

THE INDEPENDENT REVIEW COMMITTEE

In the matter between; IRC/C /2017

ARCHITECTS INTERNATIONAL Applicant

And

SWAZILAND COMMUNICATIONS COMMISSION Respondent

Before: L Howe [Chairman]
E Simelane [Member]
Mabuza [Member]

For the Applicant: Richard Magnus [Architects International]

For the Respondent: Neol Mabuza and O. Thakata [Swaziland Communication
Commission]

Held on the 7th day of December, 2017, at Mbabane.

Ruling of the IRC

Dated the 12th of December, 2017.

1.

The Applicant is Architects International a firm of architects who has applied to the IRC for the review of the decision of the CCM for a tender issued to the public by selection as the parties agreed in the submission. It was not open to the public at large but limited to a select members of the CIC. An invitation was issued by the Respondent to the select

members and as part of the invitation was a mandatory site inspection per the invitation dated the 25th of July 2017.

2.

The said invitation in the said document under the head Instructions to Tenderers provides as follows:

"1. There will be a mandatory site inspection on the 2nd August 2017,..."

Before we delve into this part of the matter and the arguments by the parties, we wish to mention that a point of law as raised by the Respondents in the matter which was the right of the Applicant to come before the IRC as provided by the Act. The objection is simply that the Applicant is out of time per the Act and cannot, come before the IRC. His right comes from the provisions of *section 49* of the Act.

3.

The Applicant can only in law come to the IRC within 10 days of the decision of the Controlling Officer;

"... shall not entertain an Application for administration review, unless it was submitted within 10 working days of the issue of the controlling officer...decision or the date by the ... controlling officer..."

this is the Respondents case to the IRC and the matter should stop there and not go any further in their view. The Applicant had not met this door opener in the Respondents view and the matter should be judged and end there.

4.

This point was raised by the Respondent in the following fashion, and the sections which they rely on are the powers of the IRC, which are stipulated per section 52 read with section 46;

Section 46, *"... to have suffered, or that may suffer, loss or injury due to a breach of duty... may seek review in accordance with section 47"*

5.

The Applicant has to come before the CEO or the Controlling officer which the Applicant has not done and therefore he cannot come to the IRC for the redress he seeks. The email of the 10th of October 2017, cannot be deemed to be a review as per section 47. The said email is as follows;

"1. It is obviously disappointing to see that we were in fact "non-compliant" and essentially not considered. Is it possible to understand how we were non-compliant?"

6.

Much was made of this by the Respondent in the submission but the essence of the same was simply this, that the email was not in compliance with the Act in that it was not an application for the review of the decision of the Respondent to exclude them from the tender process which, they the Respondents acknowledge they did not meet. What they do say is they are a citizen who is of the view that the process was not in terms of the Act nor was to the benefit of the Nation in the way it was structured and conducted.

7.

The letter of submission to the IRC is clear that the issues are 3 which in a nutshell are;

"... is was not evaluated for non-compliance to the tender requirements...and in the context is damaging to the professional reputation."

"...they are glaring inconsistencies in the application of the Tender Document to different bidding consultants... this" it brings the integrity of the process in to question.

"... the like for like has not been followed in assessed; or at the very least, not reported...that brings the integrity of the process, and that of the proposed ward, into question"

8.

These are the main issues of the Applicant and need to be deliberated on by the IRC and the order sought by the Applicant is that the IRC should not consider the Applicants tender, but should call for the tender to be reissued. Can this be done by the IRC is the question which we need to consider before the matter can go further. In law you cannot ask for an order which cannot be granted by the IRC.

9.

The IRC in the submission of the Respondent can only be confined to the power it has in the Act as per section 52. The said section provides that the IRC may;

"may prohibit the Respondent from acting or deciding unlawfully, any unlawful procedure or reaching an unlawful decision (a). It may annul in whole or part the or may reverse a decision of the entity and substitute the decision (b). issue an order for compensation for any reasonable costs (c). Terminate to proceedings to procure (d). recommend that the contract be terminated (e). Recommend that prosecution to the Agency (f)."

10.

The powers are clear and need no clarification as they are the functions of the IRC which is a statutory body and is confined to these powers and cannot go beyond these powers. The application to set aside the award by the Respondent in this matter can therefore be made by the IRC as is clear from section 52 (1) (b). The Applicant has not asked for his tender to be considered as he has submitted that he did not tender because he did not

submit some of the documents which were part of the tender invitation. Therefore we do not order that he be considered in the tender by the Respondent.

11.

The Respondent has further submitted that the IRC, in applying the enforcement of its authority per section 52, the Applicant has to meet the other requirements of the Act which they believe he has not. The Applicant is required to have applied for review to the controlling authority or the CEO of the Respondent before he may come to the IRC. Section 47 provides that the Applicant has to;

"...in the first instance , be submitted in writing to the controlling officer or the Chief Executive Officer..."

