



APPEAL AUTHORITY

Attention: Mr Dirk Kotze
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NOTICE OF DECISION

**APPEAL IN TERMS OF SECTION 62 OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT,
32 OF 2000: AGAINST THE AWARD OF TENDER NUMBER 199S/2022/23**

BACKGROUND

The Appellant is BC Security Solutions (Pty) Ltd herein represented by Mr Dirk Kotze ('Mr Kotze') of Dirk Kotze Attorneys.

The Appellant appeals against the decision of the City of Cape Town's ('the City') Supply Chain Management Bid Adjudication Committee ('SCMBAC'), taken under delegated authority, to award tender number: '199S/2022/23: PROVISION OF SECURITY SERVICES AT VARIOUS COUNCIL FACILITIES, PATROL ROUTES AND ADHOC SITES' ('the tender').

The City advertised the tender on 4 November 2022 and the closing date for the submission of bids was 8 December 2022. In response to the tender, the City received

one hundred and two (102) bids of which sixty-six (66) bids, including the Appellant's bid, were deemed responsive.

After the evaluation of the bids, the Supply Chain Management Bid Evaluation Committee ('SCMBEC') recommended that the tender be awarded to the twenty-five (25) highest ranked tenderers. The Appellant was not recommended for award as it was ranked at number forty-one (41).

The SCMBAC endorsed the SCMBEC's recommendation and subsequently awarded the tender on 11 December 2023 and 15 January 2024, respectively. The Appellant was notified of the decision on 18 January 2024.

Dissatisfied with the decision of the SCMBAC, Mr Kotze, on behalf of the Appellant, lodged an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') on 27 January 2024. The appeal was coupled with a request for information in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') and a request for reasons in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). No grounds of appeal were submitted, as the Appellant reserved its right to do so upon finalisation of the PAIA and PAJA requests.

Subsequent to the above, on 8 February 2024, Mr Kotze submitted the Appellant's grounds of appeal. Mr Kotze did not indicate that the Appellant requires a further opportunity to supplement its grounds of appeal, or further reserve its right to do so pending the finalisation of the PAIA and PAJA requests; hence this decision will focus on the grounds of appeal received on 8 February 2024.

GROUND OFS OF APPEAL

The Appellant's grounds of appeal can be gleaned from annexure 'A'¹ attached hereto and will be discussed in more detail under the following headings: -

1. The Evaluation of Price; and
2. Comparative Price Assessment.

¹ The annexures to the appeal have not been included due to the volume but can be made available upon request.

It is important to note that all aspects of the appeal were considered, despite not making specific reference thereto.

ANALYSIS OF FACTS

Legislative Framework

In terms of the Constitution, when an organ of state contracts for goods and services it must do so in accordance with a system that is '*fair, equitable, transparent, competitive and cost effective*'². The Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'), and the Regulations³ thereunder, as well as the Municipal Supply Chain Management Regulations⁴ ('SCM Regulations'), promulgated under the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') must be considered to give effect to section 217 of the Constitution.

In line with the obligation imposed by sections 111 and 112 of the MFMA read with SCM Regulations the City adopted and implemented a Supply Chain Management Policy⁵ ('SCM Policy').

It is trite law that the requirements set out in the tender document also forms an integral part of the evaluation criteria and cannot be disregarded at whim.⁶ Both tenderers and the City must comply with those requirements.

These legislative provisions, together with the conditions contained in the tender document, form the basis against which the Appellant's appeal must be considered. I now turn to consider the Appellant's ground of appeal.

Ground 1: The Evaluation of Price

- ***The Applicable Pricing Structure***

² Section 217 of the Constitution of the Republic of South Africa, 1996.

³ Government Notice R32 in GG 40553, dated 20 January 2017 was applicable to this tender.

⁴ The SCM Regulations, published under General Notice 868 in GG 27636, dated 30 May 2005.

⁵ The SCM Policy approved by Council: 30 May 2019 vide C18/08/2019 was applicable to this tender [2019 Policy].

⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 at para 40.

LJM

The Appellant states that tenderers were expected to provide pricing in December 2022 for services that would only commence at the earliest on 30 July 2024, i.e. approximately nineteen (19) months later. According to the Appellant, it appears that all the successful tenderers based their pricing for guarding services on the minimum pricing guidelines contained in the Private Security Industry Regulatory Authority Illustrative Costing Guideline with effect from 2 March 2022 ('2022 PSIRA Illustrative Costing Guideline') applicable in December 2022. This will necessitate artificial adjustments upwards when the services for the tender commence on or after 30 July 2024.

The Appellant states that in contrast, it acted more responsibly by submitting its pricing for guarding services based on the minimum pricing guidelines contained in the Illustrative Pricing Guide of the National Bargaining Council for the Private Security Sector effective from 1 March 2024 until 28 February 2025 ('2024/2025 PSIRA Illustrative Pricing Guide') that will be applicable by 30 July 2024. According to the Appellant, '*...these prices remain fixed, and will not have to be adjusted when the services actually commence...if the BAC was to fairly assess the prices submitted by all of the bidders, it should have first adjusted the prices presented...to the rates that would actually be charged in July 2024, and measured these against the fixed rates submitted by the appellants*'.

The Appellant further states that, by the time tenderers submitted their bids on 8 December 2022 (i.e. the closing date of the tender), they were or ought to have been aware of the actual costs for employing category A, B and C guards with effect from 2 March 2024. According to the Appellant, this information should therefore have formed the basis for payment (i.e. pricing) for such guards for 'year one' of the tender.

Clause 5.9 of the Price Schedule⁷ of the tender document states as follows:

*'[t]he Tenderer shall when pricing for this Tender take into account the terms and conditions of the **National Bargaining Council for the Private Security Industry Sector as per Regulation Gazette No: 11045 concluded for the Private Security Sector that applies at the time of tender submission**' [Writer's own emphasis].*

It is important to note the following:

⁷ Page 32 of the tender document.

1. The 2022 PSIRA Illustrative Costing Guideline⁸ is linked to Regulation Gazette No: 11045 referred to in clause 5.9 of the Price Schedule, which was published on 20 February 2020 and became effective from 2 March 2022; and
2. The 2024/2025 PSIRA Illustrative Pricing Guide is linked to the National Bargaining Council for the Private Security Industry Sector 2023-2027 Main Collective Agreement ('the 2023-2027 Main Collective Agreement'). The members of the Bargaining Council reached an agreement in respect of the 2023-2027 Main Collective Agreement on 13 September 2022, and the agreement was signed on 25 November 2022. The 2023-2027 Main Collective Agreement was subsequently signed by the Minister of Labour on 14 December 2022; gazetted/published (i.e. promulgated) in Government Gazette 47797 on 30 December 2022 (i.e. after the tender closing date on 8 December 2022).

It should also be noted that the applicability of '*Regulation Gazette No: 11045 concluded for the Private Security Sector*' as per clause 5.9 of the Price Schedule, and by implication the 2022 PSIRA Illustrative Costing Guideline linked thereto, was confirmed to tenderers during the non-compulsory, but strongly recommended clarification meeting held on 18 November 2022, as well as a notice⁹ to tenderers dated 18 November 2022.

Based on the above, I am of the view that it is an irrefutable fact that as per the wording of clause 5.9 of the Price Schedule, the 2022 PSIRA Illustrative Costing Guideline was applicable at the time of tender submission. Furthermore, I am of the view that tenderers should have taken the 2022 PSIRA Illustrative Costing Guideline into account when pricing for the tender and not the 2024/2025 PSIRA Illustrative Pricing Guide as indicated by the Appellant. The SCMBEC was therefore correct to use the 2022 PSIRA Illustrative Costing Guideline during the evaluation of the tender.

- **Price Adjustment**

The Appellant further states that clause 5.9 of the tender document does not indicate that '*...all pricing could be adjusted upwards when the tender was "operationalised"*'.

