

Juta's Quarterly Review of South African Law

Public Procurement 2015

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January to March 2015 (1)

JQR Public Procurement 2015 (1)

Geo Quinot¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Transparency and certainty of adjudication criteria

In *Stiegemeyer Africa (Pty) Ltd v National Treasury of South Africa*² the court confirmed the key principle of procurement law "that competitors are entitled to know beforehand on what basis their tenders are to be evaluated".³ The court also held that contracting authorities are bound by the criteria and adjudication methodology set out in the tender documents. Adjudicating bids on any other basis will render the award decision unlawful.

In this matter the applicant, an unsuccessful bidder, challenged the award of the tender on the basis that the Bid Adjudication Committee (BAC) erred in concluding that the winning tenderer scored the highest points rather than following a recommendation by the Bid Evaluation Committee's (BEC) that the applicant scored the highest points.⁴ The dispute turned on whether three items that formed part of the

¹ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LL.D (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

² Unreported, referred to as [2015] ZAWCHC 9, 9 February 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/9.html>.

³ Para 60.

⁴ Para 19.

tender had to be assessed individually or as a series. If they were scored individually, the applicant did not offer the lowest price on the key item in the list, but if they were scored as a series, the applicant's price was marginally below that of the winning bidder. The court thus reasoned that the key question was what method of adjudication was prescribed by the tender conditions. The outcome rendered by applying that method would be the only lawful one, whether for the BAC in its original assessment or for the court upon review.⁵ The court found that the Special Conditions of Contract for this tender provided that only those items that were indicated in the specifications as subject to assessment in a series could be so treated, and that all other items had to be individually scored. Since the items at issue did not, in terms of the specifications, form part of a series, they *had* to be assessed individually.

In *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality*⁶ the court held that a contracting authority could not invite tenders with an open-ended price and then negotiate the price with the winning bidders. Such an approach would fall foul of the Preferential Procurement Policy Framework Act 5 of 2000, which requires price to be the determinative factor in the adjudication of public bids.⁷

2.2 Abnormally low tenders

In *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality*⁸ the court dealt with the issue of abnormally low tenders. The court ruled that a bidder could not be excluded for an abnormally low bid without being granted an opportunity to explain its price.⁹ The rules of procedural fairness thus apply to such decisions.

In this matter the bids of two of the applicants were excluded in the first phase of adjudication as non-responsive, based on the view that they offered abnormally low prices. However, the court held that the difference between the price offered by these two applicants (R9 per unit) was not so much lower than the final award price (R9,28 per unit) to justify the finding that these two's bids were abnormally low. The contracting authority thus did not have a ground to exclude them. Furthermore, since the two bidders were not given an opportunity to explain their low prices, the decision to exclude them had to be set aside on the basis of procedural unfairness.

⁵ Para 55.

⁶ Unreported, referred to as [2015] ZAFSHC 32, 10 March 2015; available online at <http://www.saflii.org/za/cases/ZAFSHC/2015/32.html>.

⁷⁷ Para 29.

⁸ Unreported, referred to as [2015] ZAFSHC 32, 10 March 2015; available online at <http://www.saflii.org/za/cases/ZAFSHC/2015/32.html>.

⁹ Para 23, 31.

2.3 Cancellation of tenders

In *CFIT (Pty) Ltd v Minister of Defence*¹⁰ the court confirmed that a contracting authority will only be able to cancel a tender in circumstances that meet the requirements of Regulation 8 of the Preferential Procurement Regulations, 2011. This, importantly, includes the limited reasons for which a contracting authority may cancel a tender, namely, if:

- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
- (b) funds are no longer available to cover the total envisaged expenditure; or
- (c) no acceptable tenders are received.¹¹

Cancelling a tender for a reason other than any of these will be unlawful.¹² The court also noted that a term in the tender that purports to allow the contracting authority not to award the tender at all can only mean that the authority may cancel the tender on 'justifiable grounds',¹³ ie those set out in Regulation 8(4). Such a term in the tender thus cannot extend the circumstances under which a contracting authority may cancel a tender. It follows that notwithstanding such a term in the tender, a cancellation will have to be judged against Regulation 8.

2.4 Obligations under a transversal, framework agreement

In *Butsana Textile Services CC v National Treasury*¹⁴ the court held that an authority was not obliged to place any orders for goods under a transversal, framework agreement.

¹⁰ Unreported, referred to as [2015] ZAGPPHC 2, 12 January 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/2.html>.

¹¹ Preferential Procurement Regulations, 2011, Regulation 8(4).

¹² Para 50.

¹³ Para 45.

¹⁴ Unreported, referred to as [2015] ZAGPPHC 163, 26 March 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/163.html>.

In this matter the National Treasury arranged a transversal, framework agreement for the provision of five different items to a range of departments. However, the relevant departments ordered only four of the five items covered by the contract. The supplier consequently instituted a claim for specific performance in respect of the fifth item or damages in the alternative. The court rejected the claim holding that there was no obligation on the departments to in fact order any of the items under the contract. The court held that provision of any goods was entirely dependent on orders placed by the departments, which was within the discretion of the departments. The relevant provisions in the contract on which the court relied in reaching its conclusion stated:¹⁵

Your bid RT160-2004T dated 12 April 2004 has been accepted, subject to all the terms and conditions embodied therein, for the supply of the items indicated per attached circular.

This letter of acceptance constitutes a binding contract but no delivery should be affected until written official orders, which inter alia indicate delivery instructions, have been received. Orders will be placed by participating bodies listed in the document and on whose behalf the contract has been arranged as and when required during the contract period. (Own emphasis added)

...

It is a condition that deliveries must commence as soon as possible after receipt of an official order...

The delivery period of the material is 60 days after receipt of an order and not before receipt of an order. (Own emphasis)...

