REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS

CASE NO.: A 69/2009

In the matter between:

SELEX SISTEMI INTEGRATI S .p. A	**APPLICANT**

And

CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA	**1ST RESPONDENT**
MINISTER OF WORKS TRANSPORT AND COMMUNICATION	**2ND RESPONDENT**
THALES AIR SYSTEMS S.A	**3RD RESPONDENT**
INDRA SISTEMAS	**4TH RESPONDENT**

Neutral citation: *Selex Sistemi Integrati SpA v Chairperson of the Tender Board of Namibia* (A 69-2009) [2016] NAHCMD 228 (8 August 2016)

Coram: NDAUENDAPO J
Heard: 12 March 2009
Delivered: 8 August 2016

Flynote: Application - Urgent Application –Interdicting respondents' from taking further action in the furtherance of the award of the tender to the third respondent – Pending the finalization of the application for review– No Prima Facie right established in founding papers – Tender properly awarded - Application dismissed.

Summary: The applicant approached the court on an urgent basis, seeking an order inter alia, interdicting the first, second and third respondents from performing any conduct in furtherance of the award of the tender in respect of the supply of equipment to the third respondent. The court appreciated the urgency of the application as it concerned the supply and installation of radar equipment before the 2010 Soccer World Cup which was to be hosted by South Africa. The purpose of such supply and installation of radar equipment was the improvement of air security within the Namibian border during the World Cup. The applicant alleged it had the lowest tender and thus had a legitimate expectation to be awarded the tender. The respondents in response alleged that the Tender Board was not bound to accept the lowest or any tender. In support of their position the first respondent referred to Section 15(6) of the Tender Board Act, 16 of 1996, Regulation 5(2)(a) of the Regulations to the Tender Board Act and the tender documents.

Held; that in terms of the Section 15(6) of the Tender Board Act, 16 of 1996, Regulation 5(2)(a) of the Regulations to the Tender Board Act and the tender documents which the applicant ought to have been aware of, the Tender Board was not bound to accept the lowest or any tender and the applicant could not have had any legitimate expectation to be awarded the tender, even if their bid was the lowest.

Held; the rumours of potential bribery were not a consideration in the Tender Board's decision. The decision was based on the fact that the successful tenderer had the highest tender index and was the preferred tenderer in terms of clause 29.3 of the Instructions to Bidders. The applicant thus, did not have any right to be heard in that regard.

Held; further that, the applicant failed to establish a prima facie right in respect of the subject matter in the main action which it sought to protect with the interim relief.

Held; In light of the above, the application for an order for an interim interdict was refused.

ORDER

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[1] That the Application is hereby dismissed with costs.

[2] In respect of first and second respondents, costs of one instructed counsel and in respect of third respondent, costs of one instructing and two instructed counsel.

REASONS

NDAUENDAPO, J

INTRODUCTION

[1] This urgent application came before me on 12 March 2009. In terms of this application, the applicant was seeking an order in the following terms:

a) Condoning the non-compliance with the Rules of this Honourable Court and hearing the application for the interim relief set out in (b), (c) and (d) below on an urgent basis as envisaged in Rule 6(12) of the High Court Rules and in particular, but not limited to condoning abridgment of the time periods and the service of this application on third and fourth respondents by way of fax or courier.

b) Interdicting the first, second and third respondents from taking any further steps in furtherance of the award of tender F1/10/2-1/2007: Acquisition of Radar Surveillance for Civil Aviation (hereafter the tender) to the third respondents, pending the finalization of the application reviewing the purported decision by the Tender Board of Namibia to award the tender to the third respondent.

c) Authorizing applicant to serve this application and any further documents by edictal citation on third and fourth respondents at their respective business addresses.

d) Directing those respondents opposing the application for interim relief to pay the costs thereof jointly and severally, the one paying, the other to be absolved.

e) Granting the applicant such further and/ or alternative relief as this court deems fit.

PARTIES

[2] The applicant is, Selex Sitemi Integrati S.P.A, a Company incorporated and registered in terms of the laws of Italy with its principal place of business at Via Tiburtina, KM 12 400 00131, Rome, Italy.

[3] The first respondent is the Chairperson of the Tender Board of Namibia, duly established in terms of section 2 of the Tender Board Act, 16 of 1996, with his principal place of business at Fiscus Building, 10 John Meinert Street, Windhoek.

