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Highest score vs capacity: lessons from *Urban Icon (Pty) Ltd v South African National Roads Agency SOC Ltd*

Procurement — award of tender — highest score – objective conditions - capacity

Section 217 of the Constitution sets the parameters within which organs of state must procure goods and services. The Preferential Procurement Policy Framework Act ("PPPFA") and the Preferential Procurement Regulations give practical effect to these parameters. The legal framework seeks to balance fairness and competitiveness with the state's obligation to procure goods and services efficiently and responsibly. The Supreme Court of Appeal's recent decision in *Urban Icon (Pty) Ltd v South African National Roads Agency SOC Ltd* highlights the complexities of this task.

In this case, Urban Icon submitted bids for the provision of civil engineering services in respect of seven separate road-infrastructure tenders issued by SANRAL and achieved the highest score in respect of all seven tenders. However, SANRAL awarded only three of the seven tenders to Urban Icon. The remaining four tenders were awarded to the second highest bidders. In making this decision, SANRAL cited concerns about Urban Icon's capacity to perform all seven projects concurrently and the potential commercial risk of awarding too much work to one service provider.

Urban Icon launched review proceedings, arguing that the PPPFA compelled SANRAL to award the contracts to the highest-scoring tenderer unless an objective criterion, clearly stipulated in the tender documents, justified otherwise. The company argued that SANRAL exceeded its powers by subjecting it to a risk assessment.

Urban Icon was unsuccessful in the High Court and the matter found its way to the Supreme Court of Appeal ("SCA"). The SCA (per Unterhalter JA) dismissed Urban Icon's appeal and accepted that the legal framework allowed SANRAL a lawful discretion to take capacity and risk into account as part of its evaluation process. The court held that the legal framework must not be interpreted in a restrictive way and that it was permissible for SANRAL to consider Urban Icon's capacity to perform the services collectively (rather than being limited to its capacity to perform each of the individual contracts).

The SCA held further that, as public procurement implicates public resources, awarding a tender to a bidder that does not have the necessary capacity to do the work poses a risk to the efficient and effective use of public resources, which risk must be objectively assessed in determining whether the tender should be awarded to the bidder. The SCA also noted that SANRAL's tender conditions expressly reserved the right "*not to accept the highest-scoring tender*" and to consider the distribution of work among contractors.

Accordingly, the SCA dismissed Urban Icon's appeal, with costs.

The judgment confirms that the legal framework does not require the award of a tender to the highest-scoring bidder in all cases, and an organ of state may lawfully consider broader "objective criteria" such as capacity, risk, and feasibility, provided those considerations are rational and consistent with the tender's terms.

Key takeaways

This judgment provides useful clarity to organs of state and private entities alike, who should note that it may not be sufficient for a bidder to simply score the highest points in order to be awarded a tender: more may be required, and the bidder may also be required to demonstrate that it has the capacity to effectively render the services being procured.

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