

**IN THE COURT OF APPEAL OF LESOTHO
HELD AT MASERU**

C OF A (CIV) 7/2023

In the matter between-

ENGIDATA (PTY) LTD

APPELLANT

and

FISCHER CONSULTING JOINT VENTURE

1st RESPONDENT

MINISTRY OF PUBLIC WORKS

AND TRANSPORT

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

CORAM:

KE MOSITO P

P MUSONDA AJA

J VAN DER WESTHUIZEN AJA

HEARD:

12 APRIL 2023

DELIVERED:

12 MAY 2023

Summary

The disqualification of the first respondent at the second stage of a bidding process by the second respondent, based on the failure to submit the financial statements of the first respondent's partner in a joint venture, was not irregular. The High Court erred in setting the decision aside.

JUDGMENT

VAN DER WESTHUIZEN, AJA:

Introduction

[1] Strict adherence to legally prescribed tender procedures is extremely important. In the southern part of Africa, not unlike elsewhere in the world, the allocation of tenders has been fertile ground for corruption – to the extent that the word “tenderpreneurs” has been invented for the many who have profited from either hard work, or dishonesty.

[2] This is an appeal by Enigdata against a judgment of the High Court (Commercial Division), by Mokhesi J. The High Court reviewed and set aside the awarding of a tender by the second respondent, the Ministry of Public Works (the Ministry), to Enigdata, above its competitor, the first respondent, Fischer Consulting Joint Venture (Fischer).

[3] To some extent the appeal was unnecessarily complicated by counsel's submissions. Near the end of the hearing of oral submissions, counsel informed this Court that neither Enigdata nor Fischer would finally get the tender, because the government had withdrawn the tender invitation. The matter was, however, not

moot, counsel for Engidata argued. Engidata pursued the appeal in the interest of its reputation. So, we were told.

[4] This judgment focusses on the central issues as to the awarding of the tender and the High Court's setting aside thereof.

FACTUAL BACKGROUND

[5] The High Court's judgment provides a detailed and lengthy narration of the factual history of this matter. For the purposes of this judgment, a brief summary suffices.

[6] As part of a wider transport development project, Lesotho secured a loan from the World Bank. In terms of the agreement between the Bank and the Government procurement for goods and services had to be conducted under the World Bank Procurement Regulations for Investment Project Financing Borrowers (World Bank Regulations). Bids were invited for the supply, installation and support of Lesotho Integrated Transport Information System (LITIS). The bidding process was conducted by the Ministry of Public Works and Transport Tender Panel.

[7] Enigdata and Fischer were bidders. Fischer was eliminated at a stage prior to the technical evaluation of its bid.

[8] Fischer requested to be provided with the evaluation documents and complained about its elimination. On 4 August 2021 the Ministry informed Fischer by email that its bid had failed because it had not met the relevant requirements. Fischer complained in writing. On 10 August 2021 the Ministry explained:

“(i) Form FIN – 2.3.1. Historical Financial Performance – Form submitted ... however, Fischer “was not compliant with Historical

Financial Performance as its JV member (Sumo Inc) did not meet the required criteria of at least three ... years to demonstrate the current soundness of the Bidders financial position and its prospective long-term profitability as SUMO is newly established company in 2019 ...”

[9] The Ministry further explained, in (ii), regarding Form ESP – 2.4.1 , that Fischer had not complied with general experience requirements, also because its partner, Sumo, had not met –

“the experience under information system contracts in the role of prime supplier, management contractor ... prior to the applicants submission deadline ...”.

[10] In addition the Ministry stated:

“Your technical bid did not have Form MFA – Manufacture’s Authorisation as required in page 65 of the bidding documents ... The above deviations were considered material and therefore made your technical bid no-responsive to the bidding document ... Your bid was not evaluated in the FORM TECH-I since it did not pass the above-mentioned evaluation criteria hence there is no score provided.”

[11] Fischer responded by asking a number of questions in a letter of 17 August 2021. It disputed some of the Ministry’s statements and mentioned that “Fischer Consulting as the lead member of the (joint venture) has more than thirty (30) years’ proven experience in similar projects ...”. To this, the Ministry reacted by stating, inter alia, that the submission of audited financial statements for each member Of Fischer’s joint venture for the last three years was mandatory and the fact that Sumo had not complied disqualified

Fischer. It added further explanations regarding the manufacturer's authorization and stated that Fischer was deemed to be not substantially responsive in terms of the criteria. On 11 November 2021 the Ministry issued its intention to award the contract to Enigdata.