[4] The second respondent is the Minister of Works, Transport and Communication.

[5] The third respondent is Thales Air System S.A, a company incorporated and registered in terms of the company laws of France with its principal place business at 45, rue de Villiers, 92526 NEUILLY SUR SEINE France.

[6] The fourth respondent is Indra Sistemas, a company incorporated in terms of the company laws of Spain, with its principal place of business at Avda Bruselas, 35 28108 Alcobensdas Madrid, Spain.

[7] Having heard counsel for the applicant and counsel for the respondents and having read the documents filed of record, the application for an interim interdict was denied. The reasons for the court's judgment now follow. The applicants were represented by Adv. Smuts S.C assisted by Adv. Coleman, Ms. Katjiepuka, was the counsel for the first and second respondents and Adv. Heathcote assisted by Adv. Barnard were counsel for the third respondent.

BACKGROUND

[8] In 2007, tenders to install radar and surveillance equipment for the Namibian civil aviation were invited by the Tender Board on behalf of the Ministry of Works Transport and Communication. The prequalification process in respect of this invitation ended in September 2007. The office of the first respondent then invited bidders on 12 December 2007 to participate at the tender process. The radar equipment had to be operative in time for the 2010 soccer world cup event which was to be hosted by South Africa. This tender became known as the F1/10/2-1/2007: Aviation of Radar and Surveillance Equipment for Civil Aviation (hereafter the tender).

[9] The invitation comprised of the instructions to bidders and particular conditions of contract. These instructions to bidders and the particular conditions of contract were drafted and issued by the Ministry of Works, Transport and Communication (hereafter, the Ministry). The Ministry also appointed a consultant (Windhoek Consulting Engineers) to assist in the evaluation of the tenders.

[10] The applicant submitted its tender on 24 January 2008. On 18 March 2008, the Secretary of the Tender Board requested confirmation that the tendered prices were firm, this letter is annexed to the founding affidavit of the applicant and marked "2". The applicant confirmed that its price was firm until 30 June 2008 by a letter dated 19 March 2008 which letter was annexed to the founding affidavit of the applicant and marked "3".

[11] The Secretary of the Tender Board then requested two extensions on the validity of the tender and the applicant agreed to an extension to 18 October 2008. On 22 August 2008, on the advice of the Ministry, the Secretary of the Tender Board, released additional requirements to be delivered by 25 September 2008. The bidders were allowed to change the original tender price in this regard. The applicant however, did not change its price.

[12] The applicant had included in its initial bid, the bid price plus VAT of 16.5%. The applicant's original bid price was, upon enquiry by Mr. Kruger of Windhoek Consulting Engineers, an agent of the Ministry of Works Transport and Communication, deducted and the tender price of the applicant was then amended, this is clear from annexures "6" and "7" to the applicants founding affidavit. This amendment was confirmed by the first and second respondents in their answering affidavits.

[13] In letters dated 3rd and 11th December 2008, the applicant requested to be given an opportunity to make oral presentations on the competing proposals. On 18 December 2008, the Secretary of the Tender Board responded to the applicant's fax and informed it that the tender requirements do not call for a presentation, hence there was no need for the same, unless the Ministry specifically made a request to that effect. No such request was received from the Department of Civil Aviation of the Ministry. In a letter dated 23 December 2008, the applicant acknowledged receipt of the Secretaries response and insisted on its readiness to make presentations or to provide the Tender Board with further information it may require to finalise the on-going evaluation of the bid. On 16 January 2009, the Secretary of the Tender Board

informed the applicant that its bid was unsuccessful. It appeared from the papers that the decision to award the tender to the third respondent was taken on 5 December 2008 and was subsequently posted on the Ministry of Finance website on 11 December 2008. The applicant was aggrieved by the fact that, in light of the date the tender was awarded, it was only informed thereof on 16 January 2009.

[14] The applicant alleged that its tender price was the lowest and that as a result it had a legitimate expectation to be awarded the tender. The first and the second respondents vehemently denied that the applicant's bid price was the lowest and stated that even if it was, which it was not, the tender board was not bound to accept the bidder with the lowest bid price. The first respondent further stated that, the price component only comprised 20% of the consideration in awarding the tender and that the technical score constituted 80% of the consideration in awarding the tender. The first respondent further stated in his answering affidavit that, even if the applicant had the lowest tender and had scored 100 on the price score, its tender index would have been 85.98216. Thus, its tender index would still not have been the highest and its tender would still not have been the preferred tender.