"... the procuring entity shall not entertain an application for review, unless it is submitted within ten working days... of when he became aware of the circumstances giving rise to the application for review..."

12.

Applicant sent an email to the Respondent on the 10th of October, 2017. It was sent to a certain Pretty Dlamini, who signed her email off as Professional Assistant, Swaziland Communications Commission, within the said 10 day period. No evidence is given as to her functions nor if she is the controlling officer, and clearly she is not the CEO of the Respondent, as is required by the Act. What is clear is it did reach the CEO because the CEO replied to the email on the 25th of October, 2017.

13.

The reply was not within the said 10 days per section 47 (4) (c) of the Act, which is significant to the process should we agree with the Applicant in his submission that the email constitutes a review as per the Act. If the Respondent CEO did not comply with the

10 days, the Applicant may proceed to the IRC as he has for the review process before us. This now is the question as to what the email constitutes.

14.

A close examination of the email indicates that, this letter was not an appeal or a review to the CEO, but is a letter making an enquiry to the CEO. The CEO responded to the Applicant some 15 days later and non-one the parties took the matter further. We agree with the Respondent that no review was lodged with the CEO or the controlling officer and therefore the matter cannot come before us as the IRC in that regard. The Applicant should have in our view proceeded to then review the matter before the CEO, after the clarity which he sought from him. Had that been done it would have been acceptable and he would have a right to come before the IRC.

15.

A party is time bared by the Act if he does not meet the time periods stipulated in the Act and none of these have been followed by the Applicant.

16.

UNISERVE (PTY) LTD vs BONGANI J. MOTSA N.O. and 4 OTHERS, HC CC 1572/2014.

Per Mamba,J: para [17];

"I say so based on my reading and understanding of the provisions of section 49(2) which specifically prohibits or bars the Agency from entertaining an application for administrative review that has been submitted within ten working days of the controlling officer's decision"

the said Justice further states in para [20], that;

“from the above, it is clear to me that the decision by the Controlling Officer was communicated in the letter dated 08 September 2014 and not the letter of the 02 day of October 2014. Consequently, the application for review was filed outside the stipulated period of Ten (10) working days.”

Per para [21];

“for that reason the applicant has failed to establish or show that it has a right to the review sought and consequently to the interdict herein. (See Antoinette Charmaine Horton vs Roy Douglas Fanourakis and 2 others (05/2013)[2013] SZSC 68 (2013). The application is dismissed with costs.”

16.

The matter in respect of the relief sought by the Applicant must be dismissed due to the fact that he is bared by the Act. One in law must exhaust his domestic remedies before the party may proceed to a Court or to the IRC, which the Applicant has not.

17.

The next question is the balance of the complaint before us, which is one which the Applicant has felt it was his obligation as a citizen to report to the IRC. The issue is, the fee structure as he believes that the public will not be best served if the structure remains the way it is now. The question is further in his address combined with the scores and the client’s instruction. According to him, the client was after the services of an architect and a team so it was confusing as to what they were looking for. He non-theless submitted for both and as mention above is not interested in the tender and or being awarded for the same. He used the like for like as the main basis for this contention and said it brings the integrity of the assessment into question.

18.

The Respondent at the hearing made it clear that they were seeking the services of the Architects and that the other information was for the purpose of gathering information

for cost purposes. Section 44(h) is clear that the methodology to be used shall be clearly stated by the Respondents and here it seems they were not too sure what they want. In this tender it is not clear what the Respondent was after when he issued the tender out.

19.

In the statement of works/ services, para 2.2 (Master Document), where it provides for Specific Works To Be Done, it states that;

“... to design specifications throughout the construction of the building. The building should include...”

This was taken to mean that the Applicant had to put in a proposal for his services without the balance of his team and a proposal which was with the balance of his team. A close look at the proposals handed to us at the hearing indicate that the teams all understood it the same way. They put in a bid for themselves and the other team members who would be working on the project. What then is surprising is the Respondent only took the scores for the Architects and not the others.

20.

At the hearing in support of the same the Applicant brought the tender by Design Architects who were not successful in the bid. They had been given a score of 71% and had tendered for E5,985,000.00. The price was made up of the costs for the full team including, the Project Manager, the QS, the Civil/Structural Engineer and the Electrical Engineer. The score given to them was published in the Tender Notice, of the Intention to award. A close look at the proposal indicates that the costs of the tender for the works they were looking for, was E1.250,000.00 and not the said E5,985,000.00 as per the publication. That sum was for the full team and not the Architects.

21.

The winning person on the other hand, Building Design Group, was scored 87% at a price of E2,755,729.66. for the Architects and was not reflected as E9,414,472.87 as was Design Architects on the notice, which was not what he had offered. This score is not correct and is clear to all that it was not.

22.

