

**IN THE HIGH COURT OF LESOTHO**

**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/0125/2022**

**In the matter between:**

**PT RATALANE CONSTRUCTION (PTY) LTD**

**APPLICANT**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF**

**EDUCATION AND TRAINING**

**1<sup>ST</sup> RESPONDENT**

**MINISTRY OF EDUCATION AND TRAINING**

**2<sup>ND</sup> RESPONDENT**

**PROCUREMENT UNIT MINISTRY OF**

**EDUCATION AND TRAINING**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** PT Ratalane Construction (Pty) Ltd v P. S. Ministry of Education and Training & 3 Others [2023] LSHC 134 Comm. (03<sup>RD</sup> AUGUST 2023)

**CORAM:** MOKHESI J

**HEARD:** 22<sup>ND</sup> MAY 2023

**DELIVERED:** 03<sup>RD</sup> AUGUST 2023

### **SUMMARY**

**Administrative Law:** *Tender process cancelled without giving the successful tenderer reasons for cancellation- Held, the decision is both unfair and unreasonable- the decision reviewed and set aside.*

### **ANNOTATIONS**

#### **Books**

Lawrence Baxter *Administrative Law (1984) (Juta).*

#### **Cases:**

*Jeffery v President, South African Medical and Dental Council 1987 (1) SA 387 (C)*

*National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC)*

*UWC v MEC for Health and Social Services 1998 (3) SA 124*

## JUDGMENT

### [1] **Introduction**

In this matter the applicant had approached this court on urgent basis seeking the following reliefs as outlined in the Notice of Motion:

*“1. That a Rule Nisi be issued returnable on a date and time to be determined by this Honourable Court calling upon the Respondents to show cause (if any) why: -*

*(a) The Rules as to notice and form of service shall not be dispensed with on account of urgency herein.*

*(b) The 1<sup>st</sup> and Respondents (sic) shall not be restrained and interdicted from re-advertising and re-tendering the tender for the construction of Secondary Schools – BID REF. NO. GoL/JICA/W001/2021/2022 & GoL/JICA/W001/2021/2022/L2 in any newspapers or media platforms in any manner whatsoever pending the finalization hereof.*

*(c) The 1<sup>st</sup> to 3<sup>rd</sup> Respondents shall not be ordered to refrain from accepting any tender documents and to stop any processes of tendering which are consequent to the re-advertisement of the re-tendering of the tender for the Construction of Secondary Schools – BID FEF: GoL/JICA/W001/2021/2022/L1 & GoL/JICA/W001/2021/2022/L2 in any Newspaper or media platforms in any manner whatsoever pending the finalization hereof.*

- (d) *The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not be ordered to dispatch the record of proceedings (if any) that gave birth to the decision to cancel the tender for the construction of Secondary Schools – BID FEF: GoL/JICA/2021/2022/LS with immediate effect to the Registrar of this Honourable Court within ten (10) days hereof and/or as may be directed by this Honourable Court.*
- (e) *The 3<sup>rd</sup> Respondent shall not be ordered to dispatch the record of proceedings that gave birth to the decision to declare the Applicant as the successful bidder in respect of the tender for the construction of Secondary Schools – BID FEF: NO GoL/JICA/W001/ 2021/-2022/L1 & GoL/JICA/W001/2021/2022/L2 to the Registrar of this Honourable Court within ten (10) days hereof and/or as may be directed by this Honourable Court;*
- (f) *The 2<sup>nd</sup> Respondent’s decision to cancel the tender for the construction of Secondary Schools – BID FEF: NO. GoL/JICA/-2021/ 2022/W001/L2 with immediate effect and without affording the Applicant as the successful bidder any hearing whatsoever shall not be reviewed, corrected and set aside.*
- (g) *The 1<sup>st</sup> and 3<sup>rd</sup> Respondents shall not be compelled, directed and ordered to proceed with the tendering process and to invite the Applicant as the successful bidder to enter into a contract in accordance with the Public Procurement Regulations of 2007.*
- (h) *The Respondents shall not be ordered to pay costs hereof on Attorney and client scale.”*

[2] **Background Facts**

This application is opposed. The project now the subject matter of these proceedings is a product of the Grant agreement (Agreement) between the Government of Lesotho (GoL) and Japanese government. In terms of Article 1 of the Agreement, the purpose of the grant is to contribute to the improvement of secondary schools outlined in its Schedule 1, by constructing their facilities, procuring and installing equipment and consulting services for the designated schools. In terms of Section 1 of Schedule 2 to the Agreement the goods and services needed for the project will be procured in accordance with Japan International Cooperation Agency (JICA) Procurement Guidelines for the Japanese Grants (for Japanese Consultants and local contractors) (Tentative Type II) February 2016 (hereinafter ‘Procurement Guidelines’).

