AAA 9241/09

**Sheleg Lavan (White Snow) 1986 Ltd**

**v.**

1. **Ashkelon Municipality**
2. **Ram K.R.M. Ltd**
3. **Tnufa Personnel Services Ltd**
4. **J.J.A. Maintenance and Services Ltd.**

The Supreme Court
Sitting as a Court of Appeals for Administrative Affairs
[8 July 2010]

*Before Justices E.E. Levy, E. Arbel and N. Hendel*

Appeal of an Administrative Affairs decision of the Beersheba District Court dated 8 November 2009 in AA 357/09, issued by the Honorable President J. Elon.

**Facts:** The respondent, the Ashkelon municipal government, issued a tender for the provision of cleaning services. The tender documents set a minimum bid price in accordance with the exact amount of the wages for cleaning workers as determined in a government circular establishing a national standard for such wages. Respondent 2 submitted the lowest and ultimately winning bid. As part of the tender process, respondent 2 explained its ability to pay the minimum wage while also covering expenses and earning a profit by noting its expectations that a percentage of its workers at any given time would not have acquired enough seniority to entitle them to pension and other benefits; thus, savings with respect to the compensation of its workers would allow the respondent to cover its expenses and earn a minimal profit. The lower court upheld the award of the tender to the respondent, noting that the tender itself had included no requirement regarding the seniority of workers and that the bid was therefore entirely acceptable. The appellant, which had tendered unsuccessfully on the basis of a higher salary cost, appealed.

**Held**: The appeal against the lower court's decision was allowed in full. There is no ground for distinguishing between the rules governing this matter in a national government context and the rules that apply to local government; recently enacted regulations and government directives make clear that the upholding of workers'

rights is of paramount importance and will be a relevant consideration in government tender decisions, because of the administrative authorities' obligations vis-à-vis the public. Although it is impossible to predict or to prevent every possible violation of workers' rights through the tender process, a government authority issuing a tender to contract for services with an external party must nevertheless provide as much forward-looking protection for the contractors' workers as is possible. Thus, when a bidder has expressly stated a plan to dismiss workers after particularly short periods of time in order to minimize the burden of social benefit payments, the bid cannot be accepted.

Appeal allowed.

**Legislation cited:**

Severance Pay Law, s. 3.

Local Councils Order (a), 5711-1951, s. 192.

Local Councils Order (Regional Councils), 5718-1958, s. 89.

Mandatory Tenders Law, 5752-1992.

Municipalities Ordinance [New Version], 5724-1964, s. 197.

Municipalities Regulations (Tenders), 5748-1987, reg. 11.

**Supreme Court Case Cited**

[1] HCJ 10245/07 *Israel National Organization of Guarding and Security Companies v. Minister of Justice* (2007) (unreported).

**District Court Cases Cited**

[2] AP (TA) *Modi'in Ezrachi Ltd v. Association of Dan Region Municipalities* (2008).

[3] AP (Jerusalem) 1077/06 *Koach Otzma Ltd. v. Jewish National Fund/Keren Kayemeth Le'Israel* (2007).

[4] AP (Nazareth) 117/08 *Reshef Security [1993] Ltd v. Afula Municipality* (2008).

**Labor Court Cases Cited**

[5] NLC 45/44-3 *Kara v. Ofir* (1995) (unreported).

[6] LabA 122/03 *Waxman v. ITC 24 Around the Clock* (2007) (not yet reported).

[7] LabA 420/06 *Kogen v. Kfir Electronic Security and Protection Ltd* (2007) (not yet reported).

For the appellant — R. Barak; R. Garber.

For respondent 1 — Y. Avishur.

For respondent 2 — G. Tavur.
For respondent 3 — A. Shur; A. Lazar.
For respondent 4 — A. Kaminetzky.

JUDGMENT

**Justice E.E. Levy**

*Factual background*

1. In May 2009, respondent 1, the Ashkelon municipality, published a tender for the provision of cleaning services in its offices and in the city's educational institutions. The tender covered a period of two years with the possibility of an extension for an additional period. The appellant and the respondents were among those that submitted bids for the tender, and respondent 2, Ram K.R.M. Ltd, was awarded the contract.

Section 2 (b)(3) of the tender conditions provided as follows:

'*Bids will be based on the tender documents* [including] *the "Tender Participant's Proposal" form which includes the costing of wages for the employer (Appendix A to the Proposal Form)*.'

