

Juta's Quarterly Review of South African Law

Public Procurement

January 2008 – December 2017

Contents

1. Legislation.....	12
2. Cases.....	13
2.1 Temporary relief pending review of procurement decisions	13
2.2 Access to tender documents	14
2.3 Choice of legal route to challenge contractual action.....	17
2.4 Market value for the sale of capital assets	19
3. Literature	21
April to June 2008 (2)	22
1. Legislation	22
2. Cases.....	22
2.1 Strict compliance with tender conditions	22
2.2 Past experience as tender condition	23
2.3 Choice of legal route to challenge contractual action.....	25
2.4 Judicial review of tender awards: Remedies.....	26
July to September 2008 (3).....	29
1. Legislation	29
1.1 Broad-based black economic empowerment verification manual	29
1.2 Municipal asset transfer regulations	30
2. Cases.....	30
2.1 The law governing public contract relationships.....	30
2.2 Scope of s 217(1) of the Constitution	32
2.3 Time period for internal appeals against tender decisions	33
2.4 Disqualifying tenderers from future public contracts.....	34
October to December 2008 (4)	36
1. Legislation.....	36
2. Cases.....	36

2.1	Re-appointments in procurement policy as racial discrimination	36
2.2	Composition of bid committees	37
2.3	Strict compliance with tender conditions and tenderers' tax affairs	38
2.4	Damages claims for tender irregularities	38
3.	Literature	39
	January to March 2009.....	40
1.	Legislation.....	40
2.	Cases.....	40
2.1	Scope of s 217 of the Constitution.....	40
2.2	Preferential procurement systems.....	42
2.3	Awarding tenders to non-highest scoring tenderers	42
2.4	Restarting a tender process	43
2.5	Internal appeals against municipal tender awards.....	44
2.6	Setting tender awards aside upon review	46
3	Literature	48
	April to June 2009 (2)	49
1.	Legislation.....	49
1.1	Delegation of procurement powers of the Department of Correctional Services	49
1.2	Notice on BEE verification certificates.....	49
2.	Cases.....	50
2.1	Fairness in changing procurement approach	50
2.2	Documents to be considered by successive decision-makers in municipal procurement	51
2.3	Invalidity of public contracts not concluded in terms of the relevant procurement laws.....	51
	July to September 2009 (3).....	53
1.	Legislation	53
1.1	Draft Preferential Procurement Regulations	53
1.2	Notice on BEE verification certificates.....	54
1.3	Contracts for National Land Transport Services	54
2.	Cases.....	55
2.1	Internal administrative failures in a procurement process	55
3.	Literature	56
	October to December 2009 (4)	57

1. Legislation	57
2. Cases.....	57
2.1 The application of s 217 to contracts between organs of state	57
2.2 Fairness of tender procedures	58
January to March 2010 (1).....	60
1. Legislation	60
2. Cases.....	60
2.1 Internal appeals against municipal tender awards.....	60
2.2 Duty to act against fraudulent preferment claims	62
3. Literature	64
April to June 2010 (2)	65
1. Legislation	65
2. Cases.....	65
2.1 Points system under the Preferential Procurement Regulations	65
2.2 Access to tender information.....	66
July to September 2010 (3).....	69
1. Legislation	69
2. Cases.....	69
2.1 The validity of tenders' tax clearance certificates	69
2.2 Conditional tender awards	70
2.3 Setting tender awards aside upon review	71
3. Literature	71
October to December 2010 (4)	72
1. Legislation	72
1.1 Restricting public servants from doing business with government	72
2. Cases.....	73
2.1 Duty to act against fraudulent preferment claims	73
2.2 Awarding tenders to non-highest scoring tenderers	73
2.3 Revocation of tender awards.....	74
3. Literature	75
January to March 2011 (1).....	76
1. Legislation	76

2. Cases.....	76
2.1 The application of s 217 to contracts between organs of state.....	76
2.2 Deviation from procurement rules.....	78
2.3 Consequences of a failure to accept bids within their validity period	79
2.4 Awarding tenders to more than one bidder	80
2.5 Post-tender negotiations	80
2.6 Temporary relief pending review of procurement decisions	81
April to June 2011 (2)	84
1. Legislation	84
1.1 Scope of application of the Procurement Act	84
1.2 New preferential procurement regulations	84
2. Cases.....	87
2.1 Coverage of public procurement rules.....	87
3. Literature	89
July to September 2011.....	90
1. Legislation	90
2. Cases.....	90
2.1 Coverage of public procurement rules.....	90
2.2 Arbitration in procurement disputes.....	92
3. Literature	93
October to December 2011	93
1. Legislation	93
1.1 Implementation of the Preferential Procurement Regulations, 2011.....	93
2. Cases.....	94
2.1 Public lease agreements and the Treasury Regulations.....	94
2.2 Strict compliance with tender conditions	95
2.3 Tenders by joint ventures	96
2.4 Changing award criteria.....	96
2.5 Invalidity of public contracts not concluded in terms of the relevant procurement laws and setting tender awards aside upon review.....	97
2.6 Choice of legal route to challenge contractual action.....	98
2.7 Disqualifying tenderers from future public contracts	100

January to March 2012.....	101
1. Legislation.....	101
1.1 Implementation of the Preferential Procurement Regulations, 2011: local preferences.....	101
2. Cases.....	102
2.1 Coverage of public procurement rules.....	102
2.2 Arbitration in procurement disputes.....	102
3. Literature	104
April to June 2012	105
1. Legislation.....	105
2. Cases.....	105
2.1 Deviation from procurement rules.....	105
2.2 Offering more than what was called for	106
2.3 Pricing benchmarks	106
3. Literature	107
July to September 2012.....	108
1. Legislation.....	108
2. Cases.....	108
2.1 Fairness of functionality assessment.....	108
2.2 Setting tender awards aside upon review	109
October to December 2012	112
1. Legislation.....	112
2. Cases.....	112
2.1 Cancellation of tenders.....	112
3. Literature	113
January to March 2013 (1).....	113
1. Legislation.....	113
2. Cases.....	114
2.1 Vagueness of adjudication criteria	114
2.2 The role of functionality in tender adjudication and awarding tenders to non-highest scoring tenderers	114
2.3 ADR in procurement disputes	116

2.4 Internal administrative failures in a procurement process and composition of bid committees.....	119
2.5 Procedural fairness in tender awards.....	119
3. Literature	120
April to June 2013 (2)	121
1. Legislation.....	121
2. Cases.....	121
2.1 Two-contract approach to public tenders.....	121
2.2 Awarding tenders to non-highest scoring tenderers	122
2.3 Access to tender information.....	124
July to September 2013 (3).....	125
1. Legislation.....	125
2. Cases.....	125
2.1 Fairness of functionality assessment.....	125
2.2 Unbalanced bid pricing.....	128
October to December 2013 (4)	129
1. Legislation	129
2. Cases	129
2.1 Procedural fairness in tender awards and vagueness of adjudication criteria.....	129
2.2. Duty to investigate preferment claims.....	131
2.3 Strict compliance with tender conditions and tax clearance certificates	132
2.4 Judicial review of tender awards: Remedies	133
2.5 Cancellation of tenders	134
January to March 2014 (1).....	135
1. Legislation	135
2. Cases	135
2.1 Consequences of a failure to accept bids within their validity period.....	135
2.2 Legally binding procurement rules	136
2.3 Standing to challenge procurement decisions.....	136
2.4 Judicial review of tender awards: Remedies	137
April to June 2014 (2)	139
1. Legislation	139

2. Cases	139
2.1 Submission of BEE status level certificates.....	139
2.2 Excluding bidders from tenders.....	140
2.3 Access to tender information	142
2.4 Internal appeals against municipal tender awards	143
2.5 Judicial review of tender awards: Remedies	144
2.6 Legal status of suppliers under a procurement contract.....	146
3. Literature	147
July to September 2014 (3).....	147
1. Legislation	147
2. Cases	148
2.1 Coverage of public procurement rules.....	148
2.2 Internal appeals against municipal tender awards	149
3. Literature	151
October to December 2014 (4)	152
1. Legislation	152
1.1 Restricting public servants from doing business with government.....	152
2. Cases	152
2.1 Submission of B-BBEE status level certificates	152
2.2 Tenderer's duty to disclose business rescue.....	154
2.3 Past experience as tender condition.....	155
2.4 Municipal bid committees	156
2.5 Interpretation of tender contracts.....	157
2.6 ADR in procurement disputes	158
2.7 Damages claims for cancelling tender contracts.....	159
2.8 Judicial review of tender awards: Remedies	159
January to March 2015 (1).....	161
1. Legislation	161
2. Cases	161
2.1 Transparency and certainty of adjudication criteria	161
2.2 Abnormally low tenders.....	162
2.3 Cancellation of tenders	163

2.4	Obligations under a transversal, framework agreement.....	163
2.5	Standing to challenge tender awards	165
3.	Literature	165
April to June 2015 (2)		166
1.	Legislation	166
2.	Cases	166
2.1	Cancellation of tenders	166
2.2	Judicial review of tender awards: Remedies	168
3.	Literature	170
July to September 2015 (3).....		170
1.	Legislation	170
2.	Cases	170
2.1	Access to tender information	170
2.2	Tender contracts and budget allocations	171
2.3	Fettering of discretion by public contracts	172
2.4	Internal appeals against tender awards	174
2.5	Interim relief pending review of procurement decisions	174
2.6	Reviewing decisions on adjudication methodology	175
October to December 2015 (4)		176
1.	Legislation	176
2.	Cases	176
2.1	Cancellation of tenders	176
2.2	Adjudication criteria	180
2.3	Disqualification of bidders based on prior involvement in projects.....	181
2.4	Registration on supplier database as tender condition.....	181
2.5	Participation in contract placed by another organ of state	182
2.6	Internal appeals against tender awards	184
3.	Literature	184
January to March 2016 (1).....		185
1.	Legislation	185
2.	Cases	185
2.1	Standing to challenge tender awards	185

2.2	Condonation in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.....	186
2.3	Internal failures in a procurement process and liability on the basis of estoppel.....	187
April to June 2016 (2)		189
1.	Legislation	189
1.1	Restricting public servants from doing business with government.....	189
2.	Cases	189
2.1	Tenderer's duty to disclose business rescue and changes in financial position	189
2.2	Past experience as tender condition.....	190
2.3	Adjudication of bids in framework agreements	191
July to September 2016 (3).....		192
1.	Legislation	192
2.	Cases	192
2.1	Choice of legal route to challenge contractual action	192
2.2	The relationship between contracting authorities and SITA in procurement.....	194
2.3	Cancellation of tenders.....	195
2.4	Turnkey contracting strategy	197
2.5	Strict compliance with tender conditions and tax clearance certificates	198
2.6	Validity of bidder's CIDB registration.....	199
2.7	Awarding tenders to non-highest scoring tenderers and pricing benchmarks	200
2.8	Timeframe for challenging procurement decisions on review.....	201
October to December 2016 (4)		202
1.	Legislation	202
2.	Cases	202
2.1	Coverage of public procurement rules.....	202
2.2	Advertising of construction tenders	202
2.3	Revocation of tender awards	203
2.4	Time frame for challenging procurement decisions on review.....	204
2.5	Contracting authorities and collateral challenges.....	205
2.6	Standing to challenge tender awards	205
2.7	Judicial review of tender awards: Remedies	207
3.	Literature	208

January to March 2017 (1)	209
1. Legislation	209
1.1 New Preferential Procurement Regulations	209
2. Cases	214
2.1 Disqualification of bidders based on prior involvement in projects	214
2.2 Tender committee knowledge imputed to contracting authority	214
2.3 Cancellation of tenders	214
2.4 Time frame for challenging procurement decisions on review	215
2.5 Judicial review of tender awards: Remedies	216
3. Literature	217
April to June 2017 (2)	218
1. Legislation	218
2. Cases	218
2.1 Strict compliance with tender conditions	218
2.2 Cancellation of tenders and bid validity periods	219
2.3 Standing to challenge tender awards	220
2.4 Time frame for challenging procurement decisions on review	220
2.5 Contracting authorities and collateral challenges	221
3. Literature	222
July to September 2017 (3)	223
1. Legislation	223
2. Cases	223
2.1 Adjudication criteria	223
2.2 Strict compliance with statutory and tender conditions, tax affairs and negotiations	223
2.3 Unsolicited bids and deviations	225
2.4 Duty to investigate abuse of procurement system	226
2.5 Time frame for challenging procurement decisions on review	226
2.6 Damages claims for cancelling tender contracts	227
2.7 Judicial review of tender awards: Cost orders against officials	228
3. Literature	230
October to December 2017 (4)	231
1. Legislation	231

2.	Cases	231
2.1	Cancellation of tenders	231
2.2	Tax clearance certificates	232
2.3	Choice of legal route to challenge contractual action	233

January to March 2008 (1)

JQR Public Procurement 2008 (1)

Geo Quinot¹

1. Legislation

On 8 February 2008, the Minister of Trade and Industry, by notice in the *Government Gazette*,² extended the transitional period for the use of scorecards under the Broad-based Black Economic Empowerment Act 53 of 2003. The transitional arrangement would have come to an end on 9 February 2008 (one year after the publication of the Codes of Good Practice),³ but will now continue until 31 August 2008. Under the continuing transitional arrangement medium and large enterprises have a choice to be measured for BEE compliance either on the generic scorecard or on the transitional scorecard. Once the transitional period comes to an end compliance will be measured against the generic scorecard (or any sector code based on the generic scorecard where applicable).

The main difference between the generic and transitional scorecards is that the transitional version measures compliance against only ownership and management control, whereas the generic scorecard includes a host of additional elements, such as employment equity, skills development, preferential procurement and socio-economic development initiatives.

The Act requires all organs of state to 'take into account and, as far as is reasonably possible, apply' the Codes published under it, inter alia, in 'developing and implementing a preferential procurement policy'. The Codes in turn expressly apply to 'any enterprise that undertakes any business with any organ of state or public entity'.⁴ At present public procurement and in particular the BEE dimension of public procurement is still largely done in terms of the regulations under the Preferential Procurement Policy Framework Act 5 of 2000, which contain their own approach to BEE status that differs somewhat from the approach under the Broad-based Black Economic Empowerment Act. However, given the express

¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Senior Lecturer, Department of Public Law, Stellenbosch University.

² Notice 218 of 2008 in GG 30766 of 8 February 2008.

³ Broad-based Black Economic Empowerment Codes of Good Practice (Notice 112 of 2007 in GG 29617 of 9 February 2007).

⁴ Para 3.1.3 under the heading 'Statement 000: General Principles and the Generic Scorecard' of the Broad-based Black Economic Empowerment Codes of Good Practice.

application of the general principles found in the latter Act and its Codes, quoted above, there can be no doubt that these are already of particular relevance to public procurement and will increasingly be implemented in public procurement practice.⁵ It should also be noted that the regulations under the Preferential Procurement Policy Framework Act are currently in the process of being redrafted to bring them in line with the Broad-based Black Economic Empowerment Act and its Codes.⁶

2. Cases

2.1 Temporary relief pending review of procurement decisions

Organs of state that do not co-operatively engage with disgruntled, unsuccessful tenderers in a manner that will enable the latter to assess its legal position forthwith cannot later rely on the partial implementation of the tender contract to resist temporary relief pending a review application.

In *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* (unreported, Northern Cape Division case no 213/2008, 29 February 2008) the High Court (Bosielo AJP) granted temporary relief to the applicant, suspending the implementation of the tender contract at issue approximately eight months after the award of the tender and after work apparently worth R82 million (of the total R94 million contract price) had already been done. The court emphatically rejected the respondents' arguments that such interim relief should not be granted since it would cause significant harm to the respondents and seemingly the public due to the advanced stage of performance under the contract.⁷ It enjoined organs of state to assist unsuccessful tenderers so as 'to enable the aggrieved party to investigate its case in order to determine what legal recourse he/she intends to take.'⁸ This duty includes furnishing 'full and adequate' reasons for the award decision⁹ and providing the aggrieved tenderer with all relevant documents. The court ruled that where an organ of state fails to comply with this duty and rushes into concluding and implementing a public contract, knowing of an unsuccessful tenderer's reservations about the tender process, it could not rely on partial performance to resist the interim relief and eventually judicial review.

⁵ See eg the Treasury Regulations under the Public Finance Management Act 1 of 1999 (Notice R225 of 2005 in GG 27388 of 15 March 2005), which require in Regulation 16A6.3 that '[t]he accounting officer or accounting authority [of state departments, constitutional institutions and public entities listed in Schedules 3A and 3C to the Act] must ensure that ... (b) bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)'.

⁶ See the Draft Preferential Procurement Regulations, 2004 (Notice 2174 of 2004 in GG 26863 of 4 October 2004), which incorporate the scorecard under the Broad-based Black Economic Empowerment Act into all tender evaluations.

⁷ At paras 27–28.

⁸ At para 25.

⁹ Para 25.

This judgment should counter the emerging trend in public procurement for contracting authorities to conclude and implement public contracts in a rush and under a protracted veil of secrecy, with the intention of reaching a critical stage of advanced performance beyond which judicial review will no longer be feasible. However, unlike the majority judgment in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC),¹⁰ Bosielo AJP did not suggest in the present matter that parties to public contracts should simply delay performance under their contracts as a solution to the problem, but clearly spelt out the positive duties resting on organs of state to avoid the kind of harm that may flow from a blind rush into contractual performance. The court's formulation of positive duties to assist aggrieved tenderers, linked to caution in proceeding with contract implementation in the knowledge of discontent among unsuccessful tenderers, seems to achieve a fair balance between protecting aggrieved parties' interests and efficient public contracting.

2.2 Access to tender documents

An unsuccessful tenderer's right of access to all documents used to adjudicate and award a public tender, including competing tenders, was affirmed by the Supreme Court of Appeal in *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA). In *Tetra Mobile* the appellant, an unsuccessful tenderer, wanted to appeal against the award decision of the provincial Central Procurement Committee in terms of the KwaZulu-Natal Procurement Act 3 of 2001, which allowed for appeals to an Appeals Tribunal on limited grounds.¹¹ For this purpose the appellant sought access to the documents used in the tender process, including the competing tenders. The Procurement Committee provided the appellant with some of the documents it requested, but specifically refused to hand over the competing tenders, arguing that those documents were confidentially received and could accordingly not be disclosed. The Pietermaritzburg High Court (Murugasen AJ) turned down an application by the appellant for an order compelling the Committee to disclose all the documents requested.

¹⁰ See Geo Quinot 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stell LR* 68 for criticism of this judgment.

¹¹ In terms of s 21 of the Act the Appeals Tribunal may interfere 'only if the Central Procurement Committee, Tender Award Committee, a member of either committee or the delegate:

- (a) committed misconduct in relation to their duties as members;
- (b) committed a gross irregularity;
- (c) exceeded its or their power;
- (d) awarded a tender in an improper manner; or
- (e) awarded a tender inconsistent with the objectives of this Act.'

This refusal was reversed upon appeal by the SCA, thereby granting the appellant access to all the documents it requested. Mthiyane JA, for the court, affirmed the foundational importance of s 217 of the Constitution for all public procurement decisions, including ones made under legislation such as the provincial Procurement Act at issue.¹² One of the particular requirements of s 217 is that of fairness. According to the court this does not only require the initial tender adjudication to be fair, but also that the subsequent scrutiny of the adjudication process in terms of the appeal mechanism must amount to a fair hearing.¹³ Fairness in this latter respect implies that the Appeals Tribunal must be in possession of all the documents that informed the Procurement Committee's award decision and also that the appellant must have access to all the documents necessary to formulate its grounds of appeal properly.¹⁴ The court noted that these conclusions, based on s 217 of the Constitution, are also supported by the requirements of procedural fairness found in administrative law, which applies to public tender decisions,¹⁵ and ostensibly the right of access to information in s 23 of the Constitution.¹⁶ As a result the appellant was in principle entitled to all the documents it requested, including the competing tenders.

The SCA was not persuaded by the respondents' confidentiality arguments. While the court did not reject the argument that some or parts of some of the relevant documents were confidential, it was of the view that any confidentiality interests could be balanced against the appellant's interest of access to the information by granting an order along the lines of that formulated by Schwartzman J in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W). In terms of the order the respondents had to identify those parts of the disclosed documents that they considered confidential and the appellant's attorney was prohibited from disclosing such confidential information to any party, including the appellant, other than counsel or an expert for the purpose of formulating the appellant's appeal to the Appeals Tribunal.

Although the *Tetra Mobile* case dealt with the now repealed KwaZulu-Natal Procurement Act 3 of 2001 and the particular internal appeal mechanism created by that statute, the principles expressed in the judgment are of wider application. It is firstly clear that while the internal mechanism at issue was labelled an appeal, it provided in fact for a review of the award decision.¹⁷ The case is consequently just as relevant for the review of procurement decisions as an appeal against such decisions. Secondly, there are a number of other statutory mechanisms providing unsuccessful tenderers with internal remedies

¹² At para 9.

¹³ At paras 10–11.

¹⁴ At para 15.

¹⁵ At para 11.

¹⁶ At para 15.

¹⁷ See para 11 where the SCA noted: 'It is significant also that the appeal provided for in s 20 is in substance a review.' Also see note 11 above where the limited 'grounds of appeal' are listed.

which are sufficiently similar to the one at issue in *Tetra Mobile*, so that the approach in the judgment is still highly relevant, despite the repeal of the KwaZulu-Natal statute.¹⁸

Moreover, the *Tetra Mobile* judgment may be relevant in a wider context than internal (administrative) remedies and may also apply in instances of judicial review. The judgment is based on the implicit distinction between two dimensions of fairness as it applies in the context of procurement decisions. The first dimension is fairness in the adjudication and award of the tender, the failure of which will constitute the ground of review or appeal. The second dimension is fairness in the subsequent review or appeal procedure. It was this second dimension that was at issue in *Tetra Mobile* and which the SCA expressly found part of a fair procurement system under s 217 of the Constitution.¹⁹ The appellant's right of access to the relevant documents flowed from fairness in this second sense. Since it can hardly be argued that *judicial* review can be any less fair than internal (administrative) review, it stands to reason that the fairness of judicial review procedures also requires access to relevant materials, including competing tenders. Since judicial review will always be available to an unsuccessful tenderer, given that the award of a public tender generally amounts to administrative action, access to competing tenders, principally the winning tender, will always be possible under the *Tetra Mobile* approach.

A final point to note in relation to *Tetra Mobile* is the endorsement by the SCA of the *ABBM Printing* approach to confidentiality. Following this latest SCA judgment it seems that the *ABBM Printing* approach – giving access to confidential materials only to the unsuccessful tenderer's legal representatives for purposes of formulating a legal challenge – now seems to be the appropriate way of dealing with confidential materials, primarily competing tenders, in an appeal against or review of public procurement decisions.

In *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* (unreported, Northern Cape Division case no 213/2008, 29 February 2008),²⁰ the court noted the importance of providing aggrieved tenderers with full access to the complete materials used to adjudicate the tenders as part of the 'basic and fundamental principles of openness transparency and accountability which should underpin the actions of all organs of state.'²¹ The court went further and noted that the first respondent's allegations that no written records existed of crucial meetings during the tender process, or of technical advice received from expert consultants and the National Treasury Consumer Advisor were 'seriously confounding and

¹⁸ See eg the mechanisms provided for in s 62 of Local Government: Municipal Systems Act 32 of 2000; Regulation 16A9.3 of the Treasury Regulations under the Public Finance Management Act 1 of 1999 (Notice R225 of 2005 in GG 27388 of 15 March 2005); Regulations 49 and 50 of the Municipal Supply Chain Management Regulations under the Local Government: Municipal Finance Management Act 56 of 2003 (Notice R868 of 2005 in GG 27636 of 30 May 2005).

¹⁹ At para 15.

²⁰ Also see JQR Public Procurement 2008 (1) 2.1 above.

²¹ At para 24.

disturbing'²² and 'seriously suspicious to a point where ... it attracts seriously negative inferences.'²³ In this regard the judge stated: 'How first respondent can be content with oral representations on such an important and strategic aspect, defies my logic.'²⁴

2.3 Choice of legal route to challenge contractual action

The question whether contractual actions of organs of state can be challenged on administrative law grounds has received considerable attention in the public employment context in recent times, leading to the Constitutional Court judgment in *Chirwa v Transnet Ltd* (2008) 29 ILJ 73 (CC).²⁵ The issue has, however, largely been one of jurisdiction in the employment context. The same question is relevant in a more general substantive form in the public procurement context, where the issue is whether such contractual actions need to comply with administrative law requirements, especially flowing from the procedural fairness requirement of s 33(1) of the Constitution as fleshed out in ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In *Equity Aviation Services (Pty) Ltd v South African Post Office Ltd* (unreported, Transvaal Provincial Division case no 17239A/07, 8 January 2008) this question again came under scrutiny with the court finding arguments based on administrative law and constitutional grounds misplaced.

Although not strictly a procurement case, but one dealing with a lease agreement between an organ of state, the South African Post Office, as lessor and a private enterprise as lessee, the *Equity Aviation Services* judgment raises interesting questions in the current context. The parties concluded a sublease, which terminated at a date fixed in the contract and which was expressly non-renewable. However, the contract stated that while the lease would not be renewed at the end of the term, the parties could negotiate a new lease agreement should they wish to do so. Towards the end of the term of the lease the parties engaged in discussions regarding a new lease, not only of the property currently being leased, but also extending to an adjoining property. Following a failure to finalise a new agreement, the applicant contended that the respondent frustrated negotiations to enter into a new lease agreement and failed to honour a right of first refusal which the applicant supposedly enjoyed in relation to the lease of the adjoining property. On the facts the court found that the applicant's offer to enter into a new lease was never accepted by the respondent, but that the respondent made a counter-offer, which was never accepted by the applicant. Consequently no new agreement was entered into.

²² At para 23.

²³ At para 24.

²⁴ At para 23.

²⁵ For a discussion of this case see JQR Constitutional Law 2007 (4) 2.4 and JQR Labour 2007 (4) 2.1.

The applicant, however, also argued that the respondent's decision not to enter into a new lease agreement should be reviewed and set aside on various public law grounds, given that the respondent was an organ of state. The applicant specifically relied on the fairness requirements in ss 195 and 217 of the Constitution and the procedural fairness requirements in s 3 of PAJA. The court rejected all of these arguments, relying on the *Chirwa* judgment (supra) and *Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates)* 1993 (1) SA 405 (T). It found that a refusal to enter into an agreement, where there was ostensibly no duty to do so, did not amount to administrative action under the tests adopted in those cases. Consequently s 3 of PAJA did not apply. In a single sentence, without providing any reasons, the court found the applicant's reliance on s 217 of the Constitution 'also misplaced'. Moreover, the court did not deal with the argument based on s 195 of the Constitution at all.

It is a pity that the court did not deal with the applicant's case based on the latter two constitutional provisions. It remains an open question whether s 217 of the Constitution applies strictly only to acquisitions or to state contracting, including leases, more generally.²⁶ One wonders whether the court in *Equity Aviation Services* found the applicant's arguments based on s 217 misplaced because of a strict reading of that section's field of application,²⁷ or whether in the court's view it flows logically from the conclusion that the action is not administrative action. The judgment is highly problematic if one reads it to say the latter, ie that s 217 (and arguably also s 195) of the Constitution does not apply because the action at stake is not administrative action. While there is clearly an overlap between administrative law, based on s 33 of the Constitution, and the general constitutional 'values and principles' governing public administration in s 195 and public procurement in s 217 of the Constitution, the application of the latter two sections cannot be restricted to that of administrative law and certainly not PAJA. Judgments such as *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) made it clear that administrative law forms but one part of the legal control over conduct of organs of state and that the Constitution contains significant other controls as well. A conclusion on whether a particular contractual action of an organ of state amounts to administrative action or not therefore cannot determine the application of other constitutional controls over such action eg in terms of ss 195 or 217.

In seeming contrast to the judgment in *Equity Aviation Services* (supra) the SCA in *Transnet Ltd v The MV Snow Crystal* (referred to as [2008] ZASCA 27; available online at

²⁶ See Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 3, 67–68 where she argues for a wider reading of s 217 and cf Geo Quinot 'The Law of Government Procurement in South Africa, Phoebe Bolton' (2007) 16 *Public Procurement Law Review* 464 at 466 and Glenn Penfold and Pippa Reyburn 'Public Procurement' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2003) at 25-7 for a stricter interpretation.

²⁷ Perhaps suggested by the court's description of this argument as the 'applicant's reliance on the procurement provision of the Constitution'.

http://www.supremecourtofappeal.gov.za/judgments/sca_2008/sca08-027.pdf) affirmed the existence of concurrent avenues of legal challenge in the context of state contracting. This case also falls within the broader category of state contracting rather than strictly public procurement. The court in this matter found that an arrangement between a private ship owner and Transnet to use dry docks in the Cape Town harbour, which is governed by the Regulations for the Harbours of the Republic of South Africa,²⁸ amounted to a contract. The contractual damages claim instituted by the respondent was therefore well-founded. However, the court noted that the relationship between the parties would ostensibly also be of a public nature.²⁹ In distinct contrast to the ruling in *Equity Aviation Services* (supra) the SCA noted:

An organ of state which is empowered by statute to contract is obliged to exercise its contractual rights with due regard to public duties of fairness. It could not, for example, refuse without good reason to contract with a particular person. Its decision in such an event would constitute administrative action and would be reviewable.³⁰

The court did not, however, expand on this reasoning or provide any further indication on what grounds a refusal to contract (such as, for example, the refusal to enter into a further lease agreement in the *Equity Aviation Services* case (supra)) would qualify as administrative action and be reviewable. Of greater significance in the present context is the court's express, albeit *obiter*, recognition of the potential concurrence of contractual and public law remedies in these instances, declaring that:

[e]ven when it is clear that an organ of state has in fact entered into a contract, it may still be difficult, depending on the circumstances, to determine where the line is to be drawn between, on the one hand, its public duties of fairness and on the other its contractual obligations, or indeed the extent to which the two may overlap, if at all.³¹

2.4 Market value for the sale of capital assets

In *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* (unreported, Witwatersrand Local Division case no 18763/07, 21 February 2008) the High Court

²⁸ Promulgated in terms of s 73(1) of the South African Transport Services Act 65 of 1981, which regulations continued in force under the Legal Succession to the South African Transport Services Act 9 of 1989 in terms of s 21 of the latter statute.

²⁹ At paras 19, 21.

³⁰ At para 21 (footnotes omitted).

³¹ At para 21 (footnotes omitted).

(Sutherland AJ) concluded that a municipality is under no obligation in terms of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) to sell capital assets at market value. In fact, the court interpreted the MFMA as allowing municipalities to dispose of capital assets at no value at all, ie to donate capital assets.³²

In this case the respondent resisted the transfer of municipal land to the applicant under an agreement of sale. The respondent argued that the purchase price was below the present market value of the land (at the time when transfer was demanded) and that the MFMA, specifically s 14, consequently forbid such a transaction.³³ The court rejected this argument for two reasons. Firstly, it found that s 14 of the MFMA only requires a municipality to 'consider' the fair market value of the asset along with a number of other considerations, including the 'economic and community value' to be gained from the disposal of the asset. In the court's interpretation s 14 did not require the municipality to in fact obtain a fair market value. The obligations imposed by s 14 were in the court's view only of a procedural nature and not substantive.

While this interpretation of s 14 generally accords with the Municipal Supply Chain Management Regulations promulgated under the MFMA,³⁴ it should be noted that the regulations contain substantive limitations on the sale of capital assets in respect of price. Regulation 40(2)(b)(i) states that a municipality's 'supply chain management policy must ... stipulate that immovable property may be sold only at market related prices except when the public interest or the plight of the poor demands otherwise.' The court's second reason for rejecting the respondent's argument based on s 14 of the MFMA was that the operative date on which the market value of the relevant asset had to be determined under s 14 was at the conclusion of the transaction and not the later date on which the

³² At para 33.

³³ The operative parts of s 14 of the MFMA read:

Disposal of capital assets

(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public—

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

(3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

...

(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.

³⁴ Notice R868 of 2005 in GG 27636 of 30 May 2005.

asset was delivered.³⁵ This line of reasoning is particularly persuasive and provides a more solid foundation for the judgment than the court's first argument.

3. Literature

Phoebe Bolton *The Law of Government Procurement in South Africa* (2007)

Glenn Penfold and Pippa Reyburn 'Public Procurement' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2003) 25-1 – 25-36

Geo Quinot 'The Law of Government Procurement in South Africa, Phoebe Bolton' (2007) 16 *Public Procurement Law Review* 464

Geo Quinot 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stell LR* 68

³⁵ At para 37.

April to June 2008 (2)

JQR Public Procurement 2008 (2)

Geo Quinot³⁶

1. Legislation

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

2. Cases

2.1 Strict compliance with tender conditions

In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) the Supreme Court of Appeal held that the disqualification of a tender that did not strictly conform to the tender conditions was reviewable based on the tender committee's error of law in thinking that it was obliged to reject such a non-conforming tender. As a result the award of the tender was also reviewable.

