

IN THE INDEPENDENT REVIEW COMMITTEE HEARING (“IRC”)

HELD AT MBABANE

IN THE MATTER BETWEEN;

N.J.E.M (JOINT VENTURE)

APPLICANT

AND

ESWATINI ELECTRICITY COMPANY

RESPONDENT

**RULING ON ADMINISTRATIVE REVIEW PROCEEDINGS IN TERMS
OF SECTION 49 OF THE PROCUREMENT ACT 2011 ON TENDER
NO. 13 OF 2019/20**

INDEPENDENT REVIEW COMMITTEE (“I.R.C”);

MR. B.S DLAMINI : Chairman

MR. N. MAPHANGA : Member

MR. Q. MAGAGULA : Member

1. PARTIES

- 1.1 The Applicant is a joint venture made up of four companies namely, Nhlane Electrical and Civil Contractors, Jemma Holdings (Pty) Ltd, Masibhekisise Investments (Pty) Ltd and Eco-buzz Investments (Pty) Ltd. The first two companies are South African based companies whilst the remaining two companies are based in Eswatini. The four companies are trading under the style “N.J.E.M” for purposes of the tender issued by the Respondent Eswatini Electricity Company. Accordingly, the Applicant will be referred to as “N.J.E.M” in this ruling.
- 1.2 The Respondent is Eswatini Electricity Company (“EEC” or the “Company”), a Government owned enterprise based at Eluvatsini House, Mhlambanyatsi Road in Mbabane, District of Hhohho.

2. ISSUES IN DISPUTE

- 2.1 The dispute between the parties emanates from an intention by EEC to award Tender No.13 of 2019/2020 to Hancy Construction (Pty) Ltd. The tender in question is described as an “EPC” tender meaning the service provider selected for the work must render engineering, procuring, construction and commissioning services to the procuring entity (PE).
- 2.2 The dispute lodged by the Applicant as outlined in its application for review and amplified in their written submissions as well as oral submissions by its lead counsel is founded on a number of grounds. The main two grounds however can be summarized as follows;

(i) The Respondent did not properly assess or score the Applicant in the various categories of technical evaluation. The Applicant argues that it ought to have been scored higher than the score communicated to it, namely 59% on the technical evaluation.

(ii) The company which is earmarked to be awarded the tender does not qualify to carry out all the works required to be done in terms of the tender as it is only a construction company and is not within the categorization specified in the tender document.

2.2.1 The Respondent's position is that the Applicant could not be scored higher because it failed to meet the original as well as the revised or amended specifications of the works required to be done in terms of Tender No.13 of 2019/2020.

2.2.2 It was EEC's further argument that it properly and fairly carried out technical evaluations on all the companies that tendered for this project.

3. **BACKGROUND INFORMATION**

3.1 The first sitting of the Committee was on the 17th December 2019 at the Eswatini Public Procurement Regulatory Authority ("ESPPRA") boardroom with those in attendance being the Applicant and Respondent's officers who had an interest in the tender in question.

3.2 During the hearing of the 17th December 2019, several issues were discussed including but not limited to the following issues:

(i) Introduction of the Independent Review Committee members.

- (ii) Introduction of all parties involved in the matter.
- (iii) Declaration of conflict or potential conflict by all parties concerned.
- (iv) The rights of the parties to legal representation.
- (v) The procedure to be adopted during the administrative review hearing.
- (vi) Exchange of documents between the parties.
- (vii) The documents required by the committee prior to hearing the application.
- (viii) The date, time and venue for the hearing of the review application.

4. **THE APPLICANT'S CASE**

4.1 The Applicant's submissions were largely based on the response given by EEC in rejecting the Applicant's bid in the internal review process. In its response to the Applicant's complaints, the Respondent, namely EEC, had formulated the following responses as grounds for rejecting the Applicant's bid;

- (i) NJEM, being the Applicant, had used a generic approach in its methodology statement with no specifics to the project at hand.
- (ii) The Applicant was lacking in transmission level turnkey projects but showed experience only in distribution level projects and maintenance contracts.
- (iii) The Applicant's proposal lacked a clear organogram of the project team with no indication of specific roles and responsibilities.

(iv) The proposed equipment intended to be used by the Applicant for the project was incomplete and there was no mention of the type of transformers that they would use for the project.