Appendix A, which is the Tender Participant's Proposal form, adds the following:

'*The amount per work-hour* [proposed by the participant] *will not be less than the minimum amount of NIS 28.64*.'

Section 4 of the tender conditions provides that a bid specifying an amount lower than the minimum amount will be disqualified.

The minimum amount is based on a single variable: the cost of the lawful employment of a cleaning worker. The calculation made by the municipality relies on Directive No. 2007-2-41, published by the Ministry of Finance Accountant-General and dated 10 Av 5767 (24 July 2007), entitled "Protection of Rights of Workers Employed by Service Contractors." The Directive was made binding on the local authorities in Circular No. 460 (December 2007) of the Director-General of the Center for Local Government, as ordered by the Director-General of the Ministry of the Interior.

The appellant proposed to provide the service for NIS 29.34 per work-hour. The party that was awarded the contract, Ram K.R.M., submitted a lower bid, in which it offered the prescribed minimum price. However, since it is presumed that a bid submitted in a tender reflects not only the costs of the wages to be paid to the bidder's workers, but also additional expenses (here — materials, equipment and supervision costs), as well as a profit, the

winning party was asked to explain to the tenders committee how the terms of its bid would allow it to comply with the tender conditions. After a discussion that I see no need to describe at length, the winning party submitted a calculation which indicated that it would be able to comply with the tender conditions, and even to earn a profit – even if it was charging the municipality only the minimum price. The calculation was simple: while the wage components as laid out on the basis of the Accountant-General's specification related to workers with more than one year of seniority, the winning bidder presumed that a certain percentage of the workers that it would employ would have less seniority than that, and the cost of their employment would therefore be lower. In calculating the costs of the allocations for pensions, which the employer is required to set aside only after six months of employment, the winning party calculated that "20% of the workers are expected not to work for more than half a year" (Pricing Letter dated 16 July 2009, Exhibit G of the appellant's exhibits). Regarding the cost of severance pay and of seniority-based salary increments, to which a worker with one year or more of seniority is entitled, "the consideration was of [only] 60% of the employees[,] who are expacted to work for more than one year" (*ibid.*). The National Insurance payments component was also set at a lower rate than that established in the Accountant-General's directives, based on an assumption that the savings in the above-mentioned salary components would generate savings in relation to the obligatory National Insurance payments related to such components. Based on these calculations, the party that was awarded the tender argued that it could pay the workers their legally mandated wages, and at the same time pay all the expenses involved in the provision of the service and also generate an (admittedly low) profit from the contract with the municipality — a profit of two percent of the value of the transaction.

2. The Beersheba District Court dismissed the appellant's argument that the tender should be cancelled in the absence of any legally acceptable estimate and that in any event the winning bid should be disqualified, on the grounds that it reflects either an underpayment of the amounts to be paid to the workers, meaning a violation of their rights; or, alternatively, a financial loss to the party submitting the bid, meaning a deficit bid which it could not fulfill. The District Court held that the "calculation made by the Ram Company regarding the mix of seniorities for the workers that it would employ to carry out the work, as reducing the marginal costs proposed in the context of the pricing, is acceptable, and it is not unrealistic" (third paragraph of the decision). "There is no doubt," the President wrote, "that it would be

preferable for the workers that their employment be long-term. However, this item is not a material condition of the tender — either express or implicit — and the tender's retroactive expansion so as to include the item as a threshold condition is a contravention of the principles of the law of tenders" (*ibid*., at para. 5). "The bid price," the lower court added in its holding, "thus ensures the payments to the employees" (*ibid*., at para. 4). Regarding the tender itself, the court held that "the appendices establishing the minimum price bid for the cost of average work-hours comply with the required criteria, in light of the nature of the tender — in which the pricing and the costs are comprised, almost exclusively, of the costs of an average work-hour" (*ibid*., at para. 7).

This is the main issue in the appeal before us, and it appears to me to be obvious that the appeal must be allowed.