The appellant submitted a tender for the disposal of medical waste in response to an invitation to tender by the Department of Health and Social Development in the Limpopo Province. The tender conditions required tenderers to complete a 'declaration of interest' form in which tenderers had to indicate whether they had any links to the contracting authority. The appellant duly completed the form and initialled each page, but failed to sign the form where indicated. The tender committee consequently held the appellant's tender to be non-conforming and disqualified it. The committee's decision to disqualify the appellant's tender was based on two legal grounds. Firstly, it was of the opinion that it did not have the power to condone non-compliance with tender conditions and, secondly, it did not consider the appellant's tender as an 'acceptable tender' as defined in the

³⁶ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Senior Lecturer, Department of Public Law, Stellenbosch University.

Preferential Procurement Policy Framework Act 5 of 2000: 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.³⁷

The court rejected both grounds. On the first ground, the court found that the committee did have the power to condone non-compliance in terms of the applicable provincial procurement regulations. These included the familiar procurement provision stating that 'the Board may accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does not comply with the tender invitation in respect of which the offer has been made.'³⁸ More importantly, the court held that 'our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted.'³⁹ In the court's view condonation of the appellant's failure to sign the form would have enhanced competition between the tenderers and, since the appellant's tender price was significantly less than that of the successful tenderer, condonation 'would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217' of the Constitution.⁴⁰ On the second ground, the court held that the 'acceptable tender' requirement of the Preferential Procurement Policy Framework Act had to be applied in line with the constitutional imperatives of s 217 and the s 33 administrative justice rights. This meant that tenders could not be excluded based on 'conditions which are immaterial, unreasonable or unconstitutional'⁴¹ or in an unreasonable manner.⁴² Excluding the appellant's tender for a failure to sign the 'declaration of interest' while the rest of the form was duly completed, including the name of the person completing the form, was unreasonable in the court's view. The committee thus erred in thinking that it had to exclude the tender.

While the court's insistence on substance over form is certainly welcome, this judgment will complicate the work of tender committees and will arguably open the door to increased litigation in an already litigious field. All tender committees will hence have to exercise a discretion using the nebulous criterion of compatibility with the public interest to decide whether tenders that do not strictly conform to tender conditions need to be excluded or not.

2.2 Past experience as tender condition

³⁷ Para 18.

³⁸ Regulation 5(c) issued under the Northern Transvaal Tender Board Act 2 of 1994.

³⁹ Para 17.

⁴⁰ Ibid.

⁴¹ Para 19.

⁴² Para 21.

The relevance of past experience and a tenderer's general track record, both operationally and financially, in adjudicating tenders was raised in two recent judgments: *The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd* (unreported, case no 07/27391 (W), 14 May 2008) and *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads and Transport* (unreported, case no 2/2008 (Eastern Cape Provincial Division sitting as an Equality Court Bhisho), 24 April 2008).

In *The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd* the applicant challenged the award of a tender by the first respondent to a newly formed company (the second respondent), which inevitably had no record of any past experience or financial standing. The respondents' view was that the second respondent's tender was submitted as a joint venture between it and its major shareholder, a company that, mostly through its other subsidiaries, did have an established record both operationally and financially. The first respondent consequently assessed the second respondent's tender on the basis of the shareholder's record (including those of its other subsidiaries). The court found this approach to be irrational and set the award of the tender aside. The gist of the court's reasoning was that the second respondent was a separate legal entity from its shareholder and the latter's other subsidiaries, and that the awarded tender thus placed no legal obligation on any party other than the second respondent. The second respondent had no experience of its own and, importantly, could not satisfy the first respondent regarding its sound financial standing. In awarding the tender to the second respondent, the first respondent thus contracted with an inexperienced company that was not 'suitably experienced, qualified and economically viable', as required by the tender conditions. The judgment does not suggest that tenders cannot be submitted by joint ventures and assessed as such, ie on the basis of the individual members' respective records. What it does say is that where a tender is intended to be submitted in a joint venture, the members must ensure that there are legal obligations in place that tie the members' experience, facilities and financial capacity to the joint venture and hence the contract, should its tender be successful. It is only once a contracting authority is satisfied of such legal obligations between the members of the joint venture that it can rationally assess the tender on the basis of the members' records rather than on the basis of the joint venture's records.

In *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads and Transport* the applicant challenged the tender requirements, which required that 'successful bidders must have a history of at least seven years involvement in similar projects, must have completed at least five similar projects, and that technical members of its staff must have a minimally prescribed level of engineering experience'.⁴³ Applicant's argument was that these conditions amounted to unfair discrimination because they effectively excluded previously disadvantaged tenderers from public contracts since they had had no opportunity in the past to obtain the requisite experience. Froneman J, sitting as an Equality Court, held that the test to be applied to the challenged tender requirements was whether it was an approach that a reasonable decision-maker could reach as set out in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*

⁴³ Para 1.

2004 (4) SA 490 (CC). On the facts it emerged that the current requirements of experience were premised on an earlier procurement policy in terms of which tenders were awarded on a roster to previously disadvantaged tenderers. The logic of the current requirements was thus that previously disadvantaged companies could have obtained the necessary experience under the previous roster approach. In the court's view it rationally followed that the current requirements of experience were accordingly a justifiable way of ensuring quality performance under public contracts without wasting public money. Froneman J thus found the experience requirements reasonable.

The above cases indicate that the equal and rational treatment of tenderers in public procurement processes must be carefully balanced against the need for economic transformation and the provision of quality public services while protecting public funds, if public procurement is to realise its enormous potential in advancing transformation in South Africa. The importance attached to past experience and the ways in which the tenderers' track records are assessed in the adjudication process are key considerations in achieving such balance.

2.3 Choice of legal route to challenge contractual action

The field of public procurement and public contracting generally is particularly prone to jurisdictional disputes, given the large number of different areas of law intersecting in this context. Apart from competing challenges (and jurisdiction) in terms of labour, contract and administrative law,⁴⁴ questions have now emerged about public procurement challenges in Equality Courts. In a trio of recent decisions, High Court judges have adopted divergent views on this matter. These judgments are *Manong & Associates (Pty) Ltd v City of Cape Town* 2008 (2) SA 601 (C); *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads and Transport* (unreported, case no 2/2008 (Eastern Cape Provincial Division sitting as an Equality Court Bhisho), 24 April 2008), and the earlier decision in *Manong & Associates (Pty) Ltd v Department of Transport, Eastern Cape Province* (unreported, case no 928/06 (Eastern Cape Provincial Division sitting as an Equality Court Bhisho), 18 October 2007). The question in all of these matters was to what extent a public procurement challenge can be brought in the Equality Court. The two Eastern Cape judgments, the 2007 one by Pillay J and the 2008 one by Froneman J, came to diametrically opposite conclusions. In his later judgment, Froneman J expressly noted the disagreement between himself and Pillay J and declined to follow the earlier judgment.

In his 2007 judgment in *Manong & Associates (Pty) Ltd v Department of Transport, Eastern Cape Province* Pillay J held that the Equality Court did not have jurisdiction to review administrative action generally or to determine constitutional challenges. As a result the court could not entertain an

⁴⁴ See JQR Public Procurement 2008 (1) 2.3.

application for the review of the award of a tender by the respondent. The gist of Pillay J's reasoning was that the Equality Court was a specialised court with its jurisdiction limited 'to determin[ing] whether unfair discrimination, hate speech or harassment has taken place'. The fact that it was the High Court constituted as Equality Court did not, in the judge's view, add the High Court's jurisdiction to that of the Equality Court in the present instance. Central to the judgment was Pillay J's view that '[i]t is important to always be mindful of the fact that the Equality Court is different from a High Court even if the latter is constituted as an Equality Court'.¹⁴⁵

It is exactly on this last point that Froneman J differed from Pillay J in his decision in *Manong Associates (Pty) Ltd v Eastern Cape Dept of Roads and Transport*. In this matter the applicant again attempted to have the award of a public tender set aside on review in the Equality Court. And, as in the previous matter, the grounds of review included arguments based on procurement regulations, including s 217 of the Constitution, as well as on unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Froneman J held that the court did have jurisdiction to hear the present matter, ruling that '[t]he High Court sitting as an 'equality court' sits as a High Court, retaining its original jurisdiction as such, together with any expanded jurisdiction that may be conferred upon it in terms of the provisions of the Equality Act'.¹⁴⁶ It was thus perfectly possible for the court in the same proceedings to entertain causes of action arising from the Equality Act and other causes of action within the High Court's jurisdiction such as review of tender awards.

The third judgment by Moosa J in *Manong & Associates (Pty) Ltd v City of Cape Town* took a somewhat narrower view.⁴⁷ There the judge held that the Equality Court has jurisdiction to review public tender awards, but only under the Equality Act and expressly not under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This meant that if the challenge to the tender award was one of unfair discrimination the Equality Court would have jurisdiction. In Moosa J's view the Equality Court had concurrent jurisdiction with the High Court in such matters so that an aggrieved tenderer may bring review proceedings in 'either or both courts'.⁴⁸ However, the causes of action and the relief would differ.

At present there thus seem to be at least three different approaches to the review of tender awards in Equality Courts: Pillay J's no-jurisdiction approach, Moosa J's concurrent jurisdiction approach and Froneman J's 'cumulative jurisdiction' approach.

2.4 Judicial review of tender awards: Remedies

⁴⁵ Page 17 of the judgment.

⁴⁶ Para 16.

⁴⁷ See JQR Administrative Law 2007 (4) 2.3.2.

⁴⁸ Para 4.

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province 2008 (2) SA 481 (SCA) is also noteworthy for the innovative remedy crafted by the court. The court noted the difficulty regarding effective remedies in applications for the judicial review of tender decisions where considerable further action have typically followed the award of the tender by the time the review is heard.⁴⁹ Orders in such cases therefore have potentially far-reaching implications, not only for the unsuccessful tenderer challenging the award and the contracting authority (ie the primary parties to the application), but also for the successful tenderer and the public affected by the service rendered under the tender. As a result the court highlighted the importance of ensuring a fair outcome in relation to all of these interests for an order to be just and equitable as required by the Constitution and s 8 of PAJA. In particular the court noted that an order simply setting the award of the tender aside with the result that all consequent action (including the resultant contract) would be void from the outset is unsuitable in such cases. The relevant factors in formulating a suitable remedy were the specific 'loss to the appellant from the unfair act', the culpability of the successful tenderer in respect of the reviewable irregularity, the expenditure already incurred by the successful tenderer following the award of the tender to it, the public's interest in uninterrupted service delivery under the tender, the public authority's ability to continue such services if the contract is set aside, and the impact on the public purse. This last factor included the significant difference in tender price between the unsuccessful (lower) and successful (higher) tenderers, implying that setting the award aside could result in considerable saving to the public purse, but also the potential costs of setting the award aside and restarting the tender process with no guarantee of lower prices in the fresh round of tenders, as well as the costs of implementing interim arrangements to continue the relevant public service pending the award of a new tender.

The court formulated a detailed remedy in order to cater for all of these interests, which rightly in the court's words 'maintains a balance between the parties' conflicting interests while taking into account the public interest.' It ordered the contracting authority to evaluate the mistakenly excluded tender of the appellant against the successful tender within a given time frame. Only if the authority concluded that the appellant's tender ought to have been accepted, rather than the successful tenderer's one, would the initial tender award be set aside and then only with prospective effect. The order of invalidity would thus not result in the tender award being void from the outset. The court furthermore expressly underlined this effect by ordering that the successful tenderer would remain entitled to any moneys due to it under the contract up to the date it was set aside.

The importance of paying particular attention to the effect of an order setting the award of a tender aside is illustrated by the recent judgment in *Vulindlela Security Force CC v MEC - Department of Works, Province of KwaZulu-Natal* (unreported, case no 2267/2007 (N), 10 March 2008). In this matter the

⁴⁹ Such as the conclusion of a contract and even performance under that contract.

award of a tender to the applicant was set aside by the High Court in a preceding application by an unsuccessful tenderer. In the present matter the applicant claimed payment for the performance tendered by it after the tender was awarded, but before it was set aside. Based on the Supreme Court of Appeal judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) the court rejected the claim. The court held that '[t]he "substantive validity" of the award of the tender was "a necessary precondition for the validity" of the consequent agreement'.⁵⁰ When the tender award was set aside the consequent agreement accordingly also became void from the outset. As a result the applicant's tender of performance under the agreement was also 'without any legal validity'.⁵¹ The court significantly noted that it had no discretion in this matter based on an averred injustice to the applicant if the claim was rejected. Injustice to a party such as the applicant was only relevant in the initial review proceedings where the court did have a discretion to set the challenged administrative action (ie the tender award) aside. Once the review court exercised that discretion in favour of setting aside, the invalidity effect followed automatically. This judgment thus highlights the importance of assessing the effect of setting a tender award aside in the initial review application, as was done in *Millennium Waste Management*, rather than relying on subsequent judicial unscrambling of the effect of such setting aside.

While the court in *The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd* (unreported, case no 07/27391 (W), 14 May 2008) noted the importance of balancing the interests of the public, the contracting authority, the unsuccessful tenderers and the successful tenderer, with explicit reference to the *Millennium Waste Management* judgment, it arguably placed too much emphasis on the public interest in simply setting the award of the tender aside. The fact that most of the successful tenderer's expenses under the contract were incurred *after* the review application was launched influenced the court to refuse any relief to that party in setting the award aside. However, the court failed to internalise an awareness of the various interests at stake in the *formulation* of its order, but seems to have restricted its awareness of multiple interests to a choice between which of these individual interests to vindicate. It is submitted that this approach is not in line with the much more sophisticated approach of Jafta JA in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*.

⁵⁰ Para 15.

⁵¹ Para 16.

July to September 2008 (3)

JQR Public Procurement 2008 (3)

Geo Quinot⁵²

1. Legislation

1.1 Broad-based black economic empowerment verification manual

On 18 July 2008, the Minister of Trade and Industry, by notice in the *Government Gazette*,⁵³ issued a 'verification manual' setting out the 'framework for accreditation and verification by all verification agencies' under the Broad-Based Black Economic Empowerment Act 53 of 2003 ('B-BBEE Act'). In terms of s 10 of Code Series 000 Statement 000 of the Broad-Based Black Economic Empowerment Codes of Good Practice⁵⁴ issued in terms of s 9(1) of the B-BBEE Act, verification agencies are to play an important role in verifying BEE compliance by issuing verification certificates to applying entities. The BEE status of an entity can consequently be assessed on the basis of such certificate. Given the central role of BEE status in public procurement, this development is of obvious significance for public procurement regulation.

In terms of the verification manual a 'verification certificate' will reflect 'the overall B-BBEE Status of a Measured Entity and Scoring allocated for each Scorecard Element verified in respect of the measured entity'. Examples of such certificates are contained in appendix 1 of the manual. The overall purpose of the verification process is stated to 'give confidence to all parties that rely upon the score set out in the verification certificate that the information on which the certificate is based has been tested for validity and accuracy'.⁵⁵ The manual itself, which came into operation on publication, sets out minimum standards for verification agencies and the verification process. In relation to the latter the manual contains detailed provisions setting out the methodologies to be adopted in measuring each of the seven elements of the codes as set out in the relevant scorecards (either generic or sector specific).

⁵² BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Senior Lecturer, Department of Public Law, Stellenbosch University.

⁵³ GN 776 of 2008 in GG 31255 of 18 July 2008.

⁵⁴ GN 112 of 2007 in GG 29617 of 9 February 2007.

⁵⁵ At 3.1.

1.2 Municipal asset transfer regulations

Although it is strictly speaking not a matter of public procurement, it is worth noting that the Minister of Finance has issued new Asset Transfer Regulations for municipalities with effect from 1 September 2008 in terms of the Local Government: Municipal Finance Management Act 56 of 2003.⁵⁶ These Asset Transfer Regulations 2008 govern the ‘transfer and disposal of capital assets by municipalities and municipal entities; and the granting by municipalities and municipal entities of rights to use, control or manage capital assets’.⁵⁷ The regulations determine the conditions and procedures in terms of which municipalities and municipal entities may transfer capital assets to other organs of state or private parties.

2. Cases

2.1 The law governing public contract relationships

The judgment in *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) ostensibly settled the question regarding the law governing public contract relationships. However, a number of recent judgments have again raised doubts about which law applies. The latest such case is *Government of the RSA v Thabiso Chemicals* (unreported, referred to as [2008] ZASCA 112, 25 September 2008, available online at http://www.supremecourtofappeal.gov.za/judgments/sca_2008/sca08-112.pdf).

In this case the respondent was awarded a tender by the State Tender Board (‘STB’) and a contract was subsequently entered into between the appellant and the respondent. However, when it later emerged that the respondent did not comply with the SABS requirements listed as special conditions applicable to the contract at issue, the STB cancelled the respondent’s contract. The respondent subsequently claimed damages for what it argued was ‘a repudiation in the sense of an anticipatory breach’ on the part of the appellant. On appeal, the SCA found that the respondent did not comply with the stated SABS requirements, that the contract had, as a result, been concluded on the basis of incorrect information furnished by the respondent, and that the appellant was thus entitled to cancel the contract in terms of clause 24.8.2 of the State Tender Board General Conditions and Procedures (ST36). The contract at issue was expressly subject to both ST36 and the Regulations promulgated under the State Tender Board Act 86 of 1968. The appellant accordingly also relied on reg 3(6)(b) of these regulations to justify its cancellation. Regulation 3(6)(b) is ‘virtually identical’ to clause 24.8.2 of ST36. Finally, the STB

⁵⁶ GN R878 of 2008 in GG 31346 of 22 August 2008.

⁵⁷ Regulation 2(1).

also relied on s 4(1)(eA) of the State Tender Board Act to cancel the contract. However, despite the government's express reliance on these statutory provisions, the SCA stated in an *obiter dictum* that 'the principles of administrative law have [no] role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law.' In support of this statement the court referred to the judgments in *Cape Metropolitan Council v Metro Inspection Services* CC 2001 (3) SA 1013 (SCA) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA). Curiously, the court did not refer to the judgment in the *Logbro Properties* case (supra), which placed a significant gloss on the *Cape Metropolitan Council* judgment (supra).⁵⁸ In *Logbro Properties* the court stated:

[10] [*Cape Metropolitan*] is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.

[11] In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, 'acting from a position of superiority or authority by virtue of its being a public authority' in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract. [footnotes omitted]

It is submitted that the *obiter* remarks in the *Thabiso Chemicals* case (supra) are not in line with the *Logbro Properties* approach: the state clearly dictated the terms of the contract (in the form of ST36) and then relied (inter alia) on those terms to cancel the contract. Even without the nuanced reading of the *Cape Metropolitan Council* judgment (supra) in *Logbro Properties* (supra), the former case does not support Brand JA's remarks in *Thabiso Chemicals* (supra), ie that 'the principles of administrative law have [no] role to play ... After the tender has been awarded, the relationship between the parties is governed by the principles of contract.' In the *Cape Metropolitan Council* case (supra) Streicher JA said:

In my view, there can be no question that, had the appellant purported to cancel the contract in terms of the provisions of reg 22(1) [of the Financial Regulations for Regional Services Councils R1524 of 28 June 1991], it would have been exercising a public power which would have constituted 'administrative action' in respect of which a fair procedure in terms of s33 of the

⁵⁸ See Cora Hoexter *Administrative Law in South Africa* (2007) 402–404.

Constitution would have required compliance with the *audi* rule. That would have been the case even if the provisions had been incorporated into the contract (see *Zenzile* at 36G - I). However, the appellant did not purport to cancel the contract on any of the grounds referred to in reg 22.⁵⁹

On this approach the STB's cancellation of the contract in *Thabiso Chemicals* (supra) did amount to administrative action since the STB expressly also relied on the Regulations promulgated under the State Tender Board Act to cancel.

2.2 Scope of s 217(1) of the Constitution

In *Londoloza Forestry Consortium (Pty) Ltd v South African Forestry Company Ltd* 2008 JDR 0816 (T) the High Court held that a decision to discontinue a tender process for the sale of state assets was not subject to s 217(1) of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') or s 51(1)(a)(iii) of the Public Finance Management Act 1 of 1999 ('PFMA').

In this case the first respondent, acting with the Minister of Public Enterprises (the second respondent), embarked upon a process to sell the state's commercial interests in a number of state forests (held by the respondent in a wholly owned subsidiary). However, following the withdrawal of the preferred bidder, the respondents decided to discontinue the process and start over with a restructured process. The applicants, the reserve bidder, challenged that decision in a review application. In the present proceedings the applicants sought interim relief pending the outcome of the review application. The court ruled that the applicants were not entitled, at least *prima facie*, to the relief sought in the (main) review application and accordingly did not satisfy the requirements for interim relief. In assessing the applicants' arguments in the review application the court held that the Minister's decision to discontinue the tender process was part of the broader privatisation process, which amounted to policy decisions and were not decisions taken in terms of any legislation. Accordingly, such decisions were not subject to PAJA. The court also held that the Minister's decision did not amount to 'a contract for goods or services' and that s 217(1) of the Constitution accordingly did not apply. Finally, the court held that since the decision was also not 'a procurement and provisioning system', s 51(1)(a)(iii) of the PFMA did not apply either.

The interesting point in relation to s 217(1) of the Constitution, which is not clear from the judgment, is on exactly what basis the challenged decision fell beyond the scope of this constitutional provision. It is

⁵⁹ Para 20.

clear that the decision does not amount to 'a contract', but s 217(1) does not only apply to contracts, but rather contracting.⁶⁰ Thus, a decision *not* to contract for goods and services would be subject to s 217(1). This leaves two bases for finding that the decision under attack is not subject to s 217(1). Firstly, it could be because the proposed contract at issue is not one for goods and services, but rather capital assets. Secondly, it could be because the proposed contract is one in terms of which the organ of state is selling and not acquiring. Both of these views are contested interpretations of s 217(1)⁶¹ and it is a pity that the court did not set out its reasoning more precisely.⁶²

2.3 Time period for internal appeals against tender decisions

In *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) the court held that the longer period of 21 days for internal appeals against tender decisions provided by the relevant municipality's procurement policy, based on s 62 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), trump the shorter 14 day period for such internal appeals envisaged in reg 49 of the Municipal Supply Chain Management Regulations, 2005 (made under the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA')).

In this case an unsuccessful tenderer internally appealed against the award of the relevant tender approximately 20 days after it was informed of the outcome of the tender process. The municipality rejected the appeal on the grounds that the tenderer was out of time, being more than 14 days after the decision was communicated. The municipality based its view on reg 14 of the Municipal Supply Chain Management Regulations, 2005 (made under the MFMA), which states that '[t]he supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.' The aggrieved tenderer, however, argued that the appeal was not out of time, relying on the municipality's procurement policy, which stated that '[t]he written notification [of the acceptance of a bid] ... shall inform the parties ... of their right to appeal such decision within 21 days of the written notification of that decision in terms of s 62 of the Systems Act.' Section 62(1) of the Systems Act reads: 'A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision

⁶⁰ See Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 66–70.

⁶¹ Cf Bolton *op cit* at 3, 67–68; Geo Quinot 'The Law of Government Procurement in South Africa, Phoebe Bolton' (2007) 16 *Public Procurement Law Review* 464 at 466; Glenn Penfold and Pippa Reyburn 'Public Procurement' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2003) at 25-7.

⁶² Also see JQR Public Procurement 2008 (1) 2.3.

by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.’ In court the municipality argued that the 14 day period under the Municipal Supply Chain Management Regulations had to prevail over the ostensibly conflicting 21 day period under its own policy and as set out in the Systems Act. This argument was based on s 3(2) of the MFMA, which states that ‘[i]n the event of any inconsistency between a provision of this Act and any other legislation in force when this Act takes effect and which regulates any aspect of the fiscal and financial affairs of municipalities or municipal entities, the provision of this Act prevails.’ It followed, so the argument went, that the regulations made under the MFMA had to prevail over conflicting provisions of other enactments. The court found that there was no irreconcilable conflict between these two provisions. The 14 day period provided for under the Municipal Supply Chain Management Regulations was only a minimum period that every municipal policy had to provide for. This did not, in the court’s view, mean that a longer period of time provided for in a particular policy would not be binding. Accordingly, if a municipality allowed for a longer period than 14 days to lodge an internal appeal an unsuccessful tenderer would be entitled to such longer period. The court, however, did not address the difference between the 14 day period under the Municipal Supply Chain Management Regulations and the 21 day period provided for in s 62 of the Systems Act itself. The question thus remains whether a period for lodging appeals shorter than 21 days (but longer than 14) in a municipality’s procurement policy would prevent an unsuccessful tenderer from lodging an internal appeal specifically in terms of s 62 of the Systems Act after such shorter period had expired, but within the 21 day period.

2.4 Disqualifying tenderers from future public contracts

In *The Chairman of The State Tender Board v Supersonic Tours (Pty) Ltd* 2008 JDR 0499 (SCA) the court confirmed that decisions by the STB and National Treasury in terms of the State Tender Board Act 86 of 1968 and the Preferential Procurement Policy Framework Act 5 of 2000 to disqualify a tenderer from future public contracts amount to administrative action and can be reviewed under PAJA.⁶³

In this case the STB awarded a tender to the respondent, but it later emerged that information provided by the respondent in its tender was incorrect. The inaccuracies related specifically to tax clearance and the respondent’s empowerment status in respect of its equity ownership. Both the STB and the Treasury requested the respondent to explain the discrepancies in its tender, warning the respondent that a failure to adequately explain these inaccuracies could lead to a variety of measures taken against it. When the respondent failed, in the opinion of the STB, to explain the incorrect information in its tender, the STB decided to cancel the relevant contract and to bar the respondent and its directors from any

⁶³ See JQR Administrative Law 2008 (2) 2.1.2 and JQR Administrative Law 2008 (2) 2.2.1 for a discussion of the administrative law aspects of this case.

government business for a period of 10 years. The respondent successfully applied for the review and setting aside of the STB's decision to disqualify it from future public contracts. Upon appeal the SCA held that the relevant decision was reviewable as procedurally unfair in terms of s 6(2)(c) of PAJA. The court also held that the power to disqualify a tenderer from future public contracts could only be exercised in a limited number of circumstances in terms of reg 3(5)(a)(iv) under the State Tender Board Act, viz when the tenderer had 'promised, offered or given a bribe, or has acted in respect [of the contract] in a fraudulent manner or in bad faith or in any other improper manner'. A tenderer could not be disqualified from future contracts simply for providing incorrect information. Similarly, under the Preferential Procurement Regulations, 2001 (made under the Preferential Procurement Policy Framework Act 5 of 2004), a tenderer could also only be disqualified on the grounds that a preference had been fraudulently obtained, or where 'any specified goals are not attained in the performance of the contract' (reg 15). A tenderer could accordingly also not be disqualified under these regulations for simply providing incorrect information, including 'an 'incorrect' claim for preference'.⁶⁴

In *Entsha Henra Bk v Hessequa Munisipaliteit* 2008 JDR 0455 (C) the court held that neither a mayoral committee nor a municipal council has the power to disqualify a tenderer from future public tenders with the relevant municipality. The court held that in terms of the Local Government: Municipal Finance Management Act 56 of 2003 only the municipal manager has the power to make procurement decisions, including decisions to disqualify tenderers from future business. Furthermore, oversight of procurement decisions at local government level rests primarily with organs of state external to municipalities, viz. national and provincial Treasuries and the Auditor General. The court stated that political office bearers, such as members of municipal councils, have only a very limited role to play in the general oversight of the municipality's procurement policy, which expressly excludes any active decision-making powers.

⁶⁴ Para 15.

October to December 2008 (4)

JQR Public Procurement

Geo Quinot⁶⁵

1. Legislation

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

2. Cases

2.1 Re-appointments in procurement policy as racial discrimination

The lawfulness of reliance on past work of a tenderer in procurement policy was again questioned in another *Manong* case.⁶⁶ The court held that a procurement policy of re-appointments may in fact amount to unfair discrimination.

In *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town (No 2)* (unreported, case no 9934/2005 (Cape Provincial Division sitting as an Equality Court Cape Town), 12 November 2008)⁶⁷ the claimant, a wholly black owned company, argued that the respondents' practice in terms of their procurement policy of re-appointing consultants that have worked on earlier phases of public works projects to subsequent phases unfairly discriminates against it on the basis of race. The court agreed with this argument. Moosa J noted that while a re-appointment policy may make good sense, it is

⁶⁵ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

⁶⁶ See JQR Public Procurement 2008 (2) 2.2 for earlier assessments of such policies, inter alia in a case brought by the same complainant.

⁶⁷ See JQR Administrative Law 2007 (4) 2.3.2 and JQR Public Procurement 2008 (2) 2.3 for comment on the first judgment in this case.

objectionable from an equality perspective when it is implemented within a history of racially exclusive public contracting.⁶⁸ In a case such as the present, where contracts were historically awarded only to white firms, a re-appointment policy would fail ‘to protect or advance persons or categories of persons disadvantaged by unfair discrimination’ as required by ss 9(2) and 217(2)(b) of the Constitution.

This approach is in line with Froneman J’s judgment in *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (No 2)* 2008 (6) SA 434 (EqC) where the judge found that a requirement of past experience as a tender condition was not discriminatory where it followed an earlier procurement policy that facilitated access to public contracts by previously disadvantaged persons.

2.2 Composition of bid committees

In *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* (unreported, case no 1357/2007 (NC), 12 December 2008) the court held that the requirements regarding the composition of bid evaluation and adjudication committees under the Municipal Supply Chain Management Regulations⁶⁹ are peremptory rather than directory and that a failure to comply with such requirements may lead to a tender award being set aside.

In this case neither the bid evaluation committee nor the bid adjudication committee of the respondent in respect of a particular set of tenders included, as members, technical experts from the relevant department requiring the services tendered for. The court found that where such experts are available they *must* be appointed as members of the respective committees in terms of the regulations. A failure to do so would constitute non-compliance with a ‘mandatory and material procedure or condition prescribed by the empowering provision’, with the result that the tender award can be reviewed and set aside in terms of s 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000. The court rejected arguments that the phrases ‘as far as possible’ and ‘if the municipality or municipal entity has such an expert’ in the respective regulations setting out the composition of the committees⁷⁰ rendered these requirements directory.⁷¹ The court furthermore held that mere participation of such experts as non-members in the deliberations of the committees would not be adequate, since, in the court’s view, it is

⁶⁸ At para 30.

⁶⁹ Regulations 27 and 28 of the Municipal Supply Chain Management Regulations under the Local Government: Municipal Finance Management Act 56 of 2003 (Notice R868 of 2005 in GG 27636 of 30 May 2005).

⁷⁰ Regulations 28(2) and 29(2)(iii) respectively read with the defendant’s own procurement policy based on these regulations.

⁷¹ Paras 47, 48 and 64.

the active participation of such experts in the decision-making of the committee, eg by voting, that is of paramount importance.

2.3 Strict compliance with tender conditions and tenderers' tax affairs

In *IMVUSA Trading 134CC v Dr. Ruth Mompoti District Municipality* (unreported, case no 2628/08 (B), 20 November 2008) the court confirmed a contracting authority's power to condone *bona fide* errors in tender documents and to allow a tenderer to correct such *bona fide* mistakes in its tender after the close of tenders. In this case the tender conditions stated that a 'Tax Clearance Certificate must be submitted in the original with the tender that is before the closing time and date of the tender' and that a 'failure to submit an original and valid Tax Clearance Certificate, or certified copy thereof, will invalidate the tender.' When it emerged before the bid evaluation committee that one of the tenderer's tax certificates had expired, the committee allowed the particular tenderer to submit a valid certificate after tenders had closed. Eventually the contract was awarded to that same tenderer. Upon review, the applicant, an unsuccessful tenderer, argued that the successful tenderer's bid should have been disqualified for non-compliance with the tender conditions. The court rejected the argument and held that the mistake was clearly *bona fide* and one of form rather than substance since the successful tenderer's tax affairs had been in order at all times; it was merely a matter of the expiry date of the certificate. Accordingly, the court held that the committee acted properly in allowing the successful tenderer to substitute the tax certificate after close of tenders. In assessing regulation 43 of the Municipal Supply Chain Management Regulations, which stipulates that a contracting authority must verify with the South African Revenue Services that a tenderer's tax affairs are in order before awarding a contract, the court noted that it could find no authority in the enabling legislation, the Local Government: Municipal Finance Management Act 56 of 2003, which allowed the regulations (or procurement policies made under it) to override the secrecy provisions in s 4 of the Income Tax Act 58 of 1962.⁷² However, the court noted that this does not necessarily invalidate regulation 43 of the Municipal Supply Chain Management Regulations, but simply means that the contracting authority must obtain the tenderer's consent to make such enquiries. The court's ruling, however, implies that obtaining a valid tax certificate from the tenderer may be another way of complying with the requirements in regulation 43.

2.4 Damages claims for tender irregularities

⁷² Para 14.

