

RULES OF TENDERING AND THE INFLUENCE OF THE PRIVILEGE CLAUSE IN SOUTH AFRICA

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The tendering process typically engages a number of parties, each of whom invests considerable time and money in the competition for a construction contract. Most of the rules of the competition are set out in the tender document. But the process also involves implied obligation and duties of fairness which do not appear in the tender documents and are not easily defined. Therefore this paper tend to address some legal and practical aspects of the tender process, the nature of the contractual obligations, potential remedies for aggrieved tenders, and the influence of the privilege clause on tender documents. Because of the expectation that government tender processes are conducted fairly and in accordance with high standards of probity and integrity the paper examine the legal aspects of government tender processes with a view to provide pointers on how to minimise adverse legal consequences of a poorly conducted tender process and conditions to tender.

Keywords: tender process, construction contract, obligation, duty, fairness.

INTRODUCTION

Rwelamila and Meyer (1996) have revealed that South Africa had adopted a ready-made construction framework, including the hybrids of traditional procurement systems during the years when South Africa was a British colony. Although the South African procurement system is based on the British model, the context and the application of this model were unsystematic for the then apartheid South Africa; this was due to the different set-up and institutional arrangements between South Africa and Britain.

However, Mathonsi and Thwala (2012) indicated that the political uncertainties that had taken place during the early 1980s and late 1990s led to some changes within the South African construction industry. This was due to the South African construction industry shifting its focus from a predominantly first-world oriented construction environment to a developing-world construction environment that focuses on the basic needs of the population and its economic circumstances. Among other things, this shift was directed towards the development of new construction policies aimed at promoting stability; fostering economic growth and economic competitiveness; crating new sustainable employment; as well as addressing the historic imbalances as new industry capacity is being generated for development (Department of Public Works (DPW), May 1999).

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Post-1994, the newly formed South African Government of National Unity and all stakeholders of the construction industry headed by the Department of Public Works, initiated and co-ordinated the development of the Construction Industry Development Board (CIDB) which was mandated among other things to improve a standardised application of best practice in construction procurement within the framework of government procurement policy (Construction Procurement Library, CIDB, 2005). Therefore, this study aims to investigate the privilege clauses and the duty of fairness inserted and applied in tendering procedures in a South African context.

Procurement is a major part of supply chain management and specifically on tendering process in South African national government. Moeti et al. (2007:122). This is used to acquire goods and services by national, provincial government and also represent a substantial source of income to private sector.

According to Rashid, Taib and Ahmad (2006), there are today several types of project procurement systems being widely used in the construction industry. They range from the traditional system to the many variations of "fast-tracking" systems such as turnkey, design and build, build-operate-transfer (BOT), management contracting, cost-plus contracting etc. The introduction of many variations of project procurement system was induced by the quest for more efficient and speedier project delivery system and better project performance. They are innovations to the traditional delivery method aimed at meeting the changing demand of clients or customers. The different procurement systems present have brought changes not only to the process and procedure of project delivery but also the aspects of management and organization.

The following prescripts should be adhered to by all national and provincial government departments and tenderers namely Constitution of the Republic of South Africa. Act No. 108 of 1996; Preference Procurement Policy Framework Act (PPFA), Act, No. 5 of 2000; Public Finance Management Regulations Framework. The PFMA in general provides a clear regulatory framework for the tendering.

In terms of Sections 217 (1) of the Constitution (1996), when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

PFMA was promulgated in 1999 and is mainly focused on the provision of sound financial practices to promote effective service delivery to people of South Africa through effective, efficient and economical use of existing resources (Luyinda et al., 2008:30).

Section 38(1) (a) (iii) of the PFMA stipulates that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system.

The policy strategy is provided against the background of the provisions of the Constitution and subsequent enabling legislation and the promulgation of new BEE legislation and amendments to the PPFA as contemplated by government.

According to Visser and Erasmus (2007), this act gives effect to section 217(3) of the Constitution, by providing a framework for the implementation of the procurement policy framework. The Act requires any organ of state to determine its preferential procurement policy and implement this within the legislated framework of South Africa.

Furthermore Visser and Erasmus (2007) also alluded that the objective of act may include contracting with persons or categories of persons, previously disadvantaged by unfair discrimination, or implementing the programmes of the Reconstruction and Development Programme (RDP).

Singleton (2005) alluded to the fact that after much has been written about the law of tendering over the past decade or so, the decision by the Supreme Court of Canada in the case of Ron Engineering gave birth to the "two contract" model into the law of tendering. Under this model, the tendering process consists of the formation of two separate contracts: Contract A and Contract B. Contract A, also known as the bid contract, governs the manner in which the tendering process is to be conducted. Contract B is the substantive construction contract to perform the work that has been bid. This example is used as South Africa follow the same rule in tendering by first calling for tenders which can be regarded as contract A and then appoint the compliant tenderer which this can be regarded as contract B.

