

**IN THE INDEPENDENT REVIEW COMMITTEE HEARING (“IRC”)**

**HELD AT MBABANE**

**IN THE MATTER BETWEEN;**

**SWAZI SURVEYS (PTY) LTD**

**APPLICANT**

**AND**

**ESWATINI ELECTRICITY COMPANY**

**RESPONDENT**

---

**RULING ON ADMINISTRATIVE REVIEW PROCEEDINGS IN TERMS  
OF SECTION 49 OF THE PROCUREMENT ACT 2011 ON TENDER**

**NO. 48 OF 2018/19**

---

**QOURUM:**

<b>MR. B.S DLAMINI</b>	<b>: Chairman</b>
<b>MR. R. MAZIYA</b>	<b>: Member</b>
<b>MR. A. NGWENYA</b>	<b>: Member</b>

## **1. PARTIES & REPRESENTATION**

- 1.1 The Applicant is Swazi Surveys (Pty) Ltd, a company duly registered in accordance with the company laws of the Kingdom of Eswatini with its principal place of business in Mbabane, District of Hhohho. During the administrative review hearing, the Applicant was represented by its Director, Mr Chris Forte.
- 1.2 The Respondent is Eswatini Electricity Company (“EEC” or the “Company”), a Government enterprise based at Eluvatsini House, Mhlambanyatsi Road in Mbabane, District of Hhohho. The company was represented by Mr V. Dlamini, the Head of Legal & Company Secretary, Miss Shongwe and Mr B. Makhanya.

## **2. ISSUES IN DISPUTE**

- 2.1 The dispute between the parties emanates from an intention by EEC to award Tender No.10 of 2018/2019 titled “GIS DATA MAPPING” to a company called Computronics Systems (Pty) Ltd which had partnered with another company called Land Resources International (Pty) Ltd, a South African based company in tendering for the works to be done on behalf of EEC.
- 2.2 The argument by the Applicant is two-fold. First, it is alleged that the company which is intended to be awarded the tender is not in the line of business required of the tender. Secondly, it is alleged that none of the officials of the Joint Venture (Respondent) are qualified to carry out the

works required as per the laws of the country as they are not registered with the relevant professional bodies in the country.

2.2.1 The Respondent's position is that the works required to be done as per the tender document are not confined to professional work generally done by professional personnel i.e surveyors. The argument by EEC is that the work required to be done is that of Geographical Information System (GIS) which basically can be done by anyone as long as the required accuracy levels (sub-metre accuracy) are met.

2.2.2 It was EEC's further argument that the work to be done in terms of the tender is not confined to the work done by professional surveyors. The submission by EEC was that all that EEC was interested in was a software system that will enable the company to map its infrastructure within the level of accuracy stated in the tender document.

### 3. **BACKGROUND INFORMATION**

3.1 The first sitting of the Committee was on the 19<sup>th</sup> March 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 19<sup>th</sup> March 2019, several issues were discussed including but not limited to the following issues:

(i) Introduction of the 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 case has already been summarized above. It was submitted by Mr. Chris Fortes that the tender requires qualified and registered surveyors to carry out the work of identifying with reasonable precision all EEC's infrastructure. According to Mr. Fortes, the level of accuracy required, namely sub-metre accuracy can only be achieved by professional surveyors using surveying equipment such as Global Positioning System (GPS) or the Global Navigation Satellite System (GNSS) and not any other equipment.
- 4.2 It was the Applicant's contention that if it is accepted that only professional surveyors can legally carry out the work required in the tender, then Computronics Systems and its partner in the Joint Venture Agreement are disqualified because none of the officials of these companies are registered as professionals in terms of the Registration of Architects, Engineers, Surveyors and Allied Professional Act, 2013. It was the Applicant's

further submission that only surveying equipment namely GPS and GNSS can be used to carry out the work as required in the tender document.

- 4.3 The Applicant submitted that the GIS data will be used **“in the accurate query and analysis for the development, extension installation, repair maintenance, renewal, renovation, alteration dismantling or demolition of EEC infrastructure. This infrastructure is a major asset of the Kingdom and requires constant adjustments, improvements or maintenance using engineering principles. The mapping of these features is therefore a Survey function.”** [See p.3 of Applicant’s written submission].

- 4.4 The Applicant also submitted that the tender required “suitably qualified” companies to carry out the work and that Computronics was not such a company. The argument advanced on behalf of the Applicant was that none of the officers of Computronics or its South African partner was registered in terms of the **Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013.**

## 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 did not breach any laws of the country.



## 6. ANALYSIS OF ISSUES

6.1 The Independent Review Committee derives its powers to make a determination on any complaint lodged with the agency 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 point of discourse between the parties is whether or not the works required to be done in terms of the “*Invitation to Tender Document*” is one that requires the use of professional personnel registered as surveyors.

