



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

DATE 3/06/2013


SIGNATURE

3/6/2013

70100/12
CASE NO: 58961/2012

DATE: 31 May 2013

In the matter between:

TRENCON (PTY) LTD

Applicant

and

THE INDUSTRIAL DEVELOPMENT
CORPORATION OF SOUTH AFRICA LIMITED

First Respondent

BASIL REED (PTY) LIMITED

Second
Respondent

JUDGMENT

MOTHLE J:

1. This application concerns a review of a decision to award a tender. The Applicant ("*Trencon*") seeks an order reviewing and setting aside a decision by the First Respondent ("*IDC*") to award a tender to the Second Respondent ("*Basil Reed*"). Trencon further prays that in reviewing and setting aside the decision to award the tender, this Court should instead award the tender to it as provided for in Section 8 of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*").
2. IDC opposes the application, while Basil Reed filed a notice to abide the decision of this Court.

BACKGROUND:

3. During or about 18 May 2012, IDC issued a public invitation under reference number:T27/07/12 to prospective building contractors, requesting for proposals ("*RFP*"), from construction entities to prequalify for the principal building contract of the IDC head office external upgrade, Sandton, Johannesburg. The RFP contained, amongst others, a provision that any application received after the closing date shall not be evaluated or assessed. The closing date was set as Monday, 4 June 2012 at 12H00.

4. The tender for these works was a two-phased process. The first phase concerned the request for proposals and short listing of companies that prepared the best proposals. These proposals were basically the profile and suitability of companies to tender for the work. The second phase was the bidding itself, which had to follow several stages of evaluation and reporting, with the necessary recommendations by various procurement committees, until the final stage, before the Executive Committee of the IDC (*Exco*), which then took the decision to award the tender.

5. Trencon and other construction companies submitted their RFP on time. Basil Reed on the other hand submitted their RFP on the closing date but after the closing time. Snow Consultants, an independent consulting company whose services were engaged to assist IDC with evaluation of the RFPs and tenders, referred the matter of the late submission of Basil Reed's RFP to the IDC Procurement Committee. The Procurement Committee condoned the late submission of Basil Reed's RFP, and this construction company was shortlisted to participate in the bidding process.

6. Snow Consultants then shortlisted seven (7) construction companies which had presented acceptable RFPs. Trencon was Number: 3 on

the list and Basil Reed was Number 4: behind Trencon. The 7 companies were allowed to proceed to the next stage of submission of tenders.

7. On the 12th July 2012, the IDC issued the tender document where only the 7 contractors that have been approved in terms of the RFP procedure were invited to tender. The deadline for the tender submission was initially the 7th August 2012 and later extended to the 14th August 2012 at IDC's instance.
8. The tender document stated, amongst others, that the site handover date is 6 September 2012. Trencon contends that they determined their tender price on the basis of this scheduled date of site handover. On the 20th August 2012, during the evaluation of the tenders, De Leeuw Group Quantity Surveyors (*"the Quantity Surveyors"*), engaged to advise IDC during the evaluation of the tenders, sent a letter to Trencon requesting the latter to advise on the implication to its tendered price, should the site handover be delayed to 1 October 2012.
9. This letter from the Quantity Surveyors was directed to all bidders with the same inquiry. In response, to this enquiry, Trencon indicated that if the handover of the site is delayed from the 6th

September to 1 October, they would require .6% per month escalation amount, which is in the region of R315 000.00. At the same time Basil Reed indicated that their price will remain fixed, even if the site handover is delayed.

10. On the 30th August 2012 Snow Consultants prepared their first evaluation report. This was followed by an e-mail from IDC to Trencon, attaching a letter from the Quantity Surveyors who were still requesting clarification in regard to the escalation suggested. Trencon was requested to keep its price fixed and firm until 1 October 2012. Trencon responded by stating that their price remained fixed but calculated on the site handover date of the 6th September 2012 as indicated in the tender. On the 7th September 2012 Snow Consultants submitted its evaluation report in which it recommended that the tender be awarded to Trencon for an amount of R110,948,822.71 excluding VAT but including the approximately R315,000.00 for the escalation.

11. The Snow Consultants' report reflected that before and after making adjustments for site handover, Trencon scored most points in both instances. The Support Services of the IDC also prepared and submitted a report to the Procurement Committee in which they also recommended that the contract be awarded to Trencon subject to

two conditions stipulated by Snow Consultants. The two conditions were that Trencon was to remove conditional acceptance of revised contract award value and secondly, that an agreement be reached with the Quantity Surveyors in regard to the use of BOQ Sunscreens.