Requests for Tender are a common pre-contractual step. However, for the purpose of contract formation, a Request for Tender does not constitute an offer. Instead, it is an invitation to treat or a mere request to negotiate or make an offer.

It is the instructions to tenders and the tender form which establish the specific terms and conditions of Contract A. One of the terms of Contract A will be an obligation that the bidder is contractually bound to enter into the construction contract, Contract B, if the owner accepts its tender. Contract A comes to an end when an owner either 1) enters into the construction contract with one of the bidders; 2) rejects all of the bids; or 3) when the irrevocability period of the tenders (if applicable) expires.

The primary source of the express terms of the bid contract is the Instructions to Tenderers. Typically, this document will contain the fundamental terms of the tender call, including the irrevocability of the tender, the time of the tender close, the owner's discretion to accept or reject bids (including privilege or discretion clauses) and procedural requirements relating to the tender form and bid security. Other express terms and conditions can be found in other documents comprising the tender package, including any Tender Addenda, drawings, specifications, engineer's reports and the Tender Form. The bid contract may also incorporate, by specific reference in the tender package, standard industry rules.

Thus according to Singleton (2005), indicated that in evaluating and accepting or rejecting a tender, the owner is required to comply with both the express terms of the bid contract as well as the implied overarching duty of procedural fairness and good faith. In nearly all cases, the Instructions to Tenders will include a "privilege clause" which provides the tendering authority with broad discretion in relation to the acceptance or rejection of tenders. Although the privilege clause can take many forms, it usually reserves to the owner discretion to accept or reject the lowest, or any, tender.

Therefore, Derek and Brindle (1995), in their construction law report alluded about the expressed terms and conditions of the bid contract are contained in the tender documents, including

- Instructions to renderers
- Tender form
- Form of construction contract to be awarded;

- Drawings, specifications, consultants' reports (geotechnical, environmental, etc);
- Other information required to be provided with the tender.

The instructions to renderers generally incorporate a form of "privilege clause" which provides that the owner is not required to accept the lowest or any tender. Further, in order to provide the owner with some flexibility in overlooking non-essential irregularities in the tender submittals, the instructions to tenderes typically provide that the owner may waive technical irregularities, omissions, etc. in the tender form. The case law has yet to fully develop on whether this latter type of clause may be resorted to in curing defects that otherwise would invalidate a tender. Furthermore Derek, et al., (1995), argued that a bid contract will, in most instances, be held to contain an implied term that the owner will only accept a compliant tender and will invariably contain and implied term that the owner must act fairly and in good faith in the tendering process.

METHODOLOGY

After literature review, a pilot survey was conducted on a capture audience during an annual general meeting of the Free State Chapter of the Association of South African Quantity Surveyors, on the 17th April 2013 at Anta Boga of which 23 quantity surveyors were in attendance questionnaires were distributed and 18 (78%) were completed and returned.

Section A consisted of questions regarding the profile, qualifications, professional registration and years of experience. The aim of this section was to determine the qualifications and experience of the respondents particularly in respect of privilege clauses inserted by clients in tender documents. In attendance where 16 (88%) quantity surveyors of which 9(50%) of them were directors in private companies with experience of more than 10 years.1(6%) was a project manager in private company and 1(6%) was a construction mentor in a higher education institute. 8(43%) of the respondents hold a B.Sc(Hons) and 4(22%) had a masters degree and only 2(11%) had a PhD. 12(67%) were male and 6(33%) female who are active role players in the construction industry in the Free State Province of South Africa. This was just a pilot study and the results will not be viewed conclusive but will provide a directive to the construction industry of the Free State Province.

Section B consists of questions regarding the mitigating challenges of the privilege clause inserted into tender documents by clients during procurement. The opinion of the respondents was collected using the likert scale of 1 to 5, where 1 is strongly disagree, 2 disagree, 3 neither agree nor disagree, 4 agree and 5 strongly agree

