of the Preferential Procurement Policy Framework Act, 5 of 2000 (the PPPFA), an organ of state such as the Municipality must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;
- (b)(i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
- (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
- (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in

identified in the tender document as the "B-BBEE STATUS LEVEL OF CONTRIBUTOR". Then, under s 2(1)(f), the tender *must* be awarded to the tenderer who scores the highest points unless additional objective criteria which had been clearly specified in the bid offer in addition to those I have mentioned, ie the goals of black economic empowerment, justify the award to another tenderer.

- 8 The only other identified criterion in the tender document was the price. The tender document stated that points for price would be awarded in accordance with a formula which translates to:

$$\begin{aligned} &\text{Percentage scored for price by any bid under consideration} \\ &= (\text{lowest acceptable bid} \times \text{price of bid under consideration}) \\ &\times 90\% \end{aligned}$$

- 9 It will be seen that functionality, ie the capacity to deliver the product identified in the tender was not to be taken into account in the award of points. Nevertheless functionality was considered for purposes of identifying those bids which were ultimately to be scored. This makes sense because there is no point in evaluating the bid of a tenderer who is unlikely to be able to perform as specified. The decision to use functionality as a threshold factor was not attacked on review.

- 10 The evaluation of the competing bids was done in the first instance by the Municipality's bid evaluation committee. The bid evaluation committee identified three tenderers which met the Municipality's threshold requirements for functionality: Contour, Cigicell and the fourth respondent (Itron). The bid evaluation committee gave Contour 51,75, Itron 51,25 and Cigicell 89.
- 11 The procedure within the Municipality required that the bid evaluation committee then proceed to submit its findings to the bid adjudication committee. It was the task of this latter committee to make the ultimate recommendation to the council of the Municipality as to the tenderer to which the tender should be awarded.
- 12 The bid adjudication committee met and decided to send the matter back to the bid evaluation committee. Its reasons for sending the matter back appear from a memorandum of the second respondent, the chairperson of the bid evaluation committee, signed by him on 20 March 2015. I must confess that I do not really understand the memorandum. Suffice it to say that the record shows that the bid evaluation committee re-evaluated for functionality and awarded Contour 63, Itron 69,75 and Cigicell 83,85.

13 There is nothing at all in the record which bears upon the other essential evaluation component, ie price. Indeed, that complaint is the principal focus of Contour in this review. Nevertheless, the bid evaluation committee recommended that Cigicell be awarded the tender. It gave reasons. These reasons do not even refer to the scoring system prescribed by the PPPFA.

14 The bid adjudication committee met on 2 April 2015. According to a minute of this meeting, the bid adjudication committee made the following recommendation:

The committee recommends that [Cigicell] be appointed for the provision of Pre-paid Vending System for scoring the highest points on functionality also considering the [response] from Polokwane Municipality.

15 The tender was then awarded to Cigicell. On 2 June 2015, Contour was informed of this by a representative of Cigicell.

16 As I have said, the principal attack of Contour in this review was that the procedure and methodology prescribed by the PPPFA was simply not followed; in essence that the three competing tenders which survived the revised functionality scrutiny of the bid evaluation committee were apparently not scored for price at all. The Municipality and its organ, the bid adjudication committee, neither opposed the

review nor gave an explanation in the review itself for the apparent irregularities which had been perpetrated in the evaluation and adjudication process. So in the review itself, Contour's attack stands unchallenged.

17 However, Cigicell, which did oppose the review, relies on what was said by the Municipality in the earlier urgent application in which Contour had unsuccessfully applied for an interdict to prevent the implementation of the award to Cigicell pending review.

18 In an affidavit submitted on behalf of the Municipality in the urgent application, it was said that the Municipality faced extreme difficulty in comparing the bid prices of Contour and Cigicell and so decided to award both of them 90 points for price. Having done, that, thus the affidavit, the bid evaluation committee then once again had recourse to functionality to decide the issue, together with what it had been told by the Polokwane Municipality. I might mention that the input of the Polokwane Municipality was contained in a letter dated 8 April 2014, recording that Cigicell had been selling pre-paid electricity on its behalf since 2011 and that the Municipality had not had any problems with Cigicell or customers regarding money not banked or overcharging. As the bidders had already been scored for functionality, it is difficult to understand the reliance on what was essentially a character reference.

- 19 As regards the merits of this review, it is clear that on any basis the Municipality disregarded the provisions of the PPPFA. It was not entitled to abandon the comparison of prices offered or to conduct that comparison on the basis of a fiction. The Municipality quite simply disregarded the law.
- 20 Counsel for Cigicell submitted that the Municipality was entitled to take this approach because s 2(1)(f) empowered the Municipality to have regard to other objective criteria. I think there are two reasons why this argument cannot succeed. Firstly, functionality was not identified for this purpose in the tender offer. Secondly, the Municipality had recourse to functionality not because it had concluded that the bids of Contour and Cigicell were *in fact* equal as to price but because it allegedly found the price comparison exercise too difficult to undertake and then decided to abdicate the obligation upon it both under the PPPFA and under administrative law to perform the price comparison.
- 21 The exercise of public power is always a constitutional matter. Under s 172(1) of the Constitution, the court must declare the conduct of the Municipality in adjudicating the tender in disregard of the law to be invalid. The next step in the enquiry relates to remedy: what should the court do, if anything, to put right what the Municipality has done wrong? The court has a wide range of remedial tools at its disposal

but all those tools must be used to fashion a just and equitable remedy. The submissions of counsel traversed the whole spectrum of available remedies. Counsel for Contour submitted that I should substitute the decision of the court for the decision of the Municipality and award the tender to Contour. Cigicell, principally on the strength of a submission that Contour's price was not objectively determinable, argued that I should not direct any remedial action.