4.2 In attacking the above listed grounds for allegedly not meeting the required standards, Mr B Ngcamphalala who represented the Applicant went to great lengths in seeking to demonstrate that the Applicant had fully complied with the tender document in terms of how the Applicant would approach the project and that it [Applicant] also surpassed the mark on the methodology it would employ in ensuring that the project was successfully constructed and commissioned. In this regard, we were shown several parts of the Applicant's bid and how it addressed all the queries raised by EEC as areas of concern.

4.3 The Applicant's representative was highly critical of EEC's stance to penalize the Applicant on standards and requirements that were not specified in the tender document. Mr Ngcamphalala urged the committee to simply look at the **Invitation to Tender Document** against the Applicant's proposal and then assess for ourselves on whether or not the Applicant should not have been awarded a higher score on the technical evaluation.

4.4 In seeking to demonstrate how EEC was unfair in the evaluation of the Applicant's proposal, the Applicant's representative referred the committee on the alleged requirement of an organogram that was supposedly lacking in Applicant's proposal. According to Mr Ngcamphalala, in the Invitation to Tender Document, under the "**Qualification Criteria**" heading, all that EEC stated was that contractors would be evaluated on the following aspects;

(i) demonstration of experience in at least three similar projects

(ii) Academic qualifications necessary to undertake the required service

(iii) Professional affiliation and professional bodies

- 4.5 There was therefore no mention that contractors must set out an organogram and set out the specific roles and responsibilities of the personnel that would be involved in the project. According to the Applicant's representative, to be judged on an unlisted item was unfair and unlawful.
- 4.6 The Applicant, through its erstwhile representative also vehemently disputed that it had used a generic approach on how it would go about implementing the project. As already indicated above, the Applicant's representative referred the committee to several components in its proposal document in which the Applicant detailed how it would go about implementing the project from site preparation up to the completion of the project.
- 4.7 The Applicant's representative also questioned EEC's decision of intending to award the contract to **Hancy Construction Limited** in that this company is only a construction company. The submission by the Applicant in this regard was that the Applicant, acting on its own, would not be in a position to fulfil all the scope of works required to be done in terms of the original tender document as well as the revised tender document. The argument by the Applicant was also that the Applicant was not registered by the Construction Industry Council (CIC) in the category specified in the tender document namely B2 and C2 or above.
- 4.8 In the end, the Applicant's representative implored the committee to carefully scrutinize the Applicant's proposal against the **Invitation to Tender Document** and then re-evaluate its proposal as stated in the

Procurement Act with a view of reversing the evaluation carried out on it by EEC.

5. THE RESPONDENT'S CASE

- 5.1 The Respondent submitted that in the Tender Clarification Meeting convened by EEC, it was explained to all the parties present that parties are allowed to enter into joint ventures as long as such an arrangement was lawful and registered with CIC.
- 5.2 The Respondent also argued that the scope of the work was Engineering Procurement and commissioning contract, such that construction only covers 30 percentage of the work. This therefore means the CIC categorization could not be the only qualifying factor taking into account that the Eswatini Energy Regulatory Authority is the main regulatory of companies within the Energy sector.
- 5.3 The Respondent stated that the Applicant's proposal was generic in its approach and was not specific to the project at hand. To demonstrate this, the Respondent through its representatives Mrs Nonhlanhla Maphalala and Mr Lwati Dube stated that the proposal by the Applicant did not specify how it would deal with the different terrains at Siphocosini and Malkerns. It was argued on behalf of the Respondent that the proposal by the Applicant did not indicate the type of equipment that would be used in the preparation of the site as well as the construction thereon.
- 5.4 It was further submitted on behalf of the Respondent that at the Malkerns depot, there is an existing sub-station and the Applicant's proposal did not

address how it would deal with this sub-station namely, whether it would be dismantled and, if dismantled, how the Applicant proposed to deal with the equipment or assets and debris of the dismantled substation, site leveling and preparation thereof.