- 6.6 The Applicant submitted that the **Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013** is applicable to the tender as the works can only be lawfully carried out by professional surveyors. The Respondent disputed this and stated that anyone familiar with the use of GIS can carry out the works required as long as that person is able to achieve the sub-metre accuracy.
- 6.7 We have carefully considered all the submissions by the respective parties on this particular issue and we are unable to find anything that would lead us to conclude that the process or exercise of mapping is only confined to the work general done by surveyors. EEC is therefore correct in saying that the Applicant is misguided in holding that the work required to be done can only be so done by qualified and registered surveyors in the country.
- 6.8 The difficulty which the Respondent faces is to be found in the **Construction Industry Act, 2013** read together with the **Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013**. In its arguments, the Respondent stated that the works required to be done do not fall within the scope of “construction works” because the appointed contractor or consultant will not be required to “*interfere with the existing electricity infrastructure of EEC.*”
- 6.9 In the definition section of the **Construction Industry Act, 2013**, “construction works” are defined as meaning the “**provision of goods and or services for the development, extension, installation, repair, maintenance renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure.**”

- 6.10 Clearly the main purpose of EEC's mapping exercise falls within the scope of the definition of construction works as alluded to above. In order to map an infrastructure, one is not necessarily required to physically interfere with that infrastructure being mapped. If the mapping exercise is aimed at "installing" or "developing an identification system" of the infrastructure within a certain level of accuracy, then by all means that process or exercise falls within the meaning of "construction works" as envisaged in the Construction Industry Act, 2013.
- 6.11 Accordingly, if the mapping exercise as required by EEC falls within the meaning of construction works, then Computronics Systems was required to be registered in accordance with the **Construction Industry Act, 2013** as well as the **Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013**. If Computronics is registered in terms of the Construction Industry Act, 2013, as was the evidence at the hearing, then its officers were similarly required to be registered in terms of The Registration of Architects, Engineers, Surveyors and Allied Professionals Act 2013. The Construction Industry Act 2013 is responsible for regulating the registered companies or the industry players in construction whilst the Registration of Architects, Engineers, Surveyors and Allied Professionals Act 2013 regulates the individual officers within the industry. Registration in both Councils is therefore compulsory. In the present matter, Computronics was not necessarily required to register its officers as Surveyors but as Allied Professionals. Allied professional work is defined in the Act as meaning;  
**"construction management, environmental management, evaluation, project management or town planning."**



6.12 If Computronics Systems identified a need to register with the Construction Industry Council, then it should have taken a step further and registered one of its officers as a “Construction Manager” or any of the other categories identified in the Act so as to be able to undertake any project or assignment within the construction industry. In section 50 (1) of the Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013, it is provided that;

**“A person shall not offer services as a construction manager, evaluator, environmental manager, project manager or town planner, unless the person is a registered allied professional who has a valid practicing certificate.”**

6.13 We were not given any evidence of any officer within Computronics Systems who is registered under the Registration of Architects, Engineers, Surveyors and Allied Professionals Act, 2013 as an “Allied Professional”. This effectively means Computronics was not qualified to undertake the project or works on behalf of EEC. This being a partly a construction exercise and partly a data collection and computation exercise, we note that in Item 7.0 of the Tender Document dealing with “EXPECTED OUTCOMES”, it is provided therein that;

**“The expected outcomes of the GIS Data Mapping exercise are as follows;**

- i) A clean file of *geodatabase* with the following feature classes**
  - **Prepaid meters**
  - **Transformers**
  - **Poles**

- Switches
- Mini-sub
- Kiosks
- Power-lines”

6.14 A “geodatabase” is a type of information system that predominantly contains physical or geographical information on the above mentioned assets of EEC which must be identified within a sub-metre accuracy. This information or data base must be “constructed” using the relevant tools and according to the specifications and standards as stipulated in the tender document. The process of constructing the data is both a physical function (in terms of achieving the sub-metre accuracy and use of equipment) and an Information Technology (IT) function (in terms of the data system). The two cannot be separated. In other words, before the GIS can be developed, programmed and implemented, there must first be physical work done using the relevant equipment. All of these facts convince us as a committee that indeed the works required to be done falls within the definition of “construction works” as contained in the 2013 Act.

6.15 In the Public Procurement Act 2011, it is provided in section 40 (2) that;

**“Any qualification criteria shall be specified in the invitation document and may relate to-**

- (a) professional and technical qualifications**
- (b) .....**
- (c) .....**
- (d) .....**
- (e) .....**

**(f) registration or licensing with the relevant professional body in Swaziland or in the tenderer's country of origin where so required by law."**

6.16 Computronics fails to meet the above requirements and, in fact came out clearly during the hearing of the matter that they are not in this line of business and that they have never done this work before.

6.17 Another issue that we have focused on as a committee is section 3 (2) (d) of the Public Procurement Act, 2011 which stipulates that;

**"The objectives of this Act shall be to establish a system and practices that serve to -**

**a) develop economic capacity in Swaziland, through the provision of opportunities for Swazi companies to participate in public procurement."**

6.18 If the spirit of the Act is aimed at promoting Swazi companies, then by similar standards, procuring entities must, by the same standard be seen to be promoting Swazi companies in uplifting the economy of the country. The decision by EEC appears to us to be digressing from this objective. The intention to award the contract to Land Resources International together with its local partner to the total exclusion of Swazi companies is not in the spirit of the Procurement Act, 2011. We say the decision by EEC has the effect of excluding Swazi companies because Computronics has, by its own statement at the hearing, admitted that it is not in the line of business required as per

the tender document and therefore the decision by EEC will leave capable Swazi companies who are trading in this area 'high and dry'.