While the possibility of claiming damages following irregularities in a public tender process has virtually been quashed in South African law following a number of recent judgments,⁷³ the one exception remains instances of fraud in the tender process, as authoritatively held in *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA). And as the recent *quantum* judgment in this matter, *Gore v The Minister of Finance* 2008 JDR 1352 (T), illustrates, these claims can be substantial. In a detailed *quantum* judgment, Prinsloo J awarded the defrauded, unsuccessful tenderer damages for lost profits to the amount of R215 517 500 plus interest. An interesting argument advanced by the defendants in this case, but ultimately rejected by the court, is what was called the 'implementation argument'. The defendants argued that the plaintiff 'should be non-suited altogether because he had failed to prove ... that [the unsuccessful tenderer] would have been able to implement the contract successfully and profitably.' This argument is of interest because it was presented as a separate argument from the usual one in cases of this nature on whether the plaintiff would have been awarded the tender contract so that lost profits can be claimed as damages flowing from the botched tender process. This latter argument was already decided in favour of the plaintiff in the present matter during the preceding merits trial. The 'implementation argument' is a crafty one, because it argues that even where the tender would have been awarded to the plaintiff it could only succeed with a damages claim if it can additionally prove that it would have been able to successfully *implement* the contract. This suggests proof beyond the mere award of the contract to the plaintiff and a subsequent calculation of income and expenses in terms of that contract. The argument introduces an additional hurdle to a damages claim. The court rejected the argument, but the judge carefully restricted his comments on it to the circumstances of the present matter⁷⁴ where successful implementation seems to have been accepted already at the earlier merits stage of the case. While one may question whether the 'implementation argument' properly forms part of the quantification part of the damages claim or rather the preceding merits part, it may still be a successful argument in the tender context under different circumstances than the present.

3. Literature

Quinot, Geo 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stell LR*

⁷³ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) and also Malan J's remarks in *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (unreported, case no 2008/19224 (W), 8 September 2008) at para 8; Geo Quinot 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stell LR* 68.

⁷⁴ See particularly para 31.

January to March 2009

JQR Public Procurement 2009 (1)

Geo Quinot⁷⁵

1. Legislation

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

2. Cases

2.1 Scope of s 217 of the Constitution

The scope of application of s 217 of the Constitution of the RSA, 1996 and related legislation, and in particular the institutions to which they apply, was raised in a number of recent judgments including *Thebe Ya Bophelo Healthcare Administrators v the National Bargaining Council for the Road Freight Industry v Road Freight* 2009 JDR 0130 (W) and *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG).

In *Thebe Ya Bophelo Healthcare Administrators v the National Bargaining Council for the Road Freight Industry* the decisions by the first respondent, a bargaining council registered as such under the provisions of the Labour Relations Act,⁷⁶ not to award a contract following a tender process, but to seek fresh tenders and ultimately to award the contract to a new tenderer were challenged by a first-round tenderer. An interesting argument made by the first respondent was that s 217 of the Constitution did not apply to the matter at hand and, as a result, that ‘the first respondent is not required by law to follow a particular type of procurement process, whether a “tender” process or otherwise’.⁷⁷ The gist of

⁷⁵ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

⁷⁶ Act 66 of 1995.

⁷⁷ At para 5.

this argument was that the first respondent is neither an organ of state in the 'national, provincial or local sphere of government' nor one 'identified in national legislation' as required by s 217(1) in the application of that provision. In support of the argument that the first respondent did not fall within the latter category, counsel argued that the reference to legislation there is restricted to legislation that specifically identifies institutions as subject to s 217(1), and not legislation generally. Such legislation would include the Public Finance Management Act ('PFMA')⁷⁸ and the Preferential Procurement Policy Framework Act ('PPPFA').⁷⁹ Since the first respondent was not subject to any of these enactments, s 217 of the Constitution also did not apply to it. Unfortunately, the court did not deal with this argument, since the parties were in agreement that the Promotion of Administrative Justice Act ('PAJA')⁸⁰ did apply and that the matter was to be dealt with in terms of that enactment.

In *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* the contracting authority was a public entity in terms of the PFMA, but did not qualify as an organ of state under the PPPFA. It was common cause that the authority was also an organ of state in terms of the Constitution and PAJA. The court noted that the relevance of this difference was that while PAJA placed a general duty on organs of state to act fairly, s 217 of the Constitution and the consequent PPPFA placed a particular duty on specific organs of state to act fairly in public contracting. This particular duty involved a specific form of preferential procurement as laid down in the PPPFA and its regulations. However, the contracting authority in this case did not escape the application of s 217 simply because it did not qualify as an organ of state under the PPPFA. In terms of s 51(1)(a)(iii) of the PFMA the accounting authority of a public entity must maintain a procurement system that is 'fair, equitable, transparent, competitive and cost effective', which mirrors the requirements in s 217(1). Furthermore, in terms of the instructions issued by the national treasury under s 76(4) of the PFMA to all public entities '[t]he prescripts of the [PPPFA] ... and its associated regulations should be adhered to'.⁸¹ The difference between the direct application of s 217 and the PPPFA and the indirect application by reference in either the tender documents or treasury instructions (such as those under the PFMA) is that compliance with the preferential procurement requirements in the PPPFA in a case of direct application would be a matter of lawfulness, whereas in the case of indirect application such compliance will be a matter of general fairness in terms of PAJA. In the present matter the contracting authority adjudicated the tenders on a points system, which awarded 90 points for price *and* functionality and 10 points for BEE. However, the PPPFA provides for 90 points to be awarded for price only and the remaining 10 points to be awarded for other goals.⁸² On a strict lawfulness analysis the contracting authority's points system thus did not comply with the PPPFA and would be unlawful. In contrast to the PPPFA itself, the regulations made under that Act provide for a maximum of 90 points to be awarded for price *and* functionality.⁸³ This was

⁷⁸ Act 1 of 1999.

⁷⁹ Act 5 of 2000.

⁸⁰ Act 3 of 2000.

⁸¹ At para 18.

⁸² Section 2(1)(b)(i).

⁸³ Preferential Procurement Regulations, 2001 (Notice R725 of 2001 in GG 22549 of 10 August 2001) reg 8(3).

the approach expressly adopted by the contracting authority. Since the PPPFA did not apply directly to the contracting authority, but only indirectly, the court held that the issue was not one of strict lawfulness, but rather general fairness in terms of administrative law and the general requirements of s 217(1) of the Constitution. The court held that the question was ‘whether the parties to the tender process were treated fairly, firstly in the sense whether they knew what the “rules of the game” were going to be, and, secondly, whether those rules were fair in the particular circumstances of the case’.⁸⁴ The court found that on the facts there was no indication that the difference in relation to the appropriate points system between the Preferential Procurement Regulations and tender conditions on the one hand and the PPPFA on the other caused any confusion in the minds of the tenderers or that they were even aware of such difference. As a result, that difference did not impact on the fairness of the process. Since strict compliance with the PPPFA was not required because it only applied indirectly to the contracting authority, the variation in the preferential procurement approach did not impact on the validity of the tender award.

2.2 Preferential procurement systems

In *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG) the court held that the preferential procurement system formulated in the PPPFA is one way of achieving the ‘standards and values set out in s 217(1) of the Constitution’,⁸⁵ but that it is not the only way of achieving those values and that there certainly are other reasonable ways of doing so as well. This means that where a public authority is not subject to the PPPFA, it may still comply with s 217 of the Constitution even though its preferential procurement system deviates from the one set out in the PPPFA. The test for the legality of such system would be the ‘broad goals of fairness, equity, transparency, competitiveness and effectiveness’ set out in s 217 itself and not the particular interpretation thereof in the PPPFA. The court accordingly held that the approach at issue, which placed a higher premium on ‘quality or functional assessments’ in adjudicating public tenders than the PPPFA, did not offend against s 217.

2.3 Awarding tenders to non-highest scoring tenderers

In *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, case no 508/2009 (O), 27 February 2009) the court had to consider what criteria may justify the award of a tender to a tenderer other than the one scoring the highest points in terms of the procurement system followed under the PPPFA and regulations. Section 2(1)(f) of the PPPFA provides that a ‘contract must be

⁸⁴ At para 24.

⁸⁵ At para 26.

awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer'. In the present matter the contract was not awarded to the highest scoring tenderer and the question was what the 'objective criteria' were that justified such award. In terms of the scoring system followed in this case, in addition to price, points had already been allocated to equity ownership by historically disadvantaged individuals and locality of the tenderer within the province. The court held that the 'objective criteria' required to justify the award to a tenderer other than the highest scoring one had to be found in something other than these two criteria already taken into account during scoring. The court held that such additional criteria could be found in 'necessary skills, experience, good financial standing and capacity',⁸⁶ to which ample reference was made in the tender documents. On the facts, however, the court found that no such reliance was intentionally placed on these factors and that they could accordingly not justify the award of the tender to any tenderer other than the highest scoring one.

2.4 Restarting a tender process

It will not necessarily be unreasonable or procedurally unfair for a contracting authority to cancel an open tender process following a public call for tenders and start a new 'restricted invitation' or 'selective tender' process, which excludes first-round tenderers.

In *Thebe Ya Bophelo Healthcare Administrators v the National Bargaining Council for the Road Freight Industry* 2009 JDR 0130 (W) the first respondent decided to abandon an open tender process following a public call for tenders when, in its view, no suitable tenderer emerged. It subsequently concluded a contract with a tenderer in a 'restricted invitation' or 'selective tender' process, which targeted specific tenderers, none of whom had participated in the first open round of tenders. The first respondent did not invite the applicants, who were tenderers in the first tender round, to tender again because of concerns regarding the applicants' financial position as well as their ability to perform under the proposed contract. The first respondent did not, however, provide the applicants with any opportunity to make representations regarding the decision to cancel the first round or to engage in the second restricted round of tenders.

Upon judicial review in terms of PAJA the court found that the decisions not to award a contract and to exclude the applicants from the second tender round were not unreasonable in the sense of decisions that 'no reasonable decision-maker could reach', in particular having regard to the legitimate financial and performance concerns relating to the applicants' tender. The court also refused to interfere on procedural fairness grounds. It is not exactly clear whether the court found that the first respondent's

⁸⁶ At para 46.

failure to provide the applicants with an opportunity to make representations was procedurally unfair. The court merely noted that the first respondent fell short of the 'optimum standard' in relation to the procedure followed and would have done better had it informed the applicants of its intended decision to cancel the open tender process and proceed on a restricted process excluding the applicants. However, the court did not label the first respondent's conduct as procedurally unfair. Ultimately, the court simply refused to intervene, suggesting that there was a reviewable procedural irregularity, but that the court exercised its remedial discretion in favour of the respondents. It seems that the potential adverse effect of judicial intervention on the concluded contract in this case, in the light of what the court considered a relatively minor procedural misstep, moved the court to find for the respondents.

2.5 Internal appeals against municipal tender awards

Internal appeals against the award of tenders by local authorities in terms of s 62 of the Local Government: Municipal Systems Act ('the Systems Act')⁸⁷ continues to be a problematic issue in public procurement.⁸⁸ This section was at the heart of two recent Western Cape High Court judgments, viz *Loghdey v Advanced Parking Solutions CC* 2009 JDR 0157 (C) and *M5 Developments (Cape) (Pty) Ltd v Groenewald NO* 2009 JDR 0094 (C). It was also raised in an *in limine* point in *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, case no 508/2009 (O), 27 February 2009).

In *Loghdey v Advanced Parking Solutions CC* the contracting authority, the City of Cape Town, awarded a tender to the applicant and within days the contract was concluded between the parties. The first respondent, a disappointed tenderer, subsequently lodged an appeal against the award in terms of s 62 of the Systems Act. Initially the contracting authority took the view that no appeal was available and informed both the first respondent and applicant as such. However, the authority subsequently decided to indeed hear the appeal. When the hearing of that appeal was twice postponed, the applicant approached the court for an order that no appeal was available. The gist of the applicant's argument was that since rights had already accrued to it as a result of the unconditional award of the tender to it and the subsequent conclusion of the tender contract, s 62(3) applied to the matter, which effectively

⁸⁷ Act 32 of 2000.

⁸⁸ The relevant parts of s 62 read:

- (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
- (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).
- (3) The appeal authority must consider the appeal and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

precluded any appeal under s 62. The first respondent countered by pointing out that both the tender bid document and the city's supply chain management policy provided that a tender award was subject to the 21-day appeal period. In finding for the applicant, the court held that the conditions in the tender bid document relating to the appeal period 'can only be regarded as informative'⁸⁹ and that the city's supply chain management policy did not provide the right to appeal, but simply created the obligation that the parties be informed of any right of appeal. Furthermore, since there were no conditions relating to an appeal period in either the notification of the tender award or the concluded tender contract, the court found that unconditional rights vested in the applicant following the award of the tender and the conclusion of the contract. As a result, s 62(3) applied and while an appeal in terms of s 62(1) was still possible, it effectively rendered the appeal nugatory.⁹⁰ The court also distinguished the judgment in *Syntell (Pty) Ltd v The City of Cape Town* (unreported, case no 17780/07 (CPD), 13 March 2008) from the present matter. While the facts in that case were largely similar to those at hand, the crucial difference in the court's view was that the notification of the tender award in *Syntell* expressly stated that the award was subject to the 21-day appeal period and that no rights accrued before the end of the period. In the present matter the notification contained no such statement. The court also noted that even if the city had not complied with its own supply chain management policy in that it did not notify unsuccessful tenderers of their right of appeal, the concluded contract remained valid until set aside upon judicial review. The rights that accrued from that contract would as a result continue to bar an effective internal appeal in terms of s 62 of the Systems Act until the contract had been set aside by a court upon review.

In *M5 Developments (Cape) (Pty) Ltd v Groenewald NO* a (local) contracting authority awarded a tender to the applicant, but expressly stated in the notification of the award that it was subject to the 21-day appeal period under s 62 of the Systems Act and that a contract would be concluded after that period had lapsed. Two unsuccessful tenderers lodged appeals in terms of s 62. Only one, however, was in time and only that appeal was considered, but eventually rejected. While considering the appeal, the appeal authority discovered certain irregularities in the award process. It informed the applicant of these irregularities and invited it to make representations in this regard and requested that certain further information be provided. The applicant requested an extension of time to allow it to prepare the requested documents and make meaningful representations. This request was rejected and the appeal authority proceeded without hearing the applicant, finding that the tender award was irregular and deciding that the tender should rather be awarded to another tenderer. The applicant subsequently applied to court for an order that the decision by the appeal authority be set aside. The main question before the court was whether the appeal authority had the power to reallocate the tender once it had rejected the single in-time appeal before it. The court held that, while an appeal in terms of s 62 of the Systems Act was a wide one, 'the re-hearing and or fresh determination by the appeal authority must rationally be relevant to the subject of the appeal'.⁹¹ In the court's view this meant that the

⁸⁹ At para 30.

⁹⁰ At para 33.

⁹¹ At para 41.

determination of the appeal could only be directed at the narrow question brought on appeal and only in relation to the parties to the appeal. In the present case that meant that the question before the appeal authority was whether the particular unsuccessful tenderer-appellant's tender was rightly rejected. Once the appeal authority found that the contracting authority was correct in not awarding the tender to the appellant, the appeal authority had no further power to reassess the tender award generally and to reallocate the tender on other grounds to a tenderer not party to the appeal. It followed that the reallocation of the tender was unlawful and stood to be set aside. The court furthermore found on administrative law grounds that the appeal authority had acted in a procedurally unfair manner in refusing the applicant an extension of time and that the reallocation decision was also invalid on that score.

In *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* the possibility of an appeal in terms of s 62 of the Systems Act against the award of a tender was raised as an available internal remedy as contemplated in s 7(2) of PAJA. As a result, so the argument went, the applicants could not approach the court for judicial review of the tender award until they had exhausted that internal remedy, ie lodged a s 62 appeal. The court rejected the argument. Firstly, the court noted that since it was only dealing with interim relief in the present matter pending a full review, s 7(2) of PAJA found no application. That section would only bar the full review under PAJA and not the application for interim relief. Secondly, the court noted that s 62 of the Systems Act in any case did not provide an internal remedy to the applicant as contemplated in s 7(2) of PAJA. This was because the municipal manager's ratification of the tender award by the bid adjudication committee, in terms of regulation 29(5)(b)(i) of the Municipal Supply Chain Management Regulations,⁹² was not in terms of a delegated power as envisaged in s 62(1), but in terms of an original power. It followed that a s 62 appeal was not available against the ratification of the tender award and accordingly that there was no effective internal remedy that could upset the award of the tender. Furthermore, since a tender contract had already been concluded with the successful tenderer, the court held that in terms of s 62(3) of the Systems Act an appeal in terms of s 62 would no longer be effective. As a result, a s 62 appeal was also on this basis not an internal remedy as contemplated in s 7(2) of PAJA under the circumstances at hand.

2.6 Setting tender awards aside upon review

In *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 JDR 0190 (SCA) the court confirmed the discretionary nature of the set aside remedy in proceedings for judicial review of public tender awards. The court also highlighted a number of relevant considerations in exercising that discretion.

⁹² Issued under the Local Government: Municipal Finance Management Act 56 of 2003 (Notice 868 in GG 27636 of 30 May 2005).

In this case the court confirmed the order of the court below in setting aside the award of a public tender by the first appellant.⁹³ The court premised its analysis of the discretion to set the award of the tender aside by noting that in the ordinary course an applicant that can show reviewable irregularities in the tender award is entitled to an order setting the award aside. The court emphasised this point of departure when it later distinguished the matter at hand from the one in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*⁹⁴ where a tender award was not set aside despite a finding of reviewable irregularities. With reference to this aspect of *JFE Sapela Electronics* the court noted: 'It is important to emphasize that that was an exceptional case.'⁹⁵ The court rejected the argument of the appellants that the respondent was not entitled to a set aside remedy because it should have sought an interdict at an earlier stage to prevent the conclusion of the contract under tender and resultant performance under that contract. Apart from the fact that the court was not convinced that the respondent could have obtained such an interdict, the court held that such a mitigation argument did not apply in the context of the set aside remedy, but only in relation to damages. The court further held that the second appellant, the successful tenderer, was not an innocent bystander and hence did not deserve protection from a set aside remedy on that basis. While *mala fides* was not shown on the part of the second appellant the court held that it was nevertheless the error committed by the second appellant in its tender that resulted in the tender being set aside. Accordingly, it could not be heard to complain. Along the same lines the court rejected the argument that the advanced stage of performance under the contract counted against setting it aside. The court found that although only three months of the two-year contract remained, the lapse of time was of the appellants' own making due to their appeal against the judgment below. In this regard, however, the court noted that performance under the contract was not continuous, but occurred rather in separate, independent instructions from the first appellant. In terms of the tender contract each instruction was viewed as a separate contract. It was thus perfectly possible for the first appellant to conclude a new contract with another tenderer even if only for the remainder of the original two-year contract. Finally, the court held that public interest would also not be significantly affected by setting the tender award aside.

Although the court's treatment of the successful tenderer in this case seems a bit harsh, especially since it seems that its error was an honest one, the court's careful and express focus on the multiple interests involved, ie those of the wronged and successful tenderers; the contracting authority and the public interest generally and in relation to the contract at issue specifically, is a commendable continuation of the same court's exemplary approach to remedies in public procurement cases in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*.⁹⁶

⁹³ See JQR Public Procurement 2008 (2) 2.2 for a discussion of the judgment below.

⁹⁴ 2008 (2) SA 638 (SCA).

⁹⁵ At para 16.

⁹⁶ 2008 (2) SA 481 (SCA). See JQR Public Procurement 2008 (2) 2.4 for a discussion of that approach.

Also on the setting aside of tender awards, Froneman J noted, albeit *obiter*, in *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG) that a contracting authority may seek judicial review of its own tender award where a subsequent independent inquiry into the tender process reveals irregularities.

3 Literature

Bolton, Phoebe 'When Can Bidders with Bad Track Records be Rejected?' (2009) 11 *Local Government Bulletin* 22

Roos, R & De La Harpe, S 'Good Governance in Public Procurement: A South African Case Study' (2008) 2 *PER*

Williams, Sope & Quinot, Geo 'To Debar or not to Debar: When to Endorse a Contractor on the Register for Tender Defaulters' (2008) 125 *SALJ* 248

April to June 2009 (2)

JQR Public Procurement 2009 (2)

Geo Quinot⁹⁷

1. Legislation

1.1 Delegation of procurement powers of the Department of Correctional Services

In a notice recently published in the *Government Gazette*⁹⁸ the Commissioner of Correctional Services has provided in detail for the delegation of his procurement powers under the Public Finance Management Act.⁹⁹ In the notice, procurement powers both in general and specific forms, with rand values attached, are delegated to specific post levels within the department. The notice covers all stages of the procurement process from pre-award to contract administration, as well as restrictions of suppliers generally. The notice also contains important conditions on the delegation, which will accordingly be conditions on the exercise of these procurement powers, ie procurement by the department. These conditions relate to issues such as when competitive, written price quotations must be invited, which quotations must be accepted, what conditions must be set and approvals obtained in inviting bids, what communication is allowed between the department and individual bidders after close of bids, how single bids are to be dealt with and the scope and nature of the reasons that must be formulated at various stages of the procurement process. The notice furthermore contains a list of mandated reasons for deviating from inviting competitive bids.

1.2 Notice on BEE verification certificates

In notices published in the *Government Gazette*¹⁰⁰ under the Broad-Based Black Economic Empowerment Act,¹⁰¹ the Minister of Trade and Industry has determined that from 1 August 2009, BEE

⁹⁷ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

⁹⁸ GenN 582 in GG 32251 of 29 May 2009.

⁹⁹ Act 1 of 1999.

¹⁰⁰ GenN 354 in GG 32094 of 9 April 2009 and GenN 677 in GG 32281 of 5 June 2009.

verification certificates will only be valid if ‘issued by Accredited Verification Agencies or Verification Agencies that are in possession of a valid pre-assessment letter from South African National Accreditation Systems’. Certificates issued before 1 August 2009 by non-accredited agencies will remain valid for 12 months from the date of issue.¹⁰²

2. Cases

2.1 Fairness in changing procurement approach

In *MEC for Education, Northern Cape Province v Bateleur Books (Pty) Ltd* 2009 JDR 0282 (SCA), [2009] ZASCA 33, the Supreme Court of Appeal held that while a contracting authority may change its approach to procurement from a decentralised one to a centralised approach, it must do so in a fair manner, which requires timely notice to the suppliers affected by the change.

In this case the department of education in the Northern Cape followed a decentralised procurement approach for the acquisition of learner teacher support materials (essentially books) in terms of which public schools ordered the materials they needed from bookshops using departmentally sanctioned catalogues produced by private publishers. In 2006, however, the department decided to centralise the procurement of materials. For 2007 the department itself would order materials directly from publishers. The main aim of this change was to save costs by buying in bulk and negotiating discounts. As a group the publishers stood to lose from this change, since fewer publishers would do business with the department, at lower prices. The publishers accordingly approached the court to review the department’s decision to alter the procurement process. A majority of judges in the SCA held that the publishers had a legitimate expectation that the decentralised procurement approach would continue. As a result, the department was under a duty in terms of s 3 of the Promotion of Administrative Justice Act¹⁰³ to follow a fair procedure in altering its approach, which at least required it to inform the publishers in good time of the intended change of approach. Since the department did not inform the publishers of the change at all, the decision to alter the procurement approach had to be set aside on procedural fairness grounds. The court emphasised that while the department’s objectives to achieve efficiency and cost-savings in their procurement were laudable, it could not do so in a procedurally unfair manner. The court expressly pointed out that its finding did not mean that the department cannot change their procurement approach to a centralised one, but only that the department must

¹⁰¹ Act 53 of 2003.

¹⁰² On the impact of BEE status and verification in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 on public procurement see JQR Public Procurement 2008 (1) 1 and JQR Public Procurement 2008 (3) 1.1.

¹⁰³ Act 3 of 2000.

follow a fair procedure when it changes its approach. The majority also rejected the minority view that the two-year period in which the decentralised procurement approach was followed was too short to establish a legitimate expectation. The court held that the deciding factor to determine whether an established practice existed was not the length of time involved, but ‘whether what happened [in the past] was an isolated event or a procedure designed to lay a basis for planning future conduct and arrangements’.¹⁰⁴ In the present matter the court held that the decentralised approach was viewed as the normal approach that ‘was designed and intended to continue’¹⁰⁵ and although it had only as yet been in effect for two years, it was ‘a fairly settled way of doing things’.¹⁰⁶ On this basis the publishers had a legitimate expectation that the department would continue to follow the decentralised procurement approach until they received timely notice of a different approach.

2.2 Documents to be considered by successive decision-makers in municipal procurement

In *Lohan Civil–Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, case no 508/2009 (O), 9 April 2009),¹⁰⁷ the court held that it is not necessary for successive bodies in the municipal procurement process to physically look at and assess each of the tenders submitted themselves, but that they may rely on the reports and recommendations of preceding bodies. In this case the Bid Adjudication Committee (‘BAC’) did not have the tenders of the relevant tenderers before it when it made a recommendation to the municipal manager on which tender to accept, but simply relied on the report and recommendations of the Bid Evaluation Committee (‘BEC’), which did look at the relevant tenders (although the BAC departed from those recommendations). Likewise, the municipal manager, who approved the BAC’s recommendation, relied only on the minutes of the latter’s meeting and did not consider the individual tenders himself. The court held that the Municipal Supply Chain Management Regulations¹⁰⁸ did not require either the municipal manager or the BAC to consider all the tenders themselves. The court did, however, hold that when decision makers, such as the municipal manager and BAC in this case, rely on reports and recommendations of preceding bodies, such as the BEC, they still need to exercise discretion themselves and thus need to consider the full reasons for the preceding body’s report and recommendations. Simply accepting a recommendation because the preceding body made it would not be sufficient.

2.3 Invalidity of public contracts not concluded in terms of the relevant procurement laws

¹⁰⁴ At para 18.

¹⁰⁵ At para 19.

¹⁰⁶ At para 20.

¹⁰⁷ The judgment on an application for interim relief in this matter was discussed in JQR Public Procurement 2009 (1) 2.3.

¹⁰⁸ Issued under the Local Government: Municipal Finance Management Act 56 of 2003 (GenN 868 in GG 27636 of 30 May 2005).

In *Qaukeni Local Municipality v FV General Trading* (324/08) [2009] ZASCA 66, the SCA confirmed that a public contract concluded without following the relevant procurement laws was invalid and that the relevant contracting authority was not only entitled to resist enforcement of such contract, but may indeed be obliged to do so. In this case the local authority concluded a municipal services contract with the applicant without following any of the statutory procurement regulations under the Local Government: Municipal Systems Act¹⁰⁹ or the Municipal Finance Management Act.¹¹⁰ It emerged that the local authority in fact had no supply chain management policy as statutorily required. The court held that the local authority could not evade the requirements of s 217(1) of the Constitution, in particular that when contracting for services it 'must do so in accordance with a system which is fair, equitable, competitive and cost-effective' by simply not having a supply chain management policy. The court adopted quite a strict view on the validity of the contract. In rejecting an argument that the court has a discretion in declaring the contract invalid, which could be exercised in favour of the private contractor, the court stated: 'It is not a question of a court being entitled to exercise a discretion having regard to issues of fairness and prejudice. Rather, the question is one of legality.'¹¹¹ After referring to a number of earlier judgments where the court has held public contracts invalid, the judge concluded 'I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost effective and competitive tendering process in the public interest, is invalid and will not be enforced.'¹¹²

¹⁰⁹ Act 32 of 2000.

¹¹⁰ Act 56 of 2003.

¹¹¹ At para 14.

¹¹² At para 16.

July to September 2009 (3)

JQR Public Procurement 2009 (3)

Geo Quinot¹¹³

1. Legislation

1.1 Draft Preferential Procurement Regulations

In what is probably the most significant development in public procurement regulation in the last five years, new draft preferential procurement regulations were recently published for public comment in the *Government Gazette*.¹¹⁴ While these are only in draft form at present, their significance merits attention here.

Following the enactment of the Broad-Based Black Economic Empowerment Act¹¹⁵ it was realised that the approach to preferential public procurement, as an important aspect of government's BEE strategy, under the existing Preferential Procurement Policy Framework Act,¹¹⁶ had to be realigned to the general approach to BEE under the BBBEEA. As a result a draft of new preferential procurement regulations was prepared in 2004,¹¹⁷ but the process stalled and nothing came of the 2004 draft. This process has now been revived with the publication of the 2009 draft regulations on 14 August.

The new draft regulations in principle retain the current model for preferential procurement using the 80/20 and 90/10 preference points systems¹¹⁸ for award criteria based on price and preference points

¹¹³ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

¹¹⁴ GenN 1103 in GG 32489 of 14 August 2009.

¹¹⁵ Act 53 of 2003 ('BBBEEA').

¹¹⁶ Act 5 of 2000 ('PPPFA').

¹¹⁷ Draft Preferential Procurement Regulations, 2004 (Notice 2174 of 2004 in GG 26863 of 4 October 2004).

¹¹⁸ The thresholds for using the 80/20 and 90/10 points systems respectively have however been changed so that the 80/20 split will be used for contracts of a value between R30 000 and R1 million and the 90/10 split for contracts of a value above R1 million.

respectively. One of the most significant changes is the much more structured and significantly narrowed-down approach to the calculation of the 20 or 10 preference points, depending on the size of the contract. Whereas the current Preferential Procurement Regulations, 2001 allow a large measure of discretion to contracting authorities in setting up the way in which preference points will be calculated, with a mandatory emphasis on equity ownership by HDIs,¹¹⁹ the 2009 draft simply provides a grid in terms of which suppliers' BEE status as determined and certified under the BBBEEA is directly translated into a set number of preference points.¹²⁰ Another significant development is the inclusion of all entities governed by the Public Finance Management Act¹²¹ under the regulations.¹²² This means that for the first time, 'public entities' including 'government business enterprises' as defined under the PFMA will also be subject to the preferential procurement scheme of the PPPFA and will no longer be able to define their own divergent approaches to preferential procurement.

1.2 Notice on BEE verification certificates

In a notice published in the *Government Gazette*¹²³ under the BBBEEA, the Minister of Trade and Industry has postponed the date (1 August 2009) previously set as the cut-off date after which BEE verification certificates will only be valid if 'issued by Accredited Verification Agencies or Verification Agencies that are in possession of a valid pre-assessment letter from South African National Accreditation Systems'¹²⁴ to 1 February 2010. Certificates issued before 1 February 2010 by non-accredited agencies will remain valid for 12 months from the date of issue.¹²⁵

1.3 Contracts for National Land Transport Services

On 31 August 2009 parts of the new National Land Transport Act¹²⁶ came into operation,¹²⁷ dealing with matters relating to contracts for public transport services. At the same time regulations, the National

¹¹⁹ Preferential Procurement Regulations, 2001 regulation 13.

¹²⁰ Draft Preferential Procurement Regulations 2009, regulations 4(3), 5(3).

¹²¹ Act 1 of 1999 ('PFMA').

¹²² Draft Preferential Procurement Regulations 2009, regulation 2.

¹²³ GN 810 in GG 32467 of 31 July 2009.

¹²⁴ See GenN 354 in GG 32094 of 9 April 2009 and GenN 677 in GG 32281 of 5 June 2009, noted in JQR Public Procurement 2009 (2) 1.2.

¹²⁵ On the impact of BEE status and verification in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 on current public procurement practices see JQR Public Procurement 2008 (1) 1 and JQR Public Procurement 2008 (3) 1.1 and on the proposed impact in future, see JQR Public Procurement 2009 (3) 1.1 above.

¹²⁶ Act 5 of 2009 ('NLTA').

¹²⁷ Proc 54 in GG 32532 of 31 August 2009.

Land Transport Regulations on Contracting for Public Transport Services, 2009¹²⁸ were promulgated to provide further detail arrangements for the procurement of public transport services under the NLTA. The purpose of the NLTA is to 'further the process of transformation and restructuring the national land transport system'¹²⁹ and it provides for various contractual arrangements to be entered into by contracting authorities (national department of transport, provinces and municipalities) with service providers to supply public transport services.¹³⁰

The NLTA and regulations expressly confirm that contracts for public transport services, whether those are of a subsidised or commercial (ie non-subsidised) nature, must be concluded in terms of the public procurement statutory framework.¹³¹ However, the act and regulations also provide for 'negotiated contracts' under certain circumstances as a mechanism to secure transport services parallel to public tender processes.¹³² The regulations contain specific requirements that suppliers must meet in order to qualify for public transport services contracts, which relate to both commercial criteria, such as financial ring fencing,¹³³ and secondary (policy) criteria, including tax compliance¹³⁴ and a number of other law enforcement objectives such as compliance with road traffic legislation and firearm controls.¹³⁵ The regulations lay down a number of terms and conditions forming part of public transport services contracts, which include the requirements that suppliers be annually audited and keep separate records.¹³⁶ The Minister is furthermore empowered in the Act to prescribe standard tender and contract terms and conditions to be used.¹³⁷ A final point of interest is the specific provisions relating to advantages enjoyed by suppliers flowing from organs of state in supplying public transport services. The regulations expressly prohibit suppliers from enjoying any 'unfair advantage emanating from an organ of state' when contracting for public transport services and list examples of what would qualify as such unfair advantage.¹³⁸ These include all kinds of benefits such as donations or grants, guarantees and unfair use of public resources.

