

THE INDEPENDENT REVIEW COMMITTEE OF  
THE PROCUREMENT AGENCY

HELD IN MBABANE  
In the matter between

V J PROGRESS PRINTING AND PUBLISHING  
1994 (PTY) LIMITED

Applicant

and

THE MINSITRY OF EDUCATION AND TRAINING

Respondent

LOAFTUS PRESS (PTY) LIMITED

1<sup>st</sup> Intervening Party

APPOLO PRINTERS

2<sup>nd</sup> Intervening Party

R & R PRINTERS and STATIONERY

3<sup>rd</sup> Intervening Party

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Ruling dated the 15<sup>th</sup> day of December 2016

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Before:

Mlangeni T, Ngwenya A and Howe L.

SUMMARY

1.

In the matter of Tender No 84 of 2016/17 – Printing, Packing and Delivery of Exercise Books and Stationery Packs to Primary Schools. The Applicant was excluded from the tender for reasons of non-compliance- Applicant deemed to have not submitted the tender – incorrect names on tender register and general receipts issued by Government Revenue Offices on payment for the purchase tender documents.

1.

The Applicant lodged an application with the Committee for the review of the intended award by the Respondent per the notice dated the 9<sup>th</sup> of September 2016. The said notice was published in terms of Section 45 of the Act, advising that the contract award decision has been made. On the said notice being issued, the Applicant submitted a review application to the controlling officer of the procuring entity, who dismissed the application. The grounds for the dismissal were that the Applicant had not submitted a tender and was not part of the process and that it was an entity in Law which was deregistered some 20 years ago and this was confirmed by the Registrar of Companies after written enquiry. The Applicant has now made an application to the Committee for review of the matter and the decision by the Controlling Officer.

2.

On the application being served on the Commission, a notice was issued calling upon all the parties who had tendered to join the application should they wish too. At the first hearing of the matter, all the parties were present and they were advised of their rights in the matter. The only parties in the proceedings are the present parties herein above and shall be the only parties who will be participating in the matter. All the parties were granted the opportunity to file their submissions which they did. A further submission was filed by the Respondent as it had only submitted on the point of Law. The Intervening parties did not file on the merits of the matter.

3.

On the first day the matter was set, the Respondent raised points of law that the Applicant had no *locus standi*, in that it was not a party to the tender as it had not submitted a tender. Further it was deregistered by the Registrar of Companies some 20 years ago and was a separate legal entity. The Intervening Parties, supported the Respondents objection and the point of law.

4.

The Applicant in reply submitted that the point was not valid in law as it was common amongst most of the tenders that the mistake in the name on the register and that of the documents submitted in support of the tenders was different. The Applicant requested that the other general receipts be produced to show the mistake which was common to most. We must state that before the sitting the Committee requested that all the parties produce the original documents at the hearing, which was not done. It further submitted that the Respondent was victimising the applicant and that it was evident from the request by them of the information from the Registrar of Companies. And that they were not aware what information was requested by them and if it was requested for all the persons who had participated in the process.

5.

What must be mentioned here is that the Respondent had applied to the Tender Board for the award to proceed while the matter was before the Committee, which was refused. The Application was in terms of section 48 of the Act.

6.

The Committee requested that the Tender Board be called upon to produce the original tender documents submitted by all the applicants within 24 hours to the Committee. The Respondent advised that it had no control over the documents as they were in the custody of the Tender board and that some of the information in the documents was of a confidential nature.

7.

The Tender Board is clearly subjected to the Committee in terms of the Act and this was made clear. The rulings made by the Committee are binding on it and no justification can be made by the Respondent in that regard. It must be said that the Act which established the Committee for the tender process in terms of section 3 of the Act. The Tender Board is referred to in the definition section and is subject to this Act and further to the provisions of Section 52 of the Act which clearly describes the powers of the Commission.

8.

The said Section 52 (b) empowers the Commission to;

“... revise an unlawful act or decision of a procuring entity or substitute its own...”

9.

The issue of confidentiality which was raised by the Respondent has no place in the process of the sittings of the Committee and or matter before it. The object of the Committee is to deal with all the issues including what others may think is confidential as this is a public process dealing with public funds which must be accounted for. It is evident that it has no place here and that could have been no better served than in this matter where the Applicant produced documents which indicated that it has submitted the information to the entity, which the entity when called upon to produce the original documents, it was clear they had left it out.

10.

We cannot overstate the importance of transparency in this process and the need for all documents to be before the Commission to the extent that this should be a requirement that all the original documents must be before the Commission for inspection by all and the Commission, as a standing Rule.

11.

Eventually , the Tender Board delivered the requested original documents. These documents have given clarity to the matter at hand. The application for *locus* was found to be lacking in merit as the majority of tenders were of the same fate as that complained of by the Respondent, but were not disqualified. The names and particulars of most tenders was different to that which was recorded by the

government tender board on the tender register which is opened on the day of the tender. This supported the contention by the Applicant that it may have been unfairly treated or prejudiced by the Respondent in the process.

12.