Orders will be placed by participating bodies listed in the bid document on whose behalf the contract has been arranged as and when required during the contract period.

2.5 Standing to challenge tender awards

¹⁵ Paras 7, 19.

In *Trans Creations KZN CC v City of Cape Town*¹⁶ the court assessed the question of standing to challenge a tender award. In this matter, an unsuccessful bidder sought orders reviewing and setting aside the award of the tender to another bidder, a declaration that a particular clause in the tender document was ambiguous and misleading and an order directing the contracting authority to rerun the tender *de novo*.¹⁷ The applicant did not seek to have the contracting authority's rejection of its own bid reviewed. The court held that the applicant lacked *locus standi*, reasoning that in the absence of a challenge to the rejection of its own bid, the applicant had no interest in the relief sought. The applicant could not rely on an interest in participation in a new tender process, since there was no certainty that the contracting authority would in fact rerun the tender process should the court set the award of the tender aside. The court held that it was up to the contracting authority to decide whether it would rerun the tender process.

3. Literature

P Bolton 'Disqualification for non-compliance with public tender conditions' (2014) 17 *PER* 2314–2353

G Quinot 'In-house provisioning and South African public procurement law' (2014) 39 *Journal for Juridical Science* 115–129

P Volmink 'Legal consequences of non compliance with bid requirements' (2014) 1 *African Public Procurement Law Journal* 41

S Williams-Elegbe 'Beyond UNCITRAL: The challenges of procurement reform implementation in Africa' (2014) 25 *Stellenbosch Law Review* 209–224

April to June 2015 (2)

¹⁶ Unreported, referred to as [2015] ZAWCHC 32, 23 March 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/32.html>.

¹⁷ Para 2.

JQR Public Procurement 2015 (2)

Geo Quinot¹⁸

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Cancellation of tenders

In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*¹⁹ the Constitutional Court authoritatively dealt with when organs of state may cancel a tender. In this matter the respondent organ of state (the IDC) argued that it was entitled not to award a bid at all rather than awarding to the highest scoring bidder (the applicant). This argument was premised on a term in the tender invitation, which stated that 'the IDC reserves the right not to accept the lowest tender'.²⁰ The court held that this term must be read subject to s 2(1)(f) of the Preferential Procurement Policy Framework Act²¹ and regulation 8(4) of the Preferential Procurement Regulations, 2011. This, the court held, meant that the IDC could decide not to award the bid only if it had objective criteria or justifiable reasons for rejecting the applicant's bid, that is the bid with the highest number of points, *and* one of the three conditions in regulation 8(4) is met. Those conditions are:

- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
- (b) funds are no longer available to cover the total envisaged expenditure; or

¹⁸ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

¹⁹ Unreported, referred to as [2015] ZACC 22, 26 June 2015; available online at <http://www.saflii.org/za/cases/ZACC/2015/22.html>.

²⁰ Para 62.

²¹ Act 5 of 2000.

(c) no acceptable tenders are received.

Since the IDC could not point to any objective criteria justifying not awarding to the applicant nor could it show that any of the three conditions in regulation 8(4) were met, it did not have the discretion to cancel the tender or, put differently, to not award the tender.

This is an important judgment, because it leaves no doubt as to the circumstances under which organs of state can walk away from tenders. The court expressly held that the type of clause in the tender invitation quoted above, which is commonly found in tender invitations of organs of state, purporting to allow an organ of state not to award a bid at all, cannot extend the organ of state's powers in respect of cancellation beyond what is provided for in the regulations. These clauses are thus essentially ineffective. At best, they serve to confirm the organ of state's power to cancel under regulation 8(4). The judgment also, importantly, clarifies that a decision not to award is tantamount to a cancellation.²² There can accordingly be no more doubt that a decision not to award is subject to regulation 8(4). Finally, the court also pointed out that the power to cancel under the regulation is only available prior to award of the bid.²³ It follows that once the organ of state has purported to award the bid, the power to cancel is no longer available.

In *Valazone 268 CC v Head of Department Mpumalanga Department of Education*²⁴ the court dealt with one of the particular bases on which an organ of state may cancel a tender process under regulation 8(4) of the Preferential Procurement Regulations, 2011, namely the ground stated in sub-s (b) of the regulation, that 'funds were no longer available to cover the total envisaged expenditure'. In this matter the organ of state presented the novel argument in court that it was entitled to rely on this ground of cancellation on the basis that should it proceed with what it considered to be a flawed tender process there would potentially ensue a floodgate of litigation against it. The organ of state argued that it did not have the funds available to engage in such litigation, with the result that it was entitled under the regulation to cancel.²⁵ The court rejected this argument.²⁶ The court held that regulation 8(4)(b) refers to only the cost of the actual procurement and not any potential litigation that may flow from the procurement process. The court held that as long as the funds are available to implement the procurement contract envisaged by the tender process, regulation 8(4)(b) would not constitute a ground for cancellation.

2.2 Judicial review of tender awards: Remedies

²² Paras 68–70.

²³ Para 71.

²⁴ Unreported, referred to as [2015] ZAGPPHC 179, 7 April 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/179.html>.

²⁵ Para 66.

²⁶ Para 69.

In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*²⁷ the Constitutional Court granted a substitution order following the judicial review of an award of a tender in which the court awarded the tender under scrutiny to the applicant.

In finding that this was an exceptional case, which qualified for a substitution order under s 8(1)(c)(ii) of the Promotion of Administrative Justice Act,²⁸ the court held that it was in as good a position as the organ of state to award the bid given that the tender adjudication process had run its full course with all technical and administrative assessments, processes and recommendations having been completed.²⁹ What remained was simply that the final decision-maker had to apply its mind to the material before it and reach a conclusion within the framework of the relevant statutory provisions. The court held that there was no reason why it could not perform that same exercise.