What must be kept in mind is that Respondent in his submissions to the IRC, advised that he was seeking the services of an architect and no more. That being the case we invoke in terms of section 52 (1) of the Act, the power to annul the award to Building Design Group and substitute the award with an award to Design Architects in the Sum of E2,500,00.00 as a fixed sum for the services as per the proposal. The said scores were not done as per the Act, as in in a fair and transparent manner, to the best of the public and the entity per section 3 of the Act.

23.

Can a person who has no interest in a matter come forward and report this the IRC and if so what would the result be. The function of the IRC is to hear these complaints before it and to give ruling on the issues. At the same time it has to enforce the Procurement Act as the primary legislation.

Section 3 of the Act is clear what the Act was established for, in particular, section3(2)(a);

“ ensure transparency and accountability in public procurement...”

“...ensure value for money in the use of public funds”

“ promote more diverse private sector participation, through fair and non-discriminatory treatment of tenderers”;

this is further emphasised in Section 39 (1) of the Act, that;

“a tenderer shall not be excluded from participating in public procurement on the basis of nationality, race, religion, gender...”

one cannot discriminate and furthermore the Constitution prohibits such behaviour.

24.

The act emphasises the question of fairness at all times in the process and the transparency. These are public funds which will be used and are accountable to the public as the law dictates. A citizen has come to the IRC on this one issue and asked the IRC to look at the process as to how the award was made and if it was fair. The Respondent on the one hand is of the view that, if the Applicant is bared then nothing can come which comes with him. The door is closed and must stay that way in his view. We do not agree with him.

25.

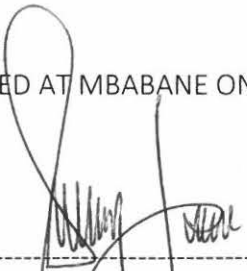
The public must not be afraid to come forward as has the Applicant to defend the public expenditure. In terms of section 51, the IRC can investigate a matter and on doing so it must give a written ruling within 15 days of the said application. Our investigations show that the process was not in accordance with the Act and that it was not fair and transparent. Applicant has been an exemplary citizen and come forward to expose the wrongdoing by the entity and we are grateful for same. To say the section would require that the matter be before the IRC as per section 49, would be unjust. The mischief here is the wrong doing by the entity.

26.

The following decision be and is hereby made;

- 1) That the Applicants application is time bared and therefore his application for the orders in terms of prayer 1 and 2, he is seeking is dismissed and can not be entertained.
- 2) That the Applicants 3rd order he is seeking, is in terms of section 51 of the Act and is upheld. The award by the Respondent to Building Design Group, is set annulled and is replaced with an award to Design Architects in the sum of E1,250,000.00 as a lump sum price inclusive of professional fees and expenses for the executing the scope of the project, (per clause 2.3.4 of the Commercial and Legal compliance document) sought by the Respondent, per the scores recalculated herein by the IRC.
- 3) No order as to costs and the Applicant is not to be refunded the application fee in light of the fact that he has failed in his main application.

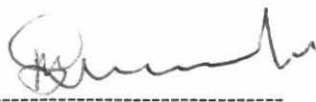
DATED AT MBABANE ON THE 12TH OF DECEMBER 2017



L HOWE



E D SIMELANE



M MASUKU

As per the Commission's submission, Technical Scores and Financial Proposals are as follows;

TENDERER	TECHNICAL SCORE	FINANCIAL PROPOSAL (ARCHITECTURAL INPUT ONLY)
Building Design Group	62%	E2,755,729.66
Design Architects	54%	E1,250,000.00
Steve Hall Development	55%	E4,077,324.44
Africa South Architects	58%	E6,853,852.56
Sabvilla Architects	53%	E2,450,000.00
	56%	E6,741,772.01

As per World Bank formula, Financial Scores are as follows;

Design Architects		= 100
Building Design Group;	$\frac{1,250,000}{2,755,729.66} \times 100$	= 45
Steve Hall Development;	$\frac{1,250,000}{4,077,324.44} \times 100$	= 31
Africa South Architects;	$\frac{1,250,000}{6,853,852.56} \times 100$	= 18
Sabvilla Architects	$\frac{1,250,000}{2,450,000} \times 100$	= 51
Ramashka Architects	$\frac{1,250,000}{6,741,772.01} \times 100$	= 19

Combined Technical and Financial Scores:

TENDERER	COMBINED SCORE
Design Architects	$54 \times 0.7 + 100 \times 0.3 = 67.8$
Building Design Group	$62 \times 0.7 + 45 \times 0.3 = 56.9$
Steve Hall Development	$55 \times 0.7 + 31 \times 0.3 = 47.8$
Africa South Architects	$58 \times 0.7 + 18 \times 0.3 = 46.0$
Sabvilla Architects	$53 \times 0.7 + 51 \times 0.3 = 52.4$
Ramashka Architects	$56 \times 0.7 + 19 \times 0.3 = 44.9$