

CONSTRUCTION LAW BULLETIN

SETTING ASIDE TENDER AWARDS: A SEQUEL

In a previous Bulletin we dealt with the case of Grinaker-LTA Ltd v The Tender Board Mpumalanga in which the High Court set aside what was considered to be a tainted tender award. In another recent case¹, as yet unreported, the High Court has again had occasion to set aside an improperly awarded tender.

Before considering the facts of the case, a brief look at the legal framework within which such cases are adjudicated is appropriate.

Legal framework

Special constitutional legal principles govern the award of tenders by the State.

These legal provisions have as their source section 217 of the Constitution of the Republic of South Africa Act, No 108 of 1996, which is to the following effect:

“217 **Procurement**

- (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.*
- (2) *Subsection (1) does not prevent the organs of State or institutions referred to in that subsection from implementing a procurement policy providing for:*
- (a) *categories of preference in the allocation of contracts; and*

(b) *the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination.*

(3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”*

In essence, the Constitution requires tendering and the award process to be fair, transparent, competitive and cost effective.

The specific legislation contemplated in section 217 of the Constitution has been promulgated in the form of the Preferential Procurement Policy Framework Act, No 5 of 2000 (“the Act”). The Act applies to tenders involving an organ of State which is defined to include a national or provincial department and a municipality.

The Act requires organs of State to determine their own preferential procurement policy within the stated framework set out in the Act.

The framework in the Act entails:

- having a points system;
- allocating either 90 points (large contracts) or 80 points (small contracts) for price;
- allocating 10 points or 20 points respectively for specified RDP goals relevant to:
 - preferring persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - implementing the programmes of the Reconstruction and Development Programme.
- tenders must be awarded to the tenderer scoring the highest points unless objective criteria other than those described above can justify an award to another tenderer;

¹ RHI Joint Venture v The Minister of Roads and Public Works Eastern Cape and Others, High Court Bisho, Case No 769/02, Full Bench Decision dated 18 March 2003.

- any specific goal for which a point may be awarded must be clearly specified in the invitation to tender.

Regulations have been promulgated under the Act which provide guidance in the implementation of the preference points system.

RHI Joint Venture Case

The facts of the case were:

- Tenders were invited for the rehabilitation and surfacing of a 43 kilometre gravel road in the Eastern Cape and the construction of two bridges.
- The preferential procurement policy applicable in respect of the tender was that as developed by the National Public Works Department.
- Various tenders were submitted, the two most competitive being those of the RHI Joint Venture and Basil Read (Pty) Ltd.
- The RHI Joint Venture scored 95,6 points and Basil Read (Pty) Ltd 89,9 points.
- Despite this, the Eastern Cape Roads Department, contrary to the recommendation of its consultant who had recommended award of the contract to the RHI Joint Venture, recommended to the Provincial Tender Board that the tender be awarded to Basil Read (Pty) Ltd.
- In making its recommendation to the Tender Board, the Department purported to rely on the fact that the partners of the RHI Joint Venture had existing work from the Department whereas Basil Read (Pty) Ltd did not.
- The Department contended that it was concerned with the fair distribution of work in the Eastern Cape and that it considered this to be an objective criterion entitling it to procure the award to Basil Read (Pty) Ltd.
- There was no evidence of a pre-existing clear-cut transparent and known policy of fair distribution of work in the province. It emerged that, to the extent any such policy existed, it was applied very much on an ad hoc basis.
- The Department also sought to justify the award to Basil Read (Pty) Ltd on the basis that it had offered to donate its site offices and some additional computer equipment to the local community on conclusion of the contract.
- In the ensuing court proceedings to have the tender set aside Basil Read (Pty) Ltd argued that the calculation of the points awarded to it had been erroneous and, if properly calculated, it would have scored the highest number of points.

The High Court in the Eastern Cape set aside the award and awarded the contract to the RHI Joint Venture reasoning that:

- The so-called distribution of work policy did not qualify as an objective criterion as contemplated in the Act.
- Placing reliance on Basil Read's offer to donate site offices and computer equipment amounted to double counting of the RDP criteria which were already the subject matter of the 10 point allocation for the contract, i.e. it was not an objective criterion separate to the RDP criteria provided for in the Act.
- It was not in a position to determine whether Basil Read should have been allocated the highest number of points and it was incumbent upon Basil Read to have made its own application for the review and correction of the points awarded to it.

Although generally a court does not substitute its own decision for an administrative body, the court does have the power to do so in appropriate circumstances. It is also permitted by the provisions of the Promotion of Administrative Justice Act² to do so.

A court will do so where no useful purpose would be served in referring the matter back to the administrative body and in the interests of saving time and money. Taking into account these factors, the court took the decision to award the contract to the RHI Joint Venture.

ALASTAIR HAY
COX YEATS
12th Floor, Victoria Maine
71 Victoria Embankment
P O Box 3032
DURBAN
Tel: (031) 304 2851
Fax: (031) 301 3540
INTERNET ADDRESS:
ahay@coxyeats.co.za

² Section 8(1)(c)