

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER  
JUDGES: YES / ~~NO~~.

(3) REVISED.

DATE 16-01-2015

SIGNATURE

A handwritten signature in black ink, appearing to be 'G. G. G. G.' followed by a flourish.

16/01/2014

CASE NO: 25286/2013

IN THE MATTER BETWEEN

SAAB GRINTEK DEFENCE (PTY) LTD

APPLICANT

AND

SOUTH AFRICAN POLICE SERVICE

FIRST RESPONDENT

STATE INFORMATION TECHNOLOGY AGENCY  
(PTY) LTD

SECOND RESPONDENT

**NATIONAL COMMISSIONER OF THE SOUTH  
AFRICAN POLICE SERVICE**

**THIRD RESPONDENT**

**MINISTER OF POLICE**

**FOURTH RESPONDENT**

**MINISTER OF PUBLIC SERVICE AND  
ADMINISTRATION**

**FIFTH RESPONDENT**

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**JUDGMENT**

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**MAKGOBA J.**

[1] This case arises from a tender process in respect of an Integrated Mobile Vehicle Data Command and Control Solution ("IMVDCS"). The Applicant seeks an order against the Respondents in the following terms:

1. Reviewing and setting aside the decision of the first respondent purportedly to cancel bid number RFB 822/2010 ("the tender").
2. Reviewing and setting aside the decision of the second respondent not to award the tender to the applicant,
3. Directing the second respondent, alternatively the first respondent, within one (1) month from date of the order to award the tender to the applicant

and to conclude a contract with the applicant on the same terms and conditions contained in the tender, provided that this shall not preclude the parties from jointly agreeing to amend such terms and conditions,

4. Directing that the costs of this application be paid by any respondent opposing the application.

[2] The factual chronology of events is essentially common cause or not disputed.

[3] On 13 February 2009 the State Information Technology Agency ("SITA") published a Request for Bids ("RFB") on behalf of the South African Police Service ("SAPS") in respect of the procurement of the IMVDCS. After the initial evaluation, the Applicant ("SAAB") was shortlisted alongside Brighthouse Holdings (Pty) Ltd, as a potential supplier. The RFB was later withdrawn..

[4] On 3 September 2010, SITA republished the RFB, this time as RFB 822/2010 ("the tender") the closing date for the tender was 4 October 2010. Saab submitted a bid and was again shortlisted – along with Brighthouse – as a potential supplier of the IMVDCS.

[5] Saab was invited by SITA to present its solution to the Bid Evaluation Committee ("BEC") on 29 November 2010. On 13 December 2010 SITA

requested Saab to perform a proof of concept of its solution. Saab performed the proof of concept on 25 January 2011.

- [6] On 2 February 2011, SITA advised Saab that the validity of its bid had expired on 4 January 2011. It requested Saab to extend the validity of its bid by 90 calendar days. Saab agreed. SITA subsequently requested further extension of Saab's bid on 1 April 2011, 2 June 2011 and 1 August 2011.
- [7] During the evaluation process Saab's combined scores on the paper and demonstration evaluations were the highest. Saab was the only bidder to score above the 70% threshold on both the paper and demonstration evaluations. On the basis of these evaluations, the BEC recommended that Saab be the only bid to proceed with the remaining evaluations in respect of pricing and Black Economic Empowerment ("BEE") points and on 8 October 2011, the Technical Evaluation Team recommended to the Recommendation Committee that the tender be awarded to Saab.
- [8] On 1 November 2011, SITA requested a further extension of Saab's bid. Saab agreed. On 4 November 2011, the Recommendation Committee recommended to the Procurement Committee that the tender be awarded to Saab.
- [9] On 8 November 2011, SITA invited Saab to attend negotiations scheduled to take place on 11 November 2011. Saab did so. On 17 November 2011, as

part of the negotiations, Saab in response to the request of SITA offered various discounts on the price.

[10] SITA then requested further extensions of the Saab bid. It did so on 23 January 2012, on 26 March 2012 and 4 June 2012. Saab agreed to each. The last extension purports to result in the validity of the bid being extended until 4 August 2012, some 22 months from the tender's initial closing date.

