

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED.

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DATE
SIGNATURE

Case no.: **2022/003417**

In the matter between:

**SWISSPORT SOUTH AFRICA PROPRIETARY
LIMITED**

APPLICANT

and

**AIRPORTS COMPANY SOUTH AFRICA SOC
LIMITED**

1ST RESPONDENT

MENZIES AVIATION (SOUTH AFRICA)

2ND RESPONDENT

**NAS COLOSSAL AVIATION SERVICES
PROPRIETARY LIMITED**

3RD RESPONDENT

Coram:

Dlamini J

Date of hearing: 21, 22 & 23 November 2022 - Open Court (11E).

Date of delivery of Judgment: 10 March 2023

This Judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

[1] This is a review application wherein the applicant seeks to review and set aside the decision of the first respondent awarding the tender to the second and third respondents.

LEGAL FRAMEWORK

[2] The constitutional and legislative framework in terms of which administrative actions may be taken in the procurement process are now well established and are set out in Section 217¹ of the Constitution and the Preferential Procurement Policy Framework Act, Act 5 of 2000 (the PPPFA).

[3] Section 217 of the Constitution provides that;-
(1) When an organ of the state in the national, provincial, or local sphere of government, or any other institution, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent competitive, and cost-effective.

¹ Constitution of the Republic of South Africa, 1996

(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.

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

[4] The PPPFA is the national legislation contemplated in section 217 (3) of the Constitution. It requires the application of a preference point system to public tenders.

BACKGROUND FACTS

[5] The applicant (Swissport), the second respondent (Menzies) as well the third respondent (NAS Colossal) are all qualified and experienced companies that are already providing ground handling services to all ACSA's airports.

[6] The facts which form part of this dispute are largely common cause.

[7] On 26 November 2022 ACSA, invited proposals from suitable experienced, and qualified ground handling companies to be granted two licenses to provide ground handling services at its nine airports (the RFP). The uniqueness of this tender is that ACSA intimated that it will be awarding a no-fee license that permitted the successful bidders to conclude a license agreement with airlines to provide ground handling with third parties for the provision of such services as they might be required, at rates or prices to be negotiated and agreed with each such airline. The RFP included a pro forma Ground Handling License and Service Level Agreement.

[8] This tender was issued by the ACSA in line with and following the decision of the Court in *Swissport South Africa (Pty) Ltd v Airports Company South Africa SOC Limited* [2020] ZAGP JHC 70 (2 March 2020) (*Swissport 1*) which involved the 2018 request for proposal, the predecessor to the current tender process. In that case, the Court held that section 217 of the Constitution, the PPPFA, and the Procurement Regulations applied to ACSA's tender process in respect of the licensing of ground handling services.

[9] The decision in *Swissport 1* was in line with the decision of the SCA in *Airports Company South Africa SOC Ltd v Imperial Group Ltd*,² which reasoned that section 217 (1) of the Constitution applies “*whenever an organ of state contracts for goods or services, whether for itself or somebody else*”.

[10] The three well-known ground-handling providers that is; Swissport, Menzies, and NAS Colossal submitted their bids.

[11] On 6 December 2021, the bidders were invited to a compulsory briefing session.

[12] The RFP sets out the process to be followed in evaluating the tender.

12.1 a pre-qualification criterion that bidders must have a BBBEE status of Level 2.

12.2 compliance with mandatory administrative requirements, including the submission of standard bidding documents and a transformation plan.

12.3 a functionality evaluation in respect of which tenderers were required to score for certain sub-criteria and to achieve an overall minimum threshold of 72 points out of 100.

12.4 a comparative evaluation of the qualifying bids based on price and BBBEE.

² (1306/18) [2020] ZASCA 02 (31 January 2020)

[13] On 17 January 2022, ACSA convened a meeting between itself and all the potential bidders to engage and agree on the methodology around the pricing schedule, which required bidders to provide pricing for handling a narrow-body aircraft and a notional widebody aircraft based on certain assumptions as to the resources required to turn around those aircraft. Following, this meeting ACSA, prepared a revised pricing schedule on 25 January 2022, schedule Z. The key feature here is that this new pricing schedule was prepared in agreement with all the bidders.

[14] The revised pricing schedule provides for the bidders to specify a rate per turn to turn around a notional narrow-body and widebody aircraft with ground times of 40 minutes and two hours and specified the minimum resources required to turn around these aircraft. The prices contained in the pricing schedule are not the actual prices to be offered to the airlines with which the bidders will subsequently contract. It was anticipated that the prices submitted by a bidder would reflect the prices that it would ultimately offer to the airlines for a narrowbody and widebody aircraft in the scenarios set out in the pricing schedule.

[15] On 30 March 2022, NAS Holdco and Menzies PLC the holding entities of the second and third respondents wrote to ACSA to notify it of the impending merger between NAS Holdco and Menzies PLC.