Our other observation is that the government tender board should compel procuring entities to follow the guidelines in section 65 of the Swaziland Government Regulations on Procurement of 2008 in preparing tender reports in order to avoid inconsistencies as is the case in this matter. Any attempt to take short cuts will yield poor evaluation results.

13.

The Respondent offered the reasons that the difference in names is a mere spelling error and should not be seen in the same light as the Applicants case which was two different Legal entities. It was considered in its view to be a deviation which was not material and was a mere spelling mistake. The Applicant did not in its view fall in this category.

14.

On this basis the Committee found that the Applicant who had also registered incorrectly had *locus standi* and should be allowed to object to the tender process before the Committee. He had submitted a tender like all the others on the day and was at the opening of the tenders submitted. The opportunity afforded to the others should have been afforded to it too.

15.

The Applicant further submitted that on the face of the Respondents documents, he had issues which he could not explain nor could provide a lawful reason or justification. The Respondent requested the information from the Registrar of Companies on the 19<sup>th</sup> August 2016, by memo which was stamped the 22<sup>nd</sup> of September 2016. The reply from the Registrar is dated the 19<sup>th</sup> of August 2016 and the date stamp is the 19<sup>th</sup> of August 2016. No explanation for this was given and we cannot see how it can be justified. What in the view of the Applicant makes matters worse is the fact that the sittings for the evaluation were from the 16<sup>th</sup> to the 19<sup>th</sup> of August 2016. No request was made to the Applicant in terms of Section 59 (3) of the Act for clarification.

16.

The said Section provides that the Evaluation Committee may request the information in writing from the tenderer before the close of the tender, which was not done. What was done was a letter was sent to the Registrar requesting information on;

*“... whether this was one or two different companies and further state if they are both active or not.”*

The reply from the Registrar was different, it only advised that the said companies, **VJ Progress Printing and Publishing 1994 (Pty) Limited** and **Progress Printing and Publishing Co, (Pty) Limited** were not the same and were separate companies. The

question was clearly not answered in our view and nothing was done by the Respondent in this regard, this was confirmed in submissions at the hearing. He further confirmed that no request was made in this regard with all the other persons. Of the said persons who submitted tenders to the Respondent only three have in our view complied with all the requirements set by the Respondent in the invitation. These entities are, Apollo Printers (Pty) Limited lot 8 E1,452,464.60, Webster Print (Pty) Limited Lot 5 Siteki E2, 715,886.45 and Loaftus Press (Pty) Lot 4 E1, 209,782.28 Limited who were awarded as per the amounts mentioned above. The balance of the parties at this stage need not be mentioned as they will be dealt with in the merits of the matter.

17.

We therefore find that the Applicant cannot be excluded for the error in the name which was registered or misspelled for one reason or another, as the case maybe, but the justice of the case is such that it was not treated fairly and had the same issues as the others who were awarded but for the three mentioned and should be given the locus to contest the matter before the Commission.

18.

The Respondent was given an opportunity to prepare its submissions on the merits and the matter was postponed for 4 days as it had only relied on the point he had raised.



### Ad Merits

The Applicant submitted as its argument that it was not the only person who had anomalies in its tender document. It was also of the view that it was being victimised for its previous encounters with the respondent, whom it had challenged. The Respondent denied and made the submission that the difference between the Applicant and the others was justifiable for the following reasons. The errors with the others who were awarded was the spelling in the names and not the name itself which affects the existence of the entity and its identification, or the abbreviations in the general receipt issued by the revenue office. The Applicant on the other hand had not submitted at all. It was not in the list of tenderers and did not tender. The committee on request of the original documents noted that, the Applicant had submitted all the relevant documents despite the 1<sup>st</sup> Respondent having said it had not. In the register the 1<sup>st</sup> Respondent noted that the Applicant had not submitted its Form J and its trading licence. This was found not to be correct and was not the position when the original documents supplied by the Respondent were inspected.

20.

A schedule of the irregularities found by the Commission on a close look at the documents submitted to the Tender Board is attached as **Schedule 1**. A close look at it will disturb the average person given how these matters are handled by the Tender Board which, cannot be allowed to persist at the public expense. This is expected to

be the normal evaluation process to be adopted by the Tender Board and had they done so this matter would not in our view be before us.

21.

The Respondent was given an opportunity to rebut this but it did not. It sought a postponement of the matter to be able to take instructions on the matter as legal representative was not instructed on it and had not prepared submission on the merits. The postponement was granted to Respondent reluctantly and we must say, the matter took a sad turn thereafter.

22.

The matter was set for hearing on the 7<sup>th</sup> of December 2016, but unfortunately On that day one of the members could not make it due to personal reasons. The matter was then postponed to the 13<sup>th</sup> of December and on that day, none of the other parties but the Applicant was present. It was again postponed to another day being the 19<sup>th</sup> of December, which was the final day for the sitting. On that day, the Committee was advised by the registry that all the parties had been informed of the sitting and had agreed to attend. The Respondent did not attend and called the committee to advise that they were of the view that the matter was set for 4:30 pm on that day. It is surprising to the committee that only the Applicant was there at 2:30pm. Had the matter been set for 4:30pm the Applicant would have only been there at the 4:30 pm and not at 2:30pm.