- [3] On 11 July 2021 a public tender was issued inviting prospective tenders to bid for construction of secondary schools being Abia High School, Motsekuoa High School, Mt. Royal High School, and St. Catherine’s High School under Bid REF: NO. GoL/JICA/W001/2021/2022/L1 and GoL/JICA/W001/2021/- 2022/L2. The tender was divided, as can be gleaned from the above references, into two Lots, that is Lot 1 and Lot 2. Eventually after all the evaluation processes were completed the applicant was a successful tenderer in respect of both Lot 1 and Lot 2. On 17 September 2021 Procurement Manager of the 2<sup>nd</sup> respondent wrote a letter to the applicant informing him that as one of the successful bidders he was being invited to what she called an “interview to be evaluated for the tender”.

[4] The applicant duly attended the ‘interview’ as requested which turned out to be a physical evaluation exercise of the machinery he proposed to use for construction. Present at the interview were the 2<sup>nd</sup> respondent’s officials and a Japanese Resident Engineer Consultant who in terms of Article 4 (2) of the Agreement, the GoL was obliged to retain for consultation on the implementation of the project. This consultant got engaged on the recommendation of JICA as per the Agreement. Consequent to these site visits and physical evaluation of machinery, there was a lull which was interfered, on intervals by the applicant’s visits to the 2<sup>nd</sup> respondent’s offices to inquire as to when he would be invited to contract negotiation and signing. The 2<sup>nd</sup> respondent’s officials kept on assuring the applicant that he would be invited to contract negotiations, but that did not materialize until on the 18 November 2022 when the applicant was served with a letter from the 1<sup>st</sup> respondent informing him that the tender for construction of schools had been cancelled. The letter laconically and devoid of reasons stated (in relevant parts):

*“Dear Sir/Madam*

*RE: CANCELLATION OF A TENDER FOR THE CONSTRUCTION  
OF SECONDARY SCHOOLS – BID REF: NO: GoL/JICA/W001/2021/-  
2022/L2*

*Kindly be informed of the Ministry’s decision to cancel the above  
tender with immediate effect.*

*For further enquiries on the matter, please contact the head of the  
Procurement Unit as .....” [information redacted for privacy]*

*Sincerely,*  
*(signed)*  
*J. N OLIPPHANT (PHD)*  
*Principal Secretary”*

- [5] It should be stated that the Evaluation Team had disagreements with the Consultant on the purpose of the interview and site visit and the bid price, but despite these differences the Evaluation Team concluded that the applicant has enough experience on similar and recent construction projects which qualifies him to do the project. In the Evaluation Report it is recorded that the consultant’s disagreement with the Evaluation Team on the applicant’s price was baseless as the Consultant refused to disclose his detailed cost estimates for comparison of bids and costs analysis to be conducted. The Evaluation Report states (in relevant parts):

*“CONCLUSION*

*The contractor has enough experience on similar projects and construction of structural steelworks which was constructed recently.*

*It is difficult to establish the adequateness of consultant estimates, as he told he evaluation team that it was done by “Private Consultant” in Lesotho, then late said by “Matsuda Consultants International”, and later on by “EFU”. Recently the consultant in a Tender Panel virtual meeting of the 20<sup>th</sup> December 2021 that he got the prices from “The contractors in which Mr Iguchi was present.” This recent statement contradicts some procurement practices.*

*We, Tender Evaluation Team reject the baseless decision by the consultant made on page 49: Results of the Evaluation by Consultant.”*

[6] The relevance of the above recordal will become clear when we deal with the 2<sup>nd</sup> respondent’s reason to cancel the tender, because it is without doubt that the tender was cancelled merely because of the unsubstantiated Consultant’s claim that the applicant’s financial bid was low. This cancellation letter prompted the lodging of this application in the manner stated in the introductory paragraph to this judgment.

[7] **Respective Parties’ Cases**

It is the applicant’s case, variously, that the decision by the 2<sup>nd</sup> respondent to cancel the tender was unfair for not affording him the hearing prior to cancellation; that the decision was actuated by improper motives, malice, and corruption; that the decision was grossly irregular, unreasonable and irrational.