[16] On 23 May 2022, ACSA awarded the tender Menzies and NAS Colossal.

[17] On 22 June 2022, following the award of the tender, ACSA entered into Service Level Agreement with the successful bidders.

[18] Aggrieved with this decision, Swissport launched an urgent application in which it sought the following orders;-

18.1 in Part A of the order applicant sought an order interdicting the respondents from taking any steps, alternatively further steps to

implement the first respondent's decision to award the tender for the provision of ground handling services at all ACSA airports to the second and third defendants.

18.2 In Part B of the application, Swissport sought to review and set aside ACSA's decision to award the tender to NAS Colossal and Menzies.

[19] The question that falls to be determined is whether ACSA interrogated the market-relatedness of the prices submitted by the successful bidders. That is, whether the bids submitted by the successful bidders to the first respondent were market-related as required by the Procurement Regulations and further whether the successful bidders low-balled when they submitted their bids. Finally, whether Swissport has shown that it was irrational for ACSA to award the tender to the two successful bidders in circumstances where there was a pending merger between their international holding entities.

[20] On 29 June 2022, the applicant removed Part A of this application with costs reserved. I will deal with the issue of these costs below.

[21] It is trite that a decision taken in the context of a tendering process, including decisions to award tenders, constitutes administrative action for the purposes of PAJA. The decision is also subject to review on the basis of the principle of legality in terms of the Constitution.

MARKET RELATEDNESS

[22] In its heads of argument, the applicant argues that the ACSA had a duty to consider whether the prices submitted by the successful bidders were market-related or not. The applicant insists that the market-relatedness of the bid is a mandatory and materially relevant consideration in any public tender. This becomes vital in the present tender, argues the applicant, because the services are to be rendered not to ACSA but to the airlines that make use of ACSA's airports.

[23] It is further submitted by the applicant that the prices contained in the bidders completed pricing schedule are not the actual prices to be offered to the airlines with which the bidders will subsequently contract. This situation according to the applicant will create a real risk and strong incentive that those bidders might 'low-ball' by submitting unrealistic low prices for purpose of winning the ACSA tender and then charging higher prices to the airlines.

[24] In reply, the second respondent argued that it complied with its obligation and provided its actual prices for the cost component required in terms of the agreed schedule Z. Further, submit the second respondent that for a considerable time the relevant market and its prices have been set by all the bidders herein, in the result that the bidders herein comprise this market including their range of price.

[25] The applicant's allegation that the ACSA did not interrogate the market-relatedness of the bidding prices has no merit and stands to be dismissed. This is so because the pricing schedule was agreed upon by ACSA and all the bidding parties on 17 January 2020, that culminated in the drawing of the appendix Z schedule. Part of appendix Z provides as follows;-

“6. To ensure like-for-like tender comparison bidders must submit pricing strictly in accordance with this pricing schedule. Deviation from this pricing schedule could result in a bid being declared nonresponsive.”

“9. The pricing schedule provided will be used for comparison purposes and awarding of a license as directed by the PPPFA regulations and ACT.”

[26] Further, on behalf of ACSA in the answering affidavit Ms, Mphephu testified that she was intrinsically involved in the drawing up of the bid document and denies that ACSA did not have the knowledge and did not properly consider whether the prices submitted by the successful bidders were market-related.

In paragraph [7] of her affidavit, she says the following; *“I led the process of formulating input to the Service Level Agreement with the service providers. In doing so, I consulted with internal airport stakeholders, conducted research on industry best practices, and proposed appropriate model for ACSA with regard to the provision of Ground Handling Services at ACSA airports before the tender was issued. I was also involved in the evaluation of prices submitted by the bidders and I was present at the meeting between ACSA and the bidders on 17 January 2022”*.

Ms. Mphephu continues at [9] and says; *“I considered the prices submitted against my own knowledge of the nature of the services required and the way that such services would be generally priced in the industry”*.

[27] In my view, Ms. Mphephu's evidence put paid to the applicant's submission that ACSA did not interrogate the market-relatedness of the prices submitted by the successful bidders. Significantly no evidence has been adduced by the applicant in this Court to rebut Ms. Mphephu's testimony. Accordingly, her evidence remains unchallenged and should stand.

[28] The allegation by the applicant that the prices submitted by the second and third respondents were not market-related and it appears that there may have been some measure of *“low-balling”* by the two successful bidders is misplaced. The applicant has not provided this Court with evidence to sustain this claim and this allegation stands to be dismissed. As I have indicated above, the pricing schedule was agreed upon by all the bidding parties. Second, ACSA notified the bidding parties that the pricing schedule they submitted in the bid, ACSA will share this information with the airlines. Therefore, there was no incentive for the successful bidders to low-ball their prices in circumstances where they were fully aware that ACSA will share their prices with the airlines.