⁸ Attached hereto as annexure 'B'.

⁹ The notice confirmed that '*...clause 5.1 to clause 5.17 of the Price Schedule to remain as in the tender document*' i.e. thus including clause 5.9 of the Price Schedule which indicated that '*Regulation Gazette No: 11045 concluded for the Private Security Sector*' was applicable at the time of tender submission.

It should be noted that while the 2022 PSIRA Illustrative Costing Guideline provides a benchmark for pricing for evaluation purposes; Schedule 8 of the tender document makes provision for contract price adjustment for, *inter alia*, the minimum sectorial determination of the Department of Employment and Labour: Private Security Sector (i.e. the labour component).

During the consideration of the appeal, the SCMBEC confirmed that the prices offered by all the successful tenderers would be upwardly adjusted when services in respect of the tender commence. This was also confirmed to tenderers during the clarification meeting held on 18 November 2022. Upon perusal of the minutes of the clarification meeting, it states as follows: '*Gazetted statutory price increases in respect of the labour component that may come into effect between the date of tender submission and date of tender implementation may be considered at the time of tender operationalisation [sic]*'. It is imperative to underscore that the information in question was explicitly communicated to tenderers during the clarification meeting convened on 18 November 2022, which is indicative that tenderers were alive to the fact that the prices would be upwardly adjusted.

Furthermore, upon perusal of the resolutions of the SCMBAC dated 11 December 2023 and 15 January 2024 respectively, it specifically states at paragraph (c) thereof that '*[p]rices will be subject to adjustment in accordance with schedule 8 of the tender document*'.

- **Market Related Pricing and Risk Analysis**

The Appellant states that the SCMBEC undertook negotiations with some of the successful tenderers, in respect of line items which the SCMBEC believed were higher than the '*market-related*' criteria. The Appellant refers to paragraph 6.4 of the report to the SCMBAC and contends that this pricing amounts to deliberate '*low-balling*', in which tenderers presented prices below those that are market related.

In addition, the Appellant states that many of the prices presented by the successful tenderers present a significant risk to the City, as it should be evident that the successful tenderers will not be able to sustainably perform the services which they have been awarded at the prices contained in their bids.

LW

It should be noted that the term 'market related' is not defined in the SCM Policy. However, when having regard to the fact that the City may negotiate a market related price, it stands to reason that a non-market related price refers to a price that is higher than what is expected to be paid and not a price which is lower. In *Sethakatshipa Business Enterprise and Others v Mangaung Metropolitan Municipality* where the court was considering the irregularity of disqualification of a tenderer for having tendered a low price, the court ruled that fairness dictates that tenderers should be afforded an opportunity to explain their prices before being disqualified.¹⁰

To reiterate, in terms of clause 5.9 of the Price Schedule, tenderers should have taken the 2022 PSIRA Illustrative Costing Guideline into account when pricing for the tender. The 2022 PSIRA Illustrative Costing Guideline is divided into three (3) parts. **Part A** includes the employee benefits, **Part B** is statutory fees and **Part C** provides for overheads, which includes, *inter alia*, '...liability and other insurance, payroll and admin, control centre, transport costs (vehicles, maintenance and fuel), fixed infrastructure, rates & taxes, registers, security aids, occupational health and safety compliance, management and supervision and statutory fees payable' and sets of uniform in terms of statutory requirements.¹¹ It should be noted that the 2022 PSIRA Illustrative Costing Guideline stipulates that the costs provided therein '[e]xcludes profit and VAT'.

During the consideration of the appeal, the SCMBEC stated that '[i]t is important that a distinction be made regarding **minimum threshold** and **market related/benchmark rate**:
- **minimum threshold**= Parts A and B
- **market related/benchmark rate**= Parts A+ B+ C (as per report to the SCMBAC)'

According to paragraph 6.4 of the report to the SCMBAC, under the heading 'A related financial offer', it states that:

'[t]he prices offered by recommended preferred bidders were deemed not market related. The BEC identified [sic] high rates and was authorised...to enter into negotiations. In order to establish whether rates are market related an analysis of current rates, a desktop search and a review of PSIRA illustrative pricing guidelines was undertaken.

