WERKSMANS
ATTORNEYS

REGULATORY

Public Procurement Agreements Should Not Have Confidentiality Clauses: A Case of the Health Justice v the Minister of Health and Another (10009/22) [2023] ZAGPPH 689

9 May 2024 *4 min read*

The Promotion of Access to Information Act 2 of 2000 ("**PAIA**") is an empowering piece of legislation and allows that secretes cannot be hidden in the shadows.

The matter of *The Health Justice Initiative v The Minister of Health* provides insight from a regulatory point of view, not only since it has consequences for the privacy and information regime but also the procurement regime.

The Heath Justice Initiative instituted an application out of the High Court of South Africa, Pretoria to compel the Minister of Heath to disclose certain Covid-19 vaccine contracts that were entered into with various pharmaceutical manufacturers and suppliers.

The Health Justice Initiative sought access to copies of documents relating to the negotiation and conclusion of agreements by the National Department of Health for the supply of vaccines.[1] The vaccine manufacturers and suppliers included, but are not limited to, Pfizer, Sinovac, Johnson & Johnson and the Solidarity Fund.

The request for access by the Health Justice Initiative was refused by the Department and this refusal was premised on the notion that the Department was bound by the confidentiality clauses in the agreements, the disclosure would prejudice the Department in future commercial dealings with the companies, and that there are no adequate public interest considerations in favour of the disclosure. The Department also submitted that the agreements were negotiated in good faith and in the best interests of the country.

Findings of the Court

The court, however, considered of great importance duties of accountability and transparency. The court, insofar as the confidentiality of the agreements is concerned, found that it is not open to the Department to conclude agreements which include a confidentiality clause and then seek to rely on the confidentiality clause to circumvent its duties of accountability and transparency. This finding was based on the fact that the Department is an organ of state and organs of state act in the interest of the public.

The court referred to the matter of *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) ("***Transnet***") where the Supreme Court of Appeal held, among other things, that organs of state are bound by the constitutional duty to conduct their operations in a transparent manner which then speaks to accountability. In *Transnet* the court further held that once an organ of state concludes a commercial agreement of public character, the principles of transparency and accountability prevail as required by the Constitution and this entitles members of the public to know what the agreement entails, and that the parties cannot circumvent the duty of transparency by resorting to a confidentiality clause.

The court also found that it seems obvious in the context of public procurement that the mere presence of a confidentiality clause does not mean that the information and documentation can be withheld on that basis alone. This therefore means that more than just merely relying on the fact there is a confidentiality clause, a party must put forth reasons that strongly justify refusal of access to records. An example in this regard would be for a party relying on a confidentiality clause to submit that if the confidentiality is breached the agreement provides that the innocent party can claim contractual damages.

Insofar as the Department submitted that the disclosure would cause commercial prejudice to future engagements with the companies, the court held that it is necessary to show that the disclosure would, in actual fact, result in a disadvantage or, alternatively, prejudice in commercial competition. An unsubstantiated submission does not suffice.

Procurement Perspective

Section 217 of the Constitution provides that when an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable and transparent, competitive and cost-effective. It is common cause that organs of state act in the public interest and in turn owe it to the general public to, in line with the principles of transparency and accountability, show the basis upon which governmental contracts were entered into and what considerations were taken into consideration.

It thus follows that public procurement agreements should not have confidentiality clauses because the principles of accountability and transparency are cornerstones of public administration, and it is in the public interest that procurement agreements of this nature be made public.

Based on this judgment and the principle that organs of state do not have carte blanche to act as they please when performing public administration actions, secrecy will always be tested and the rationality of it has to be justified. State organs must therefore not hide procurement contracts behind a veil of confidentiality but ensure transparency.

---

[1] The Applicant sought copies of the procurement contracts, memorandums of understanding, agreements, negotiation meeting outcomes and the minutes thereto, and correspondence exchanged between the Department and the companies.



Ahmore Burger-Smidt

Head of Regulatory

View Profile

Keep us close