[29] Also, it is common knowledge that before the bidding parties submitted their bids, the bidding parties were and are continuing to provide ground-handling services to the very same airlines. The airlines have knowledge, skill, and

expertise in this industry. Therefore to suggest, as the applicant does, that they can be low-balled by the successful bidders is rather not practical and stands to be dismissed.

[30] Significantly, to safeguard against low-balling ACSA included the penalty provisions in the Service Level Agreement, which stipulated that if any bidder submitted information which information could in the future be discovered to be incorrect, ACSA will be entitled to revoke the license. Accordingly, there exists no incentive for the successful bidders to low-ball in circumstances where the successful bidders knew that if discovered ACSA will revoke their license.

[31] Further, subsequent to the award of the tender, Menzies concluded new contracts with Safair and Air Belgium. This, in my view, bolsters this Court finding that ACSA considered the bidder's prices and this further dispels any notion of low-balling by the successful bidders. In that had Menzies low-balled, Safair and Air Belgium would not have concluded these new contracts, if Menzies's pricing schedule materially differed from the pricing schedule that it submitted in the bid to ACSA.

[32] In all the circumstances mentioned above, I am satisfied that ACSA took all reasonable measures to ensure that the pricing model was commercially viable. That ACSA interrogated the pricing and ensured that there was no low-balling in this tender. In the result, it is thus my finding that the prices of the successful bidders were commercially viable and were market-related.

MERGER

[33] I now turn to deal with the merger of the holding companies of the successful bidders.

[34] It is common cause that at the time ACSA was evaluating this bid, the international holding companies of the successful bidders were engaged in a discussion to merge the successful bidder's global holding companies

[35] In July 2022, the Competition Commission approved the merger subject to conditions, including a divestiture condition which required the disposal of, the share of Agility Public Warehousing Company K.S.P. in NAS Colossal's South African ground handling business.

[36] The applicant argues that the merger has resulted in two principal irregularities;-

36.1 ACSA did not apply its mind to the potential impact of the merger on ground handling services at ACSA's airports, particularly if divestiture had not been ordered.

36.2 Second, divestiture, undermines the principles of public procurement in that it allows the purchaser of the divested business to obtain the benefit of an ACSA license without having competed for the opportunity.

[37] In reply, ACSA argues that the proposed merger did not prohibit it, from adjudicating the tender. Further, it acted reasonably and rationally because it received legal advice to proceed with the adjudication of the tender. Finally, the approval of the merger by the Commission means that Menzies and NAS will continue to conduct business in this country as separate and distinct entities.

[38] In my view, the applicant's submission in this regard has no merit and must be dismissed. This is so because there is nothing in the law that prohibited ACSA from adjudicating this tender during the proposed merger. Doing so will have resulted in ACSA having to wait for an indeterminable period for the Competition Commission to issue its ruling. ACSA has a legislative mandate to ensure that the traveling public and airlines have certainty of being provided with ground handling services at its airport.

[39] Mergers and acquisitions are normal commercial transaction that takes place daily nationally and internationally. There is nothing unique or unlawful about them. In any event, the Competition Commission delivered its ruling and ordered the divestiture of one of the successful bidders. The Competition Commission's ruling ensured that there would be no monopoly and this leveled the playing field.

COSTS IN PART A

[40] The applicant had brought the application in two parts. Part A of the notice of motion sought an order, on an urgent basis interdicting ACSA and the successful bidders from taking any steps to implement the award and extending the term of the current license agreements of Swissport and the successful bidders, pending the finalization of the review contemplated in Part B.

[41] On 31 May 2022, the applicant sent a letter to ACSA regarding the decision not to award the tender to Swissport.

[42] On 3 June 2022, ACSA replied to the aforesaid letter and undertook to respond to the applicant's letter by the close of business on 6 June 2020.

[43] On 6 June 2022, the applicant launched the urgent application.

[44] On 21 June 2022, following a meeting between the parties, ACSA via email extended the applicant's licence until 31 March 2023.

[45] On 29 June 2022, Swissport removed the urgent application with costs reserved. The result is that the applicant dragged the respondents to court in circumstances when it was unnecessary for the applicant to do so. The respondents were forced to incur costs and file their opposing papers to defend the urgent application.

[46] I have dismissed the applicant's main application, accordingly, costs should follow the result. The applicant is ordered to pay the costs of the respondents in Part A.

[47] Taking into account all the circumstances that I have alluded to above, it is my considered view that the applicant has failed to discharge the onus that rested on its shoulders and proved its case for the relief it sought. Accordingly, the review application in Part B is dismissed.

ORDER

1. The order marked X which I signed on 16 February 2023 is made an order of this Court.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 21, 22 & 23 November 2022

Delivered: 10 March 2023

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