[11] On the 8 August 2012, SAPS informed Saab that it had cancelled the tender in a letter addressed to SITA on 28 May 2012. It explained the decision to cancel the tender with reference to the following considerations:

11.1 the time lapse in the evaluation process, and

11.2 the need for SAPS to review its business processes.

On 20 August 2012, SITA informed Saab that it would not be issuing requests for validity extension because the tender was due to be cancelled.

[12] The applicant relies on the following three grounds of review:

12.1 First, that the cancellation of the tender was unlawful,

12.2 Second, the respondents had no good reason to cancel the tender,  
and

12.3 Third, the SAPS's decision that the tender be cancelled was made in a procedurally unfair manner.

[13] The thrust of Saab's case is that there was no lawful basis upon which the tender could have been cancelled, and that there was no lawful basis upon which SITA could have refused or failed to award the tender.

In essence Saab wants to persuade the Court to find that:-

1. the tender was cancelled unlawfully,
2. there was no good reason for the tender to have been cancelled,
3. the decision to cancel the tender was made in a procedurally unfair manner,
4. that SITA Board should be instructed to award the tender to Saab.

[14] The Respondents opposition to this application is based on four pillars:

1. The first is that the order sought against SITA is misplaced in that SITA does not have the power to decide who to award the tender to. That SITA merely makes a recommendation to SAPS who decides whether or not to accept the recommendation.

2. The second is that it is common cause that the bid validity period for the RFB was 90 days after the closing date for submission. This meant that the bid expired after 90 days unless it was extended by agreement. There was no timeous extension by agreement. Instead the first extension came 30 days after the bid expired. That the RFB does not provide for the revival of an expired bid and therefore everything that transpired after 4 January 2011 was ultra vires in view of the fact that there was no valid bid.
3. The third is that the procurement process itself was fraught with difficulties in that the evaluation committee adopted a method of evaluation of the demonstration of product which was not provided for in the RFB. That this is contrary to the prevailing procurement prescripts and casts a shadow of a doubt on the outcome of the evaluation process.
4. The fourth is that, even should Saab be successful in persuading the Court to set aside either of the impugned decisions, there is no basis for the Court to grant the exceptional remedy of substituting its decision for that of SAPS/ SITA by ordering either to enter into a contract with Saab.

[15] It will be convenient to deal first with the second point raised by the respondents, namely that the bid expired after 90 days of the closing date for submission thereof before considering the merits of the application.

The principal issue raised herein is the legal consequence of a failure by a public body to accept within the stipulated period for the tender proposals, any of the proposals received.

- [16] Furthermore the question is whether, if the expiry of the tender validity period put an end to the tender process, it could subsequently be revived by agreement between the parties.
- [17] This issue was dealt with squarely in a matter that is essentially on all fours with this case by Southwood J in the matter, **Telkom SA Limited v Merid Training (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others [2011] ZAGPPHC dated 7 November 2011 – now reported at [2011] JOL 26617 (GNP).**
- [18] In that matter, as in this one, Telkom published a request for proposals in order to appoint service providers. The request for proposals stipulated a closing date as 12 December 2007, and a tender validity period of 120 days from the closing date, during which the offers made by bidders would remain open for acceptance by Telkom. By the time the tender validity period expired on 12 April 2008, no decision had been taken by Telkom and the tender validity period had not been extended. Despite this, Telkom continued to evaluate and short-list the bids it had received. It was only after the tender validity period had expired that Telkom sent emails to the 15 bidders it had short-listed requesting them to agree to an extension of the tender validity period. Some agreed to do so. The decision to accept the bids of six respondents was only taken after the expiry of tender validity period of 120



days. Before any contract had been concluded with the accepted bidders, Telkom decided, on legal advice, to apply for the setting aside of its own decision.

[19] Southwood J then went on to conclude:

*"[14] The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution.*

*In my view it was not. As soon the validity period of the proposals had expired without the applicant awarding a tender, the tender process was complete- albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive.*

*All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals.*

*It failed to award a tender within the validity period of the proposals it received, it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondents' reliance only on rules of contract is misplaced."*

[20] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on 4 January 2011, the tender process had been completed, albeit unsuccessfully.