12. The Procurement Committee met on the 12th September 2012 to consider the recommendation of the Support Services and that of Snow Consulting. This Committee also recommended appointment of Trencon, subject to the stated conditions.
13. It needs to be stated that IDC, in particular the Quantity Surveyors, had not decided on a final date for site handover. They were sending out feelers to test the waters on the attitude of the bidders regarding their bid prices, in the event the site handover is delayed beyond the date stated in the tender. They regarded the possible escalation of the bid price raised by Trencon in response to the possible shift of the site handover date, as a refusal to keep the bid price firm.
14. On the 13th September 2012 Trencon received another e-mail from IDC informing of three possible new dates of handover as being 15 October; 1 November or 15 November 2012. Trencon was once

more requested to indicate what its position will be in the event the site is handed over on those dates. Trencon wrote back to indicate the price implication for each of the revised scheduled dates. In the meantime, the Procurement Committee also made a recommendation to Exco, that the tender be awarded to Trencon for R111,739,422.28 excluding VAT, but subject to the stated conditions concerning the late site handover and concerns over the purchase of new sunscreens.

15. On the 14th September 2012 being the same day the recommendation of the Procurement Committee was made, Grant Orlando Augustine (*"Augustine"*), Manager of the IDC Procurement Committee, in consultation with other managers of IDC, sought an opinion from an Attorney on the issue of the implication of the proposed escalation of the bid price by Trencon.

16. The appointed attorney, TGR was instructed to urgently opine on two issues, namely; an under-quoting of an element of its bill by *"the First Bidder"*, and whether the conduct of *"the Second Bidder"* in providing a price escalation during the consideration of the bids, is standard practice and proper. Even though the *"First"* and *"Second"* bidders were not identified by name, it is clear that reference to the Second Bidder meant Trencon. The content of the opinion shows

that Augustine communicated the instructions by memorandum and later telephonically. The opinion was to be provided on the 17th September 2012.

17. On the 19th September 2012 the Exco of IDC met to consider the award of the tender. It was at this meeting that Exco decided to award the tender to Basil Reed. Trencon was advised on the 26th September 2012 that it was not the successful party.

18. It is common cause that correspondence was exchanged between Trencon and IDC following the award of the tender to Basil Reed. On the very day, the 26th September 2012 after being informed that they were not the successful bidder, Trencon requested reasons for the decision from the IDC. There was a delay in providing the reasons which became available only on the 26th October exactly a month after they were requested and after Trencon had brought an application to the High Court which was set down for the 16th October 2012. Trencon contends that further records that were requested from IDC were provided in drips and drabs, initially in a redacted form, and later comprehensively. The opinion, for example, which was secured by Augustine prior to the Exco meeting, was made available to Trencon only on 19 March 2013.

19. The reasons for the decision came from IDC's attorneys, Edward Nathan Sonnenbergs Inc. ("*ENS*"). These reasons, described as "*actual reasons*", were that Trencon's tender became non-responsive because Trencon failed to keep their price fixed for 120 days of the period of evaluation of the tender by adding an escalation on its price, as a result of the anticipated delay in the site handover date.

GROUND OF REVIEW

20. The essence of Trencon's grounds of review, is that IDC's reasons for the decision to award the tender to Basil Reed, was based on a material error of law. There are also further allegations of procedural irregularity in allowing Basil Reed's RFP to be accepted even though it was filed late as well as an attack on the grounds that the conduct of Augustine showed bias. I will therefore deal with these grounds of review in the order in which I have just stated them. Before doing so, I need to deal with a side issue which was brought to bear on the proceedings.
21. Counsel for IDC in his heads of argument as well as in Court raised, in the strongest terms, an objection against manner in which the Applicant (Trencon) presented its case. IDC submits that Trencon in

its affidavit and heads of argument has presented a case "*replete with serious and unsubstantiated allegations of bias, improper conduct and at times dishonesty, perpetrated by IDC.*" It is further submitted that the target of this attack is Augustine.

22. I need to state upfront, however, that I did not find any evidence that IDC acted *mala fide* or was dishonest or improper in its conduct in this matter. The attack by innuendo on ENS as a law firm in particular is unwarranted as there is no evidence to suggest that they did anything other than represent a client. It seems to me, however that Trencon was aggrieved by the role of Augustine in the RFP and tender process; the manner in which the tender was considered by Exco and the subsequent delay in receiving reasons for the decision, which reasons came from a law firm and not from the decision-maker. These circumstances, and perhaps others, viewed cumulatively, seem to have fuelled the suspicion of foul play. However this cannot be an excuse for the unwarranted attack of a party in the course of litigation. I deal with the perception of bias as it relates to the role of Augustine, in detail later in this judgment.

