

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 5838/2022P

In the matter between:

SHULA CONSTRUCTION CC

APPLICANT

and

**ETHEKWINI MUNICIPALITY
RESPONDENT**

FIRST

**STEDONE CIVILS (PTY) LTD
RESPONDENT**

SECOND

JUDGMENT

P C BEZUIDENHOUT J:

[1] First Respondent advertised for tenders in respect of the provision of civil engineering services for the Redcliffe Housing project (Wards 59 & 60). Applicant was one of the tenderers and was informed during February 2022 that it had been unsuccessful. Its bid was found to be unresponsive as it only achieved a scoring of 51 out of 100 points where it required at least 60 points for it to proceed. Applicant now seeks that the awarding of the tender to Second Respondent be reviewed and set aside; that the contract entered into between First and Second Respondent be declared *nul* and *void ab initio* and costs if the matter is opposed. The application for review has been opposed by both First and Second Respondents.

[2] It was submitted by Mr Pedderson, on behalf of Applicant, that the issues that require determination was whether First Respondent correctly interpreted and correctly scored Applicant and whether it should have been declared non-responsive or not.

[3] It was submitted on behalf of Applicant that in terms of section 6(2)(c), 6(2)(c)(iii), 6(2)(e)(x), 6(2)(f)(ii)(cc)(dd) and 6(2)(i) of PAJA Applicant was entitled to bring the review application and that the grounds for the review are set out in these sections. It was submitted on behalf of Second Respondent that Applicant failed to set out in its founding affidavit the grounds of review and that that was only brought to the attention of everyone at the hearing. Mr Pedderson referred me to two cases Logbro Properties CC v Bedderson NO and others 2003 (2) SA 460 (SCA) paragraph 5 and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at paragraph 25. They both deal with the right to review an administrative decision and it is not disputed in this matter and therefore not necessary to deal with it any further. I am satisfied that Applicant, having been aggrieved by the outcome, is entitled to bring a review application. Although it may not have been set out in detail what exactly the grounds of review were it is possible from a reading of the papers to establish what the grounds are.

[4] It is apparent from Applicant's papers that the main contentions are that the bid adjudication and bid evaluation committee had incorrectly scored the points of Applicant relating to the contract manager, site agent and the foreman and the methodology and accordingly that as a result of the incorrect scoring it was found to be unresponsive. It was submitted that if it was done correctly then indeed it would have scored more than 60 points.

[5] It may be prudent at this stage to refer to the tender requirements which appear on page 143 of the indexed papers. On page 143 it sets out the criteria for the contracts manager, site agent and foreman. It clearly sets out what experience is required to obtain a certain level in terms of the scoring diagram. At the bottom of page 143 it is marked NB and it is stated:

“The period stipulated in the respective levels for the various key personnel, shall only be counted for the time spent in that key position. No period prior to being promoted to one of the respective positions above shall be counted towards the experience of the employee.”

[6] On page 66 of the papers it sets out that Applicant had only completed three relevant projects within the past 15 years and therefore fell into level 3. As far as the contract manager is concerned it fell into level 1 as most of his experience was irrelevant and as far as the site agent that he had no relevant experience therefore also fell into level 1 and the foreman only had 3 and ½ years relevant experience therefore also falling into level 1.

[7] It was submitted on behalf of Applicant that from page 445 to 452 it set out the position of the managing member/contracts manager and/or the projects that it had dealt with over the years. The *curriculum vitae* of the site agent was set out on page 455 and sets out everything that he had done over the years. That of the foreman is set out in pages 462 of the indexed papers and sets out the previous work which he had done. As far as the construction methodology is concerned it was submitted that it was the contention of Applicant that it could not include it as it was a requirement that it employs local labour as subcontractors and that that could only be established when the contract had been amended.

[8] It was submitted on behalf of First Respondent that the issues were narrow and that as appears from page 143 the criterion for the project organogram and experience of key staff is set out clearly on that page. Further it is stated at the bottom of the page and marked NB which is referred to in paragraph 5 above. It was submitted by First Respondent that there was a volume 6 which had been missed by all the parties. Applicant had in actual fact at page 633 thereof set out the subcontractors that were to be used. This however does not assist Applicant because it would only have granted it 2 points which would still have resulted in Applicant still being far short of the points that it required. It was submitted that Applicant did not meet the threshold according to the point that were scored and accordingly that the application should be dismissed. I was referred to *Dr J S Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr J S Moroka Municipality* (2014) 1 All SA 545 (SCA) where it was held that there was no discretion to condone a failure to comply with the prescribed minimum prerequisites.

