
CONSTRUCTION LAW BULLETIN

UNFAIR TENDERS CAN BE SET ASIDE

The High Court of South Africa, Transvaal Provincial Division,¹ recently set aside a tender award by the Mpumalanga Tender Board and awarded the tender to the tenderer that had achieved the most points.

In March 2001 tenders were invited for the rehabilitation and construction of a road in the Province of Mpumalanga.

The conditions of tender:

1. provided that the tender would be adjudicated in terms of the Preferential Procurement Policy Framework Act, 5 of 2002 ("the Act");
2. incorporated the draft Regulations issued under section 5(2) of the Act; and
3. stipulated that preference points as envisaged in the draft Regulations would be awarded for active participation of historically disadvantaged individuals who were equity owners as tenderers.

A firm of consulting engineers, Africon (Pty) Ltd ("Consultant"), was appointed, with the approval of the Tender Board of Mpumalanga, by the Department of Public Works, Roads & Transport (Mpumalanga) to *inter alia* evaluate and report on tenders received.

The relevant section, being section 2, of the Act provides

¹ Grinaker-LTA Ltd & Another v Tender Board (Mpumalanga) & Others 2002[3] All SA 336.

as follows:

- (1) *an organ of State 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 the 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) *...;*
 - (c) *...;*
 - (d) *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 Government Gazette No 16085 dated 23 November*

1994;

- (e) *any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender;*
- (f) *the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*
- (g)

(2) *any goals contemplated in subsection (1)(e) must be measurable, quantifiable and monitored for compliance.*

In terms of the tender, the only specific goal for which points might be awarded as contemplated in section 2(1)(e) of the Act was equity ownership by historically disadvantaged individuals in the tenderer whether as sole contractors or as part of a joint venture.

Various tenderers submitted tenders for the contract including a joint venture incorporating Grinaker-LTA ("Grinaker JV") and another joint venture incorporating King Civils ("King JV").

The Consultant evaluated the tenders and awarded the Grinaker JV 94 points and the King JV 91,7 points. The Consultant recommended the award of the tender to the Grinaker JV having considered *inter alia* whether there existed any objective criteria in addition to those contemplated in paragraphs (d) and (e) of section 2(1) of the Act which might have justified the award to another tenderer.

The Tender Committee of the Department of Public Works also recommended that the tender be awarded to the Grinaker JV.

Notwithstanding all of this, the Tender Board of Mpumalanga awarded the tender to the King JV, reasoning that the historically disadvantaged element of the Grinaker JV had no experience in civil contracts and there was only a 2% variance in the tender sums of the two joint ventures, both of which fell within the budget.

The Mpumalanga Tender Board was evasive and over a protracted period refused to provide reasons for its decision to the Grinaker JV. It took the attitude *inter alia* that it had the sole power to award tenders. Eventually when, after the institution of legal action, it was forced to provide reasons, it gave different and conflicting reasons for its decision at various stages.

The court held that:

1. The award of a tender, by an organ of State such as the Mpumalanga Tender Board, is an administrative decision. Bidders in a tender process are entitled to fair administrative action and have the legitimate expectation that their tenders will be evaluated fairly, properly, justly and without bias, in accordance with the Act and in the public interest.
2. Section 33 of the Constitution provides that administrative action shall be lawful, reasonable and procedurally fair.
3. A public power vested in a functionary must be exercised in an objectively rational manner.
4. The Mpumalanga Tender Board was obliged, in terms of section 33 of the Constitution, the provincial legislation in terms of which it was constituted, and the Promotion of Access to Information Act, to have promptly furnished reasons for its tender award.
5. The Act requires tenders to be awarded to the tenderer who scores the highest points unless objective criteria in addition to those contemplated in subparagraphs 2(1)(d) and (e) of the Act justify the award to another tenderer.
6. The Act therefore requires a two stage enquiry when considering the award of tenders, namely:
 - (a) firstly, determining which tenderer has the highest points; and
 - (b) secondly, determining whether other relevant objective criteria exist justifying the award to a tenderer which does not have the highest points.
7. In this case there were no other objective criteria which would have justified awarding the tender to any tenderer other than the Grinaker JV.
8. The Mpumalanga Tender Board had committed errors of fact and law in making its award which had resulted in it not properly applying its mind to its decision and which in turn rendered its decision reviewable.

The general principle of our law is that if a decision is set aside on review, the matter is, unless special circumstances exist, referred back to the body that made the decision.

The Promotion of Administrative Justice Act² provides that in exceptional cases the court reviewing administrative action can substitute its own decision for that of the administrative body concerned.

The court considered that the case in question was one in which it could properly exercise its discretion to both set aside the decision of the Tender Board and to impose its own decision.

In the event, the court set aside the tender award to the King JV and directed that the tender be awarded to the Grinaker JV. This despite the protestations on behalf of the Tender Board that this should not be done because a contract had already come into existence with the King JV.

It would seem that aggrieved tenderers who believe they have been unfairly passed over can take heart from this decision which provides useful guidelines to both tenderers and those organs of State which are engaged in making tender awards.

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² Section 8(1)(c).