[15] It was further alleged in the papers that the applicant's representatives had approached one Ralph Erdtelt and indicated to him that they had funds available" to distribute to vital persons in the tender process in order to ensure that the tender is awarded in their favour". These allegations were denied by the applicant's representatives, who were further of the view that should such allegations have been considered in the determination of the award, they should have been availed an opportunity to be heard. They thus submitted that the decision to award the tender to the third respondent upon such considerations in the absence of them being availed an opportunity to be heard, was a violation of Article 18 of the Namibian Constitution.

[16] Upon learning that the tender had been awarded to the third respondent, the applicant's representatives travelled to Namibia to challenge this award. The applicant's instructing attorney, sent a letter to all interested parties on 23 January 2009, informing them that the applicant wished to challenge the award. On 2 February 2009, the applicant's instructing attorney received a response from the Government Attorney. In this response the Government Attorneys informed the

applicant's instructing attorney that, the Tender Board was not bound to accept the lowest or only tender and that the applicant's tender was not the lowest tender for that matter. Furthermore, that the evaluation process was done in accordance with clauses 26 and 29 of the instructions to bidders which were in the possession of the respective tenderers, including the applicant. Further, that the applicant's was not the preferred tender in terms of clause 29.3 of the instructions to bidders and the Tender Board thus recommended the tender that was the preferred tender in terms of clause 29.3. The Government Attorneys further explained that, the unsuccessful tenderers were informed after the successful tenderer, this was an administrative process aimed at ensuring that the successful tenderer commences work immediately. Furthermore, that the unsuccessful tenderers were informed within a reasonable time and that the Tender Board had thus acted fairly and reasonably. Following this response, the applicant's instructing counsel was instructed to prepare papers on 3 February 2009. An affidavit was then couriered from Italy to the instructing attorney in Namibia and received on 10 February 2009.

[17] The applicant further alleged that in terms of section 5(6) of Act 16 of 1996 the price was of great significance and should have been the determining factor. The first respondent challenged the existence of section 5(6) of Act 16 of 1996 and rightfully so. There is no section 5(6) of Act 16 of 1996. The applicant's further alleged that in terms of sub-clause 30.1 of the instructions to bidders, it should have been awarded the tender. This allegation will be dealt with below.

[18] The applicant alleged that it had established a prima facie right for the interim relief sought and a clear right in terms of the main relief sought. Further, that the balance of convenience favours the applicant, because its tender price was the lowest. That, by the time the review application is determined, the radar systems to be supplied would have been delivered thereby making the setting aside of the decision at that stage *brutum fulmen*. Furthermore, having regard to the time periods for exchanging affidavits which apply to review proceedings and the Practice Directives in terms of securing trial dates, the review would not be capable of being heard until the last term of the year which commences on 15 September 2009. If the interim relief were not to be granted, the applicant would suffer severe prejudice if the review application subsequently succeeds.

ISSUES

[19] The court had to determine, whether the matter was in fact urgent as alleged by the applicants. If the matter was accepted to be urgent, whether to grant the application for an interim order.

SUBMISSIONS

[20] It is was submitted on behalf of the applicant that, the applicant's bid of € 9 578 440.00 included 16.5% VAT, which the other bids did not include. That, for a proper comparison, this 16.5% VAT had to be deducted from the applicant's bid. This adjustment was in fact effected in terms of a letter addressed to Mr. Kruger of Windhoek Consulting Engineers (WCE) which was dated 06 November 2008. The applicants further submitted that, after such deductions, its tender was the lowest and should have been successful.

[21] It was further submitted on the applicant's behalf that, the applicant had a legitimate expectation that it would be awarded the tender as its bid was the lowest and was substantially responsive according to the evaluation criteria in the instructions to bidders.

[22] In response to the applicant, it was submitted that, in terms of section 15(6) of the Tender Board Act, 16 of 1996, Regulation 5(2)(a) of the Regulations to the Tender Board Act, paragraph 5 of the invitation to bids and the evaluation criteria provided for in the instructions to bidders, the Tender Board was not obliged to accept the lowest or any tender. It was further submitted that, the applicant was in possession of these tender documents and ought to have known its contents.

[23] The applicant's grounds of review were the following:

1. The applicant's tender was the lowest and should thus have been awarded the tender on that basis.
2. The bid price of the third respondent, to whom the tender was awarded was N$ 30.9 million higher than that of the applicant.