23. Having stated the above, I am however of the view that the circumstances of this case are not comparable to the allegations by innuendo, implying fraudulent conduct on the part of one of the

parties in the Supreme Court of Appeal matter of *AllPay Consolidated Investment Holding & Others v Chief Executive Officer of the South African Social Security Agency & Others* (2013) ZASCA 29.

LEGAL PRINCIPLES

24. Trencon submits, correctly so in my opinion, that IDC is;

23.1 A Major Public Entity listed in Schedule 2 of the Public Finance Management Act 1 of 1999 (*“the PFMA”*); and

23.2 An Organ of State as provided in section 239 of the Constitution of the Republic of South Africa, 1996 (*“the Constitution”*) and PAJA.

25. It is also trite that tender processes are reviewable as administrative action under PAJA. Also of relevance is the foundation of the law relating to government procurement of goods and services stated in Section 217 of the Constitution, which provides:

“(1) When an Organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do

so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

26. One of the objects of PFMA, the provisions of which also applies to IDC, is to ensure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies, **see *Chief Executive, South Africa Social Services Agency v Cash Pay Masters (Pty) Limited SA 2012 (1) (SCA)***.

MATERIAL ERROR OF LAW

27. Trencon contends that the IDC's decision that its bid submission was invalid, was materially influenced by an error of law and consequently such decision is reviewable in terms of section 6(2)(d) of PAJA. The *actual reasons* for the decision as communicated by ENS allege that Exco relied on allegations of shortcomings in the Trencon bid, which resulted in such bid being declared invalid and being in contravention of the tender conditions.
28. The essence of the error of law is that the IDC misunderstood the provisions of its own tender documents as relates to adjustment of the contract price. They failed to differentiate between the CPAP

Adjustments for increases in the costs of labour, materials, plant and goods on the one hand and Default Adjustments of contract prices that result from delays such as those concerning site handover, on the other hand. These differences are found in the provisions of the Contract Data and the JBCC Series 2000 Principal Building Agreement (*"the JBCC 2000"*), both of which applied to this tender. The JBCC 2000 is a publication by the Joint Building Contracts Committee Inc.

29. The nub of the error lies in misreading and misunderstanding of these provisions of the Contract Data of this tender with cross reference to the JBCC 2000 on price adjustments. Both documents provide for CPAP Adjustments as well as Default Adjustments. The CPAP adjustment, on which the decision of Exco was based, prohibits, in this tender, any adjustment of bid price as a result of costs in labour, plants and materials. However, the adjustment of the bid price consequent to Default Adjustment such as delays in site handover, are not prohibited. The Exco concluded, erroneously so, that Trencon's proposed escalation of price, in response to possible delays in site handover, was prohibited, and as such, the Trencon bid was invalid.

30. Further, the IDC contends that Trencon refused to keep their price fixed for the 120 days of consideration and evaluation of the tender. This contention is not correct. The undertaking that Trencon made in the tender, was to keep their price fixed and firm not for 120 days of consideration of the tender, but for the planned duration of the contract; *“provided the work starts as per the date as indicated in the tender document.”* There is no evidence that they changed their bid price for the duration of the evaluation of the tender or at any other time. They indicated that the change of site handover date will lead to additional escalation fee as permitted by the tender documents. The possible escalation of the price was disclosed in response to an enquiry as to what would be its position on the bid price, in the event the handover of the site is delayed from the 6 September 2012, a date stated in the tender document. The suggested dates of site handover were raised unilaterally by IDC after it received the tenders. Trencon was therefore responding to a speculative question, which was not even a decision by IDC to amend the tender document to reflect a new site handover date.
31. The IDC made an error of law when it contended that the terms of the tender documents prohibited any charge of escalation fees for delays in handing over the site. This error was conceded by IDC's counsel in his heads of argument as well as in Court.

32. Trencon kept their bid price fixed and its bid was therefore compliant and responsive. IDC Exco erred in holding the view that Trencon's bid was non-responsive and consequently it should therefore not be accepted and the award not made as recommended. This material error of law on its own is a sufficient ground to review and set aside the decision of the Exco.

PROCEDURAL FAIRNESS:

33. The RFP instructions stated categorically that any application received after the stipulated closing date shall not be evaluated or assessed. IDC accepted Basil Reed's late RFP to be evaluated and assessed, when all other potential bidders kept within the time frames for submission of the RFP. Trencon contends that IDC should not have evaluated and assessed Basil Read's late RFP nor allowed Basil Read to participate in the tender process.
34. IDC's contention is that based on the policy read in conjunction with the Guidelines, it was entitled to evaluate the Basil Read proposal. It is further contended that the information furnished in the RFP contains only the profiles of the bidders and was thus not sensitive.