*The normative framework*

3. Section 197 of the Municipalities Ordinance [New Version], 5724–1964 (like its parallel provisions, s. 192 of the Local Councils Order (a), 5711–1951 and s. 89 of the Local Councils Order (Regional Councils), 5718–1958), establishes that municipalities are required to contract for the execution of work through the issuance of a public tender. The Ordinance, like the Municipal Regulations (Tenders), 5748–1987 — which were enacted pursuant to the Ordinance — does not refer to any obligation to be especially meticulous regarding the rights of the employees of the contractor with whom the municipality enters into a contract. The Mandatory Tenders Law, 5752–1992, which establishes the duty of government ministries and of other public entities to contract through public tenders, also did not include — until recently — any provision in this spirit.

However, the regime that protects the rights of the employees of bidders at public tenders is an integral part of the law of tenders — in theory, and since recently, recently in practice as well. This regime is derived, first and foremost, from the fiduciary duty that the administrative authorities owe to the public (D. Barak-Erez, *Administrative Law* (2010), at p. 631); from the fact that the objectives in pursuit of which the authorities act are not purely economic (O. Dekel, *The Tenders Requirement for Administrative Entities* (2001), 49, at p. 293); and from the fact that the activity of these authorities is subject to all aspects of public policy — i.e., that they are subject to all the "basic principles of the legal system" (S. Gavish, *Issues in the Law of Public Tenders* (1997), at p. 24). It is undisputed that the protective labor laws constitute an essential part of these principles. Thus, the case law also reflects the concept that "when the state contracts with external parties, it is entitled, and even obligated, to do what it can in order to ensure that the protective

laws are upheld and that the scope of the violation of the rights of the workers is minimized" (HCJ 10245/07 *Israel National Organization of Guarding and Security Companies v. Minister of Justice* [1]). And in this respect, the rule applicable to the state is also applicable to the local authorities, whose activities are subject to the same principles of public law.

Alongside this obligation in principle, a number of concrete steps have been taken in recent years to intensify the protection of the rights of the workers of parties bidding in a public tender. In February 2007, the Government adopted Resolution no. 1134, which directs the Ministry of Finance's Accountant-General to extend the applicability of the labor laws to cover parties providing services to the government in labor-intensive fields, and to establish directives that protect the rights of their workers. At the same time, the Director-General of the Ministry of the Interior and the Director of the Government Companies Authority were ordered to implement these rules within the local authorities and the government companies. Consequently, the Funds and Economy By-laws ([known by their Hebrew acronym as] the Takam), issued by the Accountant-General, which include rules protecting workers' rights, came to be binding on most public authorities (see also G. Shalev, "Public Tenders After the Mandatory Tenders Law, 5742-1992" 2 *Mishpat U'Mimshal (Law and Government)* 455 (1995), at p. 457; S. Herzig, *Law of Tenders* (vol. 2, 2002), at p. 72).

In February 2009, the Mandatory Tenders Regulations, 5753-1993, KT 6750, were amended; the main part of the amendment entered into effect in June 2009. The duty to be meticulous regarding workers' rights runs through the Regulations like a crimson thread. Thus, for example, a tenders committee is authorized to invalidate bids the acceptance of which would involve a violation of workers' rights (Regulation 20(d)); a bid submitted by a party that was convicted of a violation of labor laws during the years preceding the tender must be rejected (Regulation 6a(a)); and the matter of diligence regarding workers' rights is established as one of the criteria to be used in weighing the qualified bids that have been submitted (Regulation 22(a)(6)). The literal language of these Regulations does not bind local authorities, as they cover only those entities that are subject to the Mandatory Tenders Law; however, in the absence of any substantive basis for distinguishing in this matter between government ministries and the local authority, it is only natural that those matters that have not yet been regulated in express language by the legislator will be supplemented by the case law, taking a coherent view of the principles of the public tender.

The fundamental principle — i.e., that as part of the requirement within the law of tenders that a bid must be examined on the basis of its benefit for the public and its fair and reasonable price, it is also necessary to examine the treatment, within the framework of the bid, of the rights of the workers who will be employed thereby — has already found expression in the rulings of the administrative tribunals of the lower courts. In a recent case, Judge M. Rubinstein of the Tel Aviv-Jaffa District Court aptly described the matter as follows:

> 'A reasonable decision by a tenders committee can lead to the selection of a bid which is not the cheapest, but which considers additional matters beyond the price criterion. The bidder's ability to ensure the rights of its workers in the framework of the project which is the subject of the tender could be [one such] additional consideration. This consideration is different from considerations such as the bidder's experience, training, reliability, etc., since it does not relate to the customer's ability to provide the services that are being requested through the tender, and instead refers to the interest of a third party — the bidder's workers — who are not technically a part of the contractual relationship between the parties. Although this consideration does not pertain, on its face, to the relationship between the customer and the bidder, there has been a clear tendency in recent years, both on the part of government entities and on the part of the courts, to insist that tenders for the provision of services to public entities also ensure the rights of the workers of the providers of those services' (AP (TA) 1705/07 *Modi'in Ezrachi Ltd v. Association of Dan Region Municipalities* [2], at para. 12).