¹⁰ *Sethakatshipa Business Enterprise and Others v Mangaung Metropolitan Municipality* (A917/2014) [2015] ZAFSHC 32 (10 March 2015) para 31. This is a judgment of the Free State Division of the High Court and although not binding in this jurisdiction, I find this principle to be apt.

¹¹ Refer to annexure 'B'.

Market rate/ benchmark rates for the labour component was derived from the sectorial determination from PSIRA Illustrative Costing Guideline (effective 02 March 2022)...

The market rate/ benchmark rates rate [sic] was thus determined to be the rate including overheads for all Grades.

The BEC noted that the PSIRA illustrative pricing guideline excludes profit in their structure.

...

The BEC conducted a desktop search in order to establish a fair allowance for profit and found that, according to the Corporate Finance Institute 20% is considered as a good profit margin. The BEC therefore adopted 20% as an acceptable deviation from market rate/ benchmark rates'.

During consideration of the appeal, the SCMBEC stated that the successful tenderers' prices that exceeded the 20% profit margin applicable to the market related rate were subject to price negotiations. By way of an example, the market related rate for the tender was R19 917.96¹² as set out in Annexure B. A 20% profit margin would amount to R3 983.59. Therefore, tenderers whose prices were in excess of R23 901.55 ((R19 917.96 + R3 983.59) were subject to price negotiations.

On the other hand, tenderers whose prices were more than 20% below the market related rate, i.e. lower than R15 934.37 (R19 917.96 – R3 983.59) were deemed to be low. In this instance, the SCMBEC issued letters of clarification to such tenderers as part of a risk analysis to establish whether tenderers would be able to render services at the low rates identified by the SCMBEC.

The SCMBEC stated that '*...according to the Corporate Finance Institute 20% is considered as a good profit margin. The intent was to evaluate the profit margin **in the general business environment**. Anything above the 20% profit threshold was deemed to be too high...*' [Writer's own emphasis].

The Corporate Finance Institute ('CFI') is a leading international banking and finance trading institute. However, it is pertinent to note that the profit margin provided by CFI applies generally and does not specifically relate to the security industry. Upon perusal of CFI's website¹³ it clearly states that '[a] good margin will vary considerably by industry,

¹² This was in respect of a grade C guard, Monday to Sunday.

¹³ [Profit Margin \(corporatefinanceinstitute.com\)](https://www.corporatefinanceinstitute.com) [accessed 19 March 2024].

but as a general rule of thumb, a 10% net profit margin is considered average, a 20% margin is considered high (or "good"), and a 5% margin is low. Again, these guidelines vary widely by industry and company size, and can be impacted by a variety of other factors'.

More importantly, to reiterate, it is imperative that tenderers and the City comply with the prescripts of the tender document. In this regard, Lewis JA in *Westinghouse v Eskom Holdings* stated that '**[t]he tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions...**'¹⁴ [Writer's own emphasis]. Furthermore, it is a requirement for a valid procurement process that 'a tender should speak for itself'¹⁵.

Upon perusal of the tender document, it was established that profit did not form part of the Price Schedule. Clause 5.9 of the Price Schedule is clear that tenderers shall when pricing for the tender take into account the terms and conditions of the 2022 PSIRA Illustrative Costing Guideline (i.e. Parts A+B+C thereof). To reiterate, the 2022 PSIRA Illustrative Costing Guideline stipulates that the costs provided therein excludes profit and VAT. Based on the aforementioned, it is an undisputed fact that the SCMBEC in its methodology for the evaluation of price added an additional criterion i.e. profit.

