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CONSTRUCTION LAW BULLETIN

MAKING CHANGES TO A TENDER

Some useful guidance is to be had from a recent case¹ as to what changes may be permissible to a tender after the tenders have been opened. The case also summarises the principles governing tenders in the public sector and more particularly in relation to local authorities.

THE PRINCIPLES RESTATED

In adjudicating and awarding tenders an organ of State is required to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The origin of this obligation is section 217(1) of the Constitution of the Republic of South Africa Act². This requirement of the Constitution has been given content in the Preferential Procurement Policy Framework Act³ which requires organs of State to have a procurement policy which complies with these fundamental principles. In the case of an organ of State in the local government sphere, the requirements are replicated in the Local Government Transition

Act⁴.

Apart from the express statutory exhortations referred to, there is another imperative at play which dictates that organs of State must adhere to the principles of fairness and transparency in any tender process. It derives from the fact that, in awarding tenders in the exercise of public power, organs of State are engaged in an administrative process. The Promotion of Administrative Justice Act⁵ requires all administrative action to be lawful, procedurally fair and justifiable.

What is fairness? It has been recognised to be flexible⁶ and must be decided on the circumstances of each case.

It may in given circumstances be fair to request a tenderer to explain an ambiguity in his tender or to correct an obvious mistake. In a complex tender it may be fair to ask for clarification of details required for the proper evaluation of the tender. However, whatever is done must not cause the process to lose the attributes of fairness, transparency, competitiveness and cost

¹ Metro Projects CC v Klerksdorp Local Municipality 2004(1) SA 16 SCA.

² Act No 108 of 1996.

³ Act No 5 of 2000.

⁴ Act No 209 of 1993 - section 10G(5)(a).

⁵ Act No 3 of 2000 – section 3(2)(a).

⁶ Logbro Properties CC v Bedderson N.O. and Others 2003(2) SA 460 SCA.

effectiveness.

Regard must also be had for the fact that the Preferential Procurement Policy Framework Act defines what is an “acceptable tender”. It is a tender which *“in all respects complies with the specifications and conditions of tender as set out in the tender document”*.

The court recognises that there are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or other of the validity divide. A minor non-compliance with the tender conditions will likely not disqualify a tender.

THE FACTS

The Klerksdorp Municipality invited tenders for the construction of low cost housing. There was a subsidy of R18 400,00 available for the construction of the services and top structure on each of the 1333 stands forming part of the development.

The municipality’s engineer, one Nicolas Els, adjudicated the tenders and tabulated the information derived from each tender to indicate how much each tenderer was spending on services, how much was available for the top structure and the size of the top structure which the tenderer was offering to construct.

One of the tenderers, Remmogo Property Developers, indicated that it proposed to build a top structure of 30,2 square metres. This compared poorly with a number of the other tenderers who proposed top structures of 37 square metres or larger, all of course within the overall framework of the R18 400,00 subsidy.

Instead of reflecting this fact in his tabulation, Els made a note to the effect that *“house size and layout to be discussed with community”*. This clearly misrepresented the content of Remmogo’s tender which made no such offer and on the contrary specified that its top structure would be 30,2 square metres.

Els recommended acceptance of Remmogo’s tender. The mayoral committee before which the

recommendation was tabled requested clarification on the floor area of the top structure which Remmogo intended to build. This enquiry was communicated to Els.

The honest answer from Els would have been to refer the mayoral committee to Remmogo’s undertaking to build a 30,2 square metre top structure. Instead, he did a report with an attached plan showing a top structure of 34,3 square metres without explaining the true position. This plan as well as an alternative plan showing a top structure of 38 square metres had apparently been delivered by Remmogo to Els after the tenders had been opened and Remmogo became aware of the sizes of top structure which the other tenderers were offering to build. It was apparent that Remmogo had decided on a contingency plan whereby it would try and get the contract for the smallest size top structure but with a fallback position to construct bigger houses.

No doubt relying on Els’s recommendation, the municipality ultimately awarded the tender to Remmogo.

THE DECISION

When Metro Projects CC, one of the other aggrieved tenderers, challenged the award, the municipality, through Els, firstly tried to justify its acceptance of Remmogo’s late offer on the grounds that it did not have to follow tender procedures. This outlandish suggestion was abandoned by the municipality’s legal counsel before the Supreme Court of Appeal and rightly so. The municipality’s fallback position was to try and argue that it had acted fairly.

In addressing this question, the court summarised the facts as follows:

- A high ranking municipal official gave Remmogo an opportunity to augment its tender so that its tender might have a better chance of acceptance.
- The augmented tender was at first concealed from and then represented to the mayoral committee to have been the original tender offer and it was accepted on that basis.

The court held that:

- This deception stripped the tender process of an essential element of fairness, namely, the equal evaluation of tenders.
- Where subterfuge and deceit subvert the tender process, participation in it is prejudicial to every one of the competing tenderers.

The court set aside the award of the tender to Remmogo.

COMMENT

It will be unfair for a tenderer to be given the opportunity to materially supplement or alter his tender after the tender opening so as to improve his chances of being awarded the tender. Whether this results from corruption or deceit is irrelevant because, irrespective, the fairness of the tender process will have been fundamentally undermined.

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