*Public tenders as a platform for the violation of workers' rights*

4. The juridical approach described here developed against a background in which violations are committed — a reality that unfortunately has been the norm for many years in service industries such as security and cleaning, and which has penetrated to the heart of public service as the number of contracts with external contractors has increased. A major characteristic of contracts of this type is the buffer zone that they create between the direct employer and the worker, which reduces the "visibility" of the latter as well as his negotiating power and the knowledge that is made available to him, and which opens a very wide door to a diminution of the worker's rights. "The hiring of manpower services", writes Dr. Omer Dekel, "has long since become an easy way to bypass the statutory constraints

regarding minimum wages, the requirement to provide social conditions to workers, etc." (Dekel, *The Tenders Requirement for Administrative Entities*, *supra*, at p. 371, n. 42). A clinical study conducted several years ago at the Hebrew University of Jerusalem observed this phenomenon at close range:

'Service contractors work for profit, and it cannot be presumed that they are willing to finance the gap between the cost of providing the service and the price they ask for their services . . . *The workers, who are the weakest link in the chain, are the ones who generally pay the price for the low bid [in the tender]*. In a field project that documented the employment terms of forty-six contract workers at government ministries (especially cleaning workers), *there were very high rates of violations of protective rights with respect to almost all the issues about which the workers were questioned.* Most of the workers (almost forty workers out of forty-six) reported that they do not receive the pension payments to which they are entitled pursuant to the Expansion Orders relating to the cleaning industry. A similar number of workers reported that they do not receive payment for holidays, and the same was true regarding payment for overtime and for sick days. Twenty-eight workers (out of thirty-six who answered the question) reported that they do not receive an annual vacation; thirty-one workers (out of forty-three) reported that they are not paid convalescence payments. Most of the workers reported a high number of violations that are committed concurrently. Similar findings were reached through field checks regarding the violation of the rights of security workers employed through contractors . . . *The deficit tender method has become an "incubator" for violative employment*' (A. Benish and R.Tsarfatie, "When Labor Becomes a Commodity Again: A Critical Examination of Abnormally Low Bids in the Procurement of Employment Services", 1 *Maa'sei Mishpat* 93 (2008), at p. 98 (emphases added)).

A glimpse into the manner in which these phenomena occur in practice was provided at a meeting of the Knesset's Labor, Welfare and Health Committee on 22 May 2005. The subject of the meeting was the situation of workers in labor-intensive services, and one service contractor testified about a practice which is common among many employers:

'I can tell you that because of the current state of the market, I automatically do not pay for workers' social benefits, [and I do this] in order to survive. [Only] if a worker asks for such, I will not refuse, and this is the highest level of fairness being practiced in my market . . . I must pay the minimum wage plus National Insurance and vacation pay, then I fire [the worker] after seven

or eight months, and I am not required to pay towards a pension, convalescence or severance pay for him,. . .'

*The Law of Tenders as a Preventative Measure*

5. Various mechanisms, from several areas of law, come to mind — mechanisms which can reduce these violations of the labor laws. Some of them are invoked after the violation has occurred, and are based on *ex post* considerations. These include, *inter alia*, various supervisory measures that the issuer of the tender can implement vis-à-vis the party that is awarded the contract. They also include the labor laws that are available to a worker who wishes to defend his rights, and the principles of administrative law, pursuant to which complaints may be submitted to a government authority that is not fulfilling its public obligations. By their nature, these *ex post* measures are more precise in their treatment of a violation that has already taken place, as they can take into consideration, *inter alia*, the nature of the violation, its circumstances and its intensity. However, their power as a *preventative measure*, the main point of which is to deter the violator, is limited. To the extent that the matter depends on a party issuing the tender, it is doubtful that such a party would be motivated to reopen a contract that it has already found to be preferable in terms of its price, and the replacement of which, or the enforcement of its specific terms, entails a complicated and expensive process. Regarding a worker whose interests have been violated, reality demonstrates that his access to information regarding his rights will be limited, and his willingness to pursue those rights of which he is aware will be even less.