The highly structured and constrained nature of the discretion that organs of state exercise under the statutory framework of the Preferential Procurement Policy Framework Act³⁰ in taking award decisions was also an important factor that moved the court to grant a substitution order. The court highlighted the fact that the organ of state had very limited options in taking award decisions. This makes it much easier for courts to issue substitution orders, for it decreases the potential of violating the separation of powers doctrine. As pointed out in JQR Public Procurement 2015 (2) 2.1 above, the court also held in this respect that contractual provisions cannot extend the organ of state's discretion beyond what is allowed in terms of the statutory regime. The typical attempt in this matter to reserve a wide discretion to the organ of state to award to any bidder or not to award at all was ineffective and did not bar the substitution order. The court thus held that when none of the conditions in regulation 8(4) of the Preferential Procurement Regulations, 2011 are met, meaning that the organ of state cannot cancel the tender, and there are no objective criteria justifying award to a bidder other than the highest scoring one, the outcome is a foregone conclusion and a substitution order will be appropriate.

The court also made some important remarks about the operation of tender validity periods in the context of judicial review of tender awards. A typical problem when tender awards are challenged in review proceedings is that when the review is decided and the tender award set aside and remitted to the administrator, the tender validity period has already lapsed. The outcome may be that the organ of state cannot award to one of the existing bidders, because no bids will ostensibly be open anymore. The only

²⁷ Unreported, referred to as [2015] ZACC 22, 26 June 2015; available online at <http://www.saflii.org/za/cases/ZACC/2015/22.html>.

²⁸ Act 3 of 2000.

²⁹ Para 58.

³⁰ Act 5 of 2000.

option would be to restart the entire process.³¹ However, the court held in this matter that when a tender award is challenged, the tender validity 'period is held in abeyance pending the finalisation of the matter'.³² This suggests that the bids will still be open when the decision is remitted to the administrator regardless of how long the review proceedings may have taken. The court could still grant substitution orders, again regardless of how long the review took beyond the original tender validity period. This could obviously create some difficulties regarding the pricing in the original bids, which may no longer be market-related following a lengthy delay due to review. The court held that this should not be a problem since negotiations regarding price adjustment should be possible subsequent to tender award as a matter of private law, which accordingly does not impact on the public-law procedure of judicial review.³³

In *Valazone 268 CC v Head of Department Mpumalanga Department of Education*³⁴ the court dealt with what is required of an organ of state when a court remits a tender award to it following a successful review in an order enjoining the organ of state to 'reconsider and re-adjudicate the bid'.

In this matter the initial award of the tender was set aside upon review and the reviewing court remitted the decision to the organ of state 'for reconsideration' and 'ordered and directed to consider and adjudicate upon the bid'.³⁵ This is a fairly common form of order following successful review of a tender award. Upon reconsideration, the organ of state decided not to award any bids, but to cancel and re-advertise the tender. It reached this decision on the basis of what it considered to be flaws in the tender process indicating that the process had been tampered with. A number of the initial bidders returned to court in the current proceedings arguing that the organ of state did not comply with the original order by taking this decision and hence applying for the decision to re-advertise to be reviewed and set aside. The court interpreted the original court order to mean that the organ of state had to assess all the responsive bids for functionality and the qualifying ones subsequently on price and preference points.³⁶ The court thus held that by focusing exclusively on perceived irregularities in the tender process, the organ of state did not comply with the original court order. The court further held that the organ of state was not at liberty to re-advertise the bid, partly because it did not comply with the original court order by not properly adjudicating the responsive bids, but also because there were no grounds to cancel under regulation 8(4) of the Preferential Procurement Regulations, 2011.³⁷ The court held that if the organ of state was concerned about irregularities in the tender process that may suggest that the entire process

³¹ This was held to be the position in *Ikwezi Quarries t/a Blue Rock Quarries (Proprietary Limited) v MEC For Roads and Public Works, Eastern Cape Province* (unreported, referred to as [2015] ZAECGHC 45, 30 April 2015; available online at <http://www.saflii.org/za/cases/ZAECGHC/2015/45.html>) para 58, decided prior to the Constitutional Court judgment in *Trencon*.

³² Para 80.

³³ Paras 75–76.

³⁴ Unreported, referred to as [2015] ZAGPPHC 179, 7 April 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/179.html>.

³⁵ Para 16.

³⁶ Para 62.

³⁷ See JQR Public Procurement 2015 (2) 2.1 above.

was unlawful, it should have approached a court for an order setting aside the tender process and ordering re-advertising, rather than re-adjudication.³⁸

3. Literature

C Helmrich 'Equality-Oriented Horizontal Policies in South African Public Procurement' (2014) 1 *African Public Procurement Law Journal* 61

July to September 2015 (3)

JQR Public Procurement 2015 (3)

Geo Quinot³⁹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Access to tender information

³⁸ Para 61.

³⁹ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

In *Milani Furnitures v MEC, Department of Education Eastern Cape*⁴⁰ the court held that a disappointed tenderer could rely on the common law remedy of a final mandatory interdict to obtain access to information regarding the award of a public tender.

In this case the applicant became aware that it had failed in its bid for a public contract, but was not informed thereof by the contracting authority. When the applicant's initial inquiries to obtain information regarding the tender process failed, it brought a formal request for information under the Promotion of Access to Information Act 2 of 2000 (PAIA). The contracting authority initially acceded to the request and invited the applicant to view the requested information at the authority's offices. However, when the applicant scrutinised the records made available it emerged that the key records, which it originally requested, were not present. It thus requested those to be made available. When the contracting authority was not forthcoming in making arrangements for the applicant to view these additional records, the applicant brought an application for a mandatory interdict to force the authority to make the records available. The authority resisted the application among others on the basis that the applicant had not followed the prescribed appeal procedures under PAIA (s 78 read with ss 82 and 74) and thus could not approach the court for relief at this time.