2. Cases

2.1 Internal administrative failures in a procurement process

¹²⁸ GNR 877 in GG 32535 of 31 August 2009.

¹²⁹ NLTA s 2(a).

¹³⁰ NLTA ss 40 – 46 of which 40 – 43 and 46 came into operation on 31 August 2009.

¹³¹ NLTA ss 42(3) and (4), National Land Transport Regulations on Contracting for Public Transport Services, 2009, reg 4.

¹³² NLTA s 41, National Land Transport Regulations on Contracting for Public Transport Services, 2009, reg 2.

¹³³ Regulation 5(1) and (2).

¹³⁴ Regulation 5(1).

¹³⁵ Regulation 5(5).

¹³⁶ Regulation 5(3).

¹³⁷ NLTA s 42(6).

¹³⁸ Regulation 5(3)(d) and (4)(b).

In *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* 2009 JDR 0299 (EL) the court held that a contracting authority may approach a court for an order setting its own tender process aside on the basis of internal failures by its own officials to follow procurement procedures contained in its procurement policies and regulations.

In this case a supplier claimed payment under a contract awarded to it by the respondent authority for services rendered under the contract. The authority, in a counter-application, essentially applied for the review of the tender award and an order setting the tender and consequent contract aside. The counter-application was based on the grounds that the authority's own officials had not complied with numerous procurement provisions contained in the authority's procurement policies as well as applicable legislation in calling for and awarding the tender at issue. In resisting the counter-application, the applicant argued that it was an innocent third party and that it should not be penalised for what were internal failures by the authority's officials of which it had no knowledge. The court rejected this argument and allowed the review. The court confirmed the distinction between administrative failures that resulted in conduct beyond an administrator's powers and failures that resulted in flawed conduct within an authority's powers. It held that in the former instance the conduct cannot be sustained on the basis of estoppel even though a supplier may genuinely have been misled in reliance on the administrator's ostensible authority. Regarding the argument that the failures related to the internal workings and policies of the authority, the court held that all tenderers were referred to the authority's procurement policies in the invitation to bid and that in any case the procurement policies of public authorities are public documents and not simply internal matters. As a result the court held that a 'blanket assumption that the officials of the respondent acted with authority and in compliance with all the policies would not be appropriate'. However, in relation to the steps to be taken by a local authority when deciding to outsource a previously internally provided service under the Local Government: Municipal Systems Act,¹³⁹ the court held that it would not be fair 'to expect the applicant to know, though it is possible, whether the steps mentioned had been complied with or not'. Ostensibly a public contract for such services would not be reviewable on the basis of a failure to follow these steps alone.

3. Literature

Bolton, P 'The Status of Contracts Exceeding a Municipal Tender Call: *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd* 2008 JDR 1014 (SE)' 2009 TSAR 382

Bolton, P 'The Committee System for Competitive Bids in Local Government' 2009 *Potchefstroom Electronic Law Journal*

Quinot, Geo 'Towards effective judicial review of state commercial activity' 2009 TSAR 436

¹³⁹ Act 32 of 2000.

October to December 2009 (4)

JQR Public Procurement 2009 (4)

Geo Quinot¹⁴⁰

1. Legislation

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

2. Cases

2.1 The application of s 217 to contracts between organs of state

In *Cash Paymaster Services (Pty) Ltd v The Chief Executive Officer of the South African Social Security Agency NO* (unreported, case no 53753/09 (GNP), 10 December 2009) the court held that organs of state must comply with s 217 of the Constitution even when they contract with other organs of state to supply them with services when the respective contracting organs of state are separate juristic persons.

In this matter the second respondent ('SASSA'), an organ of state, published a request for proposals for the provision of grant payment services in one or more of the provinces. The applicant, a private company that has provided such services in various provinces to SASSA and its provincial predecessors on public tender in the past, again submitted a tender in respect of all nine provinces. However, SASSA eventually cancelled the call for tenders, citing irregularities in the process as reason. In the meanwhile

¹⁴⁰ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

SASSA entered into an agreement with the South African Post Office Ltd ('the Post Office'), another organ of state (the third respondent), in terms of which the Post Office would inter alia render grant payment services to SASSA. This agreement was entered into without any tender process being followed, ie following direct and private negotiations between SASSA and the Post Office. The applicant subsequently challenged SASSA's decision to enter into this agreement with the Post Office on the basis that it did not comply with s 217 of the Constitution, in particular by failing to follow a competitive process in awarding the contract. The respondents argued that s 217 did not apply to the present case, because they are both organs of state. In support of this argument the respondents pointed to provisions in the Constitution calling on 'all spheres of government and all organs of state within each sphere [to] ... co-operate with one another in mutual trust and good faith by ... assisting and supporting one another and ... co-ordinating their actions ... with one another'¹⁴¹ and that 'public administration must be governed by the democratic values and principles enshrined in the Constitution including ... efficient, economic and effective use of resources'.¹⁴² The respondents further argued that despite the fact that SASSA and the Post Office are separate juristic persons, no organ of state is separate from the state and that all organs of state act as a unit. The argument thus followed that when different organs of state contract with one another, it is only the state dealing with itself. The gist of the respondents' argument was that in effect the state was supplying itself in the present instance, ie it was fulfilling its needs internally, in line with the quoted constitutional provisions and that s 217 as a result did not apply. The court rejected these arguments. It held that the constitutional provisions that the respondents rely upon cannot impliedly override s 217 and that those provisions in fact oblige organs of state to comply with all constitutional provisions, including s 217.¹⁴³ It further held that both SASSA's and the Post Office's status as organs of state did not change the fact that they were also separate juristic persons.¹⁴⁴ As a result, their actions amounted to a contract for services as understood in s 217.¹⁴⁵ The court noted that this view was supported by the fact that the Post Office competes in the open market with other financial institutions.¹⁴⁶ The court thus held that SASSA was bound by s 217 of the Constitution when it concluded the agreement with the Post Office.¹⁴⁷ Since that agreement was concluded behind closed doors without any competitive process or considering any alternative proposals by other suppliers, it fell foul of both the peremptory transparency and competitive requirements of s 217. As a result the court set aside SASSA's decision to enter into an agreement with the Post Office.

2.2 Fairness of tender procedures

¹⁴¹ Section 41(1)(h).

¹⁴² Section 195(1).

¹⁴³ At paras 19–20.

¹⁴⁴ At para 21.

¹⁴⁵ At para 21.

¹⁴⁶ At para 21.

¹⁴⁷ At para 21.

In *Menzies Aviation South Africa (Pty) Limited v South African Airways (Pty) Ltd* (unreported, referred to as [2009] ZAGPJHC 65, 4 December 2009; available online at <http://www.saflii.org/za/cases/ZAGPJHC/2009/65.html>) the court set aside a tender process as well as the tender contracts subsequently concluded based on a lack of fairness in the process resulting from an unreasonably short timeframe in which tenders had to be submitted and inadequate information being provided to bidders.

In this case South African Airways (Pty) Ltd ('SAA'), an organ of state, invited four bidders, including the applicant, to submit tenders for ground handling and passenger services to it at major South African airports. However, tenderers were only given nine days to submit their bids. It also later emerged that key information necessary to prepare bids was not provided to bidders. The applicant objected to both the limited timeframe and paucity of information and requested SAA to extend the deadline, which was refused. The applicant subsequently did not submit a bid and the tender was awarded in two parts to two of the other tenderers. In an application for the review of the tender process, the court held that the timeframe provided for what it described as a tender for 'a complex operation'¹⁴⁸ was unreasonable and that the process was as a result unfair. The court reasoned that the unreasonably short timeframe as well as the lack of adequate information effectively prevented the applicant from submitting a tender.¹⁴⁹ An important factor in this finding was that the winning tenderers were both incumbent suppliers of the services requested and were thus given an unfair advantage by both the limited timeframe and inadequate information provided in the tender documents. The court held that the elimination of competition resulting from the limited timeframe and lack of information was unfair not only towards the applicant as a competing tenderer, but also towards 'the State as the sole shareholder of SAA, the taxpayer who's taxes to a large extent fund the operations of SAA and the public who have to rely on the ground handling services provided by the service providers ... in question'.¹⁵⁰

¹⁴⁸ At para 27.

¹⁴⁹ At para 39.

¹⁵⁰ At para 38.

January to March 2010 (1)

JQR Public Procurement 2010 (1)

Geo Quinot¹⁵¹

1. Legislation

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

2. Cases

2.1 Internal appeals against municipal tender awards

Internal appeals against the award of tenders by local authorities in terms of s 62 of the Local Government: Municipal Systems Act ('the Systems Act')¹⁵² continue to be a problematic issue in public procurement.¹⁵³ In two recent judgments, *Loghdey v City of Cape Town* (unreported, case no 100/09 (WCC), 20 January 2010) and *CC Groenewald v M5 Developments* (Unreported, referred to as [2010] ZASCA 47, 31 March 2010; available online at http://www.justice.gov.za/sca/judgments/sca_2010/sca10-047.pdf), the applicability of s 62 in tender

¹⁵¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Associate Professor, Department of Public Law, Stellenbosch University.

¹⁵² Act 32 of 2000. The relevant parts of s 62 read:

(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
 (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).
 (3) The appeal authority must consider the appeal and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

¹⁵³ See JQR Public Procurement 2009 (1) 2.5.

cases was again raised with seemingly contrasting rulings. The SCA ruling can, however, be read to now provide an authoritative view on this matter.

In *Loghdey v City of Cape Town* the contracting authority, the City of Cape Town, awarded a tender to the applicant and within days the contract was concluded between the parties. The contract was not, however, implemented due to an internal appeal being lodged in terms of s 62 of the Systems Act. When the applicant subsequently approached the court for an order compelling the City to implement the contract, two unsuccessful tenderers applied, by way of counter-application, for the review of the award. One of the grounds of review was that the City failed to comply with clause 211 of its own supply chain management policy ('SCMP') which requires notification to all unsuccessful bidders inter alia of 'their right to appeal [an award decision] within 21 days of the written notification of that decision in terms of section 62 of the Systems Act' and a similar clause in the conditions of tender, which stated that 'in accordance with the provisions of s 62 of the [Systems Act] the award of this contract is subject to a 21-day appeal period'. The court held that since the City in fact did not comply with clause 211 of the SCMP, the reviewability of the tender award depended upon whether the unsuccessful tenderers in this matter had a right to internal appeal under s 62 of the Systems Act of which they were thus not informed, resulting in a material procedural condition not being fulfilled.¹⁵⁴ The court held that neither clause 211 of the SCMP nor the tender conditions conferred a right to internal appeal under s 62 on unsuccessful tenderers, but merely required notification if such right existed in law.¹⁵⁵ Whether such a right exists in law depends on a proper interpretation of s 62 itself. Based on the interpretation given to s 62 in *City of Cape Town v Reader*¹⁵⁶ the court held that that section does not provide unsuccessful tenderers such as those in the present matter with a right to internal appeal.¹⁵⁷ It seems that the court based its view in this regard on the conclusion in *Reader* that 'only the person who has asked or applied for the decision in question may appeal against it in terms of s 62 of the Systems Act'.¹⁵⁸ The unsuccessful tenderers in the present matter ostensibly did not fall into this category. The court also pointed out that appeals under s 62 are limited in the sense that they may not derogate from any rights that may have accrued as a consequence of the decision against which the appeal is lodged.¹⁵⁹ The court was of the view that the right to conclude the contract accrued to the applicant in the present matter once the award decision was publicly announced and that 'to attach to such a decision a note that it is subject to appeal is not to derogate from its finality'.¹⁶⁰ This also seemingly supported the view that s 62 was not available to the unsuccessful bidders in the present case. This interpretation of s 62 in the procurement context is problematic. It is not clear why an unsuccessful bidder would not be considered to be a 'person who has asked or applied for the decision in question' if the decision referred to is the one to award the tender. The unsuccessful bidder certainly also applied for that decision.

¹⁵⁴ At para 23.

¹⁵⁵ At para 28.

¹⁵⁶ 2009 (1) SA 555 (SCA).

¹⁵⁷ At para 32.

¹⁵⁸ At para 33.

¹⁵⁹ At para 33.

¹⁶⁰ At para 32.

In *CC Groenewald v M5 Developments* a (local) contracting authority awarded a tender to the respondent, but expressly stated in the notification of the award that it was subject to the 21-day appeal period under s 62 of the Systems Act and that a contract would be concluded after that period had lapsed. Two unsuccessful tenderers lodged appeals in terms of s 62. Only one, however, was in time and only that appeal was considered, but eventually rejected. While considering the appeal, the appeal authority discovered certain irregularities in the award process and eventually concluded, upon its own evaluation of the various bids, that the tender award was irregular and decided that the tender should rather be awarded to another tenderer, incidentally the tenderer who filed the late appeal under s 62. The respondent subsequently applied to court for an order that the decision by the appeal authority be set aside and that the contract be awarded to it. The court *a quo* held in favour of the respondent, finding inter alia that the appeal authority could only decide the narrow appeal lodged under s 62, which meant that it could not reassess the award on grounds unrelated to the particular appeal.¹⁶¹ On appeal the SCA confirmed this approach. It held that while an appeal under s 62 'is a wide one in the sense of a rehearing, it is a rehearing related to the limited issue of whether the party appealing should have been successful'.¹⁶² Importantly, the court had no difficulty in holding that an appeal under s 62 is available to unsuccessful tenderers, seemingly in contrast to the ruling in *Loghdey*. Although this matter differed from the *Loghdey* case in that the tender award in this matter was expressly made subject to an internal appeal period under s 62 in contrast to the award in *Loghdey*, that difference does not seem to have contributed to Leach JA's broad conclusion regarding the application of s 62 in tender cases. Also relying on the interpretation of s 62 in the *Reader* case, Leach JA stated that:

the decision of the majority in *Reader* was based on the reasoning that a neighbour could not be considered as a person whose rights were affected by the municipality's decision in regard to building plans approved for a neighbouring property as it had not been a party to the application process relating to those plans. In the present case, of course, the unsuccessful tenderers, together with M5, were all parties to the tender approval process. I therefore have no difficulty in concluding that both ASLA and Blue Whale [the unsuccessful bidders] were entitled to appeal under s 62.¹⁶³

The reasoning in this paragraph seems to stand in direct contrast to that of Binns-Ward J in *Loghdey* and it is submitted represents the correct general approach to the application of s 62 in tender matters.

2.2 Duty to act against fraudulent preferment claims

¹⁶¹ See JQR Public Procurement 2009 (1) 2.5 for a discussion of the judgment below.

¹⁶² At para 25.

¹⁶³ At para 21.

In *Viking Pony Africa Pumps v Hidro-Tech Systems* (unreported, referred to as [2010] ZASCA 23, 25 March 2010; available online at http://www.justice.gov.za/sca/judgments/sca_2010/sca10-023.pdf) the SCA confirmed that an organ of state has a duty to act against bidders that obtain preference in public tenders on a fraudulent basis.

In this matter the respondent suspected that the appellants were winning tenders from the City of Cape Town on the basis of fraudulent BEE claims. When two former directors and employees of the appellants joined the respondent, it finally had the proof to support its suspicions and immediately brought such information to the attention of the City. It demanded that the City investigate these claims of fronting and take appropriate action in terms of regulation 15 of the Preferential Procurement Regulations¹⁶⁴ under the Preferential Procurement Policy Framework Act.¹⁶⁵ When the City did not take satisfactory action, the respondent approached the High Court for an order compelling the City to take action in terms of regulation 15 against the appellants or in the alternative to further investigate the complaints about fraudulent preferment brought to the City's attention. The High Court granted the order¹⁶⁶ and the appellants consequently appealed. The SCA confirmed both the High Court's reasoning and its conclusion on regulation 15 and thus rejected the appeal.¹⁶⁷ It confirmed that under regulation 15 no organ of state may 'remain passive in the face of evidence of fraudulent preferment but is obliged to take appropriate steps to correct the situation'.¹⁶⁸ The court held that the duty to act under regulation 15 is triggered as soon as an organ of state detects fraudulent preferment and that 'detects' as used here 'connotes the discovery or awareness of a certain state of affairs not previously known to the person who so detects'.¹⁶⁹ The court rejected the argument that an organ of state can only take action under regulation 15 once it has completed a full investigation and reached a final conclusion on the basis of that investigation. Following this judgment, an organ of state is thus obliged to take action as soon as it becomes aware of the fraud. The court also held that the mere detection, which triggers the duty to act under regulation 15, will not necessarily amount to administrative action and thus be

¹⁶⁴ Notice R725 of 2001 in GG 22549 of 10 August 2001. Reg 15 reads:

- (1) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.
- (2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)-
 - (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
 - (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
 - (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
 - (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.

¹⁶⁵ Act 5 of 2000.

¹⁶⁶ The High Court judgment is reported as *Hidro-Tech Systems (Pty) Ltd v City of Cape Town* 2010 (1) SA 483 (C).

¹⁶⁷ At para 30.

¹⁶⁸ At para 32.

¹⁶⁹ At para 31.

subject to the Promotion of Administrative Justice Act 3 of 2000.¹⁷⁰ The court noted that it will mostly only be the action taken under regulation 15 pursuant to a detection of fraud that will qualify as administrative action and that administrative law requirements will thus only be triggered at that later stage.

3. Literature

Bolton, Phoebe 'The regulation of preferential procurement in state-owned enterprises' 2010 (1) *TSAR* 101.

¹⁷⁰ At para 34.

April to June 2010 (2)

JQR Public Procurement 2010 (2)

Geo Quinot¹⁷¹

1. Legislation

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

2. Cases

2.1 Points system under the Preferential Procurement Regulations

The issue of the conflict between the Preferential Procurement Policy Framework Act ('PPPFA')¹⁷² and the Preferential Procurement Regulations, 2001¹⁷³ in relation to the points system to be applied in awarding public tenders that has been brewing for some time,¹⁷⁴ has now been dealt with head-on in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*.¹⁷⁵ The court declared the regulations invalid to the extent that they are in conflict with the PPPFA.

In that case the respondent municipality awarded a tender on the basis of the 90/10 points system prescribed in regulation 8 of the Preferential Procurement Regulations. Following particularly regulation 8(3), which allows for a maximum of 90 points to be allowed for functionality *and* price, the municipality allocated 70 points for price and 20 points for functionality. The latter comprised two components (each

¹⁷¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

¹⁷² Act 5 of 2000.

¹⁷³ Notice R725 of 2001 in GG 22549 of 10 August 2001.

¹⁷⁴ See eg *TBP Building & Civils (Pty) Ltd v the East London Industrial Development Zone (Pty) Ltd* 2009 JDR 0203 (ECG) noted in JQR Public Procurement 2009 (1) 2.1.

¹⁷⁵ Unreported, referred to as [2010] ZAKZPHC 23, 12 March 2010; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2010/21.html>.

allocated a maximum of 10 points), viz. 'Targeted Experience and Years in Business'.¹⁷⁶ The applicant, an unsuccessful tenderer, challenged the validity of the tender award and the regulations on the basis that regulation 8 was in conflict with s 2 of the PPPFA. The court agreed and set both the contract and regulations 8(2) to 8(7) aside. The court held that regulations 8(2) to 8(7) were inconsistent with the PPPFA in that the regulations purported to grant contracting authorities the discretion to award 90 points for a combination of price and functionality, which may result in less than 90 points being allocated for price (as was done in the present instance), while s 2(1)(b) of the PPPFA provides that a minimum of 90 points must be allocated for price.¹⁷⁷ The same reasoning applies to the 80/20 split used for lower value contracts, ie a minimum of 80 points must be allocated for price under the PPPFA, while the regulations allow for 80 points to be allocated for a combination of price and functionality. The court rejected an argument that 'price' as used in the PPPFA should be interpreted to include functionality, holding that under both the Act and the regulations, price and functionality were clearly distinct concepts.¹⁷⁸ The court set the contract in the present instance aside, because the point allocation used by the respondent, although following the regulations, was in conflict with the PPPFA. This judgment holds significant implications for public procurement law. It confirms that public tender awards by organs of state that are bound by the PPPFA based on points allocations in terms of the Preferential Procurement Regulations that allotted anything less than 90 points (or 80 points depending on the value of the contract) to price, are vulnerable to judicial review on lawfulness grounds. It furthermore confirms the absolute supremacy of price as the single guiding criterion in awarding public contracts under the PPPFA.

2.2 Access to tender information

Given the scale of the World Cup, it is not surprising that that event would also generate noteworthy public procurement judgments.¹⁷⁹ One such recent judgment is that of *M & G Limited v 2010 FIFA World Cup Organising Committee South Africa Limited*,¹⁸⁰ which dealt with access to information regarding tenders awarded by the respondents in organising the tournament. The case raised some interesting points about the nature of tender activities and in particular when they can be regarded as public.

¹⁷⁶ Para 9.

¹⁷⁷ At para 11.

¹⁷⁸ At para 10.

¹⁷⁹ See eg *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, referred to as [2009] ZAFSHC 21, 27 February 2009; available online at <http://www.saflii.org/za/cases/ZAFSHC/2009/21.pdf>), noted in JQR Public Procurement 2009 (1) 2.3, JQR Public Procurement 2009 (1) 2.5; *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (unreported, case no 2008/19224 (W), 8 September 2008).

¹⁸⁰ Unreported, referred to as [2010] ZAGPJHC 43, 8 June 2010; available online at <http://www.saflii.org/za/cases/ZAGPJHC/2010/43.pdf>.

The respondents refused a request by the applicants in terms of the Promotion of Access to Information Act (PAIA)¹⁸¹ for all information pertaining to tenders awarded by the respondents, arguing *inter alia* that the first respondent, a company set up to organise the World Cup, was not a public body for purposes of awarding tenders. Accordingly, so the argument went, the applicants could not rely on the provisions of PAIA providing for access to information held by public bodies. This argument of the respondents has potentially far-reaching implications for access to public tender information (and beyond). They argued that under PAIA the focus of the determination of whether the relevant body is private or public is on the nature of the function it fulfilled to which the information requested relates, and not on the body's general function. Following this approach the respondents submitted that since the information requested by the applicants relates only to their tenders, the relevant function is that of 'conducting a tender process', which is private in nature and accordingly the first respondent qualifies as a private body for purposes of this information request.¹⁸² The applicants, on the other hand, submitted that the relevant function is that of 'staging the World Cup', which is a public one.¹⁸³

This argument raises the interesting question of at which level the assessment of a function must be done in order to determine whether the function is public or private. The answer to this question is not only highly relevant for purposes of access to information under PAIA, but also more generally for the application of public law rules, such as rules of administrative law, including the Promotion of Administrative Justice Act (PAJA).¹⁸⁴ In the public procurement context this question is especially relevant, because the immediate function is ostensibly always a private one, eg buying and selling goods, which may have the result that procurement functions are always private functions.¹⁸⁵ This would be the logical conclusion of the respondents' argument in this case. But at the same time, there is also always another (mostly public) function behind the relevant public procurement, ie the goods are purchased in order to fulfil a public function, such as organising the World Cup in this instance. In oral argument in this case the imagery of 'a high level (general perspective, low detail) or a low level (particular perspective, high detail) approach' was used to describe this difference.¹⁸⁶

While the court cautioned against narrowing down the enquiry to the level of a particular decision for purposes of PAIA (in contrast to the enquiry in administrative law under PAJA, which does focus specifically on the particular decision),¹⁸⁷ it unfortunately did not decide which of the two approaches is preferable or exactly how one is to determine the level of generality at which the test for a public function is to be applied. The court held instead that even at the particular level, ie focusing only on the

¹⁸¹ Act 2 of 2000.

¹⁸² At paras 177, 191, 207, 212.

¹⁸³ At para 191.

¹⁸⁴ Act 3 of 2000.

¹⁸⁵ See Geo Quinot *State Commercial Activity: A Legal Framework* (2009) 113–116.

¹⁸⁶ Para 176.

¹⁸⁷ At paras 185, 190, 225, also see para 238.

procurement of goods, the first respondent was fulfilling a public function.¹⁸⁸ The factors that motivated the court in coming to this conclusion are also quite interesting. The two factors that seem to play the biggest role are the high level of government involvement in control over decision-making in the first respondent and the public funds involved. On the first of these factors the court held that since the first respondent's board of directors included eight cabinet ministers, the government exercised significant control over decision-making, including procurement decisions, which in itself was sufficient indication that such decisions were public in nature.¹⁸⁹ However, the presence of public funding seems to be the single biggest factor upon which the court held that the procurement functions of the first respondent were public in nature.¹⁹⁰ In a far-reaching statement the court declared: 'The fact that it is in receipt of and is disbursing public funds is sufficient to constitute its activities as public.'¹⁹¹ The significance of this statement is further supported by the court's later conclusion that:

because this functionary or institution ... disbursed public funds, even though that functionary may in all other respects be a private one performing an act or acts which are in no other way governmental in character, origin or under governmental control ... it surely is performing a public function or exercising a public power. As the funds under its control are from the public purse, it cannot be otherwise.¹⁹²

The court consolidated its reasoning in this regard by pointing out that the source of public funds is taxation, which creates a clear public interest in how such funds are being spent.¹⁹³ Even where government borrows money, the repayment of such loans will come from taxation and hence such loans will constitute public funds with resultant public interest.¹⁹⁴ Under this approach information relating to public procurement will always be of a public nature and thus subject to PAIA's provisions dealing with access to information of public bodies. The court's approach in this regard may also have wider implications for the legal characterisation of state contracts. Since such contracts will always involve public funds, they will ostensibly always be public in nature.¹⁹⁵ It seems that there can thus be no such thing as a private state contract.¹⁹⁶

¹⁸⁸ At para 227.

¹⁸⁹ At paras 229–234.

¹⁹⁰ See para 239.

¹⁹¹ Para 240.

¹⁹² Para 272.

¹⁹³ At paras 254–255, 281.

¹⁹⁴ At para 281.

¹⁹⁵ Cf para 255.

¹⁹⁶ See Quinot *op cit* at 100–104.

July to September 2010 (3)

JQR Public Procurement 2010 (3)

Geo Quinot¹⁹⁷

1. Legislation

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

2. Cases

2.1 The validity of tenders' tax clearance certificates

In *Mpumalanga Steam and Boiler Works CC v Minister of Public Works*¹⁹⁸ the court held that a contracting authority must verify the validity of a tender's tax clearance certificate, especially where allegations of fraud have been made regarding such tax clearance.

In this case an unsuccessful tenderer challenged the award of the tender to a competitor *inter alia* on the basis that the winning bidder did not submit a valid tax clearance certificate as required by the tender conditions and regulation 16 of the Preferential Procurement Regulations¹⁹⁹ under the Preferential Procurement Policy Framework Act,²⁰⁰ which states that

¹⁹⁷ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

¹⁹⁸ Unreported, referred to as [2010] ZAGPPHC 128, 30 September 2010; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2010/128.html>.

¹⁹⁹ Notice R725 of 2001 in GG 22549 of 10 August 2001.

²⁰⁰ Act 5 of 2000.

No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ("SARS") certifying the taxes of that person to be in order or that suitable arrangements have been made with SARS.

On the facts it emerged that the tax clearance certificate submitted by the winning bidder was not issued by SARS. The court accordingly set the tender award aside. In doing so the court rejected the contracting authority's argument that it was under no duty to investigate a tenderer's tax affairs beyond the tax clearance certificate submitted with the tender and that the authority could take the certificate at face value as indication of tax compliance. The court noted that 'good practice' required the contracting authority 'to give effective observance to regulation 16' and to verify the validity of the certificate with SARS.²⁰¹ This seems to suggest that contracting authorities must routinely verify the validity of all tax certificates. However, later in the judgment the court seems to restrict this duty to instances where the validity of a certificate and hence non-compliance with regulation 16 is raised.²⁰² The court linked this duty to the wide duty resting on contracting authorities under regulation 15 of the same regulations to investigate instances of fraudulent preference in public procurement as soon as the authority 'detects' such fraud, meaning as soon as the authority becomes aware of the possibility of such fraud.²⁰³

2.2 Conditional tender awards

In *De Vries Smuts v Department of Economic Development and Environmental Affairs*²⁰⁴ the court interpreted the meaning of the standard condition found in tender awards that 'the service provider shall enter into a binding service level agreement with the department'. The court rejected an argument that this was a suspensive condition and that because of this condition no contractual obligations resulted from the tender award as such, pending the conclusion of the contemplated 'service level agreement'. The court held that, generally speaking, the acceptance of the tender by the contracting authority results in a binding contract coming into being. The above condition only serves to protect the authority in that it is able to force the supplier to enter into a subsequent agreement. The effect of such a subsequent, second agreement would be to 'incorporate and supersede' the first agreement and together they will constitute one comprehensive agreement between the parties.²⁰⁵

²⁰¹ At para 16.

²⁰² At para 34.

²⁰³ See *Viking Pony Africa Pumps v Hidro-Tech Systems* (unreported, referred to as [2010] ZASCA 23, 25 March 2010; available online at http://www.justice.gov.za/sca/judgments/sca_2010/sca10-023.pdf) noted in JQR Public Procurement 2010 (1) 2.2.

²⁰⁴ Unreported, referred to as [2010] ZAECHC 8, 30 July 2010; available online at <http://www.saflii.org/za/cases/ZAECHC/2010/8.html>.

²⁰⁵ At para 10.

2.3 Setting tender awards aside upon review

In *Mamlambo Construction CC v Port St Johns Municipality*²⁰⁶ the High Court again confirmed the approach adopted by South African courts in recent years to invalidate tender awards found to be reviewable.²⁰⁷ In this case the court found the tender award to be unreasonable, in particular because it lacked a rational basis and because relevant considerations were not taken into account, which, in the court's view, included the reviewable irregularity of not attaching sufficient weight to relevant considerations. As a result, the court stated, in one of the most emphatic formulations of this position to date, that:

It is therefore axiomatic that any procurement contract for municipal services concluded in breach of the prescripts of those laudable principles set out above which are after all designed to ensure a transparent, cost effective and competitive tendering process in the furtherance of public interest will virtually in every instance be declared invalid and unenforceable.²⁰⁸

3. Literature

Kufa, MacGregor “‘Tenderpreneurs’ and cartels: The devil is in the detail’ July 2010 (499) *De Rebus* 23

²⁰⁶ Unreported, referred to as [2010] ZAECHMHC 21, 24 June 2010; available online at <http://www.saflii.org/za/cases/ZAECHMHC/2010/21.html>.

²⁰⁷ See *Qaukeni Local Municipality v FV General Trading* (unreported, referred to as [2009] ZASCA 66, 29 May 2009; available online at http://www.justice.gov.za/sca/judgments/sca_2009/sca09-066.pdf) noted in JQR Public Procurement 2009 (2) 2.3 and *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 JDR 0190 (SCA) noted in JQR Public Procurement 2009 (1) 2.6.

²⁰⁸ At para 40.

October to December 2010 (4)

JQR Public Procurement 2010 (4)

Geo Quinot²⁰⁹

1. Legislation

1.1 Restricting public servants from doing business with government

On 8 December 2010 the Premier of the Western Cape assented to the Western Cape Procurement (Business Interests of Employees) Act 8 of 2010, which was duly published in the *Provincial Government Gazette* on 10 December. The Act will only come into operation on a date still to be set by the Premier. The Act restricts business dealings between the provincial government and entities in which provincial public servants have an interest. Under the Act all provincial public servants will have to disclose any interest they or their family members may have in entities contracting with the provincial government.²¹⁰ Entities wishing to contract with the provincial government will also have to disclose any interest a provincial public servant or his/her family members may have in that entity before a contract can be concluded.²¹¹ The provincial treasury is tasked with maintaining a database of all such interests.²¹²

The Act, however, does not simply call for disclosure of provincial public servants' interests in entities contracting with the provincial government, but indeed prohibits the provincial government from contracting with entities of which a provincial public servant alone or together with family members, business associates or other provincial public servants 'directly or indirectly owns or controls more than five per cent of the shares, stock, membership or other interest of that entity'.²¹³ The bar is not absolute and the relevant MEC may grant permission for a contract to be concluded despite such prohibited public servant interest in the contracting entity on stated grounds.²¹⁴

Contravention of the prohibition contained in the Act may lead to the cancellation of the contract or rejection of the relevant bid.²¹⁵ Disciplinary action may also be taken against public servants not complying with the Act.

²⁰⁹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

²¹⁰ Section 2(2).

²¹¹ Section 2(1).

²¹² Section 4.

²¹³ Section 3(1) & (5).

²¹⁴ Section 3(3).

²¹⁵ Section 5.