6. Nevertheless, the law of tenders seeks to examine a possible violation of workers' rights from a forward-looking perspective (*ex ante*) and to prevent the violation before it takes place. Naturally, the manner in which the law is applied is derived from the fact that at the preliminary stage, the details of a particular violation which has not yet occurred cannot be known — and all that can be done is to prescribe a general framework that will reduce the chances of its occurrence. Such a framework, included as an integral part of the tender conditions with which all bidders must comply, is certainly not an exact one. For example, a tender issuer who wishes to reduce the risk of a violation of the rights of female employees, and to ensure that bidders will comply with their obligations under the laws that protect women at work, can choose to require that bidders demonstrate that they are capable of honoring, meticulously, the special rights granted to working women. This is an option even when it is not known whether any women will actually be employed in the work under tender, or what percentage of all the workers

may in fact be women. Obviously, the estimation component of every such measure detracts from that measure's ability to totally prevent all future violations. But a prospective view makes a unique contribution to the combined effort to reduce the risk of a violation of the workers' rights. It thus appears that the prevention of a violation at an early stage is more efficient, not only in terms of the principles of labor law, but also with regard to the additional objectives of the tender process. I strongly support the statement that "the state, in the role of customer, is the most effective means of preventing this phenomenon [of the diminution of workers' rights] (Benish & Tsarfatie, "When Labor Becomes a Commodity Again", *supra*, at p. 104).

The unique aspect of public tender law is that it stands at a legal junction, at which basic elements of various legal fields meet. Administrative and economic efficiency, morality, public ethics, the observance of freedom of contract in its broader sense, diligent observance of the principle of equality — including equality of opportunity — are some of the principles that meet within the law of tenders (O. Dekel, *Tenders* (vol. A, 2004), at p. 92; O. Dekel, "The Purposes of the Tender: Equality is not the Main Point," in Y. Dotan, A. Bendor, eds., *Y. Zamir Volume on Law, Government and Society* (2005), 441, at p. 474). In my view, the realization of protective labor law is one of the goals of the law of tenders, alongside the other objectives of this particular field of law.

*The basic principles of labor law — a degree of social security for the worker*

7. The protective labor laws also have several objectives. One of them is to ensure a certain degree of social security for the worker is one of them. The essence of this objective is to establish that when a worker is unable to work, he will be able, for a certain period of time, to continue to support himself. A worker who becomes ill is entitled to sick pay. A female worker who has given birth is entitled to maternity leave. A worker who has been dismissed is entitled to severance pay, and the purpose of such pay is to provide a means of support for the worker while he looks for alternative work. A worker who is either on convalescence leave or in a period of convalescence will continue to receive a salary even without actually being at his place of employment. Some of these social rights result from the connection between the employee and his place of work. A dedicated worker, who is sufficiently connected to the workplace to allow the employer to feel secure with respect to his ability to keep the business going, is entitled to the same level of security with respect to his own ability to earn a living. One indication of the existence of an established employment relationship is the

seniority accumulated by a worker at the place of work. The labor laws therefore establish that a worker whose connection to the employer is severed after a few months will be treated differently from one who has worked at a single place of employment for a period of a year or more.

However, this concept, together with its accompanying logic, might do more harm than good. An employer, who benefits from the worker's labor, is nevertheless liable to terminate the employment relationship if, according to the employer's calculation, the financial profit that he derives from the worker is less than the cost of the social payments that he will be required to make for the worker over time. This situation is not generally the lot of well-placed workers who carry substantial market power. But it is very common in relation to workers whose position is weak, and whose professional skills can be provided by replacement workers with less seniority andwho have not yet accumulated any rights. Workers in the labor-intensive service industries, such as the cleaning industry, are workers of this type. It is therefore not surprising that some employers of cleaning workers habitually terminate the employment relationship with their workers before the first year of employment has ended, in order to increase the financial profit that they can produce. In relation to the submission of bids for a public tender for cleaning services, in which the profit margins are in any event very low, the concern that such a process will be followed increases drastically.