The court rejected the authority's argument, holding that the appeal under s 74 of PAIA was not available to the applicant, because the authority had not refused the request for information. The court held that under these circumstances there is no reason why the applicant could not approach a court for a final interdict. The court subsequently found that the requirements for a final interdict were met in this case. The applicant had a clear right to administrative justice in the tender process, which was threatened in this matter and which could only be protected if the applicant could gain access to the relevant information. PAIA furthermore did not provide an alternative remedy under these circumstances, nor was there any other remedy available to obtain the information.⁴¹

2.2 Tender contracts and budget allocations

In *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works*⁴² the SCA dealt with the relationship between the validity and enforceability of tender contracts and budget allocations for expenditure under such contracts.

⁴⁰ Unreported, referred to as [2015] ZAECBHC 20, 1 September 2015; available online at <http://www.saflii.org/za/cases/ZAECBHC/2015/20.html>.

⁴¹ Para 25.

⁴² Unreported, referred to as [2015] ZASCA 116, 10 September 2015; available online at <http://www.saflii.org/za/cases/ZASCA/2015/116.html>.

In this matter the contracting authority resisted a claim for payment by a subcontractor under a public contract. It was common cause that the work had been done pursuant to a public tender process and that the contracting authority had not paid the contractors. One of the authority's defences was that the funds required to make payment under the contracts had not been budgeted for and had thus not been allocated. As a result, the authority argued, the contracts could not be enforced against it, because payment under these contracts, in the absence of a budget allocation, would amount to a contravention of the Public Finance Management Act 1 of 1999 (PFMA). The authority argued that the principle of legality thus prevented it from honouring its obligations.

The SCA rejected this argument in the strongest terms, describing the contracting authority's conduct as 'unconscionable' and that it acted 'without any integrity and failed to be transparent and accountable'.⁴³ On the facts the court found that the expenditure under the contracts had been budgeted for. However, the court held that even if there was a shortfall on the amount due in terms of the allocated budget for a particular year, the PFMA prescribes that such outstanding debt must be met 'as a first charge upon the Treasury in the subsequent financial cycle'.⁴⁴ Contrary to the authority's argument, the SCA thus held that the PFMA endorses a contracting authority's obligations to pay under a contract validly concluded despite the absence of an adequate budget allocation for expenditure under the contract. The court concluded this part of the judgment with the important admonishment that '[i]t is important that governmental institutions respect the rights of those with whom it transacts. Government should be a scrupulous role model.'⁴⁵

2.3 Fettering of discretion by public contracts

One of the issues that the court in *City of Cape Town v South African National Roads Agency Ltd*⁴⁶ had to grapple with in the challenge against the declaration of toll roads in the Western Cape, is that of fettering of discretion by means of public contracts. This is an issue that has received scant attention in South African case law to date, as the court also points out.

One of the arguments put forward by the City in its challenge of the respondents' actions in implementing a toll road project in the Western Cape is that the concession contract to be concluded with the private

⁴³ At para 1.

⁴⁴ At para 20.

⁴⁵ At para 21.

⁴⁶ Unreported, referred to as [2015] ZAWCHC 135, 30 September 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/135.html>.

party that will operate the toll scheme will fetter the discretion of the Minister of Transport in setting tolling amounts to be levied on Western Cape roads pursuant to the Minister's statutory powers. In dealing with this part of the case the court provided some useful guidance on the approach to fettering by contract in South African law.⁴⁷ The court held that the rule against fettering by contract cannot be of wide application. A wide approach to the rule would unjustifiably undermine the state's power to conclude binding contracts. The court endorsed⁴⁸ the well-known comments from the Australian judgment in *Ansett Transport Industries (Operations) Pty (Ltd) v Commonwealth of Australia*⁴⁹ which commented in turn on the key English judgment on fettering in *Rederiaktiebolaget 'Amphitrite' v The King*:⁵⁰

The observations of Mason J in *Ansett Transport Industries (Operations) Pty (Ltd) v Commonwealth of Australia and Others* (1977) 17 ALR 513 (HC), at 530, are apposite. Having noted the criticism of the remark by Rowlatt J in *Rederiaktiebolaget 'Amphitrite' v. The King* (1921) 3 KB 500, at 503, that '*it is not competent for the Government [by commercial contract] to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State*' as having been 'expressed too generally', the Australian judge stated that '*Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on public authorities. And it would be detrimental to the public interest to deny to the government or a public authority power to enter a valid contract merely because the contract affects the public welfare. Yet on the other hand the public interest requires that neither the government nor a public authority can by a contract disable itself or its officer from performing a statutory duty or from exercising a discretionary power conferred by or under a statute by binding itself or its officer not to perform the duty or to exercise the discretion in a particular way in the future*'.

The court held that the applicable test in South African law is the incompatibility test of English law, which asks whether the contract at issue 'is incompatible with the purpose of the power that it fetters'.⁵¹ Further factors that must be taken into account in deciding whether the contract amounts to unlawful fettering are 'the interpretation of the statute in question, the nature and the importance of the powers and the functions of the statutory authority that are allegedly fettered, the subject matter or nature of the contract and the effect of the contract on the statutory power, the degree of the fetter and the likelihood

⁴⁷ At paras 250–254.

⁴⁸ At para 251.

⁴⁹ (1977) 17 ALR 513 (HC).

⁵⁰ (1921) 3 KB 500.