[8] On the other hand, the respondent’s case is that in terms of Article 4(2) of the Agreement, when the consultant disagrees with the Evaluation Team, his views prevail. This argument is foreshadowed in the 1<sup>st</sup> respondent’s answering affidavit (paragraph 5 thereof) when the deponent responds to paragraphs 8.1, 5 – 8.2.3 of the applicant’s founding affidavit:

*“It is important to indicate the agreement dictates the engagement or appointment of the consultant who is a Japan national whose presence is essential in the procurement processes i.e. evaluation team and tender panel. In case where there is disagreement, his opinion prevails. See Article 4(2) of the attached agreement.”*



Responding to paragraphs 8.2.5 – 8.2.8 of the applicant’s founding affidavit the 1<sup>st</sup> respondent says:

“8.2.5 – 8.2.8

*Contents therein are noted. I however wish to indicate that the recommendation of the evaluation team in terms of the guidelines should be sanctioned or in agreement with the consultant who present (sic) JICA. In the case in consideration there was always a serious disagreement between the consultant and other members of evaluation team.”*

And at paragraph 6 the 1<sup>st</sup> respondent says:

*“...I aver that the tendering processes project were those of JICA’s procurement guidelines are not followed, the cancellation was bound to happen. I should inform this honourable court that the main reason for cancellation of the tender was that, the processes followed by the evaluation team were not approved by the consultant and that itself, was contrary to section 4 to the schedule 2 of the Grant Agreement.”*

I turn to deal with the applicable law

## [9] **The Law and Discussion**

### **Applicable Procurement Legal Framework and the role of the Consultant.**

Under the Article 5, General Terms and Conditions, JICA and the recipient (GoL) shall abide by the JICA’s General Terms and Conditions for Japanese

Grant dated January 2016 (hereinafter referred to as “the GTC”), and the procurement processes stated in Section 2.01 of the GTC as described in Schedule 2 of the Agreement (hereinafter “G/A” or ‘Agreement’)).

[10] Section 1 of Schedule 2 to the G/A provides that the procurement of goods and services under the Grant should be done in accordance with JICA’s Procurement Guidelines for the Japanese Grants (Type II), dated 10 February 2016 (“the Procurement Guidelines”). Article II of the GTC provides that procurement of goods and services for implementation of the project shall be conducted in accordance with the procurement process stipulated in the G/A. It should be recalled as stated in the preceding lines that Section 1 of the Schedule 2 to the G/A stipulates that the applicable procurement processes are those stated in the Procurement Guidelines.

[11] Section 1.02 of the Procurement Guidelines read with Article 4 (2) of the G/A provides that the recipient (GoL) shall make use of the consultant for purposes of consulting services regarding designing, bidding, cost estimation, supervision of the procurement and construction of the project. The consultant is a Japanese national engaged on recommendation by JICA, as stated already. At the preparation stage, in terms of Section 2.01 (1) of the Procurement Guidelines (relevant for present purposes) it is provided that:

*“In general, the services of consultants can be grouped into the following broad categories:*

*(1) Preparation services, including:*

- (a) Detailed investigation and review of preinvestment studies;*
- (b) Preparation of detailed designs, specifications and contract documents including division of bidding lots;*
- (c) Prequalification of Contractors, if necessary;*
- (d) Evaluation of bids and recommendation regarding award of contract;*
- (e) Studies and/or recommendations related to environmental and social matters, including implementation/review of environmental impact assessments.”*

Section 2.02 on responsibilities of the consultants states that:

- (i) They shall render services with skill care, and due diligence.*
- (ii) They must act faithfully in advising the recipient (GoL) and importantly:*
- (iii) “In the case of a difference of opinion between the recipient and the consultant on any important matter involving professional judgment that might affect the proper evaluation or execution of the project, the Recipient shall allow the consultant to submit promptly to the Recipient a written report and, simultaneously, to submit a copy of JICA. The Recipient shall forward the report to JICA with its comments in time to allow JICA to study it and communicate with the Recipient before any irreversible steps are taken in the matter ...”*

[12] Section 5.06 deals with evaluation bids. It provides that:

*“(1) Bid evaluation shall be consistent with the terms and conditions set forth in the bidding documents. Those bids which substantially conform to the technical specifications, and are responsive to other stipulations of the bidding documents, shall be judged solely on the basis of the submitted price, and the bidder who offers the lowest price shall be designated as the successful bidder.*

***(2) If there has been no pre-qualification of bidders, the Recipient shall determine whether the bidder whose bid has been evaluated the lowest has the capacity and resources to carry out the contact concerned effectively.***

*(3) The criteria to be met shall be set out in the bidding documents and if the bidder does not meet them, the bid shall be rejected. In such an event, the Recipient shall then make a similar decision regarding the next-lowest evaluated bidder.” (my emphasis)*

[13] I have quoted the above provisions extensively to jettison the respondent’s mistaken belief that the Consultant, though part of evaluation team, has an overriding voice: that he can reject an objectively conducted evaluation of bids. It is apparent from these provisions that though one of the consultant’s responsibilities is evaluation of bids, I found nowhere in the Procurement Guidelines where it is stated that he does bids evaluation alone, in fact, Section 5.06 of the Procurement Guidelines makes it clear that the Recipient (GoL) through its appropriate tender evaluation bodies is the one that evaluates bids and to determine whether the lowest bid has the capacity to implement the project effectively.