In this regard, it should be noted that the tender is not the first of its kind in the City. Therefore, in the event that the SCMBEC was of the view (based on past experience) that the exclusion of profit from the 2022 PSIRA Illustrative Costing Guideline was an issue, and as such deemed it prudent for the Price Schedule to make provision for profit, same should have been included in the Price Schedule from the outset, as opposed to the SCMBEC merely adding profit as an additional criterion during the evaluation of price; and then conducting a desktop search to determine the profit margin. I am of the view that if profit was included in the Price Schedule from the outset, tenderers would have known to include a mark-up percentage and to price accordingly.

¹⁴ (476/2015) [2015] ZASCA para 43.

¹⁵ *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30 (confirmed in *Allpay*).

Furthermore, I am perplexed as to why the SCMBEC deemed it appropriate to unilaterally add profit as an additional criterion during the evaluation of price, when tenderers did not take issue with the fact that profit was not included in the Price Schedule.

As alluded to above, procurement which ultimately includes the evaluation and adjudication of tenders, must be done strictly in accordance with section 217 of the Constitution. When considering the information at hand, it appears that the procurement system was not "*fair, equitable, transparent, competitive and cost-effective*" as prescribed by section 217.

It is trite that fairness dictates that the criteria used for evaluation purposes must be disclosed upfront to all tenderers. In *Stiegemeyer Africa (Pty) Ltd v National Treasury of South Africa* the court confirmed that '*...competitors [tenderers] are entitled to know beforehand on what basis their tenders are to be evaluated*'.¹⁶ Evaluation criteria therefore cannot be tucked away or hidden from bidders only to be revealed during the evaluation stage, as in my view this would unilaterally change the rules of the game.

As a result of the above irregularity, the evaluation of price is flawed and reviewable. On this basis alone, the appeal must succeed. As such, it is therefore not necessary to discuss the potential risk associated with the low rates as averred by the Appellant.

Ground 2: Comparative Price Assessment

- ***Guarding and Security Escorts and Patrols***

The Appellant states that the basket of items used by the City to evaluate price does not differentiate between unarmed and armed guarding, as the basket of items only included unarmed guarding and mandatory/compulsory equipment. As such, the Appellant states that the award of the tender to the '*25 supposedly best-priced*' tenderers is only based on the pricing of unarmed guarding and mandatory equipment. The Appellant avers that if the successful tenderers also qualified for armed guarding or security escorts and patrols services, they were awarded these services without a price comparison to the prices offered by unsuccessful tenderers for providing the same services.

¹⁶ (2275/2014) [2015] ZAWCHC 9, para 60.

From the outset, it should be noted that the purpose of the tender is to appoint a panel of service providers to protect the City's assets, staff members and the public while on City premises. The assignment of work will be allocated to a panel member on an *ad hoc* basis. In terms of clause 2.1.5.1 of the tender document¹⁷, the service categories of the tender are guarding (including unarmed and armed guarding) and security escorts and patrols.¹⁸ The tender document was clear that tenderers could submit bids for the guarding service category only, or in combination with the security escorts and patrols service category.¹⁹ In addition to the above, clause 5.13 of the Price Schedule²⁰ states that '[s]ection A consists of two items, item 1 namely [sic] unarmed guarding and item 2 namely [sic] armed guarding. Item 1 is compulsory and item 2 are [sic] not compulsory. Tenderers must price for the mandatory line items in the service category (Section A (item 1))'.

Based on the above, I am of the view that the tender document was clear that it was mandatory for tenderers to price for unarmed guarding while pricing for armed guarding (also within the guarding service category) and the security escorts and patrols service was optional. In light of the fact that pricing for unarmed guarding was compulsory and armed guarding and security escorts and patrols was not, there was no reason to have a comparison amongst the tenderers for armed guarding and security escorts and patrols as alluded to by the Appellant²¹, since, historically; the majority of services requested are those of unarmed guarding.

- **Basket items**

In paragraph 3.6 of the report to the SCMBAC, under the heading '**Baskets"/Typical projects/evaluation of price**', the SCMBEC confirmed that '*[t]he financial offer was evaluated in terms of a basket of items / typical works project. This basket of items were based on a typical scope of work where security services and equipment would be needed. **The proposed evaluation items were identified prior to advertising and forwarded to SCM allowing for an impartial price evaluation***' [Writer's own emphasis].