⁵¹ At para 252.

or possibility of the fettering occurring'.⁵² In the final analysis, the court described the approach to fettering by contract as follows:

In these circumstances, it is necessary to strike a balance between public and private competing rights i.e. the need for public authorities to contract, protecting those that contract with state bodies and ensuring that contracts do not impermissibly fetter discretion. A court has to exercise a value judgment when determining the validity of the contract or contractual provision in issue by weighing up the public and private interests at stake.⁵³

2.4 Internal appeals against tender awards

The question of internal remedies in the context of municipal tender awards was again at issue in *Envitech Solutions (Pty) Limited v Saldanha Bay Municipality*. However, unlike most of the earlier judgments, this case did not focus directly on the appeal remedy provided for in s 62 of the Local Government: Municipal Systems Act 32 of 2000, but rather on a provision in the respondent contracting authority's supply chain management policy with identical wording to the provisions of s 62.

The authority resisted the applicant's application for review of the tender award at issue to another bidder on the basis that the applicant did not exhaust all internal remedies as required by s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In particular, the respondent argued that the applicant had to pursue an appeal provided for under the respondent's supply chain management policy (in terms essentially identical to s 62 of the Systems Act) prior to bringing the review application. The court agreed with this argument, holding that the remedy provided for in the policy qualified as an internal remedy as contemplated in s 7(2) of PAJA.

2.5 Interim relief pending review of procurement decisions

In *Slip Knot Investments 777 (Pty) Ltd v Mayibuye Transportation Corporation*⁵⁴ the court ruled on the requirement to exhaust internal remedies before approaching a court for interim relief pending a review application of a tender award. In this matter a disappointed bidder approached the court on an urgent basis for interim relief to halt the implementation of a tender award pending an application for the review

⁵² At para 253.

⁵³ At para 254 (footnotes omitted).

⁵⁴ Unreported, referred to as [2015] ZAECELLC 10; 26 July 2015; available online at <http://www.saflii.org/za/cases/ZAECELLC/2015/10.html>.

of the award. The respondent (a provincial government business enterprise) argued that the applicant first had to pursue its internal remedies under the relevant supply chain management policy as prescribed by s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) before the court could entertain the application for interim relief. The court rejected this argument and held that the requirement to exhaust internal remedies in s 7(2) of PAJA only applies to full review applications brought under that Act and not to applications for interim relief.⁵⁵

In *Tshenolo Resources (Pty) Ltd v MEC: Northern Cape Provincial Government: Department of Roads and Public Works*⁵⁶ the court confirmed that it is not only 'prudent', but may indeed be 'necessary' for parties to a tender process where dissatisfaction emerges to proceed to court on an urgent basis and for interim relief in order to avoid a situation where the work under the tender award has progressed significantly by the time that the matter is adjudicated in court. This judgment supports the view expressed in *Slip Knot Investments* above in favour of immediate application for interim relief even where internal remedies have not been exhausted.

2.6 Reviewing decisions on adjudication methodology

In *Envitech Solutions (Pty) Limited v Saldanha Bay Municipality*⁵⁷ the court considered whether a contracting authority's formulation of the adjudication method it will follow in assessing the functionality (quality) of bids can be reviewed under PAJA. The court held that the decision regarding how bids will be scored for functionality, that is the formulation of the assessment methodology, in itself does not amount to administrative action as defined in PAJA, primarily because that decision does not have any impact. The result is that such a decision cannot be reviewed under PAJA.⁵⁸ While the court's reasoning is accurate when looking at the decision on assessment methodology on its own, it should be kept in mind that such a decision is not wholly non-justiciable. A flaw in deciding on assessment methodology would still be reviewable as part of a challenge against the actual award decision premised on scoring in terms of such flawed methodology. For example, if the contracting authority decides to take price into consideration as part of its methodology to score bids during the functionality stage of adjudication, the subsequent award would be reviewable on the basis that the scoring methodology was unlawful when judged against the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations.

⁵⁵ At para 15.

⁵⁶ Unreported, referred to as [2015] ZANCHC 27, 18 September 2015; available online at <http://www.saflii.org/za/cases/ZANCHC/2015/27.html>.

⁵⁷ Unreported, referred to as [2015] ZAWCHC 108, 13 August 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/108.html>.

⁵⁸ At para 79.

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JQR Public Procurement 2015 (4)

Geo Quinot⁵⁹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Cancellation of tenders

In a surprising judgment, the Supreme Court of Appeal expressed the *obiter* view in *City of Tshwane v Nambiti Technologies (Pty) Ltd*⁶⁰ that the cancellation of a tender process did not amount to administrative action.

In this matter the appellant municipality issued an invitation to tender for IT services. However, it subsequently cancelled that tender process and issued a new invitation on somewhat altered terms. These steps followed a review of the needs of the municipality, which indicated that the terms of the original tender did not adequately address those needs and hence the need for a new tender process on different terms, which were more closely aligned to the needs of the municipality. The respondent, a tenderer in the original round as well as the previous service provider of these services, was dissatisfied with the cancellation and challenged the decision to cancel the tender process in judicial review proceedings. It succeeded in the High Court.

⁵⁹ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁶⁰ [2016] 1 All SA 332 (SCA).

On appeal the SCA held that the municipality's review of its needs and discovery that the original tender invitation did not address those needs constituted 'changed circumstances' so that 'there is no longer a need for the services' as contemplated in regulation 8(4) of the Preferential Procurement Regulations 2011.⁶¹ As a result the municipality was entitled to cancel the tender under the regulation. Although one could possibly question whether the municipality's own assessment of its needs as having changed qualifies as 'changed circumstances' as contemplated in the regulation or whether the condition set by the regulation requires a more objective determination of changed circumstances, the judgment is fairly unobjectionable on this point.

The surprising aspect of the judgment and the view that cannot be supported is the court's *obiter* conclusion that the cancellation of the tender process does not amount to administrative action and additionally is not restricted to the conditions set in regulation 8(4) of the Preferential Procurement Regulations 2011. The court reached this conclusion for a number of reasons.

