

LEGITIMATE AWARD OF STATE CONTRACTS?

The awarding of a tender to a tenderer is a systematic process consisting of different stages. At the core of this system is the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC). These committees possess much power as they influence the decision of awarding a tender by an Accounting Officer/Accounting Authority. This paper will endeavor into looking at the BEC and BAC, their authority, responsibilities and consequences thereof if such responsibilities are not properly discharged. It will also look at the relevant legislation that provides guidelines with regard to the award of tenders.

Provisions that provide for awarding of a contract/tender to the highest scoring tenderer.

Exceptions:

Section 2(1)(f) of the Preferential Procurement Policy Framework Act¹(herein referred to as the PPPFA) provides that a tender must be awarded to the tenderer who scores the highest points, unless other objective criteria justify the award to another tenderer. This section forms part of the legislative framework which, together with Section 217 of the Constitution, provide the basis upon which public procurement is regulated. In addition to this, there are Preferential Procurement Regulations promulgated in terms of section 5 of the PPPFA². The Regulations and SCM Policies provide more details on preparation, evaluation and award of state contracts. The powers of Bid Committees are sourced from SCM Policies.

In *Crossover Consulting (Pty) Ltd/ Nickigyn Joint Venture*³, the fundamental question that the court had to decide upon was whether the Second Respondent (Accounting Officer) was wrong in its decision to award the tender to Third Respondent (Third ranking Bidder) instead of the Applicant. His decision was based on the recommendations made by Bid Committees. After much scrutiny of the facts, on paragraph 32 of the judgement, the court found that the Second Respondent was justified in deviating from the recommendations of his Bid Committees and that his decision was rationally connected to the facts and one which a decision-maker would have made under the prevailing circumstances. Subsequently, the Applicant was unsuccessful in reviewing the decision made by the Second Respondent. Upon reaching such a decision the

¹ Preferential Procurement Policy Framework Act 5 of 2000.

² Ibid.

³ *Crossover Consulting (Pty) Ltd/ Nickigyn Joint Venture v MEC: Local Government and Human Settlements, North West Province and Others* (M114/2017) [2019] ZANWHC 47.

courts referred to the Implementation Guide⁴. Paragraph 16 of the Implementation Guide provides that a contract must be awarded to a bidder who scored the highest total number of points and, in exceptional circumstances, a contract may, on reasonable and justifiable grounds, be awarded to a bidder who did not score the highest number of points. This is what happened in the aforementioned case after an investigation of the key project team personnel of the recommended tenderers by the Second Respondent, which found that the key personnel put forward by recommended tenderers were not registered with relevant professional bodies. This was a requirement in the tender document.

At present, we have the 2017 Preferential Procurement Regulations⁵ (2017 Regulations) at our disposal which is also enacted in terms of section 5 of the PPPFA⁶. These Regulations replaced the 2011 Regulations and came into effect in April 2017. Paragraph 11 of the 2017 Regulations provides that a contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the PPPFA⁷. This is a clear exception to paragraph 16.1 of the Implementation Guide⁸. The insertion of the word “unless” in section 2(1)(f) of the PPPFA⁹ is also a clear indication that there is authority for the awarding of a tender to a tenderer who did not score the highest points provided that this is justified. In *Crossover Consulting (Pty) Ltd/ Nickigyn Joint Venture*¹⁰ the decision to award the tender to the third highest scoring bidder was found to be rationally connected to the facts and one which a decision-maker would have made (on paragraph 32 of the judgement). This is additional authority for the exception of awarding a tender to the tenderer with the highest points.

The BEC and BAC definition, their authority and responsibilities

As stated above, the awarding of a tender is systematic and it generally consists of different stages and in terms of the Implementation Guide¹¹ and SCM Policies. SCM must provide for

⁴ Implementation Guide Preferential Procurement Regulations, 2011 pertaining to the Preferential Procurement Policy Framework Act, No 5 of 2000 dated 01 December 2011.

⁵ Preferential Procurement Regulations, 2017.

⁶ Note 1 above.

⁷ Ibid.

⁸ Note 3 above.

⁹ Note 1 above.

¹⁰ Note 2 above.

¹¹ Note 3 above.

procedures for each of the stages, that is, the compilation of bid documentation, the public invitation of bids, site meetings or briefing sessions where necessary, the handling of bids after submission, the evaluation of bids and the award of contracts, and the administration of contracts and finally proper record keeping.

In terms of paragraph 26(1) of the Implementation Guide¹², a committee system must be in place to oversee the different stages listed above and must consist of at least a bid specification committee (BSC), a bid evaluation committee (BEC) and a bid adjudication committee (BAC). The BEC bears the responsibility of evaluating bids submitted in response to a public invitation for bids. The fundamental responsibility of the BEC is to evaluate the "ability" of each bidder to execute the contract¹³. This is undoubtedly a mandatory role as it assists in corroborating an entity's ability to perform the required services or duties.