23.

The Committee waited for more than an hour and there was a no show from the Respondent. The matter proceeded and it was recorded that the Respondent did not attend and the Applicant made further submissions on the costs. It submitted that section 52(1)(c) of the Act, gives the Committee the power to make a ruling on costs and that it was seeking such a ruling from the Committee. It submitted the costs it had incurred and it was asked to elaborate on the costs which it did, in brief though it may have been.

24.

The Committee must express its disappointment in the behaviour of the Respondent. The Respondent did not come to the hearing and has on two occasions not attended the hearings, being the 13<sup>th</sup> and the 19<sup>th</sup> of December 2016. The manner and behaviour cannot be accepted and as a sign of its disapproval the Committee agrees to award costs. It must be made clear that this is not to be taken to be the norm, but this matter is an exception to the rule.

25.

The Applicant has shown that the Respondent did not apply its judgement in awarding the tenders in the said matter before us. It did not submit all the documents which the Applicant had submitted to the Tender Board. It has not treated the others who were awarded some of the lots in the same way, who had the same issues as the Applicant such as the errors in the names on the general receipt books. The registration forms which the tenderers completed by hand did not have the full names of the tenderers, similar to the Applicant. The full names were in most instances inconsistent but was accepted by the Respondent. No reason

was given why the Applicant had been singled out, or at least one which would in our view warrant the disqualification by the Respondent. Had the same been applied consistently, our view is that all but 3 would have been disqualified. The 3 being Webster (Pty) Limited, Loftus Press (Pty) Limited and Appollo Services (Pty) Limited. The balance of those awarded are in our view defective and need to be returned to the Tender Board for re award as below.

26.

In conclusion we therefore make the following ruling to be effected without delay and to be served on all parties, including the Tender Board and those who appoint it.

27.

**Ad the Awarded contracts.**

The Committee is of the view that the tenders awarded to Loftus Press(Pty) Limited in the sum of E 1,209,782.28 for Lot 4 Mankayane, Apollo Services (Pty) Limited in the sum of E 1,452,464.62, for Lot 8 Hluthi and Webster for the sum of E 2,715,886.45 for Lot 5 Siteki are confirmed as issued procedurally and in terms of the law. These may proceed immediately to meet the obligations towards the procuring entity. These are reflected in the Tender Notice Intention to Award A Contract, issued by the Respondent. The Respondent is advised to issue the award for the above Lots mentioned in this ruling.

28.

In all fairness, one applying the rules of procedure and procurement, which we urge the Tender Board to apply, the balance of the parties should be disqualified and the tenders should be awarded to those whom we have confirmed. That we cannot do because we are not called upon to do that nor are we in a position here sitting to do that. We would have to sit as the Tender Board and access the tenders which is only our function in exceptional circumstances, which we do not believe is that case.

29.

Ruling.

We therefore rule that the other Lots which were put up to tender in terms of tender number 84 of 2016/17, being **Lots 6** Siphofaneni, Lot 3 Manzini, **Lot 2** Mbabane, Lot 7 Nhlangano and Lot 1 Pigg's Peak are to be re-tendered and the Applicant and the others such as those awarded in this ruling are to be included in the process. Further a new and different Tender Board should sit to award the Lots which remain.

30.

The costs are awarded to the Applicant in the following amounts to be paid by the Respondent. The sum **E16,416.00** for item 11 of the list of costs submitted and attached to this ruling. The sitting for the two days the Respondent did not attend at the same rate of **E 16,416.00** per day. The other costs will not be awarded as they are to be considered as part of doing normal business and part of litigation.

31.

Further we wish to record our concerns and dissatisfaction with the Tender Board and those who participate in the tender process. The lack of due care by all the parties is concerning to say the least. Tenderers do not know who they are and what their particulars are. These are public funds which are being awarded to the tenderers and they come with obligations to the State and the Tax payer. A contract is created between the parties when the tender is awarded. Should someone not be able to meet his obligations to the State, the State should have someone to turn to for this obligation.

32.

The relaxed attitude adopted by the Tender Board must stop. Attention must be paid to the entity which they award the tender to due to the obligations that come with the award which are contractual. The correct entity and the intended entity must be established and identified before the award is made and where applicable they must be disqualified during the evaluation process. This will avoid the unpleasant findings by the Committee during this hearing.

33.

The members of the Committee concur with this ruling and it is so issued in line with the provisions of the Act. The Agency is called upon to ensure the enforcement of the ruling so issued here in. This ruling is to be communicated to the Tender Board to give effect to the same and is called upon to meet and award the tenders in 14 days or sooner as to give effect to the tenders issued.

DATED AT MBABANE ON THIS THE 15<sup>th</sup> DAY OF DECEMBER 2016.

Mlangeni

Mlangeni T.M.

[Handwritten Signature]

Ngwenya A

And

[Handwritten Signature]

Howe L

[Handwritten Signature]