8. Market forces cannot provide a response to this issue. Regulatory action is required. A number of tools have been developed within the field of labor law to deal with such situations. Thus, the law does not recognize the legitimacy of a termination of an employment relationship when there is a basis for concluding that the reason for the termination was avoidance of an obligation to pay for social benefits. Section 3 of the Severance Pay Law, 5723-1953 establishes a presumption according to which "a dismissal shortly before the end of the first year of employment will be considered — unless proven otherwise — as resulting from the intention to avoid the obligation to pay severance pay, and such a dismissal will not adversely affect the right to severance pay." The case law has added that this provision is to be implemented on a substantive level, meaning that even if a worker's dismissal did not occur close to the end of the first year, but did take place against a background indicating an intention to avoid payment of social benefits, the employer will not be exempt from liability for the said payment (NLC 45/44-3 *Kara v. Ofir* [5], at para. 11; LabA 122/03 *Waxman v. ITC 24 Around the Clock* [6]; Y. Luvotsky, *Concluding Employment Relationships* (2004), at pp. 3-9). Similarly, it has been held the employment of a worker

for a period which is limited, not because of the needs of the actual job, but because of an intention to prevent the worker from accumulating seniority, cannot serve to deny the worker his entitlement (LabA 420/06 *Kogen v. Kfir Electronic Security and Protection Ltd* [7], at para. 12(b)).

9. These are, as stated, *ex post* measures, designed to deal with the deliberate evasion of obligations to workers, after the employers have already made attempts to engage in such evasion. But they suggest a general principle of law — that the employer's termination of an employment relationship, when the reason for such is the avoidance of the realization of the employee's rights, will not be recognized. An implication of this rule, when it is viewed from the perspective of the law of tenders, is that a bidder may not, in attempting to make his bid the preferable one, rely on the dismissal of a worker or on any other limitation of a worker's rights.

A tender issuer who wishes to safeguard the rights of the workers of the winning bidder can use a variety of measures (see, for example, Dekel, *Tenders* (vol. A), *supra*, at p. 414). One of these is the measure used in the present case, which is the establishment of a minimum price that reflects the proper cost of the employment of workers, *as a part of the tender conditions themselves*. This measure, being a preventative measure which is adopted in advance, cannot be absolutely precise and cannot respond, from the outset, to every possible violation. By its nature, it will focus on the establishment of threshold requirements that are designed to deal with the source of wrongful conduct on the part of employers. Because a key aspect of the harm that is done to the workers is the phenomenon of dismissal before the end of a year of employment, there is good reason to calculate the cost of the employment of workers on the basis of the wage components of workers who have been employed for over a year. Of course, this measure cannot ensure that no violation will occur. Nevertheless, it can reflect the position of the public authority issuing the tender that it will not accept a diminishment of the workers' rights; furthermore, it may be assumed that a bidder who has made a commitment from the outset to a price that properly reflects the transaction will be able, in the end, to comply with the tender conditions, and that such a bidder's incentives to violate his workers' rights in order to win the tender and to execute it will be reduced. This is similar to the rationale underlying the invalidation of a deficit bid, regarding which there is a concern that ultimately the winner will encounter difficulty in complying with the tender conditions (S. Herzig, *Law of Tenders* (vol. 1, 2001) at p. 217; O. Dekel, *Tenders* (vol. B, 2006), at p. 123). Nevertheless, I would strongly emphasize that the approach whereby workers' rights should be protected through the

tender itself does not draw its main strength from the benefit derived from ensuring the tender's implementation according to the terms included in the winning bid. Instead, it stands independently, as one of a number of objectives that the law of tenders seeks to realize.

*The tender conditions and the preparation of an estimate*

10. The above discussion clearly indicates that the establishment of a minimum price, based only on the cost of the employment and ignoring the cost of other components of the tender such as other expenses and profit, will not achieve the above-mentioned objective. It, too, generates the concern that if a bid indicating the threshold price is not a deficit bid, it will necessarily involve a violation of the workers' rights. A tender with conditions such as these essentially calls for a violation of basic elements of labor law, or alternatively, of the principle of efficiency. It is therefore impossible to allow it to stand. A minimum price mechanism is not, as I have already noted, the only tool, or a necessary tool, for protecting the workers' rights, but if the authority has chosen to use it, it must make certain that the mechanism provides true protection, and it must certainly ensure that the minimum price mechanism itself is not the cause of the future violation that the authority seeks to prevent.