Paragraph 29(1)(a) and (b) of the Implementation Guide¹⁴ provides that the BAC serves the purpose of considering reports and recommendations of the bid evaluation committee and make a final award or make a recommendation to the Accounting Officer/Authority to make the final award.

BEC and BAC recommendations and the power of an Accounting Officer/Authority to deviate from such recommendations

According to the Implementation Guide¹⁵ an Accounting Officer/Authority is entitled to deviate, ratify or reject the decision of the BAC if a BAC decides to award a bid another bidder other than the one recommended by the BEC.

It goes without saying that the BEC and the BAC merely make "recommendations" which can either be complied with by the Accounting Officer or not. In *Crossover Consulting (Pty) Ltd/ Nickigyn Joint Venture*¹⁶ the Second Respondent verified the registration credentials of the key project team personnel. The verification process revealed that some of the key project team

¹² Ibid.

¹³ 28 (1) (b) Implementation Guide Preferential Procurement Regulations, 2011 pertaining to the Preferential Procurement Policy Framework Act, No 5 of 2000 dated 01 December 2011.

¹⁴ Note 3 above.

¹⁵ 29(5) (b) Implementation Guide Preferential Procurement Regulations, 2011 pertaining to the Preferential Procurement Policy Framework Act, No 5 of 2000 dated 01 December 2011.

¹⁶ Note 2 above.

personnel of the Applicant and the Fourth Respondent, who initially obtained the highest points, were not registered with relevant professional bodies and/or their registration with relevant professional bodies had expired. The verification process further confirmed that the registration of key project team personnel in respect of the Third Respondent were valid and active. Based on the findings of this verification process, the Second Respondent deviated from the recommendation of the BEC and BAC and awarded the tender to the Third Respondent. On paragraph 32 of the judgement, the court found this decision to be rationally connected to the facts and one which a decision-maker would have made under those circumstances.

This serves to provide further authority for the view that an Accounting Officers/Authorities are entitled to deviate from recommendations by the BEC and BAC, provided there are compelling reasons for doing so.

Legal consequences for organs of state and bid committee members who fail to carry out the verification process

The failure to conduct verification of personnel as per tender document can be very detrimental as it may lead to the awarding of a tender to an entity that is unfit to perform the required services, it may further lead to challenge of the award of the tender based on the grounds listed under section 6 of the Promotion of Administrative Justice Act¹⁷ (herein referred to as PAJA). Award of State contracts resulting from Public procurement constitutes ‘administrative action’ as contemplated by PAJA and must comply with the provisions of that Act, this is the view adopted by the courts in numerous cases including *Trencon Construction*¹⁸ and other older cases including the *New Clicks*¹⁹ and the *Bato Star Fishing (Pty) Ltd*²⁰ case.

PAJA requires administrative action to be procedurally fair and provides remedies to enable an aggrieved or interested party to challenge an administrative decision which is not fair. On

¹⁷ Promotion of Administrative Justice Act 3 of 2000.

¹⁸ IDC v Trencon Construction (642/13)[2014] ZASCA 163.

¹⁹ Minister of Health and another v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC).

²⁰ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 (4) SA 490 (CC).

paragraph 21 of the *AllPay Consolidated Investment Holdings (Pty) Ltd and Others*²¹ judgement, the court stated that the process of procurement has a value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences. Subsequently, the failure to verify documents by an organ of state calling for tenders and the failure to disclose any material facts regarding the validity of certificates of the key personnel in the tender documents is a flaw which may consequently be a subject matter of a review in court.

In certain instances, our courts are beginning to make personal costs orders against state employees who are found to have been grossly negligent or have deliberately disregarded the relevant procurement prescripts in handling public procurement processes resulting in the state being taken to court. Failure to conduct verification of certain documents and/or qualifications may fall under gross negligence or deliberate disregard of the rules.

In conclusion, it can be said that bidders may not claim to have a right to state contracts and an organ of state calling for tenders is entitled to have the goods and/or services that it requires. However, there are systems and regulations in place to ensure that a tender is awarded to a person (a) who is capable of delivering the required and/or services, (b) from whose services the state will be able to attain value for money, and (c) who satisfies the government objective of economic transformation for those who were previously disadvantaged. This is in accordance with the provisions of section 217 of the Constitution²². Therefore, it is with great emphasis that all relevant bodies and committees established in terms of the relevant procurement prescripts should perform their duties with utter diligence to ensure that procurement is smooth and in accordance with the Constitution²³.

Author: Amanda Mkhwanazi (Candidate Attorney)

Under the supervision of: Agrippa Mpungose (Head of Public Law Department)

Tell No. 033-341 9107

Email address. agrippam@tmj.co.za

²¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* (678/12) [2013] ZASCA 29.

²² The Constitution of the Republic of South Africa, 1996.

²³ Note 22 above.