[14] The Recipient is enjoined to determine the bids in terms of the conditions set out in the bid documents to see if they conform substantially to the technical specifications and to judge the bids to solely on the basis of the submitted price and that the bidder who is evaluated the lowest should be evaluated to determine whether it has capacity and resources to carry out contract effectively. The idea that the consultant's queries have the trumping effect over the views of majority of the evaluation team is quite misplaced and does not find support anywhere in the provisions of the Procurement Guidelines, especially when his queries are arbitrary has evidenced by what is recorded in the Evaluation Report:

*“Consultant Estimates and Market Price*

*We did market research on local suppliers; and insurance companies and we consulted Ministry of Works (Engineers), EFU, Murdoch Green Quantity Surveyors. The consultant did not do his market research on prices, and he said he got them from contractors hence why he is too expensive because he could not have established example preliminaries amounts were M10,372,100.00 for Lot 1 which is 100% higher than almost all the bidders except one.*

*He thereof (sic) missed critical price determining information such as:*

- All schools are accessible and within 1 km radius from the main road.*
- All schools are surrounded by suppliers,*
- All aggregates are within 45 km reach,*

- *Building sand and gravel are available free from source in districts but ask permission from local authority (sic)*
- *The contractor has equipment machinery/yellow plant and material on and offside (sic) which give him competitive advantage over the other bidders hence the price is within reach.”*

[15] **Is the 1<sup>st</sup> respondent’s decision reviewable?**

It will be recalled that in a letter the 2<sup>nd</sup> respondent wrote to the applicant to inform him about the cancellation of the tender, no reasons were provided. Our democratic and constitutional order is such that administrators should openly account for their decisions through justificatory mechanism of adequate reasoning. Failure by the administrator to give reasons might lead to a finding of unreasonableness on his part. Fairness dictates that reasons be given for the decision (**Jeffery v President, South African Medical and Dental Council 1987 (1) SA 387 (C)** at 395 D – I). A decision devoid of reason may point to arbitrariness and therefore, unreasonable.

[16] In the same connection reasons which are provided or formulated after the decision has been made in order to rationalise and make it reasonable cannot be relied upon (**National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC)** at para. 39).

[17] In the present matter the 1<sup>st</sup> respondent did not justify his decision to cancel the tender, he sought to provide justification for the decision in his answering affidavit. Even the justification he provided in his answer as we

have seen is misplaced and does not find any support in the Procurement Guidelines. The consultant's objection cannot trump the decision of the evaluation team. One cannot escape the conclusion that the decision to cancel the tender is unfair and unreasonable.

[18] **Remedy**

The question of appropriate remedy in review proceedings always becomes an important issue because the court does not want to usurp the functionary's powers to decide which way the exercise of such power should point. Once the court finds that the functionary's exercise of its power is reviewable the ordinary course which the court naturally follows is to refer the matter back to the functionary to exercise its discretionary powers. It is only in exceptional circumstances that this course is not followed by the courts (see a very instructive and persuasive decision in **UWC v MEC for Health and Social Services 1998 (3) SA 124** at 131 A – I).

[19] The main consideration in deciding whether to refer the matter to the functionary to make his decision is always the question of fairness, as stated in **Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 (A)**, 349:

*“...the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ... although the matter will be sent back if there is no reason for not doing so, in essence it is the question of fairness to both sides.”*

[20] Some of the exceptional circumstances in which the court will substitute its own decision for that of the functionary who has discretionary power is where the decision of the functionary would be a “mere formality” and in a situation where there is no possibility of an alternative decision being taken by a public functionary. In these circumstances, the court will not refer the matter back for re-consideration by the functionary (See footnote 44 at p.682 Lawrence Baxter ***Administrative Law (1984) (Juta)***). In the current matter a decision has already been made to award the tender to the applicant what remains is for the parties to negotiate the contract, and therefore, an order in this regard will not amount to usurpation of the functionary’s powers to the court.

[21] In the result, the following order is made:

- (i) The 2<sup>nd</sup> Respondent’s decision to cancel the tender for the construction of Secondary – BID REF. NO. GoL/JICA/W001/2021/2022/L1 & GoL/JICA/W001/2021/2022/L2 with immediate effect is both unreasonable and unfair and is reviewed, corrected and set aside.
- (ii) The 1<sup>st</sup> and 3<sup>rd</sup> Respondents are directed and compelled, to proceed with the tendering process and to invite the applicant as the successful bidder to enter into a contract in accordance with section 5.08 of the Procurement Guidelines.
- (iii) The applicant is awarded the costs of the application.



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**MOKHESI J**

**For the Applicant: Adv. R. Setlojoane instructed by T. Matooane & Co.  
Attorneys**

**For the Respondent: Adv. Makhoali-Boroko from the Attorney General's  
Chambers**