

**BEFORE THE I.R.C. OF THE SWAZILAND PUBLIC PROCUREMENT
REGULATORY AUTHORITY**

HELD AT MBABANE

In the Matter between:-

HEPTAGON COMPANY LTD

Applicant

And

**CHIEF EXECUTIVE OFFICER,
MUNICIPAL COUNCIL OF MANZINI
MUNICIPAL COUNCIL OF MANZINI
ROOTS CIVILS (PTY) LTD**

**First Respondent
Second Respondent
Third Respondent**

RULING ON POINT OF LAW

1. The parties to these proceedings are described in the pleadings, hence there is no need to repeat the descriptions in this ruling.
2. The Applicant and the Third Respondent are major players in the construction industry. They are both registered with the recently established Construction Industry Council, in terms of Section 3 of The Act thereof. This Section establishes the Construction Industry Council whose main object is to regulate the business operations of the industry in the country with a view, among other things, to promote the industry, provide leadership and establish best practices within the industry.
3. The Second Respondent has been cited for the reason that it is the procuring entity. It is not clear why the First Respondent has been cited, given that the Second Respondent is a statutory body with legal capacity to be sued in its own name.

BACKGROUND

4. During September 2015 the Second Respondent published an invitation to tender for rehabilitation works to be carried out within the Manzini Municipality. The tender number is 34 of 2015/16 and its copy is annexure 'LD1' to the Respondents' answering papers. The Applicant and the Third Respondent are some of the construction companies that responded to the invitation by submitting tenders. The tender was eventually awarded to the Third Respondent, the Applicant being the Second qualifying contractor after the Third Respondent. The award was made on the 27th January 2016, the awardee immediately went to work and has been on the project till the present day. The contract amount is E14, 377, 565 – 25.
5. On or about the 5th February 2016 the Applicant lodged with the First Respondent an application for administrative review of the award, on the basis that the award was in violation of Section 28 of The Construction Industry Council Act No. 14 of 2013, hereafter referred to as 'the Act'. In the letter seeking review Section 28 is quoted as follows:-

“A contractor registered under this act shall not undertake construction work in a category in respect of which that person is not registered”.¹
6. The Applicant has since approached this tribunal in terms of Section 49 of The Procurement Act 2011, for review of the award. Applicant's amended application is dated 12th April 2016, and it was served on the First and Third Respondents on the same day.
7. The Applicant's case is that the award of the tender to the Third Respondent was irregular in that the Third Respondent “was not eligible to undertake the work” – i.e. that it did not qualify. According to the Applicant, the legal basis of this assertion is in Section 28 of the Act. This clause has been quoted verbatim above, at paragraph 5. The Applicant relies upon a categorisation of Construction Companies by the Construction Industry Council into 'C1' and 'C2' amongst others.

¹ Paragraph 4 of letter dated 5th February 2016.

8. Paragraphs 6 and 7 of the amended application go beyond the wording of Section 28 and they are in the following terms:-

“6. In terms of Section 28 of the Construction Industry Council Act, only contractors registered under category C2 were eligible for the tender, the aggregate value of the said works being between the sum of E10, 000,000.00 and E25, 000, 000.00

7. In terms of the Construction Industry Act the Third Respondent being registered to (sic) under category C1 and was not eligible to undertake the work.”

9. It is a fact that Section 28 of the Act says nothing on categories C1 and / or C2, and it also says nothing on the values of the works that the said categories are eligible or ineligible to undertake. For its argument the Applicant relies on a document that it has attached and marked as ‘LD8’, which the First and Second Respondents have also attached as ‘LD12’.

10. Applicant’s case can be unpacked in the following manner:-

10.1 Construction companies / entities are categorised as ‘C1’ and ‘C2’. The categorisation appears to relate to proven capacity, track record, etc.

10.2 The categorisation was crafted by The Construction Industry Council.

10.3 The Third Respondent is in category ‘C1’.

10.4 Contractors in category ‘C1’ are limited to tenders that are above the value of E25, 000, 000.00, and are not allowed to undertake projects that are lower than that.

10.5 The contract in issue is valued at E14, 377, 565.25, hence the Third Respondent was not eligible for the works.

- 10.6 Flowing from the above, the award to Third Respondent was irregular.
- 10.7 The Applicant, being in category C2 qualified for the tender and, being the next qualifying tenderer in the rating, ought to have been awarded the tender.
11. In their opposition to the application the First and Second Respondent, have filed an affidavit by one Lungile Dlamini. In this affidavit is raised a preliminary point of law. This ruling relates strictly to the point of law, for the reason that it has the potential to determine the matter.
12. The preliminary point of law can be captured as appears below:-
- 12.1 The Applicant's application relies on document LD8 / LD 12. This document purports to be an official categorisation of construction companies into C1 and C2, with values in respect of the categorisation.
- 12.2 This categorisation is invalid and of no force and effect, for the reason (alleged) that the CIC does not have authority to make the categorisation, hence the categorisation is ultra vires.
- 12.3 Categorisation can legitimately be done through regulations promulgated by the line Minister acting in terms of Section 46 (1) of the CIC Act, and acting upon the recommendation of the CIC.
13. Given that Section 28 of the Act does not make any categorisation, the Applicant relies for its case upon the document LD8 / LD12. The enquiry must therefore focus on whether or not the CIC has legal authority to designate categories and the values applicable thereto. If it does not have such authority, it follows that at this point in time there are no valid categories within the legal regime of the CIC Act, and the Third Respondent would be eligible for the tender that was awarded to it.