35. The Procurement Policy of IDC provides in clause 19.3.2 that:
"Where no bid or no acceptable bid has been received on time, the IDC reserves the right to admit late bids for consideration".
36. It is Trencon's contention that there were at least five other acceptable bids which, on the terms of the policy as quoted above, made it unnecessary for IDC to accept Basil Read's late RFP for evaluation and assessment.
37. Trencon argues that the policy clearly stipulates that the receipt of a late RFP, according to the policy of IDC, is only allowable where there are no other competitive RFPs that have been submitted and it will be in the interest of IDC and the public to accept that RFP. In this particular case, there were already reputable companies that had submitted RFPs and there was therefore no need for the acceptance of the late RFP of Basil Reed.
38. The reliance on the Procurement Procedure Guidelines in this instance is flawed, in that these cannot override the Procurement Policy. The RFP invitation instructions expressly stated that late submissions shall not be evaluated or assessed. These were the rules set by IDC itself. It is bound by these rules. See **Logbro**

Properties CC v Bedderson NO And Others 2003 (2) SA 460 (SCA) at paragraph 5 p465.

39. It is clear that the procedure followed by IDC in considering the RFP that was submitted late, went against their own stated rules and was therefore flawed and unfair to other tenderers. In terms of section 6(2)(b) of PAJA, IDC failed to comply with its own mandatory condition prescribed in the RFP invitation instructions. In my view, this procedural irregularity is material and sufficient to warrant the decision of the Exco being reviewed and set aside.

ALLEGATION OF BIAS

40. Trencon contends that the conduct, in particular of Augustine, manifested a perception of bias against its bid. In support of this contention, Trencon referred to the role which Augustine played firstly in advising the Procurement Committee to admit a late submission of RFP by Basil Reed; secondly, requesting a legal opinion on Trencon's bid, with telephonic prejudicial views communicated to the attorney and presenting the opinion to Exco during its deliberations.

41. I do not find any evidence supporting the contention that by advising the Procurement Committee on the policy of IDC or deciding to obtain a legal opinion on the implications of price escalation were instances of manifestation of bias. However, from the opinion itself, it appears that Augustine expressed certain views to the attorneys concerning Trencon's bid, which views appear to be intended to exert an influence on the conclusion to be reached in the opinion. In this regard, paragraph four of the opinion states thus: *"One of the bidders ("Second Bidder") has submitted a bid which provides for escalation of the quoted price in the event of a delay in site handover. This Augustine contends, is against the tender conditions that the bidders must submit a firm price."* This was Augustine's personal view and comment concerning Trencon's tender. He had clearly formulated an opinion which was based on an error of law and one wonders why he had to disclose his view to the attorney, after instructing the attorney to opine on the same question.

42. Before and after receiving the opinion, Augustine, failed to put the question of the need for this opinion for consideration by the Procurement Committee, of which he was a member. He appears to have harboured some doubts concerning Trencon's bid and decided to deal with these concerns outside the committee processes, albeit in consultation with other IDC officials.

43. Trencon believed that Augustine was biased. However, it should also be accepted firstly that in seeking the opinion itself, he consulted other officials in IDC and it cannot thus be said he was acting on a frolic of his own. Secondly, as a member of the Procurement Committee, Augustine supported the recommendation that Trencon be awarded the tender. Therefore on a balance of probabilities, one cannot conclude that Augustine's expressed opinion and his overall conduct was an indication of bias against Trencon.

THE COURT'S FINDING

44. Considering the conspectus of the evidence I find that the decision of the executive committee of IDC, taken on the 19th September 2012 to award the tender to Basil Reed and viewed in terms of Section 217 of the Constitution, must be reviewed and set aside on the following grounds:

44.1 The decision to award the tender to Basil Reed was influenced by a material error of law as contemplated in Section 6 of PAJA; and

44.2 The acceptance, evaluation and assessment of Basil Read's RFP was procedurally unfair as provided for in Section 6 of PAJA.

SUBSTITUTION

45. Trencon submits that if I find that the decision of the executive committee of the IDC should be reviewed and set aside I should then award the tender to it. This is provided for in terms of Section 8 of PAJA. IDC on the other hand submits that in the event I find that its decision should be reviewed and set aside, I should cancel the tender and order that the process of tendering should start *de novo*.
46. It is trite that the general rule in review proceedings is that a Court would, in the event it reviews and sets aside an administrative decision; remit it to the decision-maker for reconsideration, in some instances, subject to conditions. The provisions of Section 8(1)(c)(ii)(aa) of PAJA that the Court, instead of remitting the decision, may itself decide, should only occur in exceptional circumstances. See ***Gauteng Gambling Board v Silver Star Development Limited 2005 (4) SA 67 (SCA)***. Are there exceptional circumstances in this case?