2. Cases

2.1 Duty to act against fraudulent preferment claims

In its first purely public procurement law judgment the Constitutional Court confirmed in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd*²¹⁶ that an organ of state has a duty to act against bidders that obtain preference in public tenders on a fraudulent basis. The CC expressly endorsed the Supreme Court of Appeal's judgment in this matter,²¹⁷ quoting with approval the statement of the SCA that the Preferential Procurement Policy Framework Act (PPPFA)²¹⁸ and in particular regulation 15(1) of the Preferential Procurement Regulations²¹⁹ 'ensures that no organ of state will remain passive in the face of evidence of fraudulent preferment but is obliged to take appropriate steps to correct the situation'.²²⁰ The CC also adopted the SCA's broad reading of the word 'detect' in regulation 15 as the trigger for an organ of state's duty to act. The court held that "'detect" generally means no more than discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful tenderer, so as to profit from preference points, are plausible'.²²¹

2.2 Awarding tenders to non-highest scoring tenderers

In *Simunye Developers CC v Lovedale Public FET College*²²² the court held that an organ of state is not obliged to stipulate in the tender documents all the objective criteria that it may take into account in awarding the tender to a tenderer that did not score the highest points.

In this matter the organ of state did not award the contract to the highest scoring tenderer, the applicant, because of a report of poor performance on a previous contract. This report was compiled following a visit of the work done on the previous contract by two members of the evaluation

²¹⁶ Unreported, referred to as [2010] ZACC 21, 23 November 2010; available online at <http://41.208.61.234/uhtbin/cgiisirs/20110118085212/SIRSI/0/520/J-CCT34-10>.

²¹⁷ See JQR Public Procurement 2010 (1) 2.2 where the SCA judgment was discussed.

²¹⁸ Act 5 of 2000.

²¹⁹ Notice R725 of 2001 in GG 22549 of 10 August 2001. Reg 15 reads:

- (3) An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.
- (4) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)—
 - (e) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
 - (f) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
 - (g) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
 - (h) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.

²²⁰ At para 28.

²²¹ At para 31.

²²² Unreported, referred to as [2010] ZAECHGHC 121, 9 December 2010, available online at <http://www.saflii.org/za/cases/ZAECHGHC/2010/121.html>.

committee upon the committee's request. The report was also compiled after all tenders had already been scored for functionality, taking into account previous experience and performance on previous contracts as part of a first qualification round of assessment, a round which the applicant's tender had passed. The applicant challenged the decision not to award the tender to it on a number of grounds including the committee's failure to afford it an opportunity to state its case on the report. In the present application for interim relief, the court held that the applicant's review challenge had 'virtually no prospects of success'.²²³ In reaching this conclusion the court held that a contract may be awarded to the non-highest scoring tenderer in terms of the PPPFA on any objective, reasonable and justifiable grounds regardless of whether such grounds were stipulated in the tender documents.²²⁴ In the court's view, poor past performance was a classic example of such criteria and the organ of state was thus wholly justified in relying on the report of such poor performance by the applicant in awarding the tender to another tenderer. The court furthermore held that the organ of state was under no obligation to consult the applicant in reaching this conclusion. The court stated that in submitting a tender in response to a particular invitation including applicable specifications and conditions, a tenderer accepts that any considerations relating to its ability to perform to those specifications (regardless of the source of such considerations) will be taken into account and there is accordingly no (further) need for consultation.²²⁵

2.3 Revocation of tender awards

In *Azola Recruitment Solutions CC v National Energy Regulator of South Africa*²²⁶ the court held that an accounting authority of an organ of state may revoke a tender award by a Bid Adjudication Committee (BAC) in terms of the Public Finance Management Act (PFMA).²²⁷

In this matter the BAC of the respondent, which is subject to the PFMA, awarded a tender to the applicant. However, before a contract could be concluded the respondent discovered that the applicant's bid was submitted late and on the strength of the bid conditions, which included a term that declared that no late bids would be considered, the respondent decided to withdraw the award to the applicant. The applicant challenged that decision, inter alia on the ground that the respondent was *functus officio* once the decision was taken to award the tender and could thus not revoke it. The court rejected this argument. It held that while the decision of the BAC was patently final in terms of the bid conditions, the position had to be understood in terms of the applicable regulatory framework, which included the PFMA.²²⁸ Under the PFMA it was the accounting authority, the CEO, of the respondent that had the power to award contracts, which power was delegated to the BAC in terms of s 56(1) of the Act. Furthermore, in terms of s 56(3) the accounting authority retained the power to 'confirm, vary or revoke any decision' taken under such delegation. In the court's view this meant that the accounting authority, and hence the respondent, was not *functus officio* once the BAC decided to award the tender. As a

²²³ At para 37.

²²⁴ At para 33.

²²⁵ At para 37.

²²⁶ Unreported, referred to as [2010] ZAGPPHC 144, 8 October 2010, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2010/144.html>.

²²⁷ Act 1 of 1999.

²²⁸ At para 8.

result the accounting authority, ie the CEO in this case, could revoke the tender. What the court did not consider was the second part of s 56(3), which expressly subjects the power to 'confirm, vary or revoke' a delegated decision 'to any rights that may have become vested as a consequence of the decision'. The question that is not answered is whether the award of the tender to the applicant results in rights vesting in the applicant, even prior to the conclusion of the eventual contract. The answer to this question may largely depend on the wording of the award notification.²²⁹

3. Literature

P. Bolton 'Municipal Tender Awards and Internal Appeals by Unsuccessful Bidders' (2010) 13:3 *PER/PELJ*

²²⁹ See in this regard the cases that have dealt with internal appeals under s 62 of the Local Government: Municipal Systems Act 32 of 2000, which contains a similar condition on the power to alter a tender award following an internal appeal, noted in JQR Public Procurement 2010 (1) 2.1 as well as the recent judgment in *De Vries Smuts v Department of Economic Development and Environmental Affairs* (unreported, referred to as [2010] ZAECBHC 8, 30 July 2010; available online at <http://www.saflii.org/za/cases/ZAECBHC/2010/8.html>), noted in JQR Public Procurement 2010 (3) 2.2 where it was held that an award which is expressly conditional on the conclusion of a contract nevertheless resulted in the vesting of rights.

January to March 2011 (1)

JQR Public Procurement 2011 (1)

Geo Quinot²³⁰

1. Legislation

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

2. Cases

2.1 The application of s 217 to contracts between organs of state

The important matter of inter-organ of state contracting decided upon on first instance in *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of South African Social Security Agency NO*²³¹ has now been dealt with in the Supreme Court of Appeal in *CEO of the South African Social Security Agency N.O v Cash Paymaster Services (Pty) Ltd*.²³² Unfortunately, the SCA did not answer the crucial question that this matter has properly raised for the first time in South African law.

In this matter the second respondent ('SASSA'), an organ of state, published a request for proposals for the provision of grant payment services in one or more of the provinces. The applicant, a private company that has provided such services in various provinces to SASSA and its provincial predecessors on public tender in the past, again submitted a tender in respect of all nine provinces. However, SASSA

²³⁰ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

²³¹ Unreported, referred to as [2009] ZAGPPHC 169, 10 December 2009; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2009/169.html>. See JQR Public Procurement 2009 (4) 2.1.

²³² Unreported, referred to as [2011] ZASCA 13, 11 March 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/13.html>.

eventually cancelled the call for tenders, citing irregularities in the process as reason. In the meanwhile SASSA entered into an agreement with the South African Post Office Ltd ('the Post Office'), another organ of state (the third respondent), in terms of which the Post Office would inter alia render grant payment services to SASSA. This agreement was entered into without any tender process being followed, ie following direct and private negotiations between SASSA and the Post Office. The applicant subsequently challenged SASSA's decision to enter into this agreement with the Post Office on the basis that it did not comply with s 217 of the Constitution, in particular by failing to follow a competitive process in awarding the contract. The respondents argued that s 217 did not apply to the present case, because they are both organs of state. In support of this argument the respondents pointed to provisions in the Constitution calling on 'all spheres of government and all organs of state within each sphere [to] ... co-operate with one another in mutual trust and good faith by ... assisting and supporting one another and ... co-ordinating their actions ... with one another'²³³ and that 'public administration must be governed by the democratic values and principles enshrined in the Constitution including ... efficient, economic and effective use of resources'.²³⁴ The respondents further argued that despite the fact that SASSA and the Post Office are separate juristic persons, no organ of state is separate from the state and that all organs of state act as a unit. The argument thus followed that when different organs of state contract with one another, it is only the state dealing with itself. The gist of the respondents' argument was that in effect the state was supplying itself in the present instance, ie it was fulfilling its needs internally, in line with the quoted constitutional provisions and that s 217 as a result did not apply. The High Court rejected these arguments and held that SASSA was bound by s 217 of the Constitution when it concluded the agreement with the Post Office. Since that agreement was concluded behind closed doors without any competitive process or considering any alternative proposals by other suppliers, it fell afoul of both the peremptory transparency and competitive requirements of s 217. As a result the High Court set aside SASSA's decision to enter into an agreement with the Post Office. On appeal the SCA held that the question of whether inter-organ of state contracting is subject to s 217 of the Constitution is 'beside the point'.²³⁵ The real question, according to the court, was whether SASSA was entitled to deviate from open tendering procedures in the instant case based on the relevant provisions of the Treasury Regulations²³⁶ under the Public Finance Management Act 1 of 1999 ('PFMA'). In the court's words: 'The first inquiry ought to be to determine the meaning of the consequent legislation.'²³⁷ On this approach the court held that it simply had to determine whether SASSA met the requirements for deviation set in regulation 16A6.4.²³⁸

²³³ Section 41(1)(h).

²³⁴ Section 195(1).

²³⁵ Para 16.

²³⁶ Notice R225 of 2005 in GG 27388 of 15 March 2005.

²³⁷ Para 16.

²³⁸ This regulations reads: 'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority'.

This is a curious approach to the matter and it seems to me that the question of s 217's application to the matter at hand is not 'beside the point', but indeed central to the dispute. Firstly, as the court itself noted (at para 16), the relevant provisions of the PFMA and regulations under it are aimed at implementing s 217 of the Constitution. It thus follows that the application of those provisions implies the application of s 217. While, in terms of the subsidiarity principle, it is thus appropriate not to adjudicate the matter directly in terms of s 217 when there are legislative provisions giving effect to the constitutional provision, it does not mean that the applicability of s 217 is not at issue. The more accurate way of depicting the analysis is thus to ask whether s 217 applies via the PFMA and its regulations. Secondly, even just looking at the relevant Treasury Regulations, viz. regulation 16A6, that provision clearly applies only to 'Procurement of goods and services'. It follows that before the provision can even be applied, the question must be answered whether the matter at hand amounts to a procurement. That is the very same question that the parties raised with direct reference to s 217 and the one that the court does not seem to answer, at least not expressly. Put differently, it seems difficult to understand why regulation 16A6 would even be relevant to the dispute if SASSA and the Post Office's agreement did not amount to a procurement, which it would not if the respondents are correct in their argument that this transaction must be viewed as an in-house provision of services rather than a procurement. It would seem that despite the court's view that the application of s 217 is 'beside the point' it did indeed decide that point by holding regulation 16A6 applicable to the case. The necessary implication is that s 217 does apply to transactions between organs of state. Unfortunately that result is reached by implication and no reasoning is provided as to why that is the case. This is an important opportunity lost to answer a critical question within any public procurement regulatory regime and one that has not been answered in South African law.

2.2 Deviation from procurement rules

In *CEO of the South African Social Security Agency N.O v Cash Paymaster Services (Pty) Ltd*²³⁹ the court dealt with the requirements for a valid departure from an organ of state's supply chain management policy. The court held that in terms of regulation 16A6.4²⁴⁰ of the Treasury Regulations under the PFMA an organ of state must satisfy three requirements to qualify for departure. Those are approval by the accounting officer or authority (which was not in issue in this case); rational reasons for the decision to depart and recording of those reasons.²⁴¹

Regarding the third formal requirement, the court was satisfied that in this case the reasons for the deviation could be gleaned from the agreement between SASSA and SAPO itself and as such were

²³⁹ Unreported, referred to as [2011] ZASCA 13, 11 March 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/13.html>.

²⁴⁰ See note 238 above.

²⁴¹ Para 21.

recorded as required. This is an extremely liberal reading of the formal condition in regulation 16A6.4 and results in that requirement not being much of a condition on the power to deviate. In this approach there is also the danger that the reason for the agreement and the reason for the way in which the agreement is concluded, which are logically separate, are conflated. At least part of the reasons identified by the court from the agreement itself, viz that the object 'was to improve grant enrolment and payment services on a cost effective basis'²⁴² illustrates this danger. That reason may be validly seen as a reason for concluding the agreement, but surely does not explain why it must be done without open tendering, ie why deviation should be allowed.

In respect of the substantive requirement, viz. that rational reasons must exist for the deviation, the court also adopted what can only be described as a highly deferential standard. Particularly the court's acceptance of the Intergovernmental Relations Framework Act 13 of 2005 as the basis for the agreement and its conclusion that the 'object of the agreement was to provide for collaboration between two government entities by working together and to integrate their services'²⁴³ as a rational reason leads to the conclusion that inter-organ of state agreements will always qualify for a deviation on this basis. This general allowance of such agreements is supported by the court's reference to s 238 of the Constitution as providing authority for such action.²⁴⁴ The court held that s 238(b) authorises an organ of state like SASSA to delegate functions to the Post Office by means of an agreement as the one at issue here. On this view practically any organ of state will be able to enter into an agreement with any other organ of state for goods or services without complying with public procurement rules. What is noticeably absent from the court's analysis in this regard is an appreciation of the qualification of the s 238(b) power to delegate to *executive* organs of state. In terms of this wording this section thus does not confer a general power to delegate between all organs of state, but only a limited category. Whatever the precise meaning of the term 'executive' as used here, it seems a stretch to include SASSA and the Post Office within that category.²⁴⁵

The essential problem with this judgment is that it assumes, without reasoning, that inter-organ of state agreements are subject to public procurement rules, in the final instance based on s 217 of the Constitution, but then allows for a deviation from those rules that is so wide in scope that inter-organ of state agreements are again effectively excluded from public procurement law altogether.

2.3 Consequences of a failure to accept bids within their validity period

²⁴² Para 22.

²⁴³ Para 22.

²⁴⁴ Para 23.

²⁴⁵ The term 'executive' in s 238 probably restricts the delegation power granted in that section to high political offices, ie holders of executive power in terms of the Constitution, viz. the President, cabinet, Premiers, provincial executive councils and local councils. See De Ville *Judicial Review of Administrative Action in South Africa* (2005) 140–141.

In *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited*²⁴⁶ the court considered what the legal consequences would be if an organ of state attempted to award a bid after the validity period for the tenders had lapsed. In this matter the contracting authority engaged in discussions with the preferred bidders after the validity period of the bids had lapsed, but before any award had been made. The court held that such a step would be contrary to s 217 of the Constitution.²⁴⁷ In the court's view the entire tender process came to an end when the validity period for the tenders expired without any tender being awarded or an extension of the validity period obtained from all tenderers. If the contracting authority continued to engage with the bidders after that date it would not be acting within a valid tender process and its actions would accordingly not be transparent, equitable or competitive, ie not comply with s 217. The only avenue open to the contracting authority at such point would be to call for fresh tenders.

2.4 Awarding tenders to more than one bidder

In *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals*²⁴⁸ the court confirmed that it is acceptable for an organ of state to award more than one bid and thus conclude multiple contracts on a single call for tenders where the bid documents allow such award. The court furthermore held that this is allowed under the bid adjudication process contemplated in the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA').²⁴⁹ Significantly the court held that such multiple awards are not in conflict with the requirement in s 2(1)(f) of the PPPFA, which states that 'the contract must be awarded to the tenderer who scores the highest points'. With reference to the Interpretation Act 33 of 1957 the court held that the singular word 'tenderer' in this provision must be read to include the plural so that the section indeed allows for contracts to be awarded to more than one tenderer.

2.5 Post-tender negotiations

In quite a bold judgment, the court in *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals*²⁵⁰ held that post-tender negotiations with preferred bidders was a generally accepted practice

²⁴⁶ Unreported, referred to as [2011] ZAGPPHC 1, 7 January 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/1.html>.

²⁴⁷ Para 14.

²⁴⁸ Unreported, referred to as [2011] ZAKZDHC 22, 30 March 2011; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2011/22.html>.

²⁴⁹ Para 77.

²⁵⁰ Unreported referred to as [2011] ZAKZDHC 22, 30 March 2011; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2011/22.html>.

in public procurement and not contrary to the principles set out in s 217 of the Constitution, the PPPFA or administrative justice generally. In this matter the organ of state identified a number of preferred bidders through a public tender process and subsequently entered into negotiations with these bidders individually, primarily in relation to the price of the respective bidders' tenders. Only after such negotiations were contracts concluded with a number of bidders on the prices negotiated post-tender and which differed from that originally tendered. In a challenge to this procedure, the court held that it was not objectionable as long as post-tender negotiations were clearly contemplated in the tender document and all the preferred bidders were subjected to equal treatment in the post-tender negotiation stage.²⁵¹ The court noted that an organ of state would, under these conditions, be entitled to enter into negotiations virtually at any stage of the procurement process, including after short-listing, before or after the final tender award and by implication with only a selected number of bidders.²⁵² The court also held that if negotiations follow after a successful tenderer had been identified, but before the contract is concluded, such negotiations are purely commercial in nature and not subject to administrative law.²⁵³ This view seems to align with the SCA's statement in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd*²⁵⁴ that '[a]fter the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law'. In this regard, the court in the present case stated notably

that there is no reason why 'commercial arm twisting' should not be allowed in the procurement process and that it must be borne in mind that the purpose of section 217 is, subject to the affirmative action issue, to ensure that the government gets the best price and value for which it pays.²⁵⁵

This statement seems to open the door significantly to extensive post-tender negotiations relating to any aspect of the particular tender, especially where it relates to better value for money to the state.

2.6 Temporary relief pending review of procurement decisions

In *Freedom Stationery (Pty) v MEC for Education, Eastern Cape*²⁵⁶ another one of the familiar applications for interim relief pending review of a procurement decision was granted. This judgment is noteworthy for the way in which it dealt with the public interest in the procurement at issue. The

²⁵¹ Paras 72, 103, 104, 109.

²⁵² Para 73.

²⁵³ Para 73 with reference to *Roy Ramdaw Incorporated v Amajuba District Municipality* (unreported NPD case no AR1028/03, 27 February 2004).

²⁵⁴ 2009 (1) SA 163 (SCA) para 18.

²⁵⁵ Para 104.

²⁵⁶ Unreported, referred to as [2011] ZAECELLC 1, 16 March 2011; available online at <http://www.saflii.org/za/cases/ZAECELLC/2011/1.html>.

Department of Education in the Eastern Cape called for tenders in 2010 to provide scholastic stationery to schools in that province for the 2011 school year. 2380 schools were to be served by the goods procured under this tender, which were some of the poorest and mostly no-fee schools in the province with an estimated 688 482 learners between grades R and 12 affected. The applicants tendered for the contract, but eventually learned that the tender was cancelled on the basis that no acceptable tenders were received. They further learned that their tenders were rejected because their tax affairs were not in order. The Department in the meanwhile concluded a contract without going through a public tender process on the basis of the urgent need for the materials in light of the fact that the school year had already started by this stage. The applicants consequently launched urgent review proceedings calling for the decision to cancel the original tender process as well as the subsequent agreements to be set aside. They also applied for urgent interim relief prohibiting the Department from entering into and/or performing under the subsequent directly concluded agreements.

In its judgment on the interim relief the court noted the need to balance the various rights at stake. In this regard it referred expressly to the educational rights of the learners in terms of s 29 of the Constitution and the rights of the applicants to administrative justice and in terms of s 217 of the Constitution to fair procurement processes. However, while the court showed a commendable awareness of the conflicting interests involved, it nevertheless in my view failed to adequately distinguish between the public interest behind the procurement (in this case the learners' interests) and the relevant contracting authority's interests. In its determination of the familiar balance of convenience test for granting interim relief, the court seems to equate the actions of the Department and the interests of the learners on one side of the scale against the interests of the private tenderers on the other. This is a simplistic way of looking at tender disputes and not in line with judgments such as *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) where the SCA expressly highlighted the need to take account of the multiple interests involved, including an awareness of the public interests being served by the relevant tender separately from the relevant contracting authority's stake. The balance of convenience analysis in cases of this nature should thus at least involve the weighing up of three distinct sets of interests, viz. that of the private tenderer, the contracting authority and the public. In the present matter the court seems to suggest that the impact of granting the interim relief on the learners' interests is somewhat lessened by the mistakes made by the Department and which supports the likelihood of the applicants' success in the review application. This approach collapses what should at least be a trilateral analysis into a false dichotomy.

Furthermore noticeably absent from the court's reasoning is an assessment of exactly what interests of the applicants are to be served by the interim relief. While the effect of such relief on the public, ie the learners, seems clear (and severe) from the judgment, the applicants' interests are simply stated as 'the right to fair administrative action, also protected in the Constitution, as well and the provisions of sections 217 (1) of the Constitution which protect those who contract with the Government if the

process is not “fair equitable, transparent competitive and costs effective”.²⁵⁷ One does not find any analysis of why these rights of the applicants can only be protected by the granting of the interim relief or why, in the court’s words, a refusal to grant the interim relief will result in a ‘[t]rampling on the rights of the applicants’.²⁵⁸ It is certainly not the review application itself that depends on the interim relief. Interim relief of this nature is only really necessary to protect a particular outcome in the review application, viz. setting aside the award decision and referring it back to the administrator (or exceptionally substituting the administrator’s decision with one awarding the tender to the applicant). Without interim relief, such an order would potentially no longer be feasible at the time of the review. However, as the courts have recently made clear, that outcome is not an automatic or necessary result of review applications, even where the applicant can show a reviewable irregularity. In its most recent judgment on this issue, the SCA noted in *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd*²⁵⁹ that:

this court in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010 (4) SA 359 (SCA)] held that ‘[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction’ (para 21). Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not.

In addition, even where a review court is minded to grant relief following a successful challenge to a public tender award, such relief need not necessarily be the invalidation of the tender award. In *Millennium Waste Management* the SCA illustrated how a creative remedy can be crafted following review of a public tender award that vindicates the rights of the aggrieved tenderer while not upsetting the public service behind the tender. In the final analysis the problem in the *Freedom Stationery* judgment comes down to the continued lack of sophistication in the South African public procurement remedies regime.²⁶⁰

²⁵⁷ Para 9.

²⁵⁸ Para 34.

²⁵⁹ Unreported, referred to as [2011] ZASCA 13, 11 March 2011, para 29 (footnotes omitted).

²⁶⁰ On the lack of sophistication in the South African public procurement remedies regime see Geo Quinot 'Worse than Losing a Government Tender: Winning It' (2008) 19 *Stell LR* 68, 'Towards Effective Judicial Review of State Commercial Activity' (2009) *TSAR* 436, 'Enforcement of Procurement Law from a South African Perspective' (2011) *Public Procurement Law Review* (forthcoming).

April to June 2011 (2)

JQR Public Procurement 2011 (2)

Geo Quinot²⁶¹

1. Legislation

1.1 Scope of application of the Procurement Act

On 8 June 2011, the Minister of Finance, by notice in the *Government Gazette*,²⁶² extended the scope of application of the Preferential Procurement Policy Framework Act²⁶³ (PPPFA) and its regulations to all entities listed in Schedules 2 and 3 of the Public Finance Management Act²⁶⁴ (PFMA) with effect from 7 December 2011. This is quite a significant development since the PPPFA and the Preferential Procurement Regulations, 2001 made under it currently apply directly only to a limited category of organs of state. In particular, these public procurement rules do not currently apply directly to state-owned enterprises. The result is a fairly fragmented regulatory regime governing not only preferential procurement, but tender adjudication more generally. However, following above notice, public procurement regulation in South Africa will take a significant step towards greater uniformity on 7 December 2011 when almost all organs of state, including state-owned enterprises, will come under a single set of rules regarding tender adjudication, including preferential procurement.

1.2 New preferential procurement regulations

Following a seven-year process,²⁶⁵ new preferential procurement regulations under the PPPFA, the Preferential Procurement Regulations, 2011, have finally been gazetted²⁶⁶ and will come into effect on 7

²⁶¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

²⁶² Notice R501 of 2011 in GG 34350 of 8 June 2011.

²⁶³ Act 5 of 2000.

²⁶⁴ Act 1 of 1999.

²⁶⁵ See JQR Public Procurement 2009 (3) 1.1.

²⁶⁶ Notice R502 of 2011 in GG 34350 of 8 June 2011.

December 2011. These new regulations will now finally align the approach to preferential public procurement under the PPPFA and the broader approach to black economic empowerment under the Broad-Based Black Economic Empowerment Act²⁶⁷ (BBBEEA) and its scorecards.

While the new regulations retain in principle the current model for preferential procurement using the 80/20 and 90/10 preference points systems²⁶⁸ for award criteria based on price and preference points respectively, they introduce a number of important departures from the current approach to preferential procurement under the PPPFA. One of the most significant changes is the much more structured and significantly narrowed-down approach to the calculation of the 20 or 10 preference points, depending on the size of the contract. Whereas the current Preferential Procurement Regulations, 2001 allow a large measure of discretion to contracting authorities in setting up the way in which preference points will be calculated, with a mandatory emphasis on equity ownership by HDIs,²⁶⁹ the new regulations simply provide a grid in terms of which suppliers' BEE status as determined and certified under the BBBEEA is directly translated into a set number of preference points. The matrixes for the 80/20 and 90/10 splits are as follows:²⁷⁰

B-BBEE Status Level of Contributor	Number of Points	
	80/20 split	90/10 split
1	20	10
2	18	9
3	16	8
4	12	5
5	8	4
6	6	3
7	4	2
8	2	1
non-compliant contributor	0	0

²⁶⁷ Act 53 of 2003.

²⁶⁸ The thresholds for using the 80/20 and 90/10 points systems respectively have however been changed so that the 80/20 split will be used for contracts of a value between R30 000 and R1 million and the 90/10 split for contracts of a value above R1 million.

²⁶⁹ Preferential Procurement Regulations, 2001 regulation 13.

²⁷⁰ Preferential Procurement Regulations, 2011, regulations 5(2), 6(2).

The relevant points from the matrix above (depending on the size of the contract) will thus simply be added to the points calculated for the price offered to make up the final number of points scored by each tenderer. Subcontracting may, however, have an impact on the preference points awarded to a tenderer. A tenderer may not be awarded preference points if it intends to subcontract more than 25% of the value of the contract to an entity that does not qualify for at least the same amount of preference points on the above scale.²⁷¹ Likewise, once the tender has been awarded a contractor may not subcontract more than 25% of the value of the contract to an entity that does not have an equal or higher B-BBEE status level than the main contractor.²⁷²

The new regulations provide explicitly for functionality to be taken into account as a qualification criterion.²⁷³ Under these new rules contracting authorities must state in the tender invitation if functionality will be assessed and on what basis, setting out the details of the objective functionality criteria. Tenders failing to meet the minimum functionality score stipulated in the bid invitation must subsequently be excluded from further evaluation. These new rules thus resolve the conflict between the current Preferential Procurement Regulations, 2001 and the PPPFA where the former purported to allow functionality to be an award criterion counting along with price towards the 80 or 90 points awarded (depending on the size of the contract) to a particular tenderer, while the PPPFA restricts the 80 or 90 points to price. In *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*²⁷⁴ the court thus declared the 2001 Regulations invalid to the extent that they were in conflict with the PPPFA.²⁷⁵

A third significant development in the new regulations is the provision for preference to local suppliers. While the 2001 Regulations provided for preference to local suppliers to form part of the specific goals to be attained by a particular tender as part of the goals of the RDP,²⁷⁶ the new regulations expressly provide for a structured approach to preference for local suppliers and content.²⁷⁷ In terms of this approach certain tenders may be set aside for local production and content within sectors designated by the Department of Trade and Industry. For tenders falling outside the designated sectors, contracting authorities retain a discretion to call for minimum local content in bids.

²⁷¹ Preferential Procurement Regulations, 2011, regulation 11(8).

²⁷² Preferential Procurement Regulations, 2011, regulation 11(9).

²⁷³ Preferential Procurement Regulations, 2011, regulation 4.

²⁷⁴ Unreported, referred to as [2010] ZAKZPHC 23, 12 March 2010; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2010/21.html>.

²⁷⁵ See JQR Public Procurement 2010 (2) 2.1.

²⁷⁶ Preferential Procurement Regulations, 2001, regulation 17.

²⁷⁷ Preferential Procurement Regulations, 2011, regulation 9.

2. Cases

2.1 Coverage of public procurement rules

In a number of cases dealt with in the period under review, the question of the coverage of public procurement rules was at issue. In all of these matters the courts had to deal with the difficult questions of which bodies should be subjected to public procurement rules and in respect of which actions.

In a disappointing turn of events, the Constitutional Court refused leave to appeal against the judgment of the Supreme Court of Appeal in *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd*,²⁷⁸ simply stating that the Court is of the view that it is not in the interest of justice to hear the appeal.²⁷⁹ This matter involved the very important question of contracting between organs of state and whether such contracting should be subjected to public procurement rules, including s 217 of the Constitution. It thus raised an important question as to the coverage of public procurement law in South Africa flowing from its constitutional base in s 217. The Supreme Court of Appeal, in a most unsatisfactory manner,²⁸⁰ avoided answering this question and it is thus disappointing that the Constitutional Court did not consider it in the interest of justice to deal with the matter. Without providing any reasons for why the Court does not consider it in the interest of justice to hear the matter (reasons which must surely exist on the basis that the Court would take an informed and rational decision in making its order) one is left in the dark as to why the Court should view this clearly important constitutional question not worthy of its attention. This is an opportunity lost and South African public procurement law consequently continues to lag behind more mature systems, such as EU law, where the issue of contracting between state organs has received significant attention.²⁸¹

Another matter that dealt with the coverage of public procurement rules is that of *Steradian Consulting (Pty) Limited v Armaments Corporation of South Africa Limited*.²⁸² In this case the applicant claimed *inter alia* that the respondent's procurement policy was not in line with the PPPFA and hence unlawful. The court rejected this argument on a strict analysis of the entity coverage of the PPPFA. It correctly held that the PPPFA only applies to organs of state as defined in that Act and not generally to all organs of

²⁷⁸ Unreported, referred to as [2011] ZASCA 13, 11 March 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/13.html>, noted in JQR Public Procurement 2011 (1) 2.1.

²⁷⁹ *Cash Paymaster Services (Pty) Ltd v The CEO of the South African Social Security Agency NO* (unreported, CC case no CCT 27/11, 6 June 2011).

²⁸⁰ See JQR Public Procurement 2011 (1) 2.1.

²⁸¹ See e.g. the recent comprehensive treatment of this issue in European law in Comba & Treumer (eds) *The In-House Providing in European Law* (2010).

²⁸² Unreported, referred to as [2011] ZAGPPHC 99, 10 May 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/99.html>.

state as defined in s 239 of the Constitution.²⁸³ In terms of the definition of ‘organ of state’ in s 1 of the PPPFA, the respondent would only be subject to the Act if it was an organ of state ‘recognised by the Minister by notice in the *Government Gazette* as an institution . . . to which the Act applies’. Since the respondent was not so recognised by the Minister, the court had no difficulty in finding that the PPPFA did not apply to it.²⁸⁴ While this is clearly the correct technical analysis, the applicant in fact made a more nuanced argument than simply claiming that the PPPFA applied to the respondent. Its argument was that the PPPFA applied to the applicant in this case because the applicant acted as an agent for and was thus procuring on behalf of the Department of Defence.²⁸⁵ Since the PPPFA applied to the Department, it should also apply to the first respondent in this case, so the argument went.²⁸⁶ This is a more difficult question than simply whether the respondent is an organ of state as defined in the PPPFA. It seems that a good argument can be made that agents of organs of state subject to the PPPFA should also comply with the rules of the PPPFA when procuring in that capacity. If that were not the case, organs of state could easily avoid the rules of the PPPFA by outsourcing their procurement functions. In the present matter a contrary argument would be that procuring for the purposes of the defence force is a core function of the respondent and that as such a deliberate choice was made not to include it in the scope of application of the PPPFA.²⁸⁷ Holding the respondent subject to the PPPFA on an agency basis would undermine that deliberate choice. However, the agency argument remains an important one in general for an organ of state need not outsource its procurement function to another organ of state. Where no clear legislative scheme is applicable to the agent (as there was in this case), the agency argument would indeed be an important one to deal with in deciding whether the PPPFA applies to the particular procurement. It is thus a pity that the court did not engage with the nuanced argument of the applicant in the present matter, but decided the matter solely on the strict technical interpretation of the PPPFA.

In *Lambda Test Equipment CC v Broadband Infraco (Pty) Limited*²⁸⁸ the almost identical question as in *Steradian* was raised in relation to the respondent, also a Schedule 2 entity under the PFMA, namely whether it is subject to the PPPFA. The court did not decide this point, but made the remark that ‘[i]t may very well be that this Act [PFMA] or Treasury regulations [under the PFMA] bind the first respondent to the provisions of the Procurement Act’.²⁸⁹ The judge furthermore remarked:

²⁸³ Paras 29–30.

²⁸⁴ Para 31.

²⁸⁵ Para 24.

²⁸⁶ Para 24.