[12] Fischer approached the High Court.

HIGH COURT

[13] According to the High Court's judgment, Fischer challenged the Ministry's decision on four grounds. However, only three are mentioned, all related to its view that Enigdata did not satisfy the criteria.

[14] The issues for determination were identified by the High Court as whether the Ministry's decision -

(i) to disqualify Fischer's technical bid at the first stage of the technical evaluation was irregular;

(ii) that Fischer's bid was technically unresponsive was unreasonable, irrational and unjustified;

(iii) to award the contract to Enigdata was unreasonable and irrational; and -

(iv) the Ministry's decision to reject Fischer's procurement-related complaint should be reviewed.

[15] The High Court furthermore stated that it had to determine whether – if all the Ministry's decisions were set aside – it should order that a three-member Independent Evaluation Panel be appointed by the Ministry to evaluate Fischer's Financial Part Bid

and determine the most advantageous bid for the contract to be awarded by the Ministry.

[16] According to the High Court, it also had to determine whether Enigdata should be disqualified from the procurement process.

[17] After a lengthy and detailed “discussion and evaluation”, the High Court issued a curt but sweeping and wide-ranging order:

“The final relief is granted in terms of prayers 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7 and 2.12 of the Amended Notice of Motion.”

[18] In order to understand the order, the prayers quoted in In para [1] of the High Court judgment can help:

“2.1 Reviewing and setting aside the decision of the (Ministry) disqualifying (Enigdata’s) Technical Part bid at the first stage of the technical evaluation as irregular.

2.2 Finding that (Fischer’s) Technical Bid was technically responsive and qualified for Economic Evaluation in terms of the Bidding document.

2.3 Directing that the (Ministry) should evaluate (Fischer’s) Financial submission and award the contract accordingly.

2.4 INTERDICTING the (Ministry) from awarding the contract to LITIS and (Enigdata).

2.5 Reviewing and setting aside the decision of the (Ministry) to the effect that (Enigdata’s) bid was technically responsive in terms of the bid document as unreasonable, irrational and unjustified

2.6 REVIEWING and SETTING ASIDE the decision of the (Ministry) to award the contract ... to (Enigdata) as unreasonable and irrational.

2.7 REVIEWING, SETTING ASIDE and CORRECTING the (Ministry's) decision rejecting (Fischer's) Procurement-related complaint relating to award of contract to (Enigdata)... “

[19] Prayer 2.12 was not quoted by the High Court together with the other prayers. Yet it was granted in the order.

[20] Relevant parts of the High Court's reasoning are dealt with below.

SUBMISSIONS ON APPEAL

[21] Enigdata raised 14 grounds of appeal. Counsel for Fischer submitted that the “purported appeal” had to be struck off the roll, because the 14 points were not true grounds of appeal that this Court had jurisdiction to consider. In a lengthy written and oral argument counsel attempted to persuade us that the grounds raised by Enigdata were not directed against the judgment or order of the High Court, but rather “against the reasons and/or findings of the Court *a quo*, or worse still are grounds of review challenging the manner of proceedings by the Court *a quo*”.

[22] Much time was spent during the hearing of oral argument to gain a proper understanding of Fischer's submissions. With the concurrence of its counsel, it was concluded that at least some of Enigdata's complaints against the High Court judgment were indeed proper grounds of appeal and that the appeal could proceed.

[23] It is unnecessary to deal with each and everyone of these grounds. The fifth goes to the heart of this matter. Thus, the focus of this judgment is on it:

“The Judge in the Court-a-quo erred and misdirected itself by holding that the 1st Respondent (Fischer) was unlawfully and irregularly disqualified from the LITIS bidding process when such disqualification was lawfully done in terms of the disqualifying criteria as set out by the Instructions to Bidders (ITB).”

[24] The sixth ground is related:

“The Judge ... erred and misdirected itself by holding that a disqualifying criteria specifically stated to be material in the instructions to builders was immaterial thus qualifying an otherwise disqualified 1st Respondent into technical evaluation stage of the bid evaluations.”