The SCA placed particular emphasis on the fact that the municipality reserved for itself the right not to award a tender at all and to cancel the tender process in the tender conditions. The court seems to suggest, although this is not explicitly stated, that these terms in the tender conditions take the municipality's decision to cancel out of the realm of administrative law, ostensibly because the decision is accordingly not of an administrative nature. While the court attempted to distinguish the present matter from that in the Constitutional Court judgment of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*,⁶² the distinction is not convincing and the Constitutional Court judgment seems authoritative on the point. The SCA stated that *Trencon* did not deal with the question of cancellation and that it 'is not clear in what context the argument was advanced that the public body concerned was not obliged to award any contract at all. That was not the factual situation with which the court was confronted.'⁶³ However, in *Trencon* the question was whether the High Court was justified in ordering a substitution order in a tender dispute. The Constitutional Court held that this partly depended on whether the outcome of the tender process was a foregone conclusion, which in turn depended on whether the contracting authority had any other option but to award the tender to the only remaining qualifying tenderer. The contracting authority argued that it was not obliged to award the bid to the highest scoring (remaining) bidder or at all, based on terms in the tender conditions very similar to those in the present matter. The Constitutional Court rejected this argument. It did so implicitly by holding that the contracting authority in fact had no choice but to award to the remaining, highest scoring bidder.⁶⁴ It also did so explicitly by confirming the concession to this effect made by the contracting

⁶¹ The court erroneously refers to regulation 10(4) in this regard, which was the regulation dealing with cancellation in the now repealed Preferential Procurement Regulations, 2001, which preceded the current 2011 Regulations.

⁶² 2015 (5) SA 245 (CC).

⁶³ At para 29.

⁶⁴ At para 65.

authority in argument, adding that ‘the IDC could only cancel the tender if one of the grounds stipulated in regulation 8(4) existed.’⁶⁵ The Constitutional Court also clearly explained the rationale for this view:

‘It is a fundamental principle of the rule of law that organs of state, like the IDC, can only exercise power that has been conferred on them. They cannot, of their own volition, confer power that was never there unto themselves.’⁶⁶

In light of these findings of the Constitutional Court it is difficult to see how the SCA could maintain in *Nambiti Technologies* that the municipality was not bound by the conditions for cancellation set in regulation 8(4).

As an aside, the example given by the SCA for why it found the proposition that an organ of state should be bound to its tender processes in the absence of one of the three bases for cancellation set in regulation 8(4), is also curious. The court stated that

‘A change in control of a municipality could easily lead to a change in priorities. Is it suggested that the incoming council would be forced to go ahead with procurement decisions with which it did not agree?’⁶⁷

This example loses sight of the rule that procurement decisions at local government level are taken by the municipal manager (as the accounting officer of the municipality) and that the council may not be involved in the award of bids.⁶⁸

The SCA further reasoned that the cancellation did not amount to administrative action, because ‘inaction is not ordinarily to be equated with action’.⁶⁹ This reasoning is curious, because the SCA seems to equate the decision to cancel the tender process, a positive action, with an inaction, that is a failure to take any action. A positive decision by an organ of state that leads to no further action, such as a ‘decision not to procure certain services’ cannot be equated with inaction. The examples given by the SCA, namely ‘a failure to issue a passport or an identity document’, are not on par with a ‘decision not to procure’. A more accurate comparison would be ‘a decision not to issue a passport or an identity document’ and ‘a decision not to procure’. It would be fairly astounding if the former examples would not qualify as administrative action, which shows that the SCA’s view that the procurement decision is not administrative action is open to doubt. Furthermore, despite this confusion between action and inaction, the Promotion of Administrative Justice Act⁷⁰ makes it plain that inaction qualifies as much as administrative action as action does. For example, PAJA defines ‘administrative action’ as ‘any decision

⁶⁵ At para 68.

⁶⁶ At para 70.

⁶⁷ At para 28.

⁶⁸ Local Government: Municipal Finance Management Act 56 of 2003, s 117.

⁶⁹ At para 31.

⁷⁰ Act 3 of 2000 (‘PAJA’).

taken, or any failure to take a decision'⁷¹ and emphasises the general inclusion of omissions in this definition, by stating in the separate definition of 'decision' that the term includes 'doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.'⁷²

The most surprising aspect of this first part of the SCA's reasoning on why the cancellation does not amount to administrative action is the complete absence of any reference to the court's own decision in *Logbro Properties CC v Bedderson NO*.⁷³ That judgment has long been viewed as the leading statement on the application of public-law (and in particular administrative-law) rules to decisions such as the one under scrutiny in the current matter and has also been endorsed by the Constitutional Court.⁷⁴ In *Logbro Properties* the contracting authority decided not to award a tender in a tender process, but to call for fresh tenders. In a challenge to that decision, the SCA held that

'[e]ven if the conditions [of the tender invitation] constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly ...

The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.'⁷⁵

It is difficult to see how the decision to cancel the tender process in the present matter differs from that in *Logbro Properties* so that the ruling in that case should not also apply here.

The second leg on which the SCA based its *obiter* statements that the cancellation did not amount to administrative action was that the decision did not have a direct, external legal effect as required by s 1(i) of PAJA. Again, the reasoning is somewhat curious. While acknowledging that the process of tender adjudication was subject to administrative law, the SCA reasoned that once the process was brought to an end by means of the cancellation, there were no rights (or expectations) that could be affected and accordingly the definition of administrative action in s 1(i) could not be satisfied.⁷⁶ The logic of this reasoning does not hold. It is hard to see why the adjudication of a bid would constitute administrative action, allowing a disappointed bidder to challenge the award decision on review, premised on its rights

⁷¹ PAJA s 1(i).