- 5.5 In its submissions, the Respondent stated that the proposal is for engineering, procurement, construction and commissioning of the project at Malkerns and Siphocosini. According to Mr. Dube, this project is of significant value not just to EEC but to the country as a whole and therefore it needs to be attended by highly qualified personnel and a contractor with specialized expertise.
- 5.6 It was further contended on behalf of the Respondent that a major component of the works to be done is energy work or power generation work. The construction component according to the Respondent is minimal work. The proposal by the Applicant is substantially lacking in terms of the sourcing and type of transformers that it was proposing to install in the two different areas.
- 5.7 The Respondent argued that the Applicant's proposal was silent and/or not convincing on how it would carry out the commissioning of the works once completed.
- 5.8 It was also submitted that the issue of an organogram was important so that the procuring entity can know with precision as to how the contractor was proposing to manage the project in the two different areas so that each member of the team could easily be assessed in terms of qualifications, experience and his or her roles and responsibilities in the implementation of the project.

5.9 On the issue of experience on three similar projects, the Respondent stated that the Applicant was found to be lacking in that area essentially because the projects said to have been undertaken by the Applicant were refurbishment projects and did not involve the procurement, installation and commissioning of the type of works required by EEC at such a magnitude level in terms of the current tender.

5.10 In conclusion, EEC representatives applied that the prayers sought by the Applicant be dismissed and that the company should be allowed to continue with the major works of the project as it was important for the whole country that it be implemented without any further delays.

6. ANALYSIS OF ISSUES

6.1 The Independent Review Committee derives its powers to make a determination on any complaint lodged with ESPRRA under Section 51 (1) and (3) of the Public Procurement Act 2011. In terms of Section 51 (1), it is provided that;

“Unless the application is dismissed, the Independent Review Committee shall-

(a) Immediately institute an investigation

(b) Issue a written decision, within fifteen working days after the submission of the application.

6.4 Section 51 (3) of the Act provides that;

“The decision shall state-

(a) whether the application is upheld, in whole or in part or dismissed;

(b) the reasons for the decision; and,

(c) any corrective measures that are to be taken or remedies ordered in accordance with section 52.”

6.5 The main question for determination is whether the Applicant met the technical evaluation un terms of the Invitation to Tender Document.

6.6 The central point of disagreement between the Applicant and the procuring entity (EEC) is that the former feels that its proposal was not correctly and/or fairly assessed by the Respondent. The Applicant feels that the score of 59% on the technical evaluation is on the lower side and thus requests the IRC to independently carry out an assessment of its proposal with the sole aim of reversing the Respondent’s assessment of Applicant’s suitability on the technical side of the proposed works.

6.7 The scope of powers vested on the IRC to review decisions taken by procuring entities is wider than the normal or ordinary scope of review. The committee is given wide powers to investigate, call for evidence and expert witnesses and to subpoena for all types of evidence in carrying out its statutory functions of review. The wide powers of review are however not without limitations. The committee cannot, legally speaking, seek to assume the discretionary powers vested on the procuring entity.

6.8 In an almost similar case in South Africa, namely **IDC v Trencon Construction (642/2013) [2014] ZASCA 163 (01 October 2014)**, the Supreme Court of Appeal of South Africa stated that;

“[17] The power of a court [procurement reviews in South Africa are done by the courts] provided in s 8(1)(c)(ii)(aa) of PAJA to substitute or vary administrative action or to correct a defect resulting from an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances. In *Gauteng Gambling Board v Silverstar Development* this court described ‘exceptional’ as follows;¹

“Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.”

6.9 The court in the above cited case went to state that;²

“With these principles in mind, it is clear that the court below erred in substituting its own decision in the circumstances of this case. It overlooked the fact that IDC was not obliged to award the tender to the lowest bidder or at all. The award of the tender could not be a forgone conclusion in the circumstances. Furthermore, the court does not appear to have balanced the substitution remedy against the requirements of the separation of powers and failed to exercise judicial deference.

¹ 2005 (4) SA 67 (SCA) paras 28-29

² At para [18]

An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience and its access sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations...”