Table 1: Mitigating challenges of the privilege clause

	Response (%)				
	1 Strongly disagree 5 Strongly agree				
	1	2	3	4	5
The duty of good faith obligates clients to treat all bidders fairly and equally (without the application of hidden preferences or undisclosed bid evaluation criteria).	6	0	0	22	72
In evaluating and accepting or rejecting a tender, the owner is required to comply with both the express terms of the bid contract as well as implied duty of procedural fairness and good faith.	6	0	0	17	78
Where the privilege clause forms a term of bid contract, the owner will generally not be required to award the contract to the lowest bidder.	6	6	17	6	33
The privilege clause in the bid enables the client to take a more “nuanced” view of cost, relying on factors other than simply the tender price.	0	0	22	39	39
If the privilege clause is used the client is entitled to consider experience and capacity	0	11	22	17	44
The privilege clauses and discretion clauses will not displace the overarching duty of procedural good faith.	0	0	17	28	50
The discretion given to the client by a privilege clause must be exercised “fairly and objectively.”	0	0	0	33	67
Where the client applies a “secret preference” in evaluating a tender, it will likely be found to have breached the terms of the bid contract.	0	0	22	28	44
Do owners always understand the expressed terms of the bid contract	Yes	22	No	78	
Do you always adhere to the duty of procedural fairness and good faith when evaluating bid.	Yes	94	No	6	
Tender is valid or compliant only if it meets all the requirements of the tender call, as set out in the tender document.	0	0	0	17	83
Tender offer that contains a fatal error cannot be accepted, because it is not compliant.	6	0	6	28	56
Tender which although valid on its face, contains a latent or hidden error (such as in the calculations or economics leading to tender price) is nevertheless valid and capable of acceptance.	22	6	11	33	22
The validity of tenders that contains hidden errors or technical irregularities would not operate to undermine the integrity of the tendering process.	17	17	11	11	33
The owner can elect not to award the construction contract if all tenders offers exceed its budget, with the properly worded privilege clause.	0	0	0	39	61
Non compliant tender offers can be accepted if there are no compliant tender offers received.	39	22	17	17	0
Should all tender offers exceed the client budget, the client can negotiate with the preferred bidder to decrease the offer submitted.	33	17	17	22	11
Have you ever read through the PPPFMA and understand it properly	Yes	39	No	61	

From table 1 above it was clear that (72%) of the responded strongly agree that the duty of good faith obligates clients to treat all bidders fairly and equally. (78%) strongly agree that during evaluating, accepting or rejecting a tender, the owner is required to comply with both the expressed and implied terms of the bid contract. Whereas only (33%) of the respondents strongly agree that where the privilege clause

forms a term of a bid contract, the owner will generally not be required to award the contract to the lowest bidder. (39%) of the respondents strongly agree that where the privilege clause is used in the tender document it in fact enables the client to take a more "nuanced" view of cost, relying on factors other than simply the tender price. Whereas (44%) of the respondents strongly agree that when the privilege clause is used the client is entitled to consider experience and capacity.

(50%) of the respondents strongly agrees that the privilege clauses and discretion clauses will not displace the overarching duty of procedural good faith. (67%) of the respondents strongly agree that the discretion given to the client by a privilege clause must be exercised "fairly and objectively, (44%) also strongly concur with the sentiments that where the client applies a "secret preference" in evaluating a tender, it will likely be found to have breached the terms of the bid contract. (78%) of the respondents indicated that they believe that clients do not always understand the expressed terms of the bid contract. Whereas (94%) of the respondents always adhere to the duty of procedural fairness and good faith when evaluating bid. (83%) indicated that they strongly agree with the fact that tender are valid or compliant only if they meet all the requirements of the tender call, as set out in the tender document and (56%) indicated that they strongly agree with the statement that tender offer that contains a fatal error cannot be accepted, because it is not compliant. (22%) strongly disagree that tender which although valid on its face, contains a latent or hidden error (such as in the calculations or economics leading to tender price) is nevertheless valid and capable of acceptance, whereas (33%) agree with the statement that the validity of tenders that contains hidden errors or technical irregularities would not operate to undermine the integrity of the tendering process. (61%) of the respondents strongly agree with the statement that the owner can elect not to award the construction contract if all tenders offers exceed its budget, with the properly worded privilege clause. (39%) of the respondents strongly disagree with the statement that non compliant tender offers can be accepted if there are no compliant tender offers received and (33%) of the respondents also strongly disagree with the statement that should all tender offers exceed the client budget, the client can negotiate with the preferred bidder to decrease the offer submitted. Also very interesting to find out was the fact that 61% of the respondent indicated that they have never read through the PPPFMA and understand it properly only (39%) said they have indeed read through.

CONCLUSIONS

The procurement process is an essential tool for the construction industry. However, it remains a complex area of contract law and the subject of much litigation (Singleton, 2005). To help clients avoid costly claims, the following must be kept in mind:

1. During tender evaluation, whether accepting or rejecting a tender, die client is required to comply with both the express terms of the tender contract as well as the implied duty of procedural fairness and good faith.
2. Where a privilege clause is included in the instruction to Tenderers, the client will not be required to award the construction contract to the lowest tender. The client will be able to take a look more on factors such as the experience and capability of the contractor when assessing the relative strength of the tenders.
3. The existence of a privilege clause in the tender package will not displace the overarching duty of procedural good faith.

4. Even when there is a broadly worded privilege clause in the tender package, an owner may not award the construction contract to a tenderer whose bid is non-compliant.
5. The standard to be applied is one of substantial compliance rather than strict compliance.
6. Clients can rely on properly worded privilege clause to reject compliant tenders.

The findings of this research clearly show both parties must enter into tendering contract with a duty of good faith in mind. Furthermore in evaluating the tenders the client is expected to apply the sense of fairness. Very important the discretion given to the client by the privilege clause must be exercised "fairly and objectively".

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