⁷² PAJA s 1(v)(g).

⁷³ 2003 (2) SA 460 (SCA).

⁷⁴ See eg (most recently) *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) footnote 62.

⁷⁵ At paras 7, 8.

⁷⁶ At para 32.

to a fair tender process (and possibly contractual rights emanating from participation in the tender process), but the decision to bring an identical tender process to an end without awarding the bid (ie cancellation) would not constitute administrative action for a want of impact. In the former case (where an award is made), the disappointed bidder does not have any other rights that can form the basis for the challenge than the disappointed bidder in the latter case (where there is a cancellation). In both instances it is an impact on the right to a fair tender process (either premised on s 217 of the Constitution and accompanying regulation or on a contract governing the adjudication phase) that results in the relevant decisions being administrative action open to challenge in the hands of the disappointed bidder. In fact, the SCA itself confirmed this impact in the case of a cancellation by stating in the present matter that '[o]nce the entire tender was cancelled any expectation that the tenders submitted by tenderers would be adjudicated by the BEC and the BAC fell away.'⁷⁷ It is exactly this effect of 'falling away' that satisfies the impact requirement of the definition of administrative action.

2.2 Adjudication criteria

In *Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (SOC) Ltd*⁷⁸ the Supreme Court of Appeal confirmed that a contracting authority cannot rely on criteria other than those communicated to the bidders in the tender documents in adjudicating bids. The respondent organ of state awarded a bid in this matter to a bidder ostensibly based on six 'strategic considerations', which were in addition to the adjudication criteria relating to functionality, price and preference indicated in the tender documents. In setting the award aside, the court held that the 'very fact that the [bid committee] resorted to strategic considerations without making these known to either [bidder], and without making them part of the bid evaluation criteria, appears to me to be fundamentally unfair'.⁷⁹ The court further held that '[i]f any of the considerations that caused the [bid committee] to award the tender to Areva is outside the parameters of the bid criteria the decision is bad in law'.⁸⁰ The court thus concluded that because irrelevant considerations were taken into account, the award decision was reviewable in terms of s 6(2)(e)(iii) of the Promotion of Administrative Justice Act.⁸¹

2.3 Disqualification of bidders based on prior involvement in projects

⁷⁷ At para 32.

⁷⁸ [2016] 1 All SA 483 (SCA).

⁷⁹ At para 48.

⁸⁰ At para 50.

⁸¹ Act 3 of 2000.

The SCA held in *Aurecon South Africa (Pty) Ltd v City of Cape Town*⁸² that it would not be unreasonable or unfair to allow a supplier to submit a bid for a tender contract where that supplier was involved in the project at an earlier stage. In this matter the appellant provided the respondent contracting authority with advice during a ‘prefeasibility study’ on how to redevelop a particular property. When the contracting authority subsequently requested tenders for a contract that would essentially implement the appellant’s advice, the appellant submitted a bid and was awarded the tender. However, the contracting authority subsequently sought to have its own decision to award the bid to the appellant set aside, inter alia on the ground that it was unreasonable and unfair to award the tender to the appellant in light of the latter’s involvement in the prior process. The respondent argued that the appellant’s involvement unfairly advantaged it over other bidders. The SCA rejected this argument. It referred with approval to expert evidence submitted to it that expressed the view that excluding bidders who had been involved in an advisory capacity at an earlier stage of a project and thus had expert knowledge of the project would amount to ‘unnecessary and wasteful expenditure, and would not be in the best interests of taxpayers and organs of state, and that they should rather be encouraged to tender and put such knowledge to good use’.⁸³ The court also held that regulation 27(4) of the Municipal Supply Chain Management Regulations, 2005,⁸⁴ could not be read as prohibiting such an award and that the contracting authority’s interpretation of the regulation to the contrary ‘does not make commercial sense and goes against standard engineering practice’.⁸⁵

2.4 Registration on supplier database as tender condition

In *Intsimbi Industrial Manufacturing CC v Municipality Manager of the Nelson Mandela Metropolitan Municipality*⁸⁶ the High Court held that a bid submitted by a joint venture that was not registered on the contracting authority’s supplier database was not an acceptable tender and was correctly rejected. The tender conditions in question stated that:

‘All tenderers must be registered on the municipality’s supplier’s database . . . The municipality reserves the right not to consider the tenders of tenderers not registered on the Nelson Mandela Bay Municipality’s supplier’s database.’⁸⁷

The court held that registration on the database was a peremptory condition and that the contracting authority could not condone non-compliance. Put differently, non-compliance was material and hence resulted in an unacceptable bid. The court confirmed that this condition satisfied ‘an important

⁸² [2016] 1 All SA 313 (SCA).

⁸³ Para 41.

⁸⁴ Regulation 27(4) reads: ‘No person, advisor or corporate entity involved with the bid specification committee, or director of such corporate entity, may bid for any resulting contracts.’

⁸⁵ Para 41.

⁸⁶ Unreported, referred to as [2015] ZAECPEHC 64, 13 November 2015; available online at <http://www.saflii.org/za/cases/ZAECPEHC/2015/64.html>.

⁸⁷ Para 39.

requirement', namely of making sure that the contracting authority contracts only with suppliers that are suitable, meaning inter alia those whose tax affairs are in order and are not prohibited from doing business with the state. The purpose of registration on the database was to verify such suitability. The court also confirmed that this purpose was in line with s 217(1) of the Constitution.⁸⁸

2.5 Participation in contract placed by another organ of state

One of the distinct exceptions to following an open bidding process in procuring goods or services at local government level, namely participation in a contract placed competitively by another organ of state, was at issue in *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality*.⁸⁹ This is one of the first cases that have interpreted s 110(2) of the Local Government: Municipal Finance Management Act (MFMA)⁹⁰ and regulation 32 of the Municipal Supply Chain Management Regulations, 2005 (the MSCM Regulations)⁹¹ which provide for this possibility.

