

THE INDEPENDENT REVIEW COMMITTEE

In the matter between;

IRC/2017/18

ACUMEN SOFTWARE (PTY) LTD

Applicant

And

SWAZILAND TOURISM AUTHORITY (STA)

Respondent

Before: L. Howe [Chairman]
A. Ngwenya [Member]
N. Maphanga [Member]

For the Applicant: M. Shongwe [Acumen Software (Pty) Ltd]

For the Respondent: N. Kunene [Swaziland Tourism Authority]

Held on the 26th day of January, 2018, at Mbabane.

Ruling of the IRC

Dated the 26th of January, 2018.

1.

The Applicant is Acumen Software (Pty) Limited, a company which has come before the IRC after a decision was made against them by the Respondent, the Swaziland Tourism Authority (STA). The Respondent issued an invitation to tender for the development of the Information Technology Grading System, which the Applicant submitted his tender with others including the Digimage. The Respondent issued a notice in terms of section 45 of the Act on the 20th of September 2017, of its intention to award the tender to, Digimage. The said parties had in the opinion and after the

evaluation of the parties, given the following scores to the; 71% to Digimage who had quoted E99,750.00 for the process and 78% to Acumen who had quoted E2,496,860.00.

2.

We must mention that one has to wonder how the price between the two can be so far apart and yet the scores are close. The price difference is approximately E2,300,000.00 between the said parties, yet the scores are 8% apart.

3.

The Applicant was nonetheless not satisfied with the outcome of the matter and wrote to the Respondent tender board on the 3rd of October 2017, seeking a review of the decision to award the tender to Digimage. If the letter in our view was intended to be a review in terms of section 47 of the Procurement Act, that letter has to be addressed to the correct person being the Chief Executive Officer of the procuring entity, or the controlling officer, per section 47(1). Failure to do so means that there is no review application, per section 49;

".. shall not entertain an Application for administrative review, unless it was submitted within 10 working days of the issue to the controlling officer..."

4.

The words in the Act are clear that the person shall in the first instance be submitted in writing to the controlling officer... which therefore means it is mandatory to do so. Further the said review in terms of the said section must be within 10 days of the notice of becoming aware of the same. The notice to award was issued on the 20th of September 2017 by the Respondent and the letter was written on the 3rd of October 2017, by the Applicant to the tender board. The Applicant wrote on the 9th day to the Tender board applying for the review and wrote to the incorrect person in our view and was therefore barred from the review process.

5.

The Applicant did not submit an application for review in terms of the Act and the question is can he then come before us on review per the Act. Section 49 of the Act, gives all persons the right to come before the Agency for review subject to the CEO having made his decision on the matter. The section provides;

"(2) the Agency shall not entertain an application for administrative review, unless it was submitted within 10 working days of the date of issue of the controlling officer or the Chief Executive Officer's decision or the date by which the controlling officer or Chief Executive Officer have issued a decision." (Our emphasis).

6.

The section is clear that the decision must have been made by the person who is authorised to make the same, for you to come before the IRC. However if a decision is not made, you may in terms of the Act come before the IRC after the lapse of 10 day form when you applied for review per section 47. In terms of section 48 of the Act, if the authorised person does not issue the decision within 10 day, the Applicant may seek a review in terms of section 49;

"Where-

(a) The controlling officer or the Chief Executive Officer does not issue a decision within the period specified in section 47(4)(c); or... a tenderer may seek administrative review in accordance with section 49."

7.

The section is clear that no one person shall be deprived of the right to review even by virtue of the failure of the Procuring entity not delivering its ruling on the application for review to it. There is one requirement in our view, for this right to be available to the tenderer that is he must have had a review before the entity in the first instance. The Applicant as mentioned did not have a review before the entity and therefore cannot have a right to come before us in terms of section

49 of the Act. He does not meet the legal requirements placed by the Act for him to come before us. The Act does not provide for leave of any form for the tenderer to uplift the bar.

8.

It must be noted that this is a defence which the one party can raise and it would only apply if the same is raised as to be raised by the IRC. It is in our view and absolute defence as provided for in the law and as per the ratio in;

UNISERVE (PTY) LIMITED vs BONGANI J MOTSA N.O. and 4 Others, HC CC, 1572/2014. Per para [17] of the said judgement;

"I say so based on my reading and understanding of the provisions of section 49 (2), which specifically prohibits or bars the Agency from entertaining an application for administrative review that has not been submitted within the ten working days of the controlling officer's decision", per Mamba J.

9.

The matter came before us on the 7th of December 2017, where the Applicant applied for the review which is before us now. The matter was set to proceed but the parties agreed that they would like to discuss the matter between them and see if they cannot come to some settlement without the need for the matter to be ruled on by us. The parties agreed that the time for the delivery of the ruling and determination by the IRC as provided for by section 51 (1)(b), shall be suspended until the parties reach a decision on the matter in one way or the other. The parties in our view may agree on the same as it is a right afforded to the parties that the matter be speedily resolved and it is the spirit of the Act that it be done so. Parties in law may agree to waive their rights if they so wish, subject to them affecting the general public.

10.

The parties returned to the IRC and requested a further postponement of the matter to further negotiate between themselves and try to resolve the matter. It was agreed that the matter be

postponed to the 12th of February, for the matter to be determined if they fail to agree between themselves. They had requested the assistance of the Agency which they were given by the Agency, in determining the correct formula to use for the scoring process. When the matter returned the parties had not come to some agreement and they were directed to file the papers for the matter to proceed on the 23rd of February 2018. The parties filed the papers and the matter was ready to proceed on the 23rd when the matter was set.

11.

On the 23rd the Respondent who had raised the point that the Applicant had been bared from coming before the IRC, advised us that, they were withdrawing the opposition on instructions to do so. The reason given for the withdrawal was that, on the review of the process as they had requested, they found some other anomalies with the process and they believe they cannot be cured in anyway. The Respondent further made a plea for an order which is not adverse to them because they believe that the Applicant has sought that the scores be reviewed which they are willing to do and have done so, and they are of the view in terms of the opposing papers that Acumen should have been awarded, but they are willing to abide by our ruling in the matter, and or start the process de novo, if need be. In plea the Respondent referred us to the letter of the Applicant dated the 3rd of October, page 2 the last paragraph, where they, the Applicant had sought another assessment of the process. The Applicant in response to the same made it clear that the letter was referring to a context which was before they came here and not that they are here now.

12.

All that being said, the question is, do we as the IRC have the jurisdiction to hear the matter in light of the fact that the Applicant had not met the first requirement per section 47(4) (c), which is a prerequisite. A review must be made to the CEO or the controlling officer and if that is not done it cannot come to the IRC. The section is clear and we cannot see any other way **this matter**

13.

The matter is accordingly dismissed for lack of jurisdiction.

DATED AT MBABANE ON THE 19th OF MARCH 2018.



L HOWE



A NGWENYA



N MAPHANGA