14. It is common cause that the line Minister has not yet promulgated regulations as envisaged in Section 46 (1). If this is where the answer lies, and nowhere else, the matter would end here. We think that the issues go beyond this aspect.
15. One CIC Act provision which was not cited to us is Section 8 (j), which is under the sub-heading “FUNCTIONS OF COUNCIL”. It provides that CIC functions include one to – “prescribe and vary the categories for the registration of persons engaged in the Construction Industry;”
16. A reading of the above-quoted sub-clause points in one direction, that the CIC does have the authority to prescribe categories, and categories can only be in aggregate values.
17. An issue that flows from paragraphs 15 and 16 above is the mode of publication of the categories, once prescribed, so that participants in the industry have access to the information. The Respondents argue that the mode of publication must be a gazette. This would obviously be the case in respect of regulations made by the line Minister under Section 46 (1), but it does not follow that the CIC must adopt this route, failing which the purported categorisation would be null and void. It appears to us that if the gazetting is a requirement in respect of the CIC, there must be a specific provision in respect of such an important aspect of communication of information.
18. Section 8, on functions, makes references to publication. Sub-section ‘M’ provides for publication “from time to time” of technical and commercial information “as it considers necessary or expedient ---”. Sub-section (v) refers to provision of information to stakeholders “and to publish best practice standards and guidelines; ”. There is no specific mention of the manner of publication, and certainly no mention of gazetting.
19. The CIC has a website which is accessible to all stakeholders in the industry. The website is an official receptacle of the CIC, wherein is uploaded and kept data and information relating to the operations of the Council as well as what goes on in the industry. The website is up-dated annually; through information that is compulsorily supplied by the

Construction Companies. Document LD8 / LD12 is uplifted from the website. On that basis it is fair to conclude that all stakeholders in the industry have constructive notice of what is in the website.

20. We are thankful for the South African Act No. 38/2000 which was furnished by the First and Second Respondents. This legislation establishes a board, which is an equivalent to the Council in this country. Under powers and functions in that legislation the board, among other things, promotes best practice and “ (b) must, by notice in the Gazette, publish best practice standards and guidelines.”² One conspicuous difference is the specific reference to ‘gazette’ in the South African legislation, which is not there in ours. Hence the South African decided cases have no relevance in Swaziland on this particular aspect.
21. The result of the foregoing analysis is that the Respondent s’ argument for invalidity of LD 8 / LD 12 cannot be sustained. It follows that based on the categorisation by CIC as published in the website, the Second Respondent did not qualify for the tender in question.
22. But again the issue does not end there. Document “LD 1” is an invitation to tender, in respect of “Tender No. 34 of 2015/16”. The first paragraph reads, in part, as follows:-

“Tenders are invited from civil engineering contractors that are registered with the Ministry of Public Works and Transport under categories 3 and 4 and the Construction Industry Council” (our underlining).
23. In respect of CIC there is no mention of categories. This obviously suggests that any entity that is registered under CIC was eligible. On this basis the Third Respondent would be eligible. On the face of it tenderers were entitled to tender on the basis of categorisation under the Ministry of Public Works or under CIC or both.

² Section 5 (2) (b)

24. In conclusion, we find that:-

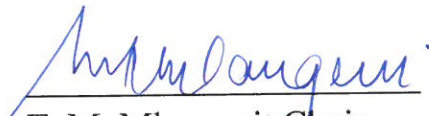
24.1 there is valid categorisation by CIC.

24.2 in terms of that categorisation the Third Respondent would not qualify for the tender in question.

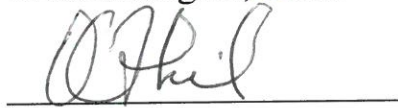
24.3 in view of the wording of the invitation to tender, there is nothing that makes the Third Respondent ineligible for the tender.

25. On the above conspectus the point of law regarding the categorisation by CIC is dismissed.

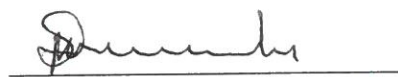
26. The issue of whether the review process was instituted within the time-line prescribed was mentioned but not sufficiently canvassed. At this stage we do not pronounce on it. If it remains alive the parties will be heard on it, in the event the matter proceeds further. IRC awaits notification in that regard.


T. M. Mlangeni, Chair

19-08-2016
Date


O. Thindwa, Member

19-08-2016
Date


M. Masuku, Member

19-08-2016
Date