¹⁷ Page 5 of the tender document.

¹⁸ Also refer to clause 13.1 of the Specifications on page 95 of the tender document.

¹⁹ Clause 2.1.5.1 on page 5 of the tender document. This is reiterated in clause 5.8 of the Price Schedule that states, *inter alia*, that tenderers may price only for those service categories tendered for.

²⁰ Page 33 of the tender document.

²¹ Refer to paragraph 61.3 of Annexure 'A'.

With regard to Appellant's averment in relation to the basket of items used for the evaluation of price, it should be noted that it is the City's prerogative to determine the conditions of tender including the methodology to be used when awarding the tender. This principle is illustrated in the case of *Dr J S Moroka Municipality v Betram (Pty) Ltd and another*²² as follows: -

'Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with the prescribed conditions will result in a tender being disqualified as an 'acceptable tender' ... unless those conditions are immaterial, unreasonable or unconstitutional'.
[Writer's own emphasis]

It should also be noted that the purpose of a basket of items/ typical works project is to give all tenderers an opportunity to be evaluated on the same platform without prejudice, as it is used as a yardstick to obtain a tangible figure from the itemised rates so that the SCMBEC can commence with the evaluation and subsequent ranking. All the bids were therefore evaluated on the same platform and the price metrics used (i.e. the basket) was not known to any of the tenderers thus ensuring fairness of the evaluation.

During the consideration of this appeal, the SCMBEC confirmed that the items that formed part of the basket *'...were derived at by considering the average number of officers and items of equipment that would be required per category based on historical usage. Historically, the majority of the service requests are for unarmed guarding and thus it was important to include unarmed guarding in the basket.'*

As previously mentioned, unarmed guarding was compulsory and armed guarding and security escorts and patrols was not²³ (hence it did not form part of the basket), historically; the majority of services requested are those of unarmed guarding. Furthermore, the Appellant has not demonstrated or substantiated how the methodology adopted by the City undermines procurement law provisions.

The Appellant further avers that there is no mechanism established to ensure that *'...the list of the 25 best-priced bidders includes a spread of those that offer: (a) unarmed*

²² 2014 (1) SA 545 (SCA), para 10.

²³ Refer to clause 5.13 of the Price Schedule above.

guards; (b) armed guards; and (c) escort / patrol services. If annexures A and D to the BEC Report are read together, it appears that:

61.5.1. Five of the successful bidders only qualified for the award of unarmed guarding services; and

61.5.2. Only ten of the successful bidders qualified for the award of armed guarding services, while 15 did not.'

In this regard, it should be noted that annexure A of the report to the SCMBAC only contains the adjudication points and that annexure D reveals whether the tenderers were responsive. Annexure D reveals the following:

- 72 tenderers were responsive for unarmed guarding;
- 22 tenderers were responsive for armed guarding; and
- 45 tenderers were responsive for security escorts and patrols.

Based on the above, the Appellant's averment relating to what is contained in annexures A and D of the report to the SCMBAC is therefore incorrect.

In light of the above, I find that there is no merit to this ground of appeal.

CONCLUSION

Based on the above analysis of facts and legislative framework, I am of the view that Appellant's grounds of appeal pertaining to the Market Related Pricing set out in ground 1 must be upheld.

Having established *supra* that the reliance on evaluation criteria not forming part of the tender document rendered the evaluation flawed, the appropriate remedy would be to revoke the tender in its entirety.

DECISION

Section 62 (3) of the Systems Act empowers the Appeal Authority to: -

'...consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.'

Acting in terms of the power vested in me by section 62 of the Systems Act, I hereby **uphold** the appeal and **revoke** the decision of the SCMBAC.

NAME: LUNGELO MBANDAZAYO

APPEAL AUTHORITY (in terms of section 62 of the Local Government: Municipal Systems Act, 32 of 2000)

LM