11. The natural place for the above-mentioned cost elements is in the estimate that the local authority issuing the tender is required by law to formulate, in compliance with its obligation pursuant to Regulation 11 of the Municipalities Regulations (Tenders). This regulation requires that the authority deposit in the tender box, in advance, a "detailed estimate of expenses or income involved in the proposed contract". According to its purpose, the estimate serves as a measurement for objective assessment, against which all the qualified bids that have been submitted are measured (Dekel, *Tenders* (vol. A), *supra*, at p. 385). It must include a specification of all the expected cost elements, against which the tenders committee will measure the cost elements in the bids. It is presumed that the estimate expresses the proper value of the contractual relationship, but this presumption can be refuted when it is proved that the amount in the estimate is unreasonable (*ibid*.). The result of an unreasonable estimate will vary depending on the circumstances (Herzig, *Law of Tenders*, *supra*, at p. 220). However, I see no need to discuss the matter at length, since I believe that it is a basic principle that the estimate does not replace the substantive conditions of the tender. It is nothing more than a helpful tool to be used by the tender issuer in formulating the conditions and in examining the bids. But

it is therefore clear that even a reasonable estimate, which has been properly prepared, cannot compensate for a defect in the tender conditions.

*The tender in this case*

12. In my view, this case involves a bid that was submitted on a deficit basis or that violates the workers' rights. Such a bid should not have been accorded preference, because the bidder, by virtue of the price tendered, indicates that it will encounter difficulty in fulfilling the tender conditions and in realizing its objectives. According to the bid that was tendered, the profit for the party winning the tender was dependent on the realization of several assumptions regarding the composition of the future work force that the contractor would employ. Respondent 2 was unable to explain — either to the tenders committee in the context of a clarification that it conducted, or in its response to this appeal — the basis for the belief that these assumptions would be realized. The matter works against them in two ways: either these were theoretical assumptions that cannot serve as a basis for winning the tender — regarding which it has been said that "in such cases, it is not sufficient to rely on estimations and unfounded assumptions made by the companies submitting bids in the tender, assumptions regarding the future that are difficult to check, to monitor and to ascertain that they have indeed come to fruition" (AP (Jerusalem) 1077/06 *Koach Otzma Ltd. v. Jewish National Fund/Keren Kayemeth Le'Israel* [3], *per* Judge Y. Tzur, at para. 22); or respondent 2's estimation is based on a future intention regarding the employment of its workers which is inconsistent with the principles of labor law. Regarding such intentions, it has been written that "the tenders committee ought not to confirm [a bid] which is neither ethical nor worthy, in that the [bidder's] intention to violate the conditions of its workers' employment is made evident in advance (AP (Nazareth) 117/08 *Reshef Security [1993] Ltd v. Afula Municipality* [4], *per* Justice B. Arbel at para. 55). Either way, this bid cannot be deemed legitimate, and in any event it should not have been preferred over the bids tendered by other bidders.

13. However, it was not only the winning bid that was seriously defective, but also the tender itself. The minimum price set did not take into consideration the additional cost elements and the profit, and in this way, respondent 1 essentially invited the bidders to submit unacceptable bids. Presumably, if the municipality had included, as required, an estimate based on all the cost components of the tender, the tenders committee would have easily noted the defect. This did not happen, and in any event the defect cannot be corrected, even if a different bid had been chosen instead of the winning bid.

In light of this, I suggest that we allow the appeal, and declare the tender to be void, and in any event disqualify the winning bid. I further suggest that we order each of respondents 1 and 2 to pay the appellant's attorneys' fees in the amount of NIS 20,000 and to pay to respondents 3 and 4 the amount of NIS 10,000.

**Justice E. Arbel**

I agree.

**Justice N. Hendel**

1. I agree with the conclusion that my colleague Justice E. Levy has reached, although on a narrower basis.

The phenomenon noted by my colleague Justice E. Levy — a violation of the workers' rights by the contracting companies, by way of a tender conducted by a public authority — is indeed harsh, and requires correction. The routine dismissal of workers after a short period of time, with the objective of withholding various benefits from such workers, is inconsistent with the function of a public authority. The latter must serve as an example and honor the rights of its workers in practice. The situation must be changed. The issue of which body is responsible for effecting this change — or more precisely, how the task should be divided between the judicial authority and the legislative authority — is a separate question.