3. There is no legitimate reason why the tender was awarded to the third respondent.

4. The first respondent did not apply the award criteria in para. 30.1 of the instructions to bidders when it awarded the tender to the third responded. That, in this regard, the first respondent failed to exercise its discretion properly and thereby breached Article 18 of the Namibian Constitution.

5. The applicant had a legitimate expectation to a hearing before the tender was awarded to the third respondent, because its tender was the lowest and was evaluated to be substantially responsive in accordance with the criteria in terms of para. 30.1.

URGENCY

[24] In terms of Rule 6(12) of the old Rules of the High Court,

"(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at a hearing in due course'.

[25] In *Mweb Namibia (Pty) Ltd v Telecom Namibia and Others*,[1] Muller, J stated that 'an applicant in an urgent application has to show good cause why the times prescribed in Rule 6 (5) of the (old) Rules of the High Court should be abridged and why the applicant cannot be afforded substantial redress at the hearing in due course'.

[26] In *Mweb Namibia (Pty) Ltd v Telecom Namibia and Others supra*, the court further held that 'an applicant should make out a clear case of urgency in the founding papers. While it is trite that a purely commercial interest can give rise to urgency, the court must be satisfied that an applicant would suffer prejudice if the application is not dealt with on an urgent basis. The convenience of the court and the prejudice to the respondent are important considerations in this regard. Moreover, where the urgency is self-created the court would be reluctant to grant urgent relief'.

[1] 2012 (1) NR 331 (HC) para. 21.

[27] In *Luna Meubels Vervaardigers v Makin & Another (t/a Makin's Furniture Manufacturers)*,[2] Coetzee, J stated that the exigency of the matter must be clearly set out in the founding papers, mere lip service to urgency will not suffice.

[28] This application pertained to the provision, installation and commissioning of radar equipment in time for the 2010 Soccer World Cup which was to be hosted by South Africa. Having regard to the time periods for exchanging affidavits which applied to review proceedings and the Practice Directives in terms of securing trial dates, the review would not have been capable of being heard until the last term of the year which commenced on 15 September 2009. If the application was not heard and the review application subsequently succeeded, the applicant would have been severely prejudiced. The applicant clearly had direct interest in the relief sought. It was also clear that, the applicant would not have been afforded substantial redress in due course. Due to the time period left before the World Cup kicked off, the fact that the equipment that had to be supplied had to be installed before the official opening of the World Cup, the time periods for exchanging affidavits in terms of the Rules and the Practice Directives of the Court, this matter clearly bordered on urgency. The respondents would have suffered no prejudice if the matter was heard on an urgent basis and the court would also not have been inconvenienced thereby. The court thus accepted that the application was urgent and that a clear case of urgency was established in the founding papers. Furthermore, the respondents' allegation that, the applicant did not lodge the application with the expediency required in urgent matters, was without merit. The founding papers of the applicant clearly showed the impediments as to language and distance which challenged the lodging of the application any sooner. The founding papers also showed that, despite these impediments, the applicant did everything reasonably possible to have the application lodged as soon as reasonably possible. On these grounds the court was inclined to and did hear the matter on an urgent basis.

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[2] 1977 (4) SA 135 (N).

INTERIM INTERDICT

a) Whether The Tender Was Properly Awarded Or Not

[29] In terms of section 15(6) of the *Tender Board Act,* 16 of1996;

"If the Board does not accept the lowest tender or tenders from among all the tenders submitted to it, the reasons for not accepting the lowest tender or tenders shall be kept on record by the Board". This section can be interpreted to mean, that generally the lowest tender will be accepted. However, the word "if" is indicative of a discretion, thus the Tender Board is not bound to accept the lowest tender when there are good reasons for choosing another tender. These reasons must be kept on record. Nothing in the subsection prohibits the Tender Board from accepting a tender, not being the lowest tender.

[30] *Tender Board Regulations*, Regulation 5(2)(a) provides that

"(2) When at the invitation of the Board, tenders are submitted to it for the purposes of concluding an agreement contemplated in section 7(1)(a) of the Act, the Board-

(a) is not obliged to accept the lowest or, in the case of the disposal of Government property, the highest or any other tender;"

[31] In the tender document, marked "Invitation for Bids" which the applicant had in its possession and whose provisions were or were supposed to be known to the applicant, clause 5 thereof also provides that the client Ministry is not bound to accept the lowest or any tender. In terms of this clause, tenderers were called upon to note the evaluation criteria contained in the instructions to bidders according to which tenders would be evaluated and based on which results the tender was to be awarded.