47. The underlying test to be applied by the Court in terms of its departure from the general practice of remitting the matter back to the administrator, has its roots in the common law principles stated in the seminal case of ***Johannesburg City Council v The Administrator, Transvaal 1969 (2) SA 72 (T) at 76***. This case, decided before the advent of the present constitutional dispensation, established the common law principles that a Court will be prepared to substitute an administrative decision where:

47.1 the end result is a foregone conclusion and it would be a waste of time to remit the decision to the original decision-maker;

47.2 any further delay would cause unjustifiable prejudice to the Applicant; and

47.3 the original decision maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again.

48. ***In Gauteng Gambling Board supra***, the Court added a further principle that such decision may be taken where the court is as well qualified to make that decision.

49. It is common cause that from the moment the building contractors were invited to submit the RFPs and later the bids, Trencon performed better than Basil Reed in terms of scoring. It is also a matter of record that during the evaluation of the tender, Trencon's bid scored the highest points.
50. It is also significant to notice that even after Trencon, in response to an enquiry from IDC, indicated that they would request an escalation and price adjustment on their fixed price in the event there is a delay in the site handover date, the price of Trencon for the entire tender remained lower than that of Basil Reed. It is further significant that an independent consultant, in this case Snow Consultants, the Support Services of IDC as well as the Procurement Committee of IDC, all recommended Trencon as the successful bidder.
51. I have found that the reasons forwarded by ENS on behalf of IDC, as to why Trencon was not awarded the tender as recommended, were influenced by a material error of law. This aside, the IDC is unable to present any evidence on the record as to firstly why the tender should not be awarded to Trencon and secondly why it would be necessary for this Court to cancel the contract and order that the process should start *de novo*.

52. This is not a case where there are grounds upon which a court would consider cancelling the tender. Similarly, it would not be in anybody's interest including that of the IDC, to delay the implementation of the project.
53. Counsel for IDC submitted, in the alternative, that I should consider remitting the matter to IDC with instructions to award the tender to Trencon. I am of the view that this is an instance where it would make no difference if the Court, as authorised by Section 8 of PAJA, would itself take that decision. This Court is qualified to do so. According to the evidence, the decision was, barring the material error of law, a foregone conclusion, considering the recommendations by the staff of IDC in the Support Services and Procurement Committee. This tender involves quite a substantial amount of public funds and any further delay of the project would cause unjustifiable prejudice to Trencon, the IDC and National Treasury. A case has been made out that it will be just and equitable to award the tender to Trencon and I am unable to see no reason, given the urgency of the matter, why I should refer this decision to IDC to award the tender to Trencon.
54. In regard to the costs, it is the general practice that these should follow the result. Trencon is also entitled to the costs of Part A of

the notice of motion whose proceedings came earlier by way of urgency before the Court.

55. In the premises I therefore make the following order, as proposed in the draft order handed to me by Trencon, which I amended.

1. The decision of the First Respondent to declare the tender submission of the Applicant non-responsive and to award the tender T27/07/12: Tender Enquiry for the Principal Building Contract for the IDC Head Office External Upgrade Sandton, Johannesburg (the "*Tender*") to the Second Respondent (the "*decision*") is reviewed, set aside and substituted with an award of the Tender to the Applicant in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act No. 3 of 2000 on the following terms:

1.1 The contract sum shall be in the amount of R110,633,822.28 (one hundred and ten million six hundred and thirty three thousand eight hundred and twenty two rand and twenty eight cents) plus VAT of R15,488,735.12 (fifteen million four hundred and eighty eight thousand seven hundred and thirty five rand and twelve cents) (RP 658 read with 623);

- 1.2 The First Respondent shall negotiate in good faith the terms of any final contract and service level agreement with the Applicant;
 - 1.3 The Applicant shall have the right to submit claims in terms of clause 9.2.1 read with clause 32.12; and/or clause 32.5 of the JBCC Series 2000 Principal Building Agreement – Edition 4.1 Code 2101 March 2005 prepared by the Joint Building Contracts Committee Inc.

2. The First Respondent is ordered to pay the Applicant's costs, including the costs of 2 (two) counsel (where employed) in respect of:
 - 2.1 The application under case number 2012/58961;
 - 2.2 The costs in respect of Part A of this application (under case number: 2012/70100);
 - 2.3 The costs in respect of Part B of this application (under case number: 2012/70100).

[Handwritten signature]


MOTHLE J

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