[9] It was submitted on behalf of Second Respondent that the volume which First Respondent was referring to in relation to the subcontractors was not before Court and therefore it cannot be considered. It was submitted that Applicant had to set out the experience of the various persons and had to comply with the specifications required. It was submitted that the bid evaluation committee acted correctly and that the *curriculum vitae* of the project manager which was submitted on behalf of Applicant did not set out the experience which was in relation to a housing project constituting multidisciplinary civil engineering infrastructures. The site agent had to have between 11 and 15 years' experience in projects of a similar nature. The *curriculum vitae* submitted by Applicant did not have such experience and therefore did not qualify for the required points to be allocated. The same was the position with the foreman. Further no methodology of subcontractors was provided and accordingly First Respondent scored Applicant correctly in this regard. It was submitted that the committee considered all the facts and correctly found that Applicant was non-responsive.

[10] In considering the submission on behalf of Applicant consideration must be given to the requirements as set out in the tender documents. The tender set out clearly with regard to the project manager, the site agent and the foreman what experience was required and also the number of years' experience required in each case. Applicant provided *curriculum vitae* in respect of the 3 positions but did not provide a construction methodology as it was contended that subcontractors had to be employed from the local community and it could therefore not have been included at that stage. However as was submitted on behalf of First Respondent it appears that such a list which was provided however did not form part of the record, which was not handed in as part of the record but also if indeed it was it would only have awarded 2 further points which would still have resulted in Applicant scoring less than the number of points which Applicant required to attain a score of 60.

[11] The main dispute by Applicant is the scoring which was done by the evaluation committee and that if it was scored correctly Applicant would have had a higher score and accordingly would have been found to be responsive and would not have been disqualified. It would therefore have been a responsive tender.

[12] Applicant in the adjudicating process scored 51 out of 100 points and submits that if it was done correctly it should have scored 67 point. It is conceded by Applicant that the number of evaluation points for functionality was 60.

[13] In the functionality evaluation criteria the tenderers experience is a total of 40 points and the experience of key staff namely the contract manager 5 points, the site agent 10 points and the foreman 10 points. The functionality evaluation panel consisted of four persons. In respect of Applicant it found that the tenderers experience in the past 15 years only had 3 relevant projects and therefore fell into level 3. It included a key staff specific and admin staff and fell into level 4. The contract manager has relevant qualifications but irrelevant experience and falls into level 1. The staff site

agent has relevant qualification but no relevant experience and fell into level 1 and the foreman had 3 to 5 years relevant experience and fell into level 1.

[14] From the score cards that were provided in respect of the tender of Applicant the total scores that were awarded to Applicant was 48, 50, 49 and 56 thus the average of 51. From this it is apparent that not one of the four persons who scored Applicant awarded it the required 60 points. As stated previously even if the 2 points extra for the methodology was granted then it may have increased the one scorer to 58 which is still below 60 and would have only had an effect of a $\frac{1}{2}$ point on the total score. A perusal of the score cards sets out in each case clearly the number of years' experience, qualifications etc. that was required in providing the necessary score.

[15] In respect of the contract manager a score of 1 was awarded. It is apparent from these score cards that, Mr Naidoo, of Applicant was the managing member for 20 years and only a contract manager for a period 3 years. It varied with the scorers between 3 years contracts experience and 2 years' experience and was therefore awarded accordingly. This is taken from the *curriculum vitae* which Mr Naidoo provided wherein his employment history states that he was a contract manager from July 1997 to April 2000 and from April 2000 to date was the managing member of Applicant. It is therefore not apparent from being the managing member if he was in actual fact involved in each project and actually acted as the contract manager. Accordingly from the information that was provided by Applicant the scoring was done and it does not appear that it was done to the prejudice of Applicant. The same applied to that of the site agent and the foreman and this was also based on the *curriculum vitae's* which were provided by Applicant when the tender was submitted.

[16] It would accordingly, from what has been set out above, appear that there was no scoring done which was not done in terms of the guidelines which were provided. In actual fact it appears that if there had been any incorrect scoring it was based on the

incorrect information which was provided by Applicant in submitting its tender and not setting out clearly what period Mr Naidoo acted as contract manager. As set out above the guideline was specific that only the period in which such a person performed duty as a contract manager would be taken into account. The result would thus be that the period which he was a managing member and not a contract manager was accordingly not taken into account and this was due to the manner in which the *curriculum vitae* had been completed.

[17] In the circumstances I am unable to find that the scoring by First Respondent was done incorrectly or to the prejudice of Applicant. First Respondent provided a complete record of the scoring of the relevant documents etc. and therefore it is determinable from these documents how these specific persons scored each of the tenders and on what basis the points were allocated.

[18] In the circumstances Applicant has failed to make out a case that the decision to award the tender be reviewed and set aside.

Accordingly the following order is made:

The application is dismissed with costs.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 5 MAY 2023
JUDGMENT HANDED DOWN ON: 24 MAY 2023

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