[32] In terms of clause 26, before the technical evaluation was conducted, the employer determined whether the bids were substantially responsive. The applicant and the third and fourth respondents' bids were all considered to be substantially responsive to the requirements of the bidding documents. Thus, regarding the submission that the applicant had a legitimate expectation because its tender was

evaluated to be substantially responsive is baseless. If such was true, all three tenderers would have had a legitimate expectation to be awarded the tender and such a conclusion would have yielded untenable results.

[33] The evaluation and comparison of the bids was done then in terms of clause 29 of the "Instructions to bidders". In terms of sub-clause 29.1 of the "Instruction to bidders", the bids that were determined to be substantially responsive underwent a technical evaluation. The technical score (Ts) was calculated in respect of each bid using the following formula: Ts=(Ti+Tc+Te+Tx+Ta). After the technical evaluation, the financial evaluation followed in terms of sub-clause 29.2 of the "Instructions to bidders". In terms whereof, the price score was calculated using the following formula; Ps= (Pl/Pn). The tender index was then calculated in terms of sub-clause 29.3 of the "Instructions to bidders" in terms of the formula It= 0.8 * Ts + 0.2* Ps. In terms of this sub-section, the tender achieving the highest tender index was to be deemed the "preferred tender".

[34] The technical scores achieved by the various bidders were: Thales Air Systems 94.9931, Selex Sistemi 82.4777 and Indra 73.4596. The opening of the financial proposals of the bidders to the tender then followed. The price score achieved by the various bidders were: Thales Air Systems 85.6711, Selex Sistemi 98.5952 and Indra 100.0000. The tender indexes for the bidders were: Thales Air Systems 93.04, Selex Sistemi 85.70 and Indra 78.78. In terms of clause 29.3, the tender achieving the highest tender index, "shall be deemed to be the preferred tender" and in this case the tender with the highest tender index was that of Thales Air Systems at 93.04. The third respondent clearly achieved the highest tender index. Bearing in mind the formula for the tender index and the technical score of the applicant, even the applicant's price score were to be 100, its tender still would not have achieved the highest tender index and thus would still not have been the preferred tender as was rightfully alleged by the respondents.

[35] In terms of clause 30.1, of the "Instruction to Bidders', 'Subject to clause 31, the Employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluated

bid price provided that such bidder has been determined to be (a) eligible in accordance with the provisions of clause 3 and (b) qualified in accordance with the provisions of clause 4'.

[36] Notwithstanding sub-clause 30 above, the Ministry and the Tender Board were not bound to accept any tender. This is clear from a reading of sub-clause 31 of the 'Instructions to Bidders' which provides that, 'Notwithstanding clause 30, the employer reserves the right to accept or reject any bid and to cancel the bidding process and reject all bids, at any time prior to the award of the contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employers action'.

b) REQUIREMENTS OF AN INTERIM INTERDICT

[37] In *Kaulinge v Minister of Health and Social Service*,[3] the requirements of an interim interdict were set out a follows:

'(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) that if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy.'

[38] In *Webster v Mitchell*,[4] Clayden, J said that;

'The phrase used were 'prima facie case' what the Court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with

[3] 2006 (1) NR 377 (HC) at p. 387D-F.
[4] 1948 (1) SA 1186 (W) at 1189.

any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

[39] The applicant did not establish a prima facie right in the subject matter of the main action which it sought to protect by means of the interim relief. The tender was awarded in terms of the procedures set out in the tender documents. The reasons for the award of the tender to the third respondent were given. At all material times and in clear and plain language, the Tender Board through the tender documents, the Regulations to the Tender Board Act and the Tender Board Act, provided that the Tender Board is not bound to accept the lowest or any tender. The Board was however cautioned by the Tender Board Act, to give reasons in the event that it chooses a tender which is not the lowest tender. In this case, the Tender Board gave its reason. Its reason that the decision was based on the fact that the third respondent was the preferred tenderer in terms of clause 29.3 of the instructions to bidders is a good enough reason and is acceptable. The applicant could at no time have had any legitimate expectation to be awarded the tender. The applicant perhaps had a hope, but so did the other two tenderers, the third respondent included. Even in the event that, the applicant's tender was the lowest, the Tender Board was not bound to accept the lowest tender. The respondents indicated that 80% of the considerations in awarding the tender were based on the technical evaluation. Whereas only 20% of the consideration in awarding the tender was based on the price aspect of the tender. The applicant had thus not established a prima facie right in respect of the main action it sought to protect with the interim relief. Furthermore, there is serious doubt that the applicant would succeed in the review proceedings in the main action.