The difficulty involved in accepting this appellant's argument is the following: the calculation of the payment for a work-hour used by respondent 2, who won the tender, is based on the assumption that 40% of all workers to be employed in executing the tender project will work for less than one year. This data is found in the pricing sheet of respondent 2's bid (see page 2 of the corrected calculation). As the material indicates, the one year seniority period has clear financial consequences. Nevertheless, the payment offered by respondent 2 for one work-hour meets the minimum threshold of the tender. Employing workers for more than one year is not a condition of the tender, nor is it a statutory requirement. The question thus arises as to whether accepting the appellant's argument would be an expression of the ideal law, as opposed to the existing law. In other words, do the facts of this case and its circumstances allow for the court to intervene in the tender proceedings? The answer to these questions must be determined according to the reasonableness of the manner in which the authority — respondent 1, the Ashkelon municipality (hereinafter: "the municipality") — conducted the tender.

2. In its briefs and in its pleadings, the municipality stresses that the "calculation of the cost of wages to the employer for a work-hour, attached to the bidder's form as Appendix A . . . has been prepared in accordance with Circular No. 460 (December 2007) of the Director-General of the Center for Local Government, entitled 'Protection of the Rights of Workers Employed Through Service Contractors', which provides that the local authorities must implement the Accountant-General's guidelines when it enters into contractual relationships with service contractors. Attached to the Director-General's circular is the Accountant-General's guideline, including the '**Price Schedule Reflecting the Employer's Cost per Work-hour** with Respect to Cleaning Workers'". Thus, in establishing a wage per work-hour of NIS 28.64, the municipality acted on the basis of the provisions of the Director-General's circular. This was the basis for the calculation. However, this amount did not include various additions that the bidder should have taken into consideration, such as: equipment, materials, various expenses, and of course profit.

Despite the above, or more accurately, because of the above, once respondent 2 had tendered a bid that included a work-hour wage of NIS 28.64 — the tender's minimum requirement — the municipality acted reasonably in its decision to demand that respondent 2 clarify that part of the calculation. This was also necessary in order to ascertain that the bid was not a deficit bid. Respondent 2 and an additional bidder were invited to appear before the tenders committee. This clarification process was not formal of course, but was instead directed at checking the matter in a substantive manner. The municipality acted in a similar fashion in deciding not to accept the first calculation presented by respondent 2. Under the circumstances of the case, the municipality acted correctly when it allowed respondent 2 to present an additional calculation. However, this calculation made clear that respondent 2 had assumed that 40% of the workers would not be employed for more than one year.

3. Given the municipality's public function, the explanation provided should have set off a warning bell. A public authority is not subject to the same rule as a private business. The authority is bound by public norms; it is a normative body. Profit is of less importance vis-à-vis the objectives and trends that it must adopt and promote. When the data were presented, it became clear that respondent 2 intended to limit the seniority of the workers who would be hired, such that some of them would work for less than one year and some (20%) would work for even less than half a year (a period which also has a certain significance). This result is incompatible with the

public authority's duty to the public. It is not even consistent with the Director-General's circular. It is a calculation which can adversely affect almost one half of the potential workers. In light of this, it should be noted that the contract period, according to the tender, is two years, with an option to continue for an additional two years.

This point became clear through a discussion of the matter before the tenders committee. I do not wish to establish a general duty or quasi-duty regarding the employment of workers for a particular period of time. In the context of this case, it is sufficient to point to the original sin of this particular tender process. It is true that the municipality established a work-hour wage based on the provisions of the Director-General's circular, which also referred to an increased wage based on seniority. However, it adopted the wage as it was presented in that circular, without taking into consideration the fact that the winner of this tender would be required to make additional payments for various expenses. Thus, a situation developed in which the municipality made it possible, through the tender, for bidders to bid unrealistic offers that could only be realized through a contraction of the workers' conditions. This result, on its face, is unreasonable and contravenes the mandate given to the public authority to conduct its affairs. The obvious conclusion is therefore that the tender must be nullified.

4. In summation, I concur, as stated, in the result reached by my colleague, Justice E.E. Levy.

Decided as *per* Justice E.E. Levy.

26 Tammuz 5770
8 July 2010