- 6.19 We also noted as a committee that the Tender Document did not contain any provision to the effect that tenderers were allowed to enter into joint ventures with companies of their choice. During the hearing of the matter, EEC stated that the company representatives enquired during the compulsory briefing meeting as to whether or not they could enter into joint ventures. At that meeting, EEC explained to all those in attendance that indeed joint ventures were allowed as long as such joint ventures complied with the laws of the land. The condition of allowing joint ventures for purposes of the tender constituted an *addendum* to the Invitation to Tender Document. Circular No.1 of 2016, Rule 71 (4) therefore provides that;

**“The procuring entity shall prepare minutes of any pre-bid conference and shall promptly send them to all tenderers to whom the invitation document has been issued.”**

- 6.20 In rule 70 (5) of the same document, it is stated that;

**“The minutes shall include-**

- (a) all information provided as part of any briefing**
- (b) details of any clarifications requested, but without identifying the source of the inquiry;**
- (c) the details of responses provided to clarifications ; and**
- (d) a record of attendance.”**

- 6.21 On the first hearing of the matter, we directed that EEC must furnish the committee with all documents relating to the tender which ideally included

the minutes of the pre-bid meeting. We doubt that all the bidders we given the minutes as required in this rule. That being the case, we seriously express doubt that the condition allowing local companies to enter into joint ventures with South African companies was part of the Invitation to Tender Document. The net effect of all these facts is that some local companies may have been placed at a disadvantage in terms of making a decision on whether or not to team up with other companies. We therefore come to the conclusion that the decision by EEC would also fail on this score alone.

## 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. 10 of 2018/2019 to Computronics Systems (Pty) Ltd and Land Resource International Ltd is improper and unlawful in the circumstances of the matter.
- 7.2 The issues raised in this matter are highly technical and we were not able to detect any *male fides* or intentional wrong-doing on the part of EEC's management responsible for taking the decision to award the tender to Computronics Systems (Pty) Ltd and Land Resource International Ltd. The area of procurement is now extensively regulated and it would assist public enterprises like the Respondent to engage their legal department intensely even before the Tender Document is issued to the public.



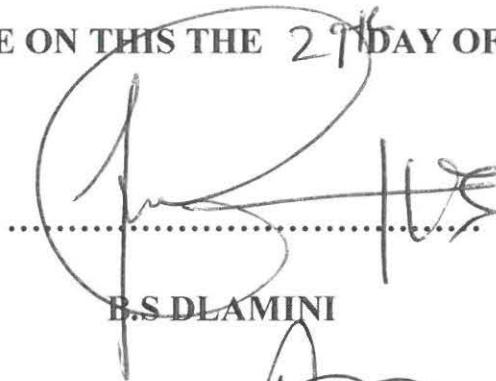
8. AWARD AND/OR ORDER

8.1 The order we make in the matter is that;

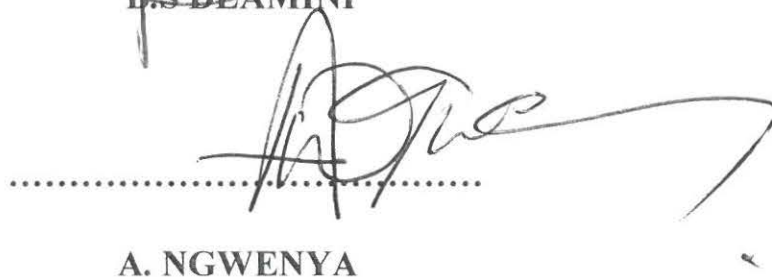
8.1.1 The intention by Eswatini Electricity Company to award Tender No: 10 of 2018/2019 to Computronics Systems (Pty) Ltd and Land Resource International (Pty) Ltd is set aside. This decision means that the Applicant's complaints are upheld in whole.

8.1.2 The Respondent is directed to start the process *de novo* or afresh and, in doing so, must take into account all the relevant and applicable legislative frame-work in the country.

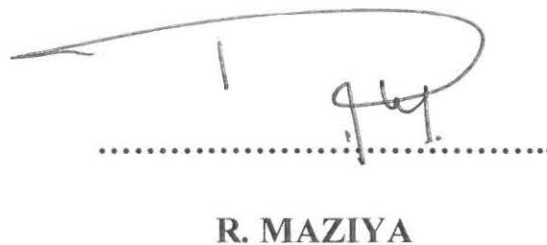
DATED AT MBABANE ON THIS THE 27<sup>th</sup> DAY OF MARCH 2019.



B.S. DLAMINI



A. NGWENYA



R. MAZIYA