

Blacklisted suppliers

De Sols Trading CC and Anitha Dubaram Singh v the Government of South Africa and Others in the High Court of South Africa, North Gauteng Division, Pretoria, Case No: 13762/10 (5 October 2010)

The courts view the blacklisting of suppliers by the National Treasury in a very serious light and confirm that organs of state are allowed to cancel contracts concluded with suppliers who, when tendering for a contract, knowingly and wrongfully fail to disclose their inclusion on the National Treasury's database as companies or persons prohibited from doing business with the public sector.

The facts and arguments in *De Sols Trading CC*

In this case, the government called for tenders for the supply of perishables in the Gauteng area. The tender documents required bidders to confirm that neither they nor any of their directors were listed on the National Treasury's database as prohibited suppliers. Bidders were also informed that the supply of false information in this respect might lead to the cancellation of any contract entered into. The first applicant, a close corporation (CC), tendered for the contract, and the sole member of the CC (the second applicant) completed the bid documents. In doing so, however, the second applicant failed to disclose her listing on the National Treasury's database as a prohibited supplier. The CC's tender was consequently accepted and it was awarded the contract.

When the fact of the second applicant's inclusion on the National Treasury's database became known, due process was followed and the contract with the CC was cancelled. The second applicant maintained that she had never received formal notification from the National Treasury of her inclusion in the database of prohibited suppliers and made numerous attempts to evade the cancellation of the contract. Eventually, she approached the court for confirmation of an interim order that had been granted earlier declaring, among other things, that neither she nor the CC were listed on the National Treasury's database as blacklisted suppliers; that, if they were, their names should be removed; and that the cancellation of the contract was unlawful and the CC was entitled to specific performance of the concluded contract.

Judgment

The Court found that the second applicant, the sole member of the CC, was indeed listed on the National Treasury's database and that she had been informed of this fact by means of a formal letter. Even though the letter had not been directly addressed to her, but to her previous employer or a company she had been connected to, on the facts before the court it was clear that she knew or should have known that she personally had been blacklisted.

The court further came to the conclusion that when the second applicant completed the bid documents on behalf of the CC, she knowingly and wrongfully failed to disclose that she had been blacklisted. The court held that the second applicant's failure to disclose the fact of her blacklisting induced the government to conclude a contract with the CC. Had the fact of her blacklisting been known, the contract would not have been

key points

- Blacklisted suppliers should not be awarded contracts.
- The conclusion and subsequent cancellation of contracts concluded with blacklisted suppliers give rise to extra costs.
- When a contract is cancelled, a new contractor has to be appointed, which may involve a new tender process.

concluded. The contract was accordingly rightly cancelled, as the government had been acting outside the regulatory framework governing state tenders.

The court discharged the interim order that had been granted earlier and dismissed the application with costs

Comment

In the *De Sols* case, bidders were, as noted, required by the tender documents to indicate whether they were listed on the National Treasury's database as prohibited suppliers or not. It is important to note, however, that even in those instances where bidders are not expressly required by the tender documentation to indicate their blacklisting status, the onus remains on organs of state to verify the status of preferred bidders. Legislation at all three levels of government, including local government level, makes it clear that no contract may be awarded to a contractor who is listed on the National Treasury's database as a company or person prohibited from doing business with the public sector. Organs of state are under an obligation to check the National Treasury's database before concluding contracts.

The conclusion and subsequent cancellation of contracts concluded with blacklisted suppliers gives rise to extra costs for the government, because a new contractor has to be appointed, and in some instances this entails calling for tenders afresh.



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