²⁸⁷ That choice was firstly made by the legislature by including the respondent in Schedule 2 to the PFMA and excluding Schedule 2 entities from the definition of organ of state in s 1 of the PPPFA, and secondly by the Minister of Finance in not designating the respondent as an organ of state subject to the PPPFA in terms of sub-s (f) of the definition of organ of state in s 1 of the PPPFA.

²⁸⁸ Unreported, referred to as [2011] ZAGPJHC 38, 13 May 2011; available online at <http://www.saflii.org/za/cases/ZAGPJHC/2011/38.html>.

²⁸⁹ Para 11.

I should, however, point out that it appears to be generally accepted that the Procurement Act gives effect to Section 217(2) of the Constitution, which requires the State, when contracting for goods and services, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.²⁹⁰

The suggestion seems to be that the respondent, being an organ of state, may be subject to the PPPFA by being subject to s 217 of the Constitution. While the judge is correct in suggesting that the respondent may be subject to the rules of the PPPFA via the PFMA, the latter suggestion that it is bound by the PPPFA via s 217 of the Constitution is not in line with the jurisprudence. In *TBP Building & Civils v the East London Industrial Development Zone (Pty) Ltd*²⁹¹ Froneman J held that while the PPPFA sets out one approach to adjudicating tenders under s 217 of the Constitution, especially in relation to the scoring of tenders, it is not the only approach that would comply with s 217. However, in that case Froneman J also confirmed that in terms of the instructions issued by the national treasury under s 76(4) of the PFMA to all public entities (thus including entities such as the first respondent in *Lambda*) '[t]he prescripts of the [PPPFA] . . . and its associated regulations should be adhered to'.²⁹² The difference between the direct application of s 217 and the PPPFA and the indirect application by reference in either the tender documents or treasury instructions (such as those under the PFMA) is that compliance with the preferential procurement requirements in the PPPFA in a case of direct application would be a matter of lawfulness, whereas in the case of indirect application such compliance will be a matter of general fairness in terms of the Promotion of Administrative Justice Act 3 of 2000. Thus, in the latter case a contracting authority may be able to depart from the strict adjudication requirements of the PPPFA, particularly the point system, if such departure is still fair.

The line between fairness and lawfulness may be quite difficult to patrol in this regard and it is thus a welcome development that the vast majority of organs of state (including the respondents in both *Steradian* and *Lambda*) will in future be directly subject to the PPPFA in terms of the new Preferential Procurement Regulations, 2011 as noted above.

3. Literature

Ferreira, C 'The Quest for Clarity: An Examination of the Law Governing Public Contracts' (2011) 128 *SALJ* 172

²⁹⁰ Para 11.

²⁹¹ 2009 JDR 0203 (ECG), noted in JQR Public Procurement 2009 (1) 2.1 & JQR Public Procurement 2009 (1) 2.2.

²⁹² At para 18.

Bolton, P & Quinot, G 'Social Policies in Procurement and the Government Procurement Agreement: a Perspective from South Africa' in S Arrowsmith & R Anderson (eds) *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (2011)

July to September 2011

JQR Public Procurement 2011 (3)

Geo Quinot²⁹³

1. Legislation

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

2. Cases

2.1 Coverage of public procurement rules

The coverage of public procurement rules, in particular the application of rules of administrative justice to procurement decisions, continues to plague the courts.²⁹⁴ In *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd*²⁹⁵ the court rejected an argument that the non-award of a tender to the respondent by the applicant did not amount to administrative action. The court accordingly held that the decision was subject to the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The court's finding in this regard is of interest in that it also rejected reliance by the applicant on the SCA judgment

²⁹³ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

²⁹⁴ In this regard see JQR Public Procurement 2011 (1) 2.1, JQR Public Procurement 2011 (2) 2.1.

²⁹⁵ 2011 (4) SA 642 (GSJ).

in *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry*²⁹⁶ and in the process interpreted this latter judgment narrowly.

In the present matter the applicant argued that its decision not to award a tender to the respondent did not amount to administrative action as defined under PAJA for a number of reasons. It argued that the applicant was incorporated as a company under the Companies Act 61 of 1973; that government owns 76% of its shares; that the impugned decision amounted to private commercial action and not the exercise of public power; that the applicant did not rely on any public source for its actions and that the decision did not impact adversely on any rights of the public.²⁹⁷ In rejecting this argument the court focused specifically on what it called the applicant's contention that it 'did not perform a governmental function' and that its action in this matter was thus not subject to PAJA.²⁹⁸ The court held that the question whether the applicant performed a governmental function was too narrow an approach.²⁹⁹ It further held that the SCA did not intend to lay this question down as the single definitive factor in deciding whether action, in a particular procurement decision, amounts to administrative action under PAJA.³⁰⁰ The court found that while performance of a governmental function is one factor, it cannot be the only one, in determining whether action is subject to PAJA. The court noted a range of other factors that support the view that the applicant's decision does amount to administrative action under PAJA. According to the court these included:

whether the body carrying out the function is publicly funded, publicly owned, performing functions that would otherwise be performed by a 'pure' governmental organ such as a department that is part of the executive, controls public assets, acquires liabilities that ultimately will have to be borne by the public, or acting in the public interest or is subject to the regulation by statute such as PFMA [Public Finance Management Act 1 of 1999] or the ACSA Act [Airports Company Act 44 of 1993].³⁰¹

The court highlighted two particular factors that in the present matter pointed towards the application of PAJA to the decision at hand. These were the facts that the applicant was subject to financial control under the PFMA and that the applicant was spending public funds.³⁰² In the court's view, the applicant's conduct, even though of a commercial nature, had to be subjected to PAJA in order to achieve proper public oversight over its finances. The implications of this judgment are to confirm the widely accepted view in South Africa that public procurement decisions are subject to PAJA in the broadest possible terms and to significantly reduce the potentially limiting effect that the *Calibre Clinical Consultants* judgment of the SCA may have had on this view. On the basis of the *ISO Leisure OR Tambo* judgment,

²⁹⁶ 2010 (5) SA 457 (SCA).

²⁹⁷ Paras 46.1–46.4.

²⁹⁸ Paras 46.3, 55.

²⁹⁹ Paras 55–56.

³⁰⁰ Paras 57–58.

³⁰¹ Para 59.

³⁰² Paras 60–61.

procurement decisions of all entities covered by the PFMA, which captures the vast bulk of public entities expending public funds, again covering practically all public entities, will be subject to PAJA.

2.2 Arbitration in procurement disputes

The judgment in *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd*³⁰³ also raised a difficult question regarding arbitration in public procurement disputes. In this case the applicant applied for a stay of judicial review proceedings instituted by the respondent, a disappointed bidder, against a tender award decision taken by the applicant. The basis for the stay application was an agreement between the applicant and all bidders, including the respondent, to submit all disputes in the public procurement process to arbitration. In the present matter the respondent brought a review application, but subsequently consented to submit its dispute to arbitration as dictated by the conditions of tender. The arbiter, however, questioned his jurisdiction in light of s 7(4) of PAJA, which states that ‘all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction’. The respondent consequently proceeded with its review application and the applicant brought the current application for a stay. The court held that s 7(4) of PAJA precludes any forum other than the High Court or Constitutional Court³⁰⁴ to adjudicate claims under PAJA.³⁰⁵ In the court’s view parties should not be allowed to ‘privatise constitutional disputes’ by submitting such disputes to arbitration and that such a practice would result in an impermissible ‘parallel constitutional jurisprudence’. This judgment may have a significant impact on the use of arbitration clauses in procurement disputes. A general interpretation of the judgment would suggest that arbitration would not be available at all in relation to disputes involving the action of the public entity in public procurement disputes, since these actions will always amount to administrative action, which are subject to review under PAJA. However, the judgment should probably be interpreted more narrowly. It is clear that in the present matter it was exactly (and expressly) the initial judicial review application brought under PAJA that the parties sought to submit to arbitration. It would, however, be possible to frame a dispute in a public procurement context in a manner that would not amount to a mere duplication of a judicial review application under PAJA and in which case the current judgment would not be a bar to submitting such dispute to arbitration. For example, it should be perfectly possible to frame a dispute in contractual terms, even where the dispute relates to the public entity’s action, which would not be barred from arbitration under this judgment.

³⁰³ 2011 (4) SA 642 (GSJ).

³⁰⁴ The specific reference to only a High Court or the Constitutional Court seems to be premised on the original wording of s 7(4) of PAJA, which provided only for review in these courts. However, the wording of s 7(4) has been amended by the Judicial Matters Second Amendment Act 55 of 2003 to now refer to ‘a High Court or another court having jurisdiction’.

³⁰⁵ Para 68.

3. Literature

P Bolton 'South Africa' in H Prieß (ed) *Getting the Deal Through: Public Procurement 2011* (Global Competition Review, 2011) 201–207

G Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) 20 *Public Procurement Law Review* 193–206

October to December 2011

JQR Public Procurement 2011 (4)

Geo Quinot³⁰⁶

1. Legislation

1.1 Implementation of the Preferential Procurement Regulations, 2011

The long-awaited new Preferential Procurement Regulations, 2011, issued under the Preferential Procurement Policy Framework Act³⁰⁷ ('PPPFA'), came into operation on 7 December 2011.³⁰⁸ To assist with implementation, the National Treasury issued a number of circulars, new standard bidding documents³⁰⁹ and an Implementation Guide.³¹⁰ The circulars indicated that the sectors designated under Regulation 9 in which preference is to be given to local content and production in procurement are: textile, clothing, leather and footwear; power pylons; rolling stocks; canned/processed vegetables;

³⁰⁶ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University.

³⁰⁷ Act 5 of 2000.

³⁰⁸ For a discussion of these regulations see JQR Public Procurement 2011 (2) 1.2 and JQR Public Procurement 2009 (3) 1.1.

³⁰⁹ Available online at <http://www.treasury.gov.za/divisions/sf/sc/Circulars/default.aspx>.

³¹⁰ Available online at <http://www.treasury.gov.za/divisions/sf/sc/Circulars/GUIDELINES%20PPPFA%20REGS%20-%201%20December%202011.pdf>.

and busses (bus body). However, implementation of such local preference is postponed until such time as Treasury along with the Department of Trade and Industry have issued guidelines on 'minimum thresholds', the criteria for awarding bids in these sectors and the methods to be used to determine local content and production.

The Minister of Finance also issued a government notice³¹¹ exempting a number of institutions from the bulk of the new regulations until 7 December 2012, thereby effectively postponing implementation to these entities for a year. The entities thus exempted are those listed in Schedules 2 ('Major Public Entities'), 3B ('National Government Business Enterprises') and 3D ('Provincial Government Business Enterprises') of the Public Finance Management Act.³¹²

2. Cases

2.1 Public lease agreements and the Treasury Regulations

In *TEB Properties CC v MEC, Department of Health and Social Development, North West*³¹³ the SCA set out the relationship between Treasury Regulations 13.2 and 16A³¹⁴ as they apply to public lease agreements. One of the arguments advanced by the appellant in this matter was that regulation 13.2 allows organs of state to enter into certain types of leases, basically leases that are not 'finance leases' as defined in the regulation,³¹⁵ without adherence to the procurement rules set out in regulation 16A. This argument was based in particular on regulation 13.2.4 that states:

The accounting officer of an institution may, for the purposes of conducting the institution's business, enter into lease transactions without any limitations provided that such transactions are limited to operating lease transactions.

It was argued that 'without any limitations' means that state organs, acting under these regulations, are not bound by procurement rules under regulation 16A. The court rejected this argument, holding that regulation 13.2 only intends to distinguish between different forms of lease and to place restrictions on

³¹¹ Notice R 1027 of 2011 in GG 34832 of 7 December 2011.

³¹² Act 1 of 1999.

³¹³ Unreported, referred to as [2011] ZASCA 243, 1 December 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/243.html>.

³¹⁴ Treasury Regulations under the Public Finance Management Act 1 of 1999 (Notice R225 of 2005 in GG 27388 of 15 March 2005).

³¹⁵ Reg 13.2 deals with 'Lease Transactions' and reg 13.2.2 states: 'A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred.'

finance leases, but without detracting from other statutory requirements, such as those found in regulation 16A.³¹⁶ It thus follows that both regulations 13.2 and 16A apply to lease transactions.

2.2 Strict compliance with tender conditions

In *VDZ Construction (Pty) Ltd v Makana Municipality*³¹⁷ the court held that the respondent should have condoned the applicant's non-compliance with the tender conditions and should not have excluded the applicant's tender as non-responsive. One of the tender conditions in this matter was that bidders must submit *original* Municipal Billing Clearance Certificates. The purpose was to ensure that the respondent only contracts with suppliers whose municipal accounts were in order. The applicant inadvertently submitted a clearance certificate with its bid which consisted of an original first page, but a copy of the second page. The respondent consequently excluded the applicant's tender as non-responsive. The court held that this was a formal mistake and one that the respondent should either have condoned or allowed the applicant to correct, as such course of action would have served the public interest, in particular by increasing competition for the public contract.³¹⁸ The court focused specifically on the purpose underlying the tender condition at stake and held that the mistake in the applicant's bid did not impact on that purpose at all, ie the difference between submitting an original certificate and a copy did not detract from the respondent's aim of only contracting with compliant suppliers.

In contrast the court held in *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*³¹⁹ that a deviation from the tender conditions in the way that price is to be calculated could not be allowed. In this matter the tender conditions called for adjustable price bids. The winning bidder, however, tendered on the basis that a '[f]ixed firm price is offered. No escalation applicable.'³²⁰ The court held that this was a substantially different bid from what the tender conditions called for. The bid was thus non-responsive. The court also rejected an argument based on the express power granted to the contracting authority in the tender conditions granting 'discretion on eThekweni to determine whether deviations were material'.³²¹ The court held that even though materiality of a deviation on these conditions depended on the opinion of the respondent, the respondent had to exercise such discretion rationally and without bias.³²² In the present instance the court found that the deviation regarding the calculation of price was 'manifestly material' and that the

³¹⁶ Paras 23–25.

³¹⁷ Unreported, referred to as [2011] ZAECHC 64, 3 November 2011; available online at <http://www.saflii.org/za/cases/ZAECHC/2011/64.html>.

³¹⁸ Para 17.

³¹⁹ Unreported, referred to as [2011] ZAKZPHC 45, 24 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/45.html>.

³²⁰ At para 77.

³²¹ At para 76.

³²² At para 84.

respondent thus did not exercise its discretion rationally or without bias, with the result that the deviation could not be condoned.

2.3 Tenders by joint ventures

In *Slipknot Investments 777 (Pty) Ltd v Eastern Cape Liquor Board*³²³ the court confirmed the importance of setting out the relationship between the parties to a joint venture in a bid by such an entity.³²⁴ In this matter a joint venture submitted a bid, claiming *inter alia* preference points based on the BEE status of one of the members of the joint venture. However, the bid did not specify the exact relationship between the members of the joint venture or how the work and entitlements arising from the contract would be shared between them. The court held that without such information the contracting authority could not have properly considered the bid and could not award the contract to the joint venture. The court held this to be a fatal flaw in the award of the tender and set it aside.

2.4 Changing award criteria

In *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*³²⁵ the court set aside a tender award because the contracting authority changed the award criteria after calling for bids without informing tenderers.

In this matter the respondent called for tenders and indicated that apart from preference points, bids will be adjudicated on the basis of quality (20 points), relevant experience (10 points) and price (70 points).³²⁶ At the time when the bid invitation was issued this approach was in line with the Preferential Procurement Regulations, 2001. However, subsequent to the call for tenders, but before adjudication and award, these regulations were held unlawful to the extent that they allowed anything apart from price to count 90 points in the award of tenders under the PPPFA in *Sizabonke Civics CC t/a Pilcon Projects v Zululand District Municipality*.³²⁷ Undaunted by this judgment, the respondent continued with the tender process, but simply adjudicated the bids by using quality as a qualification criterion and

³²³ Unreported, referred to as [2011] ZAECELLC 17, 8 December 2011; available online at <http://www.saflii.org/za/cases/ZAECELLC/2011/17.html>.

³²⁴ Also see *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA).

³²⁵ Unreported, referred to as [2011] ZAKZPHC 45, 24 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/45.html>.

³²⁶ At para 7.

³²⁷ 2011 (4) SA 406 (KZP). See JQR Public Procurement 2010 (2) 2.1.

awarding 90 points for price in adjudication. Upon review, the court held that this approach was illegal in that the call for tenders itself violated the PPPFA and no subsequent action by the respondent could cure such illegality, but also because the respondent changed the bid criteria mid-way through the tender process without informing the tenderers. The court held this action to violate the constitutional procurement principles of fairness, transparency and competitiveness.³²⁸

2.5 Invalidity of public contracts not concluded in terms of the relevant procurement laws and setting tender awards aside upon review

In *TEB Properties CC v MEC, Department of Health and Social Development, North West*³²⁹ the SCA confirmed that neither the Turquand rule nor estoppel can save a tender contract that was concluded without compliance with the statutory prescripts applicable to that contract and in *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*³³⁰ the court held that as a general rule such irregular tender awards must be set aside upon review.

In the *TEB Properties* matter the appellant concluded a contract of lease with the respondent following direct negotiations between the parties and without a public call for tenders. Before the contract could be implemented the respondent gave the appellant notice of its termination of the lease. The respondent relied upon non-compliance with applicable statutory rules as the basis for termination. The appellant consequently approached the court to enforce the contract and the respondent, in a counter-application, sought a declaration that the contract was invalid. The court held that the contract was concluded without compliance with the applicable statutory framework, in particular the North West State Tender Board Act 3 of 1994 that mandated the provincial tender board to procure on behalf of the province, but also the requirement in s 217(1) of the Constitution and a number of other statutory provisions that require open bidding for such contracts. Since the contract was not concluded by the provincial tender board, nor put out for open bidding, it had to be declared invalid. The court also rejected arguments based on both estoppel and the Turquand rule. It held that neither of these rules can sustain an action that contravenes mandatory statutory provisions such as in this case.

³²⁸ At para 74.

³²⁹ Unreported, referred to as [2011] ZASCA 243, 1 December 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/243.html>.

³³⁰ Unreported, referred to as [2011] ZAKZPHC 45, 24 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/45.html>.

In a hard-hitting judgment, the court in *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*³³¹ assessed the remedial powers of a court when a public tender award is challenged upon review. The court held that there is no discretion in declaring the award invalid if it is found to be illegal.³³² The court held this to be an inevitable result of the rule of law and the principle of legality. The court continued to distinguish from the mandatory declaration of invalidity the remedial powers that a review court enjoys in such a case. It is in relation to the remedy granted following the declaration of invalidity that a review court enjoys a discretion. As the court noted: 'Whether the declaration of invalidity results in the setting aside, correction or validation of the invalid act depends on the circumstances.'³³³ However, the court also stated that the wide and discretionary remedial powers of the court (especially under s 8 of the Promotion of Administrative Justice Act)³³⁴ is 'strictly proscribe[d]' by the 'peremptory nature of procurement law'. After noting in detail this peremptory nature of procurement law in general as well as in this particular case,³³⁵ the court held that as a general rule tender awards made in breach of these rules must be set aside.

An interesting additional order that the court made was to refer the judgment to the respondent's council, by ordering the applicants to serve a copy on the mayor and ordering the mayor to table the judgment before the council. The court further invited the council to conduct an investigation into the particular matter and to take steps to recover wasted expenditure flowing from the illegal tender process set aside by the court from any responsible officials.

2.6 Choice of legal route to challenge contractual action

The question of whether commercial conduct of organs of state should be subjected to public-law scrutiny remains a troubling one in South African law, as is evident from two judgments involving the eThekweni Municipality.

In *Kobitec (Pty) Ltd v eThekweni Municipality*³³⁶ the applicant challenged 'an arrangement' between the respondent and a private entity in terms of which the latter developed and implemented software for

³³¹ Unreported, referred to as [2011] ZAKZPHC 45, 24 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/45.html>.

³³² At para 14.

³³³ At para 14.

³³⁴ Act 3 of 2000.

³³⁵ At paras 26–33.

³³⁶ Unreported, referred to as [2011] ZAKZPHC 44, 18 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/44.html>.

the use of both parties to manage the issuing of rates clearance certificates by the respondent. This 'arrangement' was concluded orally and never put in writing. Despite recognising the respondent's statutory powers to enter into contracts, the court concluded that the 'existence of the oral agreement between the municipality and Law [the private entity] since 2003 can hardly be labelled an administrative action capable of being reviewed and set aside'.³³⁷ The court did not provide any justification for this decision. The court also rejected an argument that the respondent's refusal to enter into a similar arrangement with the applicant was reviewable in administrative law. In this regard the judge stated: 'In my view this decision was nothing more than a decision not to contract with *Korbitec*'.³³⁸ This statement is at odds with the SCA's remarks in *Transnet Ltd v The MV Snow Crystal*³³⁹ where it held:

An organ of state which is empowered by statute to contract is obliged to exercise its contractual rights with due regard to public duties of fairness. It could not, for example, refuse without good reason to contract with a particular person. Its decision in such an event would constitute administrative action and would be reviewable.³⁴⁰

The present matter, where an organ of state ostensibly refused to enter into a contract with a private party while at the same time engaging a competitor of that party for the same services in an informal, oral arrangement, seems a perfect candidate for the application of these remarks by the SCA.

In contrast, the court in *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality*³⁴¹ held in the strongest possible terms that contractual actions of organs of state are subject to public-law scrutiny. In this regard the court stated that

when exercising its contractual rights in a tender process, an authority exercises public power; it does not exercise contractual powers only and jettison its administrative justice rights and public duties under the Constitution and legislation. As the superior party to a contract an administrative authority dictates the terms and conditions of the tender and the contract. In a municipality as large as eThekweni its superiority and power is all the more formidable. Consequently, its positive duty to take action to set aside a legally invalid act and not simply ignore it is compelling.³⁴²

And later in the judgment³⁴³ the court continued with reference to the judgment in *Logbro Properties CC v Bedderson NO*.³⁴⁴

³³⁷ At para 22.

³³⁸ At para 24.

³³⁹ 2008 (4) SA 111 (SCA).

³⁴⁰ At para 21 (footnotes omitted). See JQR Public Procurement 2008 (1) 2.3.

³⁴¹ Unreported, referred to as [2011] ZAKZPHC 45, 24 October 2011; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2011/45.html>.

³⁴² At para 23 (footnotes omitted).

³⁴³ At para 46.

³⁴⁴ 2003 (2) SA 460 (SCA).

If eThekweni's officials had reflected on this ratio, they would have reminded themselves that it was a public authority and as such it could not conduct its affairs as a private enterprise. It is accountable to the public.

2.7 Disqualifying tenderers from future public contracts

In *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd*³⁴⁵ the court confirmed that decisions of organs of state to debar tenderers from future public contracts amount to administrative action and are reviewable as soon as they are taken.

In this matter the State Tender Board ('the STB') raised concerns of fronting and misrepresentation with Sneller Digital regarding a contract that was awarded to the latter, but the term of which had already expired. In essence the STB expressed concern that in its view the directors of Sneller Digital as indicated in its bid documents were only appointed after the close of tenders. Sneller Digital replied by indicating that the directors were indeed appointed prior to submission of the tender and offered an auditor's certificate to that effect. Without calling for the certificate, the STB consequently took a decision to debar Sneller Digital as well as all its directors from contracting with the state for a period of ten years. The STB also debarred Digital Voice Processing, which was a completely separate entity, the only link to Sneller Digital being that the two companies had two directors in common. However, while Sneller Digital was informed of its debarment, no notice was given to Digital Voice Processing. When Sneller Digital subsequently launched review proceedings and obtained the record under rule 53 of the High Court Rules, it was discovered that Digital Voice Processing had also been debarred and it thus also brought review proceedings. The STB's first argument was that since Digital Voice Processing had not yet been informed of its debarment, that decision was not ripe for review. The SCA rejected this argument, holding that since the decision to debar Digital Voice Processing itself clearly had a direct and adverse impact on Digital Voice Processing as soon as it was taken, that decision was ripe for review despite the absence of notice to Digital Voice. The STB's second argument was that the debarment of Sneller Digital was not subject to review, but amounted to private contractual action, since it was based on the terms of the tender contract. The SCA also rejected this argument, primarily because the contract had already come to an end when the debarment decision was taken. Also, since neither Digital Voice Processing nor the directors involved were parties to the tender contract, the contract could hardly be said to be the source of the power to debar. The SCA held that the only source for that decision could be the regulations made under the State Tender Board Act.³⁴⁶ The court consequently had no difficulty holding that the decision to debar amounted to administrative action. The court found the decision reviewable

³⁴⁵ Unreported, referred to as [2011] ZASCA 202, 24 November 2011; available online at <http://www.saflii.org/za/cases/ZASCA/2011/202.html>.

³⁴⁶ Act 86 of 1968.

and set it aside on the basis of an error of fact and irrationality flowing from the disconnect between the information before the administrator, viz that the directors were appointed prior to submission of the tender, and the eventual decision.

Noteworthy is the court's stringent criticism of the STB, both in its actions under review and its conduct in the litigation. Referring to the evidently false statements the STB made in court and the 'spurious' grounds upon which it not only resisted the review application, but also came upon appeal, the court stated:

All of this speaks of an organ of state that has conducted itself with contempt for the rights of DVP, Sneller Digital and its directors and with disdain for the constitutional values of accountability, responsiveness and openness.³⁴⁷

This indictment reflects the sorry state of public procurement regulation in South Africa and the general failure to attain the goals of public procurement stated in s 217(1) of the Constitution, viz. procurement through a system that is 'fair, equitable, transparent, competitive and cost-effective'.

January to March 2012

JQR Public Procurement 2012 (1)

Geo Quinot³⁴⁸

1. Legislation

1.1 Implementation of the Preferential Procurement Regulations, 2011: local preferences

Following the implementation of the new Preferential Procurement Regulations, 2011 in December 2011, the Minister of Trade and Industry has designated the following sectors for minimum local content as indicated in public procurement:³⁴⁹

³⁴⁷ Para 43.

³⁴⁸ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

³⁴⁹ Treasury Circular, 20 January 2012.

Sector	Minimum threshold for local content
Bus (bus body)	80%
textile, clothing, leather and footwear	100%
power pylons	100%
canned/processed vegetables	80%
rolling stock	65%

This means that in respect of bids for the above goods, the tender conditions must stipulate that only goods meeting the indicated minimum threshold for local content, as determined under Regulation 9 and the Implementation Guide,³⁵⁰ will be considered.

2. Cases

2.1 Coverage of public procurement rules

In *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd*³⁵¹ the court resolved some of the ostensible uncertainty about the coverage of public procurement rules and in particular s 217 of the Constitution. There has been some academic debate about whether s 217 of the Constitution applies beyond the strict category ordinarily understood to constitute procurement, namely the acquisition of goods, services and construction, to also include disposals and/or transactions involving immovable property.³⁵² In this judgment the High Court held that the disposal of capital assets is not covered by either s 217 of the Constitution or the Preferential Procurement Policy Framework Act 5 of 2000.³⁵³ According to the court such transactions at local government level are governed 'solely' by s 14 of the Local Government: Municipal Finance Management Act 56 of 2003.

2.2 Arbitration in procurement disputes

³⁵⁰ Available online at

<http://www.treasury.gov.za/divisions/sf/sc/Circulars/GUIDELINES%20PPPPFA%20REGS%20-%201%20December%202011.pdf>.

³⁵¹ Unreported, referred to as [2012] ZAWCHC 25, 30 March 2012, available online at <http://www.saflii.org/za/cases/ZAWCHC/2012/25.html>.

³⁵² See JQR Public Procurement 2008 (1) 2.3.

³⁵³ Para 36.

In *ZTE Mzansi (Pty) Ltd v Telkom SA Ltd*³⁵⁴ the court enforced an arbitration agreement between the parties in relation to a dispute arising from a public tender process. In this matter the respondent, which considered itself to be an organ of state in this instance,³⁵⁵ issued a request for proposals ('RFP') for services to be rendered to it. The applicant submitted a bid, but was disqualified. It subsequently sought to challenge the disqualification in terms of an arbitration clause contained in the RFP conditions, which read as follows:

1.2.2 Should any dispute arise as a result of this RFP and/or the subsequent contract, which cannot be settled to the mutual satisfaction of the Bidders and Telkom, it shall be dealt with in terms of clause 43 of the Standard Terms and Conditions (volume 1 part 4).

Clause 43 of the Standard Terms of Conditions in turn read (in relevant part) as follows:

43. Dispute resolution

43.1 If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of arbitration. The reference to negotiation and mediation is a pre-condition to the Parties having the dispute resolved by arbitration.

43.2 A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this clause.

The court held that the applicant was entitled to rely on these provisions in insisting that its challenge to the correctness of its disqualification be submitted to arbitration. In holding that such dispute resolution process can be lawfully implemented in this case, the judge stated that 'it is equally arguable that to close the door to a disgruntled bidder who may have a valid complaint, may also offend against the requirements of section 217 of the Constitution'.³⁵⁶ The court located the source of the right to go to arbitration in the conditions of the RFP holding that there was thus a contractual relationship between the respondent and all the bidders pertaining to at least arbitration in the RFP process, apart from the eventual tender contract to be awarded. The court thus endorsed a two-contract approach to the analysis of the tender process, despite the following term in the RFP conditions:

³⁵⁴ Unreported, referred to as [2012] ZAGPPHC 50, 30 March 2012, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/50.html>.

³⁵⁵ Para 40.

³⁵⁶ Para 40.

The Bidders accepts that this document and its associated documents do not constitute any contractual relationship between Telkom and the Bidders and the acceptance of any RFP/s by Telkom will not constitute any contractual relationship between Telkom and any Bidders. The acceptance of any RFP/s will only indicate without any obligations on the part of either Telkom and/or a Bidders, the willingness of such Parties to enter into negotiations, which may or may not result in a contract.

The court also rejected the argument that the applicant should rather have approached a court for review instead of insisting on arbitration. While the court noted that '[t]here may well be something to say for this submission', it nevertheless held that

it was the intention of the authors of 1.2.2 [of the RFP conditions] to create a cost effective and speedy dispute resolution mechanism presumably not to unduly delay the whole tender process. Moreover, 1.2.2 is couched in mandatory language where it provides that 'any dispute' arising as a result of the RFP shall be dealt with in terms of clause 43.³⁵⁷

In this approach the court thus differed from the judgment in *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd*³⁵⁸ where it was held that a dispute that essentially amounted to an administrative law review of a tender decision could not be submitted to arbitration.

3. Literature

Couzens, M 'Procurement adjudication and the rights of children: *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E)' 2012 (15)1 *Potchefstroom Electronic Law Journal* 391

³⁵⁷ Para 38.

³⁵⁸ 2011 (4) SA 642 (GSJ), noted in JQR Public Procurement 2011 (3) 2.2.

April to June 2012

JQR Public Procurement 2012 (2)

Geo Quinot³⁵⁹

1. Legislation

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

2. Cases

2.1 Deviation from procurement rules

In *Department of Economic Development and Environmental Affairs v JGL Forensic Services Ltd*³⁶⁰ the court confirmed the three basic requirements for departing from procurement rules on calling for competitive bids in terms of the Treasury Regulations under the Public Finance Management Act 1 of 1999. These are:

1. There must be valid and rational reasons for the decision to deviate from the usual tender procedures;
2. The deviation must be approved by the accounting officer; and
3. The reason should be recorded and reported to the relevant treasury.³⁶¹

³⁵⁹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

³⁶⁰ Unreported, referred to as [2012] ZAECBHC 3 (27 March 2012), available online at <http://www.saflii.org/za/cases/ZAECBHC/2012/3.html>.

³⁶¹ Para 10, following the SCA's judgment in *Chief Executive Officer, African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA).

The court also confirmed that only requirements 1 and 2 of these are peremptory, with requirement 3 only an administrative matter, non-compliance with which would not result in the invalidity of the relevant decision to deviate from the rules.

In this matter the Department approached the court for an order reviewing and setting aside its own decision to award a contract to the respondent without calling for competitive bids. The Department's case was that it did not comply with the first or second of the stated requirements since there were no reasons for departure from the procurement rules. The court refused relief holding that even where an organ of state is the applicant in an application for review the normal approach to the burden of proof would be applicable. In terms of this approach there is a presumption in favour of the validity of the administrative action (following the maxim *omnia praesumuntur rite esse acta*), which the applicant must trump.³⁶² In the present matter the applicant put nothing before the court that indicated an absence of reasons, that is apart from its bland statements that no reasons existed, which on their own were insufficient.

2.2 Offering more than what was called for

In *DFS Fleming SA (Pty) Ltd v Airports Company South Africa Ltd*³⁶³ the court set aside the award of a tender, because the contracting authority took into account payment offers from the successful tenderer in addition to what was called for under the tender. In this matter the respondent called for tenders for the operation of 'Core Duty and VAT-free Stores' at international airports in South Africa. In essence the tender call was for 'proposals from prospective retailers to lease retail space'³⁶⁴ from the respondent for the purpose of operating abovementioned stores. In recommending the second respondent as the successful tenderer, the Bid Evaluation Committee indicated: 'Furthermore is [sic] must be noted that [the second respondent] offered to pay ACSA a further amount of 12,5% of their after tax profit as additional rental'.³⁶⁵ The court held that in taking into account this 'sweetener', which went beyond the tender specifications, in awarding the tender the contracting authority acted unlawfully in 'taking irrelevant considerations into account' (Promotion of Administrative Justice Act 3 of 2000 s 6(2)(e)(iii)) and in a procedurally unfair manner by not revealing this offer to the other bidders.³⁶⁶

2.3 Pricing benchmarks

³⁶² Para 13.