WHETHER UNSUCCESSFUL BIDDERS WERE INFORMED WITHIN A REASONABLE PERIOD

[40] In terms of sub-clause 33.1 of the 'Instructions to Bidders', within 14 days after receipt of the letter of acceptance of their tender, the successful bidder shall deliver to the employer a performance security of 10% of the contract amount.

[41] In terms of sub-clause 32.4 of the 'Instructions to Bidders'

'Upon furnishing by the successful bidder of the performance Security, the employer will, within one week, notify the other bidders that their bids have been unsuccessful'.

[42] The applicant was informed that its tender was unsuccessful on 16 January 2009. However the decision to award the tender to the third respondent was taken on 5 December 2008 already. The award of the tender to the third respondent was subsequently published on the Ministry of Finance website on 11 December 2008. In terms of sub-clause 33.1 of the instructions to bidders, the successful tenderer had 14 days from the date of receiving the letter of acceptance from the Tender Board, to render performance security. Only after such performance security was furnished by the successful tenderer, could the Tender Board have notified the unsuccessful tenderers to that effect. The unsuccessful tenderers were informed to that effect within less than a month after the successful tenderer was informed that its tender succeeded. The respondents in their answering affidavits made it clear that, the successful bidder was informed first merely as an administrative process aimed at ensuring that such tenderer commences work immediately. Thus, the time period which lapsed before the unsuccessful tenderers were informed to that effect was reasonable.

ADDITIONAL REMARKS

[43] In addition to the above stated, in terms of the document marked "Instructions to bidders" clause 25.2 provides that:

“Subject to sub-clause 25.1 no bidder shall contact the employer on any matter relating to its bid from the time of the bid opening to the time the contract is awarded”.

[44] Sub clause 25.3 of the ‘Instructions to bidders’ further provides that, ‘any effort by the bidder to influence the employer in the employer’s bid evaluation, bid comparison or contract award decisions may result in the rejection of the bidders bid’.

[45] It is clear from the applicant’s founding affidavit as well as from the first respondent’s answering affidavit that, the applicant had made numerous attempts to contact the Secretary of the Tender Board to not only find out the status of its tender, but also to request permission to make presentations to the Tender Board. The Secretary of the Tender Board on one occasion made it clear to the applicant that, unless the Ministry requested for such presentations, which it did not, such presentations were not part of the tender procedures and would if allowed be tantamount to an irregularity. Despite this explanation, the applicants in a subsequent letter again reiterated their willingness to make such presentations. These attempts by the applicant especially in respect of the requests to make presentations, constituted an infringement of clause 25.2 of the instructions to bidders. They were clearly aimed at influencing the Tender Board to make a decision favourable to the applicant. Thus, a rejection of the applicant’s tender on that basis alone would have been justified.

[46] Furthermore, from the respondents’ answering affidavits it is clear that, the reason why the third respondent’s tender was successful, was that it had achieved the highest tender index in terms of sub- clause 29.3 of the instructions to bidders. Although, the first respondent mentions in his answering affidavit, that there were rumours of plans to bribe key persons in the decision making structure, neither he nor the documents filed of record indicate that this was a consideration in the determination of the award of the tender. Thus, to allege without evidence that, a right to be heard was denied the applicant, because such rumours were a consideration, holds no water.

CONCLUSION

[47] It was on these basis that the applicant's application for an order of interim interdict was dismissed with costs. In respect of the first and second respondents', costs of one instructed counsel and in respect of the third respondent, costs of one instructing and two instructed counsel.

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NDAUENDAPO, J

Judge

APPEARANCES

For The Applicants	Adv. Smuts SC (with him Adv. Coleman) Instructed by Sisa Namandje & Co. Inc.
For The 1st And 2nd Respondents	Ms Katjipuka For the Government Attorneys
For The 3rd Respondent	Adv. Heathcote (with him Adv. Barnard) Instructed by Koep & Partners