In this matter the applicant had entered into a service level agreement (SLA) with another organ of state, the Municipal Infrastructure Support Agent (MISA), following an open bidding process for the supply of all materials and the installation of pre-fabricated toilet structures in the Northern Cape Province. When

⁸⁸ At para 43.

⁸⁹ Unreported, referred to as [2015] ZAECELLC 16, 24 November 2015; available online at <http://www.saflii.org/za/cases/ZAECELLC/2015/16.html>.

⁹⁰ Act 56 of 2003. Section 110 reads in part:

'110 Application of this Part

(1) *This Part, subject to subsection (2), applies to–*

- (a) *the procurement by a municipality or municipal entity of goods and services;*
- (b) *the disposal by a municipality or municipal entity of goods no longer needed;*
- (c) *the selection of contractors to provide assistance in the provision of municipal services otherwise than in circumstances where Chapter 8 of the Municipal Systems Act applies; and*
- (d) *the selection of external mechanisms referred to in section 80(1)(b) of the Municipal Systems Act for the provision of municipal services in circumstances contemplated in section 83 of that Act.*

(2) *This Part, except where specifically provided otherwise, does not apply if a municipality or municipal entity contracts with another organ of state for–*

- (a) *the provision of goods or services to the municipality or municipal entity;*
- (b) *the provision of a municipal service or assistance in the provision of a municipal service; or*
- (c) *the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement.'*

⁹¹ Regulation 32 reads:

'Procurement of goods and services under contract secured by other organs of state

(1) *A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if–*

- (a) *the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;*
- (b) *the municipality or entity has no reason to believe that such contract was not validly procured;*
- (c) *there are demonstrable discounts or benefits for the municipality or entity to do so; and*
- (d) *that other organ of state and the provider have consented to such procurement in writing.'*

the respondent municipality embarked on a sanitation backlog eradication programme, it sought the permission of MISA to participate in the SLA for purposes of its own programme based on the statutory provisions cited above. MISA granted its approval. The respondent subsequently entered into an agreement with the applicant on terms negotiated between them for the provision of the sanitation services. Subsequently, the SLA was cancelled and the respondent consequently cancelled its agreement with the applicant, based on the view that 'by virtue of the cancellation of the SLA, the contractual basis of the Amathole Agreement no longer exists'.⁹² The applicant contested the cancellation of the contract and sought to enforce the arbitration clause in that contract. The respondent in turn sought a review of the conclusion of the contract in a counter-application on the basis that it was unlawfully entered into for failure to comply with the statutory prescripts cited above.

The court held that the arrangement between the applicant and respondent was unlawful and did not comply with s 110(2) of the MFMA or regulation 32 of the MSCM Regulations. As no tender process was followed for conclusion of this particular contract it thus stood to be invalidated. The court interpreted s 110(2) and regulation 32 to include only situations where

'the municipality, with the consent of the supplier, either becomes a party to the existing contract between the other organ of state and the supplier; or where the other organ of state concludes a contract with the supplier for the benefit of a third party, namely for the benefit of the municipality, against payment by the municipality of the approved contract price'.⁹³

The municipality thus had to participate in the *same* contract as the one placed by the other organ of state (MISA in this case) and was not allowed to enter into a separate contract with the supplier (as happened in this case). This also meant, according to the court, that s 110(2) and regulation 32 did not apply if the goods or services procured by the municipality were not exactly the same as those procured under the existing contract and if the prices were not the same. A change in price or goods/services in the procurement arrangement with the municipality would result in a different contract not authorised by these statutory provisions. The court quite rightly pointed out that an interpretation of these provisions that would allow arrangements such as the current one where essentially a different contract was concluded between the municipality and the supplier from that existing between that supplier and the other organ of state, would amount to a complete negation of the procurement principles set out in s 217 of the Constitution.

2.6 Internal appeals against tender awards

⁹² Para 13.

⁹³ Para 37.

In *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*⁹⁴ the Supreme Court of Appeal held that the dispute resolution mechanism created in regulation 50 of the Municipal Supply Chain Management Regulations⁹⁵ does not qualify as an internal remedy as meant by s 7(2) of the Promotion of Administrative Justice Act.⁹⁶ The result is that an aggrieved bidder can pursue judicial review of a tender award under PAJA without having to exhaust the remedy under regulation 50.

In this matter the appellant launched judicial review proceedings to challenge the award of a tender by the respondent municipality to a competing bidder. The respondent raised the *in limine* point that the appellant cannot proceed to judicial review while it has not exhausted the dispute resolution mechanism provided for in regulation 50. The court identified a number of factors supporting the view that the *in limine* argument could not be sustained. The main factor was that the independent and impartial person contemplated in regulation 50 to deal with the dispute did not have the power to invalidate the tender award. In the absence of such a power, or for that matter any decision-making powers, the court held that there was no internal remedy for purposes of PAJA. Another factor was that the regulation itself recognised the right to approach a court for review in parallel to the mechanism created in regulation 50.

3. Literature

Udeh, KT 'Nigerian National Council on Public Procurement: Addressing the unresolved legal issues' (2015) 2(1) *APPLJ* 1

⁹⁴ Unreported, referred to as [2015] ZASCA 146, 1 October 2015; available online at <http://www.saflii.org/za/cases/ZASCA/2015/146.html>.

⁹⁵ GN 868, GG 27636 of 30 May 2005, promulgated in terms of the Municipal Finance Management Act 56 of 2003.

⁹⁶ Act 3 of 2000 ('PAJA').