³⁶³ Unreported, referred to as [2012] ZAGPPHC 66 (17 May 2012), available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/66.html>.

³⁶⁴ Para 2.

³⁶⁵ Para 11.

³⁶⁶ Para 18.

In *Vuna Health Care Logistics (Mpumalanga) (Pty) Ltd v MEC of Health and Social Development, Mpumalanga Provincial Government*³⁶⁷ the court held that if a contracting authority intends using a pricing bench-mark to measure whether tender prices are realistic or market-related it must communicate such bench-mark to tenderers. If the authority only decides to use such a bench-mark after calling for or receiving tenders, eg during adjudication of tenders, it must also allow tenderers to make representations on that bench-mark.

3. Literature

Scholtz, W *The Pocket Guide to Winning Government and Municipal Tenders* (2012) LexisNexis

³⁶⁷ Unreported, referred to as [2012] ZAGPPHC 126 (22 June 2012), available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/126.html>.

July to September 2012

JQR Public Procurement 2012 (3)

Geo Quinot³⁶⁸

1. Legislation

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

2. Cases

2.1 Fairness of functionality assessment

In two recent judgments the courts emphasised the importance of indicating clearly up-front in the bid documents what the exact criteria would be for evaluating functionality. A failure to do so may result in an invalid tender award.

In *Toll Collect Consortium v South African National Road Agency Ltd*³⁶⁹ the court set aside the award of a tender because of the contracting authority's failure to reveal up-front the detail of the criteria to be used to assess quality/functionality of bids. The tender specifications indicated that a certain threshold scoring for quality/functionality will be required in adjudicating tenders, and identified, with the respective number of points, the three principal elements on which quality will be determined. However, the bid specifications did not indicate that the three main elements were further divided into sub-categories, each with its own weight. The court held that the failure to reveal these sub-categories and their respective weights rendered the adjudication unfair as tenderers did not know up-front what the standard was against which their bids would be evaluated.

³⁶⁸ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

³⁶⁹ Unreported, referred to as [2012] ZAKZDHC 43 (27 July 2012); available online at <http://www.saflii.org/za/cases/ZAKZDHC/2012/43.html>.

In *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town*³⁷⁰ the court found as reviewable a failure to clearly indicate that each and every item on a table to be completed as part of a bid had to be filled in even where the relevant information could be deduced from other items completed.³⁷¹ In the court's view it would be unfair and not transparent to exclude a bid from consideration for failure to fill in all items in the absence of such clear indication that every item had to be completed.

2.2 Setting tender awards aside upon review

In what is probably the highest value public tender dispute to be litigated in South Africa to date, involving a tender worth approximately R10 billion, the court found in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*³⁷² that while the award of the tender was invalid, it should nevertheless not be set aside.

The tender involved payment services for distribution of social grant payments on behalf of the respondent in all nine provinces. Previously social grant payments were effected by a number of service providers in the different provinces, the applicant providing such services in (parts of) four provinces. However, the current tender for all nine provinces was awarded to a competing bidder, CPS, that had been providing payment services in (parts of) five provinces. In the review application, the court found that the award of the tender to CPS fell foul of all three basic requirements of administrative justice listed in s 33 of the Constitution, ie the award was procedurally unfair,³⁷³ unlawful³⁷⁴ and unreasonable on the basis of rationality.³⁷⁵ As a consequence the tender award also did not comply with s 217 of the Constitution.³⁷⁶ However, despite this overwhelming indication of the illegality of the award, the court refused to set it aside on public interest grounds. This part of the judgment³⁷⁷ is of particular interest. The court commendably paid close attention to the potential public impact of an order setting the award aside. In particular the court noted the potential impact on children if grant payments are interrupted, because of an order setting the tender award aside.³⁷⁸ This is admirable, especially in contrast to other recent public procurement judgments where the courts paid very little attention to such impact on vulnerable members of society such as the poor and children.³⁷⁹ The court's refusal to

³⁷⁰ Unreported, referred to as [2012] ZAWCHC 162 (6 July 2012); available online at <http://www.saflii.org/za/cases/ZAWCHC/2012/162.html>.

³⁷¹ Para 25.

³⁷² Unreported, referred to as [2012] ZAGPPHC 185 (28 August 2012); available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/185.html>.

³⁷³ Para 58.

³⁷⁴ Paras 64–64.

³⁷⁵ Para 67.

³⁷⁶ Para 58.

³⁷⁷ Paras 69–78.

³⁷⁸ Para 73.

³⁷⁹ Cf *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape* 2011 JOL 26927 (E) and the comment on that judgment: Couzens, M 'Procurement adjudication and the rights of children: *Freedom*

set the tender award aside in the present matter was essentially based on its finding that it was not convinced that payment of grants would continue uninterrupted if the award was set aside and some interim arrangement put in place while the tender is restarted. On this basis the court implicitly found that the public interest in continued service delivery outweighed the applicant's rights to legality and a fair tender process under ss 33 and 217 of the Constitution.

While the court's sensitivity to the public interest in this matter cannot be faulted, there is some unease in the way that legality increasingly yields to considerations of 'practicality and certainty'³⁸⁰ in disputes of this nature. What is particularly worrying in this matter is the court's formulation of the question in this respect. It stated that 'practicality and certainty . . . does not require the setting aside of the agreement that SASSA has entered into with CPS'.³⁸¹ One would rather have thought that the constitutional principle of legality would require all unconstitutional and hence invalid administrative action, such as a tender award, to be set aside as a matter of course and only exceptionally should considerations of 'practicality and certainty' justify a departure from that ordinary course. The appropriate formulation should thus rather be whether considerations of 'practicality and certainty', or other public interest considerations, justify that the agreement NOT be set aside. While this may seem like a trivial issue of formulation it may hold significant implications for the burden of proof and eventually goes to the fundamental constitutional basis of decisions of this nature.

In the final analysis the judgment illustrates our continuing struggle to break free of the constraining all-or-nothing perspective on remedies in public procurement disputes.³⁸² This traditional view captures us in the limiting approach of either setting the award aside or letting it stand, with nothing in between. The broad constitutional remedies discretion certainly allows for much more freedom in crafting 'just and equitable' orders. It is hard to see how the order in this matter can be described as truly 'just and equitable' given the complete failure of administrative justice and fair public contracting, despite the commendable protection of the public interest. Our open-ended remedies regime must surely allow for a remedy in a matter such as this that manages a balance between the competing interests rather than a complete sacrifice of the one in favour of the other, as happened here. However, this judgment is certainly not the last word on this matter and leave to appeal has already been granted.

The question of the discretionary nature of the set-aside remedy also came up in *Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town*.³⁸³ In this matter the court also refused to set the tender award aside despite a finding of reviewable irregularities. Following an assessment, in astounding detail, of the merits of the applicant's bid, the court held that the likelihood of the applicant succeeding in winning the tender should the initial award be set aside and remitted to the contracting authority was too low to justify the setting aside of the award. The court held that the public interest dimension of

Stationery (Pty) Ltd v MEC for Education, Eastern Cape 2011 JOL 26927 (E)' 2012 (15)1 *Potchefstroom Electronic Law Journal* 391.

³⁸⁰ Para 78.

³⁸¹ Para 78.

³⁸² See G Quinot 'Towards effective judicial review of state commercial activity' 2009 *TSAR* 436.

³⁸³ Unreported, referred to as [2012] ZAWCHC 162 (6 July 2012); available online at <http://www.saflii.org/za/cases/ZAWCHC/2012/162.html>.

public procurement law supports an approach where this likelihood should be taken as a key factor in deciding whether to set a tender award aside.³⁸⁴ As in the *Allpay* judgment above, it is not altogether clear how the constitutional principle of legality figures into this approach. It seems that questions of pragmatism are given supreme importance in this context. Administrative justice thus obtains a purely instrumental value rather than an intrinsic one in this approach, where an applicant's right to administrative justice will only be effectively vindicated where some tangible benefit may follow, rather than for the intrinsic value of enforcing just administrative action and fair public contracting as a matter of the rule of law.

In *Loliwe* the court also made the puzzling statement that a

court is not able . . . to direct the fourth respondent [the winning bidder] to continue with the contract work pending the conclusion of a fresh tender process. The power in terms of s 8 of PAJA [Promotion of Administrative Justice Act 3 of 2000] to make any order that would be just and equitable in the circumstances does not extend to making contracts for the parties.

This statement is curious for a number of reasons. In the first place the court would of course not be making a contract for the parties should it order the incumbent contractor to continue performing under the current tender while new tenders are adjudicated. The court would simply be enforcing the status quo, ie the contract concluded by the parties themselves, for the time being. Secondly, this is exactly what the Supreme Court of Appeal did, to great effect, in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*.³⁸⁵ In that matter the SCA found the tender award reviewable, because of the unlawful exclusion of the applicant's bid, but also did not outright set the award aside. It rather ordered what can be called a conditional set-aside in terms of which the contracting authority was ordered to re-adjudicate the tenders, but while the current contract remained in place. The current contract would subsequently only be set aside if, upon re-adjudication by the contracting authority itself, it is found that the applicant's unlawfully excluded bid should have won the contract. However, if the contracting authority found upon re-adjudication that the applicant's bid would not have won, no set-aside would follow and the current contractor would continue. Apart from the fact that the *Millennium Waste* order achieves exactly what the court in *Loliwe* suggests cannot be done, the SCA's approach has the further advantage of leaving the assessment of the likelihood of success of the excluded tender to the mandated administrator rather than trying to do it itself, as the court in *Loliwe* seems to do. The latter approach may very well be an inappropriate encroachment of the province of the administration of the type O'Regan J warned against in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.³⁸⁶ Thirdly, there is nothing in either PAJA or the Constitution that suggests the limit on the courts' broad discretionary powers to grant 'any order that is just and

³⁸⁴ Para 41.

³⁸⁵ 2008 (2) SA 481 (SCA) paras 32, 35.

³⁸⁶ 2004 (4) SA 490 (CC) para 48.

equitable'³⁸⁷ in review proceedings to serve as basis for the court's statement quoted above. It is thus not clear what the legal authority or justification for the judge's statement is.

October to December 2012

JQR Public Procurement 2012 (4)

Geo Quinot³⁸⁸

1. Legislation

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

2. Cases

2.1 Cancellation of tenders

In *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality*³⁸⁹ the court considered the circumstances under which a contracting authority may cancel a tender process. In this matter the applicant was one of two bidders whose bids were considered acceptable and hence scored. When the rival bidder was declared as the preferred one, the applicant lodged an objection, which was upheld. However, when the bid adjudication committee subsequently recommended to the accounting officer that the bid be awarded to the applicant, the officer decided rather to cancel the bid process and re-advertise. The present matter was an application for the review of that decision. The respondent relied inter alia on the Preferential Procurement Regulations that allow an authority to cancel a tender prior to award if no acceptable bids are received (now contained in regulation 8(4)(c) of the Preferential Procurement Regulations 2011). The respondent argued that because of mistakes made in the drawing

³⁸⁷ Constitution s 172(1)(b); PAJA s 8(1).

³⁸⁸ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

³⁸⁹ 2012 JDR 2251 (KZP).

up of the bid specifications, which in its view resulted in the bid specifications being invalid, none of the bids submitted could be considered acceptable and hence it was justified in cancelling the tender. The court rejected this argument. While it seems that certain requirements for the formulation of bid specifications were indeed not followed, such as the requirements in the Municipal Supply Chain Management Regulations 27(1) and 27(2) that specifications be compiled by the bid specification committee and approved by the accounting officer, the court held that the applicant cannot be penalised for an internal failure by the contracting authority, while the latter clearly acted as if it had complied with all the requirements.³⁹⁰ The court held that there was no proof that the tender process was invalid from the outset. The court accordingly held that the decision to cancel the tender was vitiated by a material error of fact and had to be set aside. Since the applicant's tender was the only remaining one and was recommended by all the relevant bid committees, the court held that this was an exceptional case within the meaning of s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 that justified a substitution order. The court thus ordered that the contract be awarded to the applicant.

3. Literature

Quinot, G & Arrowsmith, S (eds) *Public Procurement Regulation in Africa* (2013) Cambridge University Press

January to March 2013 (1)

JQR Public Procurement 2013 (1)

Geo Quinot³⁹¹

1. Legislation

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

³⁹⁰ Para 28.2.

³⁹¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

2. Cases

2.1 Vagueness of adjudication criteria

In a particularly clear and articulate judgment the court in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*³⁹² set aside a tender award because of the vagueness of the adjudication criteria stipulated in the tender documents. In this case there were various different, at times contradictory, methods stated in the tender documents in terms of which the bids would be evaluated with no indication as to which of these methods would prevail in case of conflict. The court held that such a state of affairs would fall foul of the principles of fairness and transparency of procurement required in section 217(1) of the Constitution.³⁹³ The court reasoned that these two principles dictate that tenderers have certainty when preparing bids regarding the adjudication criteria that would be applied.³⁹⁴ In addition, the court held that transparency would also be compromised where the tender adjudicator does not know which criteria to apply.³⁹⁵ The court ruled that the inconsistencies in the tender documents resulted in the tender process falling foul of the rule against vagueness and subsequently the legality principle. This in turn resulted in the tender award being reviewable in terms of section 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

2.2 The role of functionality in tender adjudication and awarding tenders to non-highest scoring tenderers

The judgment in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*³⁹⁶ is an important development in setting out the role of functionality (or quality) in the adjudication of public tenders.

In this matter tenders were assessed in a two-stage manner following the Preferential Procurement Regulations 2011. In the first stage the functionality, or quality, of the bids was assessed and only those

³⁹² Unreported, referred to as [2013] ZAWCHC 3, 6 February 2013; available online at <http://www.saflii.org/za/cases/ZAWCHC/2013/3.html>.

³⁹³ Paras 70–74.

³⁹⁴ Para 72.

³⁹⁵ Para 73.

³⁹⁶ Unreported, referred to as [2013] ZAWCHC 3, 6 February 2013; available online at <http://www.saflii.org/za/cases/ZAWCHC/2013/3.html>.

that obtained a stated minimum threshold number of points for quality advanced to the next stage. Functionality thus constituted only a qualification criterion and not an adjudication criterion, ie it played a role only in allowing tenders in, but not in scoring the tenders *inter se*. In the second stage, price and preference points were calculated and added to constitute a final score for each bid, which resulted in a ranking of the bids. The tender was subsequently awarded to the highest scoring tenderer in line with s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'). It follows that the final decision on awarding the tender was made on the basis of price and preference points. However, the applicant, an unsuccessful tenderer, complained in a judicial review challenge that the significant difference between its functionality score in the first stage and that of the eventually successful tenderer had to be taken into account when the final decision was made. The applicant argued that functionality should in this manner be considered as an objective criterion that would justify the award of the tender to a bidder other than the highest scoring one in terms of s 2(1)(f) of the PPPFA.

The court agreed with this argument, thereby significantly changing the approach to tender adjudication under the PPPFA and Preferential Procurement Regulations, 2011. The court held that it is a constitutional imperative under s 217(1) and in particular in terms of the cost-effectiveness principle that functionality be taken into account in deciding on which bid should be awarded the contract.³⁹⁷ Functionality should, in the court's view, thus not be restricted to a qualification criterion. Within the context of the PPPFA, s 2(1)(f) would be the mechanism to take functionality into account *after* the scoring of the bids on price and preference as an objective criterion that may determine the award. The court considered it an obligation on the administrator to take into account the difference in functionality between competing bidders before awarding the contract. It thus contemplated a two-stage approach to adjudication in terms of s 2(1)(f) of the PPPFA. Firstly, the bidder with the highest score on price and preference must be identified and then secondly, other objective criteria, including functionality, must be taken into account to consider whether the highest scoring bidder or another bidder should be awarded the contract.

In the present matter the court held that since the administrator simply awarded the contract to the highest scoring bidder without taking into account the difference in functionality score between the bidders, the award had to be set aside as a failure to comply with mandatory procedures and conditions of the empowering provision (that is s 2(1)(f) of the PPPFA) in terms of s 6(2)(b) of PAJA and because of a failure to take relevant considerations into account in terms of s 6(2)(e)(iii) of PAJA.³⁹⁸

The net result of this judgment is a three-stage approach to public tender adjudication under the PPPFA and the Preferential Procurement Regulations, 2011. In the first stage, functionality will be assessed as a

³⁹⁷ Paras 109–110.

³⁹⁸ Para 114.

qualification criterion and only those bidders reaching a particular score on functionality will proceed to the second stage. At the second stage, price and preference points will be calculated and a ranking of qualifying bidders determined. Finally, in the third stage, other objective criteria, which must again include functionality, will be considered in deciding on the final award of the contract.

2.3 ADR in procurement disputes

In *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd*³⁹⁹ the SCA placed a significant damper on the use of ADR in procurement disputes.

In this case the respondent was an unsuccessful bidder under a request for proposals ('RFP') issued by Telkom, having being disqualified at an early stage of the adjudication process. The first respondent subsequently declared a dispute with Telkom, relying on the dispute resolution mechanism provided for in the RFP. That document stated:

Should any dispute arise as a result of this RFP and/or the subsequent contract, which cannot be settled to the mutual satisfaction of the Bidders and Telkom, it shall be dealt with in terms of clause 43 of the Standard Terms and Conditions.

Clause 43 of the Standard Terms and Conditions, which constituted the final contract to be concluded between Telkom and the successful bidder, stated in relevant parts:

43.1 If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of Arbitration ...

43.2 A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this clause.

In reliance on these provisions, the respondent requested Telkom to refrain from implementing the contract until the dispute had been resolved, which request Telkom refused. The respondent subsequently successfully obtained an interdict in the High Court restraining Telkom from proceeding until the dispute had been resolved in terms of the above clauses. The matter came to the SCA in appeal against the interdict order.

³⁹⁹ Unreported, referred to as [2013] ZASCA 14, 18 March 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/14.html>.

Surprisingly, the SCA held that the respondent could not rely on the above clauses to force Telkom into an ADR process to resolve the dispute. In essence the SCA interpreted the above clauses, and in particular the RFP provision, as only providing for a dispute resolution mechanism between Telkom and the eventually successful bidder following the conclusion of the contract. This outcome is difficult to accept and the court's reasoning is somewhat wanting in reaching it.

The court's reasoning rests on its statement that '[i]t is trite that the submission of a tender in response to an invitation to do so creates no contractual relationship between the parties'.⁴⁰⁰ This 'trite' principle was reinforced in the present matter by a statement to that effect in the RFP. The court subsequently interpreted the above quoted clauses against this background to mean that there can only ever be a contractual relationship between Telkom and the eventually successful bidder that can be the basis for ADR. In dealing with the phrase 'any dispute arise as a result of this RFP and/or the subsequent contract' in the RFP document quoted above, which seems to point to a different interpretation, the court held that such contrary interpretation would result in 'absurd' consequences and be 'most unbusinesslike'.⁴⁰¹ The court reasoned out the 'unfortunate term' 'and/or' in this phrase by stating that the definite article 'the' prior to 'contract' indicates that a contract is already in existence at the time that the dispute arises, which will only be the case after the award of the tender.⁴⁰²

The court's reasoning can be criticised on a number of grounds. Firstly, it is far from a 'trite' principle that no contractual relationship exists between an organ of state calling for bids and bidders. Our courts, including the SCA, have in the past endorsed the so-called two-contract approach to the construction of public procurement processes⁴⁰³ following the English judgment in *Blackpool and Fylde Aero Club v Blackpool Borough Council*.⁴⁰⁴ In terms of this approach there are two contracts at issue in a procurement process, one governing the adjudication of the bids and the second the final tender contract that may be concluded with the successful bidder. Terms in bid documents, such as those found in the present RFP, stating that no contractual relationship will come into existence simply by the submission of bids, can be interpreted in this two-contract approach as confirming that the bids are

⁴⁰⁰ Para 8.

⁴⁰¹ Para 9.

⁴⁰² Para 11.

⁴⁰³ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at paras 12, 51; *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 7.

⁴⁰⁴ [1990] 1 WLR 1195. It is of interest to note that in this case Bingham LJ noted that strict adherence to the offer and acceptance model of contract in the tender context, whereby there would be no contractual relationship between the parties during the tender adjudication process, would result in an 'unacceptable discrepancy between the law of contract and the confident expectations of commercial parties'. This stands in stark contrast to Nugent JA's remark in the present matter that the implication of a contract between the parties prior to the award of the tender would be 'most unbusinesslike'. This contrast illustrates the danger of basing findings on inherently subjective and vague notions such as 'expectations of commercial parties' and 'businesslike'. Cf *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency* (unreported, referred to as [2013] ZASCA 29, 27 March 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/29.html>) para 53.

offers to enter into the second contract, ie that the RFP itself should not be construed as an offer and the bids the acceptance. In this interpretation such clauses thus do not speak to the first contract, which governs the process of adjudication, but only the second.⁴⁰⁵ The second problem with the SCA's reasoning is that it does not take into account a number of words in the RFP clause quoted above. The court emphasises the definite article 'the' prior to 'contract' in support of its conclusion, but does not deal with the word 'subsequent' between 'the' and 'contract'. It is at least arguable that while the term 'the contract' may support the court's contention that the clause is aimed at the stage after tender award, the term actually used in the clause, 'the subsequent contract', carries a different meaning. The word 'subsequent' creates a particular timeframe relative to the foregoing 'this RFP', which, read with the conjunction 'and/or', supports a different interpretation than the one adopted by the SCA. Such alternative interpretation is further supported by the plural 'Bidders' later in the clause. On the SCA's interpretation it would not make sense to refer to more than one bidder in the clause, given that the clause only operates between Telkom and the successful bidder after award of the tender. As it is formulated, the clause much rather supports the interpretation put forward by the respondent, namely that it creates a mechanism for the resolution of disputes between Telkom and any of the bidders arising from the entire procurement process, running from the RFP to the concluded contract. Thirdly, the court's contention that the interpretation put forward by the respondent would render absurd results, because 'Telkom would be obliged to engage in resolving disputes with multiple bidders, ultimately by arbitration with varying awards, before it could safely award the tender', perhaps loses sight of the fact that the current process is a public procurement and that as an organ of state Telkom is indeed obliged to engage in dispute resolution with aggrieved bidders. The only difference between the respondent's interpretation of the RFP clause and Telkom's obligations as an organ of state in this context is the format of the dispute resolution mechanism. What the RFP attempts to create is a commercial dispute resolution mechanism as an alternative (or precursor) to public law forms of dispute resolution such as judicial review. However, there is nothing absurd in principle in postulating that Telkom has an obligation to engage in resolving disputes with aggrieved bidders. There can be no doubt that the respondent could have approached the High Court for the judicial review of its disqualification and interim relief pending such review, to the identical effect as the present matter. The important question that is thus raised by this judgment is whether commercial forms of dispute resolution, as opposed to judicial review, are somehow questionable as a way to address disputes in public procurement procedures. This question was, however, not dealt with in the SCA judgment. In this regard, the views of the High Court are to be preferred, where it held that the intention of the RFP was 'to create a cost effective and speedy dispute resolution mechanism presumably not to unduly delay the whole tender process'⁴⁰⁶ as opposed to judicial review as the primary mechanism to resolve disputes.

⁴⁰⁵ This is not to say that the two-contract approach is without difficulties. See G Quinot *State Commercial Activity: A Legal Framework* (2009) 163–168.

⁴⁰⁶ *ZTE Mzanzi (Pty) Ltd v Telkom SA Ltd* (unreported, referred to as [2012] ZAGPPHC 50, 30 March 2012, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/50.html>) para 38.

2.4 Internal administrative failures in a procurement process and composition of bid committees

In what is probably the highest value public procurement dispute to be adjudicated in our courts, the SCA upheld a contract awarded by the South African Social Security Agency ('SASSA') for the payment of social grants in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency*.⁴⁰⁷ In doing so the court confirmed that not every administrative slip will amount to a fatal irregularity and will be grounds for invalidating the contract. In this regard the court stated:

There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal.⁴⁰⁸

One of the grounds of review advanced by the applicants and rejected by the court is of particular interest. The applicants argued that the tender award was irregular, because the bid committees were improperly constituted relying on the well-known judgment in *Schierhout v Union Government (Minister of Justice)*.⁴⁰⁹ In the present matter the bid evaluation committee comprised four members, none of whom was a supply chain management practitioner, while SASSA's own procurement rules required such committee to consist of five members at least one of which had to be a supply chain management practitioner. The court held that this irregularity did not result in unlawfulness, since the requirement regarding the composition of the committee was contained in an internal circular of SASSA, which could not be considered law.⁴¹⁰ The *Schierhout* principle accordingly did not apply. This is an important finding since it confirms the status of internal procurement procedures and policies as not legal instruments. A failure to comply with such instruments would thus not result in unlawfulness. It is, however, not clear whether the same reasoning would apply to formal supply chain management policies adopted by organs of state as envisaged by the Treasury Regulations under the Public Finance Management Act 1 of 1999. In a long line of cases, the most recent of which is *Continental Outdoor Media (Pty) Ltd v Buffalo Metropolitan Municipality*,⁴¹¹ the courts have held that tender procedures that do not comply with supply chain management policies are unlawful.

2.5 Procedural fairness in tender awards

⁴⁰⁷ Unreported, referred to as [2013] ZASCA 29, 27 March 2013, available online at <http://www.saflii.org/za/cases/ZASCA/2013/29.html>.

⁴⁰⁸ Para 21.

⁴⁰⁹ 1919 AD 30.

⁴¹⁰ Para 59.

⁴¹¹ Unreported, referred to as [2013] ZAECELLC 2, 8 January 2013, available online at <http://www.saflii.org/za/cases/ZAECELLC/2013/2.html>, paras 13, 16.

In *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency*⁴¹² the SCA adopted a strict view of the application of procedural fairness in the adjudication of tenders. The court held that bidders do not have a right to be heard under the common law or PAJA since 'bidders do not have a right to a contract. Nor is there any basis upon which a bidder could be said to have a legitimate expectation of being heard in the course of a tender evaluation.'⁴¹³ This statement must of course be read in the context of this case and there may indeed be cases where a bidder does have a clear, legitimate expectation, as was the case in *Claude Neon Ltd v Germiston City Council*.⁴¹⁴ However, this ruling seems to reverse the approach adopted in *Transnet Ltd v Goodman Brothers (Pty) Ltd*,⁴¹⁵ where the SCA held that rights of an unsuccessful bidder are affected by a tender decision for the purpose of asking reasons under the interim reading of s 33 of the Constitution. While *Goodman Brothers* dealt with the right to reasons rather than procedural fairness, the reasoning of the court would equally apply in the present instance.

An alternative basis for the application of rules of procedural fairness in the procurement context could be s 217(1) of the Constitution, which requires all state contracting to be done in terms of a system that is inter alia fair. For a system to be fair it should arguably allow for procedural fairness in the taking of decisions.

Despite these difficulties in constructing the scope of application of rules of procedural fairness, the submission of a bid itself should in most cases be adequate to comply with procedural fairness in the procurement context. However, there will remain a few instances where additional opportunity to make representations, along with the other rules of procedural fairness as found for example in s 3 of PAJA, will continue to be at issue. One example is where additional information is put before an administrator about a particular tenderer from outside the bid documents and such information is taken into account in awarding the tender to another bidder. It remains a vexing question whether procedural fairness demands that the unsuccessful bidder be given an opportunity to respond before the final decision is taken.⁴¹⁶

3. Literature

⁴¹² Unreported, referred to as [2013] ZASCA 29, 27 March 2013, available online at <http://www.saflii.org/za/cases/ZASCA/2013/29.html>.

⁴¹³ Para 95.

⁴¹⁴ 1995 (3) SA 710 (W).

⁴¹⁵ 2001 (1) SA 853 (SCA).

⁴¹⁶ Compare in this regard *Simunye Developers CC v Lovedale Public FET College* (unreported, referred to as [2010] ZAECHGHC 121, 9 December 2010; available online at <http://www.saflii.org/za/cases/ZAECHGHC/2010/121.html>) and *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C).

Quinot, G 'Die reg se oënskynlike onvermoë om korrupsie in staatskontraktering in Suid-Afrika hok te slaan' (2013) 10:1 *LitNet Akademies* 215-248

April to June 2013 (2)

JQR Public Procurement 2013 (2)

Geo Quinot⁴¹⁷

1. Legislation

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

2. Cases

2.1 Two-contract approach to public tenders

In *CShell 271 (Pty) Ltd v Oudtshoorn Municipality*⁴¹⁸ the Supreme Court of Appeal expressly endorsed the so-called two-contract approach to public tendering.⁴¹⁹ This judgment is in stark contrast to recent remarks to the contrary by the SCA.

In the *CShell* matter the court explained the legal position following a call for tenders as follows:

The advertisement placed by the municipality inviting tenders for the purchase of the land constituted an offer. The submission of the tender by Coetzee . . . in response to the invitation,

⁴¹⁷ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁴¹⁸ Unreported, referred to as [2013] ZASCA 62, 24 May 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/62.html>.

⁴¹⁹ On this approach to public tendering, see Quinot G *State Commercial Activity: A Legal Framework* (2009) 163–168.

constituted the acceptance of the offer to enter into an option contract. By submitting the tender, an option contract was concluded between Coetzee . . . and the municipality. The subsequent award of the tender . . . constituted the exercise of the option by the municipality.⁴²⁰

In terms of this analysis there exists thus a contractual relationship between each bidder and the contracting authority during the tender adjudication stage of public tendering, that is prior to the award of the contemplated public contract for which tenders were called. This analysis stands in direct contrast to the recent remarks by the SCA in *Telkom SA Ltd v ZTE Mzansi (Pty) Ltd*⁴²¹ where Nugent JA declared that '[i]t is trite that the submission of a tender in response to an invitation to do so creates no contractual relationship between the parties'.⁴²²

2.2 Awarding tenders to non-highest scoring tenderers

In *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality*⁴²³ the court, in an application for interim relief, dealt with the requirements for awarding a tender to the bidder that did not score the highest number of points in the tender adjudication in terms of s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA').⁴²⁴

In this matter the applicant scored the highest number of points in the tender adjudication, but the first respondent awarded the contract to the second respondent, the second-highest scoring tenderer, on the grounds that

- (a) the applicant had benefitted over the last five years on two major projects worth approximately R49.5 million; and
- (b) the council had expressed the need to encourage the rotation of service providers who carry out work for the council.⁴²⁵

The first respondent relied in essence on s 2(1)(f) of the PPPFA in taking this decision.⁴²⁶ In assessing whether the applicant had established a *prima facie* right for purposes of interim relief, the court found

⁴²⁰ Para 21.

⁴²¹ Unreported, referred to as [2013] ZASCA 14, 18 March 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/14.html>. See JQR Public Procurement 2013 (1) 2.3.

⁴²² Para 8.

⁴²³ Unreported, referred to as [2013] ZAKZDHC 16, 6 May 2013; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2013/16.html>.

⁴²⁴ Section 2(1)(f) states that 'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer'.

⁴²⁵ Para 10.

that the contracting authority seems to have acted unfairly in deciding to reject the applicant's bid in favour of the second respondent on the above grounds. The court stated that a contracting authority can only award a tender to the non-highest scoring bidder under s 2(1)(f) 'on objective criteria which are reasonable and justifiable'.⁴²⁷ In the present matter, the court found the above reasons to be arbitrary. It seems that the main reason for this finding was the absence of any reference to these factors in the tender documents or regulatory provisions. The court also seems to suggest that the precise content of the reasons was arbitrary, noting that the 'deciding number of previous projects, for example, is an arbitrary decision'.⁴²⁸

This judgment continues the disagreement among High Courts on whether the objective grounds referred to in s 2(1)(f) must be identified in the tender documents. The present judgment aligns with judgments such as that in *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province*; *Raubex (Pty) Ltd v MEC for the Department of Transport, North West Province*; *Star Asphalters/Kgotsong Civils Joint Venture v MEC for the Department of Transport and Roads, North West Province*,⁴²⁹ which held that only criteria listed in the tender documents can be relied upon for s 2(1)(f) purposes. On the other side are judgments such as *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit*⁴³⁰ and *Simunye Developers CC v Lovedale Public FET College*,⁴³¹ which held that the PPPFA does not require these other objective criteria to be identified in the tender documents.

A further point of particular interest in the *WJ Building & Civil Engineering* judgment, but one that was unfortunately not addressed by the court was the requirement that the contracting authority imposed on the second-highest scoring bidder to match the highest-scoring bidder's lower price as a condition for awarding the contract to it. One can debate the fairness of such a course of action. On the one hand it seems unfair to allow one party to alter its competitive position with direct reference to the bid of its main competitor. However, on the other hand one can argue that if other objective factors have already justified the award of the bid to a particular bidder, subsequent price negotiations in favour of the state with only that bidder cannot be viewed as unfair, since it does not really impact on the competitive positions of the bidders.