22 The default position is that the matter should be sent back to the decision maker for reconsideration. This is in harmony with the separation of powers doctrine. The legislature has reserved the consideration of tenders in Modimole to the Municipality. The court is very cautious about making decisions in the fields reserved for other organs which must exercise public power in their respective fields. Counsel for Contour has put forward a number of factors on the strength of which counsel submitted that the court should substitute its decision for that of the Municipality.

23 This question is regulated by s 8(1)(c)(ii)(aa) of PAJA. One of the most important factors is whether the court is in as good a position as the functionary, in this case the Municipality, to make the decision. The court can only exercise its power to substitute its decision for that of the administrator when exceptional circumstances are present and it would be fair (just and equitable) to do so. If these factors are not

established, the court must defer to the constitutionally mandated functionary and allow that administrator to try to make a correct decision with such guidance as the judgment of the court might provide. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,¹ the Constitutional Court set out² certain factors which in this enquiry inevitably should carry greater weight. These are firstly whether the court is in as good a position as the administrator to make the decision; and secondly whether the decision of the administrator is a foregone conclusion. Thereafter the court should consider other relevant factors, including delay, bias or the incompetence of the administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. The exceptional circumstances enquiry requires an examination of each matter on a case by case basis which accounts for all relevant facts and circumstances.

- 24 Counsel both argue that the question whether Contour's price is clearly lower than that of Cigicell can be determined on the papers. Their submissions are diametrically opposed; counsel for Contour submits that Contour's price, properly evaluated is plainly much lower

¹ 2015 5 SA 245 CC

² Para 47

than Cigicell's. On the other hand, counsel for Cigicell argues that Contour's price cannot even be objectively determined. One of the fundamental problems arises from the fact that the percentage which Contour proposes to charge for purchases of electricity made through the Internet, cellphones, ATMs or branches of banks is 5,7% (inclusive of VAT) is 5,7% *with a minimum of R5,70*. So the actual fees payable for this category of electricity purchases will be influenced by the frequency of charges below R100. This is because a purchase of an amount lower than R100 will attract the same charge (R5,70) than one of R100.

- 25 Counsel for Contour argued on the basis of 2015 figures that there had been some 46 500 prepaid electricity purchases each month and that at that time purchases through the Internet, cellphones, ATMs or branches of banks accounted for a little less than 5% of that total, which rounded up to avoid prejudice to Cigicell to 2 325 transactions per month.. Total sales amounted to just less (in round figures) than R3,4 million. Counsel demonstrated that if each of transactions making up the 5% were for R1, then the total fee for this category would be no more than R11 625 plus VAT. If this is decisive then, counsel submits, the minimum charge proposed by Contour will have little impact on the bottom line anticipated monthly charge.

- 26 But counsel for Cigicell argued that that is not the end of the enquiry concerning the category in question and that Contour's price included call out charges which were not charged as an extra by Cigicell.
- 27 I just do not have sufficient confidence in my own skills as a mathematician or statistician to resolve this question. So I am not in as good a position as the Municipality, which has access to experts in the field. This means that the result is not a foregone conclusion either in favour of Contour or of Cigicell. The award of the tender must be set aside and the matter will have to go back to the Municipality for reconsideration.
- 28 How the Municipality resolves this question is in the first instance for the Municipality to decide. But I think that in the light of my conclusion that the Municipality acted contrary to law, the matter is urgent and that I should make appropriate orders to ensure that the reconsideration is performed swiftly. There is also the consideration that the tender has been implemented for already for some two years. I shall therefore suspend the operation of the order setting aside the tender to eliminate or at least minimise inconvenience to customers for prepaid electricity in Modimole.

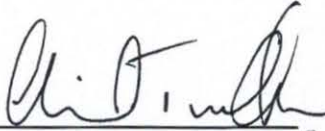
29 In performing the re-evaluation, the officials of the Municipality should bear in mind that under clause 4 of the conditions of tender, the Municipality has the right to ask any tenderer to clarify any aspect of his or her tender. This means that the Municipality will be entitled to call the affected parties to a meeting to debate the various views put forward on this issue and any other that the Municipality considers might have a bearing on its decision. The Municipality has of course also the right to instruct an expert such as an accountant to advise it on issues such as those relating to the determination of Contour's price.

30 Contour has been substantially successful. Costs must follow the result. Counsel for Contour has asked for costs against the Municipality and Cigicell, jointly and severally. But this would be unfair to the Municipality which did not oppose the review and served formal notice of its intention to abide on 21 July 2017.

31 I therefore make the following order:

1 The decision by the first and second respondents that the third respondent was the successful bidder for a bid with reference number 74/1/672 for the supply of a pre-paid vending system to the second respondent (the tender) is declared to have been invalidly taken and is hereby reviewed and set aside.

- 2 The matter is remitted to the first and second respondents for re-evaluation in accordance with the 90/10 preferential procurement points system provided for in the Preferential Procurement Policy Framework Act, 5 of 2000.
- 3 The first and second respondents must complete their re-evaluation and make a fresh decision as to the award of the tender within one month of the date of this order.
- 4 The operation of the order setting aside the decision to award the tender is suspended for one month from the date of this order.
- 5 Should the first and second respondents fail to complete the re-evaluation or fail to make a fresh decision as to the award of the tender, any party to this review may approach the court on notice and such further affidavits as the case may require for further or alternative relief, including a variation of the terms of this order.
- 6 The third respondent must pay the applicant's costs in this application on the basis that the employment of senior counsel was justified.


NB Tuchten
Judge of the High Court
11 August 2017