[21] The judgment of Southwood J was followed recently by Plasket J in **Joubert Galpin Searle and Others v Road Accident Fund and Others [2014] 1 All SA 604 (ECP)**.

In the latter case the central issues to be decided were the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the process, it could subsequently be revived.

The Court held that once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept, so the RAF had no power to accept the expired bids.

[22] As can be noted above, the decisions of Southwood J and Plasket J are essentially on all fours with the present case. Recognising and following the doctrine of stare decisis I find myself bound by the judgments of my learned brothers. I find no cause to deviate from the two judgments. In any event I am not aware of another judgment of any other Court, be it the Supreme Court of Appeal or the Constitutional Court that overruled the two prevailing judgments.

[23] Because SAPS and SITA are organs of State it is required in terms of section 217 of the Constitution, when they contract for goods and services, to do so in accordance with a system that is “fair, equitable, transparent, competitive and cost effective”. These core principles of public procurement are given effect

by a range of statutes, such as the Preferential Procurement Policy Framework Act 5 of 2000 (“PPPFA”) and the Public Finance Management Act 1 of 1999 (“PFMA”) subordinate legislation such as the regulations made in terms of the PPPFA and the Treasury Regulations made in terms of the PFMA, policies and guidelines.

[24] In **All Pay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer, South African Social Security Agency and Others 2014(1) SA 604 (CC)** Froneman J stressed that compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is thus legally required and that they are not merely internal prescripts that may be disregarded at whim.

[25] The Preferential Procurement Policy Framework Act 5 of 2000 (“PPPFA”) defines an “acceptable tender” as any tender which in all respects, complies with the specification and conditions of tender as set out in the tender document. Once the tender/bid had expired, the bid is no longer an “acceptable tender” and cannot be resuscitated after expiry.

[26] *In casu*, approximately thirty days had passed after the expiration of the bid before SITA took steps to secure the first extension. The bid documents do not provide any basis for bids to be revived once they have expired.

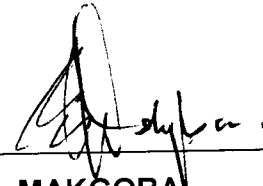
They also do not provide for extensions to be granted retrospectively. This means that, objectively, the bid had expired after 4 January 2011 irrespective of the intention of the parties to extend the bid after expiration thereof as they purported to do so on several occasions.

[27] In the present case and in terms of the RFB, the bid validity in respect of the tender was 90 days starting from the closing date for the tender which was 4 October 2010. The bid was therefore due to expire and did in fact expire on 4 January 2011. There were seven further extensions requested and granted but all these extension were sought and granted after the bid had already expired on 4 January 2011.

[28] Having dealt with the issue of the expiration of the bid validity period, I am of the view that this issue is dispositive of the whole case before me. It is therefore unnecessary for me to consider the merits of the application.

[29] My finding is that once the validity period of the proposals had expired with no extension of the period being arranged before the expiry of the validity period, there were no valid bid in existence and an award could not be validly made. For the reasons set out above the applicant has failed to make out a case for review.

[30] In the result the application is dismissed with costs including the costs consequent upon the employment of two Counsel.

**E.M. MAKGOBA****JUDGE OF THE HIGH COURT**

<b>HEARD ON</b>	<b>:</b>	<b>27 November 2014</b>
<b>Judgment delivered on</b>	<b>:</b>	<b>16 January 2015</b>
<b>For the Applicant</b>	<b>:</b>	<b>Adv. G Marcus SC Adv. J. Berger</b>
<b>Instructed by</b>	<b>:</b>	<b>Adams &amp; Adams Attorneys</b>
<b>For the Respondents</b>	<b>:</b>	<b>Adv. P.M. Mtshaulana SC Adv. S Hassim SC Adv. K Pillay SC</b>
<b>Instructed by</b>	<b>:</b>	<b>State Attorney</b>