[25] And, the seventh states that the High Court –

“erred and misdirected itself by disregarding the chronological stages of evaluation as stated in the ITB and accepting the Technical Evaluation of a disqualified 1st Respondent as done by the Project Management Consultants (PMC) as valid”.

[26] Other grounds deal with the High Court allegedly misconstruing the role of the PMC in the bidding process, *vis-à-vis* the Technical Evaluation Committee; the Court’s acceptance of the PMC report; and the Court’s placing the PMC report above the ITB, resulting in accepting the PMC’s recommendations, in spite of the ITB.

ANALYSIS

[27] The central question is whether the disqualification of Fischer before its technical bid could be evaluated by the Technical Evaluation Committee (TEC), due to the bid not meeting the criteria set in the Instruction to Bidders (ITB0 section of the Request for Bids (RFB)) was irregular. The High Court found that it was.

[28] The World Bank Regulations outlined the method of selecting the preferred bidder. They required that the evaluation criteria be specified in the request for bids. This, the ITB did. According to the Regulations, the most advantageous bid would be the one that meets the qualification criteria. The Regulations stated that the qualifying criteria were the minimum requirements for evaluating bids.

[29] On “Historical Financial Performance” each member of a joint venture had to submit financial statements for the previous three years. These were not submitted with regard to Sumo, Fischer’s partner in the joint venture.

[30] Fischer argued that the non-conformity with the criteria of one member of a joint venture should not be regarded as a material deviation, resulting in disqualification. Non-conformities, errors and omissions may be waived if a bid is substantially responsive. The non-conformity by one member of a joint venture could be compensated by the other “overly qualified” member.

[31] This argument is thoroughly unconvincing. According to the criteria, on “Historical Financial Performance”, it was mandatory

for each member of a joint venture to submit financial statements for the preceding three years.

[32] The failure to include the required financial statements was fatal. Fischer's disqualification was in no way irregular or unlawful. The importance of proof of the solid financial history of a participant in a joint venture of this kind is obvious. The Ministry mentioned that Sumo was relatively new, having come into existence in 2019. The crucial question is not how experienced or well-qualified Fischer may otherwise be. It is whether the criteria were met. The highly relevant requirement regarding financial statements was not.

[33] The ITB set out the chronology of stages in the bidding process. The first is a preliminary examination regarding the proper completion of and signatures on forms, as well as similar initial requirements. The next step is the evaluation of qualifications, a "pass or fail" stage. Only thereafter the bidder moves on to the technical evaluation stage. (Whether the process is described as consisting of three stages, or two – as the High Court did – is immaterial.) Because Fischer was disqualified in the evaluation of qualification stage stage, it could not move on to the technical evaluation stage.

[34] To the extent that the PMC report, on which Fischer and the High Court relied, proposes a different chronology than the ITB, and favours Fischer, it may not be elevated to a higher status than the ITB. On behalf of Engidata it was pointed out that the PMC report was in any event not properly authenticated. Whether it

could at some stage in the process have played a role, for example as an expert opinion, does not have to be determined here.

[35] Engidata also argued that Fischer should not have been allowed to bid, because its previous role in the wider project, including even in the drafting of procedures and criteria, gave it an unfair competitive advantage and constituted a conflict of interest. It is not necessary to consider this point.

[36] After the High Court concluded that Fischer had been irregularly eliminated, it was not necessary to continue to interrogate whether Engidata was properly qualified. Once the award of the tender was set aside because of Fischer's perceived irregular disqualification, it was not the Court's task to judge on its competitor, Engidata. The High Court's function was not to award the tender to whom it regarded as the winning bidder. This Court therefore expresses no view on whether and to what extent Engidata was properly qualified.

CONCLUSION

[37] The High Court erred in respect of the disqualification of Fischer by the Ministry. The appeal must succeed.

COSTS

[38] This is a dispute between commercial entities. Costs must follow the result.

ORDER

[39] In view of the above, the following is ordered:

(a) The appeal is upheld, with costs.

(b) The order of the High Court is set aside and substituted with the following:

The application is dismissed, with costs.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree



K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: MS M MOKEBISA

FOR RESPONDENT: ADV K J SELIMO