- 6.10 In this case, the Applicant complains that it was given a low score on the technical evaluation. During submissions, the Applicant did not state what score it believed was supposed to be allocated to it on the technical evaluation. It is standard and established practice that scoring is done at the discretion of the procuring entity. Unless a clear illegality is pointed out in the scoring done by the procuring entity, the latter retains and exercises its own discretion in the evaluation process.
- 6.11 Even though we are not compelled to carry out this exercise, we have on our own compared the two proposals between that of the Applicant and the company which is earmarked to be awarded a contract, namely Hancy Construction Limited. This company, in terms of its proposal, is not just a construction or civils works company but is also a company involved in electrical engineering.
- 6.12 Hancy Construction Limited has partnered with two major South African companies, namely Actom High Voltage as well as Tocojy Energy Investments and these partners of Hancy Construction have done massive installation and commissioning works for countries all over the world of up to 400 kV energy lines. These countries include DRC, Republic of South

Africa, Mozambique, India, Namibia, Nigeria, Swaziland and Zimbabwe. The expertise and experience of Hancy's partners is un-comparable to those partners of the Applicant. The layout of Hancy's proposal on the engineering, procurement, construction and commissioning in the two sites is detailed, impressive and articulate. We have no doubt that if the partners of the NJEM consortium were given the space to make an independent judgement, they would also award the project to Hancy Construction and its partners.

6.13 It is important that we dispel the notion that the Applicant was 'penalized' for not stating methods or approaches that are not stipulated in the Invitation to Tender Document. The correct position is that the Applicant was given points that in the discretion of the procuring entity it deserved for its proposal. However, there were companies that did more than the Applicant in terms of elucidating how they would go about implementing the project from inception to completion and commissioning. These companies were awarded high scoring than the Applicant because they demonstrated a clear knowledge of what was required to be done, the type of equipment they would use and the personnel they would use in carrying out specific tasks.

6.14 In the **Public Procurement Procedures of 2016**, it is stated in section 80 thereof under the heading "**Technical Evaluation**" that;

"(1) The evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the statement of requirements in the tender document, to determine whether the tenders are substantially responsive.

(2) The factors taken into account shall be those indicated in the tender document only, and may include but not limited to-

- (a) conformity to specifications, standards, drawings or terms of reference, without material deviations or reservation;**
- (b) satisfactory understanding of an assignment, as designated by any methodology or design; or,**
- (c) suitable staffing or arrangements for supervision or management of an assignment.**

6.15 The Respondent in the present matter applied with perfection the above principles and came to a fair and rational answer. Whilst it is absolutely true that the Respondent, for instance, did not stipulate an organogram as a requirement in the Invitation to Tender Document, but only required a list of personnel and their qualification and experience to perform the tasks at hand, a company that does more than just the listing of the personnel and their qualifications but actually takes the procuring entity to its confidence by setting out, in a graph form, how each personnel will perform the task and responsibilities in a structured manner will logically attract more points. This is more of logic than legal. That which is logical is not necessarily illegal. If anything, it demonstrates that one understands and appreciates the nature, standards and magnitude of the works to be done.

7. **CONCLUSION**

7.1 Having considered the respective submissions of the parties hereto, it is our conclusion that the Respondent's intention to award Tender NO. 13 of 2019/2020 to Hancy Construction Limited is proper and lawful in the circumstances of the matter.

7.2 There is therefore no factual, legal or other grounds upon which as a committee we can find justification to interfere with the Respondent's decision to recommend to award the tender in question to Hancy Construction Limited.

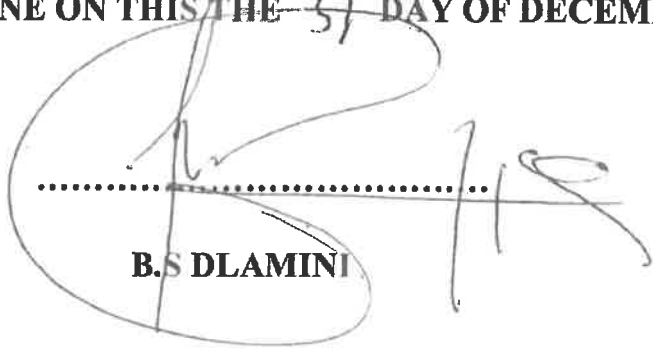
8. **AWARD AND/OR ORDER**

8.1 **The order we make in the matter is as follows;**

8.1.1 **The Applicant's application for review in terms of Section 49 of the Procurement Act 2011 is dismissed in its entirety.**

8.1.2 **The Respondent's decision in respect of Tender No.13 of 2019/2020 is confirmed as being lawful and proper.**

DATED AT MBABANE ON THIS THE ^{31st} DAY OF DECEMBER 2019.



B.S DLAMINI



N. MAPHANGA



K.Q MAGAGULA