⁴²⁶ It seems that the first respondent was unaware that the Preferential Procurement Regulations, 2001 had been replaced by the Preferential Procurement Regulations, 2011 when it took the decision to award to the second respondent and relied on the former for taking the award decision. This error was, however, of no particular concern since the relevant sub-regulation in 2001 regulations simply repeated s 2(1)(f) of the PPPFA.

⁴²⁷ Para 12.

⁴²⁸ Para 12.

⁴²⁹ 2005 JDR 1033 (BG).

⁴³⁰ Unreported, referred to as [2009] ZAFSHC 21, 27 February 2009; available online at <http://www.saflii.org/za/cases/ZAFSHC/2009/21.html>, para 56.

⁴³¹ Unreported, referred to as [2010] ZAECHC 121, 9 December 2010, para 33; available online at <http://www.saflii.org/za/cases/ZAECHC/2010/121.html>.

2.3 Access to tender information

In three recent judgments the courts emphasised the obligation of contracting authorities to provide bidders with accurate and timeous information.

In *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality*⁴³² and *Easypay (Pty) Ltd v Mangaung Metropolitan Municipality*⁴³³ the respective contracting authorities' failure to provide the requested information timeously contributed to the courts finding that the balance of convenience favoured the applicants in their applications for interim interdicts in those cases. In the former case the court held that the delay of about nine months in bringing the current application for interim relief, pending a review application of a tender award, was at least partly due to the contracting authority's tardiness in providing the applicant with information on the reasons for the tender award and details of the adjudication process.⁴³⁴ The delay consequently did not swing the balance of convenience in the contracting authority's direction despite the delay.

The *Easypay* case dealt with a failure of the contracting authority to provide the aggrieved shortlisted bidder with adequate information about a mandatory presentation of its bid. The court noted, without deciding, that there may be an obligation on contracting authorities to respond to all reasonable requests for information from bidders, including during the adjudication process, that is after submission of bids.⁴³⁵ In this matter the court found that the contracting authority's failure to provide the applicant timeously with sufficient and reasonable information regarding the required presentation and demonstration of its bid supported the applicant's review case and thus weighed in its favour in seeking interim relief pending the review.

Finally, in *SMEC South Africa (Pty) Ltd (previously known as Vela Consulting Engineers (Pty) Ltd v Mangaung Metro Municipality*⁴³⁶ the court found that the applicant bidder was entitled to information about the outcome of a tender process in terms of the contracting authority's obligation to act openly

⁴³² Unreported, referred to as [2013] ZAKZDHC 16, 6 May 2013; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2013/16.html>.

⁴³³ Unreported, referred to as [2013] ZAFSHC 44, 4 April 2013; available online at <http://www.saflii.org/za/cases/ZAFSHC/2013/44.html>.

⁴³⁴ Para 23.

⁴³⁵ Para 18.

⁴³⁶ Unreported, referred to as [2013] ZAFSHC 106, 27 June 2013; available online at <http://www.saflii.org/za/cases/ZAFSHC/2013/106.html>.

and transparently.⁴³⁷ The court held that the contracting authority erred in insisting that the applicant pursue the requested information about the outcome of the tender process under the authority's access to information procedure in terms of the Promotion of Access to Information Act 2 of 2000.⁴³⁸ The judgment suggests that bidders are entitled to information about the tender award, including reasons for the award decision, under procurement law, ostensibly under the requirement that contracts be awarded in a transparent manner, and not only as a matter of access to information.

July to September 2013 (3)

JQR Public Procurement 2013 (3)

Geo Quinot⁴³⁹

1. Legislation

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

2. Cases

2.1 Fairness of functionality assessment

In *South African National Road Agency Ltd v The Toll Collect Consortium*⁴⁴⁰ the Supreme Court of Appeal noted that it was not necessary for the contracting authority to indicate in the tender documents the precise number of points that would be allocated to each element in its assessment of functionality of tenders. In this respect the court somewhat softened the approach that had been adopted in a number

⁴³⁷ Para 15.

⁴³⁸ Paras 12–15.

⁴³⁹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁴⁴⁰ Unreported, referred to as [2013] ZASCA 102, 12 September 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/102.html>.

of High Court judgments, including the judgment of the court *a quo* in this matter,⁴⁴¹ regarding the level of detail to be provided in tender documents as part of the transparency and fairness requirements for all public contracting. These earlier judgments held that the criteria that a contracting authority intends to use in scoring tenderers' functionality had to be disclosed fully for the process to be fair and transparent. This meant that the tender documents had to indicate exactly which factors are to be taken into account in assessing functionality, including the complete breakdown of each element into constituent elements with the respective weights for each element and sub-element. The SCA noted in the present matter that this was not necessarily required. As long as tenderers knew what information the contracting authority would take into account in scoring functionality and thus what information to provide in their bids, there could be no unfairness or lack of transparency.⁴⁴²

In the present matter the tender documents indicated the main elements that would constitute the scoring of functionality, with the overall points for each main element. The returnable schedule furthermore indicated what information had to be provided under each of these main elements. However, the tender documents did not indicate the exact sub-elements that would constitute each main element, nor the relative weights for each sub-element in the calculation of the total score per element. During the assessment of the functionality of bids a detailed scoring system was used in terms of which a particular number of points were allocated to each of the sub-elements and which resulted in the final functionality score for each bid. The applicant's bid failed to achieve the minimum number of 75 functionality points and was thus excluded from further adjudication. It subsequently challenged the tender process as unfair and non-transparent based on the failure to provide detailed indication up-front of the functionality points to be allocated to each sub-element. The SCA rejected this argument, noting that there was no uncertainty as to the information that would be taken into account in calculating functionality in this case despite the absence of an indication of the number of points per sub-element. The SCA thus in effect found that adequate information was provided in the tender documents for tenderers to know how their bids would be scored and thus what to include in their bids. The court held that there could be no complaint of unfairness under such circumstances. In its reasoning the SCA provided some useful guidance on what transparency and fairness entail in the context of public tendering.⁴⁴³ In dealing with transparency the court emphasised the public purpose function of this constitutional requirement, stating that 'its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the state or those whose interests the relevant officials and office bearers in organs of state wish to advance' and *not* for 'a disappointed tenderer to find some ground for reversing the outcome or commencing the process anew'.⁴⁴⁴ Regarding fairness the court declared:

⁴⁴¹ See JQR Public Procurement 2012 (3) 2.1.

⁴⁴² Paras 17–22.

⁴⁴³ Paras 18–22.

⁴⁴⁴ Para 18.

Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.⁴⁴⁵

It is important to bear in mind that the Preferential Procurement Regulations, 2011 were not applicable in this case. At the time when the tender was adjudicated SANRAL was not subject to these Regulations. However, it is now, as are all other contracting authorities.⁴⁴⁶ Future disputes about the requirement to disclose functionality criteria will thus have to be addressed in terms of these Regulations. Regulation 4 deals explicitly with the adjudication of functionality and requires *inter alia*

(3) When evaluating tenders on functionality, the—

(a) evaluation criteria for measuring functionality;

(b) weight of each criterion;

(c) applicable values; and

(d) minimum qualifying score for functionality,

must be clearly specified in the invitation to submit a tender.

‘Functionality’ is furthermore defined in the Regulations to mean

the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.⁴⁴⁷

The question that will have to be answered in reconciling these regulations and the SCA judgment in *South African National Road Agency Ltd v The Toll Collect Consortium* is what the precise meaning of ‘evaluation criteria’ in regulation 4(3)(a) is. In one view the term can be interpreted to mean every factor for which a point is allocated, ie the criteria at the lowest level of breakdown. In support of this view one can argue that Regulation 4(3) seems to contemplate the disclosure of the actual factors that will be used to measure functionality and not merely some overarching category of factors and the weights of each individual factor, not the category. This view also seems to be supported by the definition of functionality, which requires the disclosure of the ‘predetermined norms’ that will constitute functionality within a given tender. The SCA judgment in the present matter may, however, present an alternative view of the meaning of criteria, judged against the general requirements of s 217(1) of the Constitution, in terms of which an indication of the main elements that constitute the

⁴⁴⁵ Para 20.

⁴⁴⁶ See JQR Public Procurement 2011 (4) 1.1.

⁴⁴⁷ Preferential Procurement Regulations, 2011, regulation 1(k).

functionality criteria and their weights will be adequate as long as tenderers know what information to provide for the contracting authority to judge competing tenders on an equal basis.

In *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality*⁴⁴⁸ the court confirmed that bids can only be assessed for functionality on criteria set out in the tender documents and not criteria that are not so indicated. This judgment is not at odds with the SCA judgment above since the latter dealt with the disclosure of (the weights of) sub-criteria rather than reliance on criteria that were not disclosed at all, which was the case in the *BKS Consortium* matter. In *BKS Consortium* the court held that a contracting authority is 'bound by the invitation to tender document'.⁴⁴⁹ It could thus not rely on criteria that were not contained in the tender document at all. This judgment is clearly in line with Regulation 4 of the Preferential Procurement Regulations, 2011.

2.2 Unbalanced bid pricing

In *Magasana Construction CC v City of Tshwane Metropolitan Municipality*⁴⁵⁰ the court confirmed that it is reasonable for a contracting authority to reject a bid that is priced in an unbalanced manner or what is called an unbalanced bid.

An unbalanced bid is one in which the pricing of the parts of the work is not spread out evenly over the entire contract, so that the pricing for some items is overstated and for other items understated. One reason for doing this may be to cover a larger proportion of the overhead costs and profits on the entire contract in the pricing of items paid earlier in the project. In the present matter the court accepted the respondent's argument that an unbalanced bid is objectionable because it

- (a) constitutes an advance payment;
- (b) may not ultimately prove to be the best offer;
- (c) is detrimental to the concepts [sic] of competitive bidding.⁴⁵¹

The court also recognised that in accepting an unbalanced bid, a contracting authority will run the risk that not enough funds will be available for those items that the tenderer under-priced, most likely towards the end of the contract, which may lead to sub-standard work, increases in pricing, a failure to

⁴⁴⁸ Unreported, referred to as [2013] ZAECHC 76, 1 August 2013; available online at <http://www.saflii.org.za/za/cases/ZAECHC/2013/76.html>.

⁴⁴⁹ Para 54.

⁴⁵⁰ Unreported, referred to as [2013] ZAGPPHC 196, 12 July 2013; available online at <http://www.saflii.org.za/za/cases/ZAGPPHC/2013/196.html>.

⁴⁵¹ Para 51.

complete the contract and/or disputes.⁴⁵² For all these reasons the court held that it is reasonable for a contracting authority to reject a bid that it viewed as unbalanced.

October to December 2013 (4)

JQR Public Procurement 2013 (4)

Geo Quinot⁴⁵³

1. Legislation

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

2. Cases

2.1 Procedural fairness in tender awards and vagueness of adjudication criteria

The highest-value procurement case to proceed through South African courts yet has reached its final leg in the Constitutional Court judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,⁴⁵⁴ although it is not quite yet the end of the road.⁴⁵⁵ In its judgment the court dealt decisively with the proper approach to assessing procedural fairness in tender procedures and compliance with procedural requirements.

In brief this matter involved a challenge to the award of a tender to Cash Paymaster Services (Pty) Ltd, the third respondent, by the South African Social Security Agency for rendering grant payment services

⁴⁵² Paras 52, 55, 56, 59.

⁴⁵³ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁴⁵⁴ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁴⁵⁵ See JQR Public Procurement 2012 (3) 2.2; JQR Public Procurement 2013 (1) 2.4; JQR Public Procurement 2013 (1) 2.5 for discussion of the High Court and Supreme Court of Appeal judgments in this matter.

in all nine provinces. The High Court found the award of the tender reviewable, but refused to set it aside. The Supreme Court of Appeal ruled that the award was lawful. In a final appeal, the Constitutional Court found the award reviewable, but postponed judgment on an appropriate remedy pending further submission by the parties.

One of the arguments presented by the applicants was that the award of the tender was procedurally unfair or failed to comply with procedural requirements of procurement law. The SCA dismissed this argument on the basis that while the procurement process was not perfect, perfection is not required and every mistake will not be fatal. The SCA found that the procedural mistakes made during the award process did not impact on the eventual outcome and was accordingly an inconsequential irregularity so that the award was not reviewable.

The Constitutional Court rejected this approach. The court held that the correct approach to procedural irregularities, as with all other grounds of review, is not to focus on the impact of the alleged irregularity on the eventual outcome of the administrative action, but to ascertain whether any procedural missteps undermined the purpose of the applicable statutory provisions.⁴⁵⁶ If the mistake thwarted the purpose of the empowering provision, such mistake would amount to a reviewable irregularity. The court held that compliance with procedural requirements served the following purposes:

- (a) it ensures fairness to participants in the bid process;
- (b) it enhances the likelihood of efficiency and optimality in the outcome; and
- (c) it serves as a guardian against a process skewed by corrupt influences.⁴⁵⁷

The court continued to explain that applications for review of procurement decisions were no different from any other administrative-law challenge under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and should thus be dealt with in exactly the same way. In the court's words: 'There is no magic in the procurement process that requires a different approach.'⁴⁵⁸ This *inter alia* meant that procurement challenges should not be treated with greater caution than other challenges or that a court should be more circumspect in finding a procurement award reviewable.

With regard to procedural fairness in particular, the court confirmed that the procurement process must be understood in terms of the requirements of s 3 of PAJA. In this respect the call for tenders constituted the 'adequate notice of the nature and purpose of the proposed administrative action' required under s 3(2)(b)(i) and the bids, the tenderers' 'reasonable opportunity to make representations' under s 3(2)(b)(ii).⁴⁵⁹ Consequently, the call for tenders, including the award criteria set out in the tender documents, must provide bidders with adequately clear information to enable them to submit winning bids. Where, as in the present case, there is material uncertainty about the specific

⁴⁵⁶ Paras 22–23, 30.

⁴⁵⁷ Para 27.

⁴⁵⁸ Para 45.

⁴⁵⁹ Para 90.

award criteria that will determine the award, the award process fails to comply with s 3 of PAJA and is procedurally unfair.⁴⁶⁰

The court also dealt a decisive blow to any lingering doubt about the applicability of rules of procedural fairness under PAJA to the entire procurement process and the reliance that all bidders can place on these rules. The court rejected an argument that unsuccessful bidders cannot rely on s 3 of PAJA, because none of their rights or legitimate expectations was adversely impacted as required by that section. The court listed four reasons for its finding that disappointed tenderers may indeed rely on s 3.⁴⁶¹ Firstly, all bidders have a right to a fair tender process, which is independent of the eventual outcome of the process. Secondly, it is the eventual award of the bid that is challenged in review proceedings rather than individual decisions in the award process, such as the adverse scoring of individual tenderers' bids, with the result that they are excluded from further consideration, and that final decision has an impact. Thirdly, a decision such as the one to exclude the applicant during an earlier stage of adjudication does have an effect in that it changes the nature of the competition so that it is impossible to know what the outcome may have been otherwise. Finally, the court endorsed the reasoning in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*⁴⁶² where the SCA held that the requirement that rights be adversely affected should be understood to simply require action that 'has the capacity to affect legal rights'. In the present matter, the court held that 'irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights'.

2.2. Duty to investigate preferment claims

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*⁴⁶³ the court made some noteworthy remarks about a contracting authority's obligations to confirm empowerment claims by bidders in support of preference points.

The court held that the contracting authority had to 'investigate and confirm' the empowerment credentials of the winning bidder.⁴⁶⁴ It could not simply take the bidder's claims at face value and its 'failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective'.⁴⁶⁵ The court held that the requirement of 'objectively determined empowerment credentials' was a mandatory and material condition of the constitutional and legislative public procurement empowering provisions as well as a relevant consideration to take into account and the contracting

⁴⁶⁰ Para 91.

⁴⁶¹ Para 60.

⁴⁶² 2005 (6) SA 313 (SCA).

⁴⁶³ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁴⁶⁴ Para 68.

⁴⁶⁵ Para 72.

authority's failure to conduct such confirmation resulted in the reviewability of the award in terms of s 6(2)(b) and (e)(iii) of PAJA.⁴⁶⁶

In considering these findings one should bear in mind that the tenders were adjudicated in terms of the 2001 Preferential Procurement Regulations and not the 2011 Preferential Procurement Regulations (despite the court's reference to the latter). In terms of the former Regulations the preference points awarded to bidders were determined by the tender documents. That is to say, the elements that would qualify a bidder for preference points were determined in the particular tender. In every instance, contracting authorities thus had to assess the preferment claims of bidders and calculate the preference points accordingly. Under the new Regulations the number of preference points is simply determined with reference to a set matrix using bidders' certified broad-based black economic empowerment contributor status level. The question thus arises what the implications are of the court's statements in this case for the new regulatory position. Would it be incumbent on contracting authorities to confirm bidders' empowerment credentials beyond the broad-based black economic empowerment status level certificate issued by a verification agency and submitted by the bidder in its tender?

2.3 Strict compliance with tender conditions and tax clearance certificates

In *Dr JS Moroka Municipality v Betram (Pty) Limited*⁴⁶⁷ the Supreme Court of Appeal dealt with the requirement to submit original tax certificates with bids and held that the contracting authority in this case could not condone non-compliance with this requirement.

The tender documents in this case called for original tax clearance certificates to be submitted with bids as part of a list of documents constituting 'minimum qualifying requirements'. The respondent's bid was rejected because it submitted a copy of its tax certificate, rather than the original. In challenging this rejection, the respondent argued that the contracting authority should have condoned its alleged non-compliance with the tender conditions given that its tender was R2 million less than that of the winning bidder. The SCA rejected this argument and overturned the High Court's finding in favour of the respondent.

The court held that the tender documents clearly indicated that submission of original tax clearance certificates was a mandatory condition. The respondent's failure to comply with this condition meant that its bid was not an 'acceptable tender' as required by the Preferential Procurement Policy Framework Act 5 of 2000.⁴⁶⁸ The contracting authority thus lawfully excluded the respondent's bid from consideration.

In reaction to the argument that the respondent's non-compliance should have been condoned, the SCA held that the tender documents did not confer on the contracting authority any discretion to condone

⁴⁶⁶ Para 72.

⁴⁶⁷ Unreported, referred to as [2013] ZASCA 186, 29 November 2013; available online at http://www.justice.gov.za/sca/judgments/sca_2013/sca2013-186.pdf.

⁴⁶⁸ Para 16.

such non-compliance.⁴⁶⁹ In addition, the court held that there is no general power to condone non-compliance with mandatory conditions in our law on the strength of public interest.⁴⁷⁰ In a significant statement the court held that in so far as the judgment in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*⁴⁷¹ may suggest that there is such a general condonation power, that judgment is incorrect. This seems to be exactly what the SCA held when it stated in *Millennium Waste Management* that 'our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted'.⁴⁷² The present judgment should thus be read as having overturned the *Millennium Waste Management* one in this respect.

2.4 Judicial review of tender awards: Remedies

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*⁴⁷³ the court addressed the thorny question of what the effect of the judicial review of public procurement decisions should be.

Although the court postponed judgment on the remedy to follow its finding that the award of the tender in this case was constitutionally invalid, it made some noteworthy remarks about the approach to remedies in the review of procurement decisions (and administrative action in general).

The court held that the practical implications of the invalidity of a public contract award could not be taken into account during the assessment of the reviewability of the award.⁴⁷⁴ The existence of a ground of review under PAJA must be objectively determined on the facts and if such ground exists the reviewing court *must* find the award constitutionally invalid in terms of s 172(1) of the Constitution.⁴⁷⁵ However, in the court's view that finding is consequently subject to any 'just and equitable' order that it may grant by way of remedy.⁴⁷⁶ The practical implications of interfering with the award, including the public interest and the interests of all parties involved in maintaining or setting aside the award, must be taken into account during this second, remedies stage of the enquiry.⁴⁷⁷ The court thus held that there is a distinction between the finding of invalidity under s 172(1) of the Constitution, which does not seem to have any immediate and automatic effect, and the effect of that finding, which is determined by the remedy that the court grants in the particular instance.⁴⁷⁸

⁴⁶⁹ Para 16.

⁴⁷⁰ Para 18.

⁴⁷¹ 2008 (2) SA 481 (SCA).

⁴⁷² Para 17.

⁴⁷³ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁴⁷⁴ Paras 22, 25, 29.

⁴⁷⁵ Para 25.

⁴⁷⁶ Para 29.

⁴⁷⁷ Para 56.

⁴⁷⁸ Para 26.

In *Kwa Sani Municipality v Underberg/Himeville Community Watch Association*⁴⁷⁹ the court dealt with the discretionary nature of setting a concluded contract aside upon review on a slightly different basis. Rather than locating the discretion in the remedial stage of the inquiry, the court in this matter relied on the common-law delay rule to refuse to set the impugned contract aside.⁴⁸⁰ The court aligned the judgments in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*⁴⁸¹ and *Oudekraal Estates (Pty) Ltd v City of Cape Town*,⁴⁸² probably the two most noteworthy judgments on the discretionary nature of setting aside orders, at least in the procurement context, with the delay rule. The court thus held that where there has been an unreasonable delay in bringing review proceedings, as in the present matter, the court's discretion to refuse to set the contract aside is premised on the delay rule.

2.5 Cancellation of tenders

In *Nambithi Technologies (Pty) Ltd v City of Tshwane Metropolitan Municipality*⁴⁸³ the court scrutinised the respondent municipality's purported cancellation of a call for tenders and set the cancellation aside. In this matter the municipality decided, after calling for and receiving, but before adjudicating tenders, to cancel the call for tenders. The reasons given by the municipality for this decision were that it was no longer satisfied with the original tender specifications and that the tender 'was not in line with the broader strategy of the Municipality'.⁴⁸⁴ The municipality subsequently re-advertised the tender with slightly different terms. Upon review, the court found that there were no material differences between the specifications of the first and second calls for tenders and that the changes introduced in the second call could have been negotiated with the successful tenderer under the first call. The court thus held that under Regulation 10(4) of the Preferential Procurement Regulations, 2001,⁴⁸⁵ the municipality's decision to cancel was not justified and accordingly unlawful. With this ruling the court thus implicitly held that organs of state do not have free reign to cancel invitations to tender and may only do so within the limits of the Preferential Procurement Regulations, including for the limited number of reasons set out in the regulations.

⁴⁷⁹ Unreported, referred to as [2013] ZAKZPHC 6, 30 October 2013; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2013/60.html>.

⁴⁸⁰ Paras 41–43.

⁴⁸¹ 2008 (2) SA 638 (SCA).

⁴⁸² 2004 (6) SA 222 (SCA).

⁴⁸³ Unreported, referred to as [2013] ZAGPPHC 319, 1 November 2013; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2013/319.html>.

⁴⁸⁴ Para 8.

⁴⁸⁵ Now contained in regulation 8(4) of the Preferential Procurement Regulations, 2011.

January to March 2014 (1)

JQR Public Procurement 2014 (1)

Geo Quinot⁴⁸⁶

1. Legislation

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

2. Cases

2.1 Consequences of a failure to accept bids within their validity period

In *Searle v Road Accident Fund*⁴⁸⁷ the court dealt with the question of what the effect is on the tender process where the tender validity period has lapsed.

In this matter the respondent invited bids from attorneys to be placed on a panel that will render litigation services to the respondent on an ongoing basis. However, because of significant delays in finalising the bids, the 90-day period that tenderers were requested to keep their bids open for had lapsed before the tender was awarded. The respondent consequently requested all short-listed bidders to amend their bids and extend their bid validity period to one year. It consequently adjudicated the bids under this amended bid validity period and awarded the tender. A number of disappointed bidders subsequently challenged the respondent's conduct in review proceedings, primarily based on the argument that the respondent did not have the power to continue the procurement process after the lapse of the original bid validity period.

⁴⁸⁶ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁴⁸⁷ Unreported, referred to as [2014] ZAECPHC 19, 25 March 2014; available online at <http://www.saflii.org/za/cases/ZAECPHC/2014/19.html>.

Plasket J agreed with the applicants' argument and found the award of the bid invalid. The judge agreed with the reasoning of the court in *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited*⁴⁸⁸ where Southwood J held:

As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract.⁴⁸⁹

In the present case Plasket J thus held that after the tender validity period lapsed the respondent could not lawfully take the process forward. The judge also expressly disagreed with the contrary obiter view adopted in *Cato Ridge Electrical Construction (Pty) Ltd v Chairperson, Durban Regional Bid Adjudication Committee*.⁴⁹⁰

2.2 Legally binding procurement rules

In *Searle v Road Accident Fund*⁴⁹¹ the court expressly recognised the legally binding nature of National Treasury's *Supply Chain Management: A Guide for Accounting Officers/Authorities*.⁴⁹² The court held that this instrument was part of what the Constitutional Court described as 'the constitutional and legislative procurement framework' in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*.⁴⁹³ As such the document was legally binding and not simply 'an internal prescript that may be disregarded at whim.'⁴⁹⁴

This is a significant finding, seeing that the legal status of this guideline document has at times been questioned.⁴⁹⁵

2.3 Standing to challenge procurement decisions

⁴⁸⁸ Unreported, referred to as [2011] ZAGPPHC 1, 7 January 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/1.html>, noted in JQR Public Procurement 2011 (1) 2.3.

⁴⁸⁹ Para 14.

⁴⁹⁰ 2010 JDR 1523 (KZP).

⁴⁹¹ Unreported, referred to as [2014] ZAECPHC 19, 25 March 2014; available online at <http://www.saflii.org/za/cases/ZAECPHC/2014/19.html>.

⁴⁹² Para 73.

⁴⁹³ 2014 (1) SA 604 (CC), paras 22, 40.

⁴⁹⁴ Para 73.

⁴⁹⁵ See eg Public Protector *Report No 10 of 2012/13* (2012) 127–128 and Public Protector *Report 1 of 2012/13* (2012) 64–65, 89–92.

In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*⁴⁹⁶ the SCA dealt with the question of who has standing to challenge a tender award in review proceedings. In this matter one of the unsuccessful bidders, who did not qualify for the tender due to its CIDB rating being lower than what was required in the tender, challenged the award of the tender in a review application before the High Court. In an appeal to the SCA the contracting authority argued that the applicant did not have standing to bring the review since it did not qualify for the tender and thus could never win it. It consequently could also not contest the eventual award in a review application, so the argument went. The SCA rejected the argument and held that the applicant did have standing to challenge the award in review proceedings.⁴⁹⁷

The SCA held that a bidder has 'the right to a fair and competitive tender process irrespective of whether the tender is awarded to him'.⁴⁹⁸ The court thus held that it was *inter alia* the bidder's interest in a fair tender process flowing from its submission of its bid that provided it with standing in the review application. The court added that the application raised questions about 'good governance and accountability', which implied that the court had to take a wide view of standing.

It is evident that the factors identified by the SCA, which grounded the standing of the applicant in this case, are of a general nature and will be present in most if not all procurement cases. It follows that these findings of the SCA confirm a wide approach to standing in procurement challenges, essentially meaning that all bidders will always have standing to challenge the eventual award of the tender in review proceedings.

2.4 Judicial review of tender awards: Remedies

In two matters the courts dealt with the effect of reviewing tender awards and what orders to grant in the face of that effect.

In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*⁴⁹⁹ the SCA overturned an order of the High Court that maintained a contract despite finding the award of the tender to be reviewable. In

⁴⁹⁶ Unreported, referred to as [2014] ZASCA 21, 28 March 2014; available online at <http://www.saflii.org.za/za/cases/ZASCA/2014/21.html>.

⁴⁹⁷ Para 17.

⁴⁹⁸ Para 17.

⁴⁹⁹ Unreported, referred to as [2014] ZASCA 21, 28 March 2014; available online at <http://www.saflii.org.za/za/cases/ZASCA/2014/21.html>.

scrutinising the High Court's findings, the SCA confirmed that a review court may in principle maintain a contract despite reviewable irregularities in the award of the relevant tender. However, the SCA noted a number of reasons why it considered the High Court's use of this power in the instant matter to be flawed.⁵⁰⁰ These reasons thus amount to factors that will militate against a review court exercising its remedial discretion in favour of maintaining an invalidly awarded contract.

The SCA noted that the parties to the contract acted dishonestly in obtaining it and that the contract was thus tainted by fraud. Secondly, the court noted that the winning bidder was not qualified to render the services sought in the tender, which was for construction services requiring a CIDB rating which the winning bidder did not have. Thirdly, the SCA criticised the High Court for relying on speculation as to the potential consequences should it set aside the contract. The SCA held that remedies should be granted based on fact and not speculation and that the High Court could and should have obtained the necessary factual information to enable it to deal with the consequences of setting the tender aside. In the absence of such facts it cannot use speculation to justify an order. On this point the SCA relied on the recent approach of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*.⁵⁰¹ Fourthly, the SCA held that the High Court did not achieve an appropriate balance between competing considerations that inevitably arise in scenarios like these. In particular the SCA noted the competing interests that must be balanced, stating:

In the context of an unlawful tender process for the acquisition of goods and services for the benefit of the public, the finding as to an appropriate remedy must strike a balance between the need for certainty, the public interest, the interests of the successful and unsuccessful tenderers, other prospective tenderers, the interests of innocent parties and the interests of the organ of state at whose behest the tender was invited.⁵⁰²

The court also emphasised the importance of attaching sufficient weight to the principle of legality, which would favour setting aside the contract in these cases.

The second case that dealt with the consequences of setting a tender contract aside is *Searle v Road Accident Fund*.⁵⁰³ Following its finding that the award of the tender was irregular in this case,⁵⁰⁴ the court grappled with the potential effect that invalidity may have. The court noted its discretion to keep the irregularly awarded contract in place, despite a finding of invalidity, but held that this was not a case to do so. In reaching this conclusion the court was largely influenced by the nature of the contract, which involved *ad hoc* rendering of legal services when required by the respondent. The court held that this type of contract could be invalidated after conclusion without too much disruption to services. In

⁵⁰⁰ Paras 21–25.

⁵⁰¹ 2014 (1) SA 604 (CC).

⁵⁰² Para 24.

⁵⁰³ Unreported, referred to as [2014] ZAECPHC 19, 25 March 2014; available online at <http://www.saflii.org/za/cases/ZAECPHC/2014/19.html>.

⁵⁰⁴ See JQR Publication Procurement 2014 (1) 2.1 above.

such a scenario the court thus held that the principle of legality should not be sacrificed. However, the court was also not prepared to simply set the award aside. The court held that such an order would be contrary to the public interest since it would leave the respondent without adequate legal representation, which is crucial to its effective functioning and may impact adversely on those litigating against the respondent. The court thus opted for an order that would ‘temper the setting aside of the tender in a way that minimises the negative effects’.⁵⁰⁵ This order involved suspending the invalidation of the tender award for eight months in order to allow the respondent to rerun the tender process and appoint new attorneys before the current contract falls away.

April to June 2014 (2)

JQR Public Procurement 2014 (2)

Geo Quinot⁵⁰⁶

1. Legislation

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

2. Cases

2.1 Submission of BEE status level certificates

The utilisation of BEE status level certificates to determine preference points in the adjudication of bids in terms of the Preferential Procurement Regulations, 2011 was bound to generate disputes akin to those that have been common in relation to tax clearance certificates in procurement for some time.

⁵⁰⁵ Para 105.

⁵⁰⁶ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

*Rodpaul Construction CC v Ethekwini Municipality*⁵⁰⁷ illustrates this point and confirms the parallel that now exists between BEE certificates and tax certificates in the procurement context.

In this matter the applicant submitted a bid, but failed to submit a valid BEE status level certificate with its bid. It indicated that its BEE status level was currently in the process of being verified and that it expected the process to be completed soon. It subsequently submitted its newly obtained BEE certificate to the contracting authority after the close of bids, but before the relevant adjudication committees considered the bids. However, the certificate was not taken into account and no preference points were consequently awarded to the applicant, resulting in the tender being awarded to another bidder.

In challenging the award, the applicant argued that the contracting authority erred in refusing to accept its BEE certificate. It argued inter alia that the contracting authority laboured under an error of law in thinking that it was obliged to require the submission of BEE certificates along with bids whereas the Preferential Procurement Regulations, 2011 in fact do not prescribe a particular time by which certificates must be submitted and certainly not that certificates *must* be submitted along with tenders. The applicant also argued that the contracting authority erred in not exercising its discretion in favour of the applicant to consider its certificate submitted after the close of bids.

Following a comprehensive consideration of South African and foreign law, the court rejected the applicant's arguments. The court adopted the reasoning applied in the past in relation to tax clearance certificates and held that the applicant could not supplement its bid once submitted by submitting a BEE certificate at a later stage when it did not have a valid BEE certificate at the time of bid submission. This, according to the court, would amount to amending its bid, which cannot be allowed. The court held that the tender documents were clear on when BEE certificates had to be submitted (along with bids). Since the applicant did not submit a valid BEE certificate with its bid, the contracting authority was obliged to award the applicant zero preference points. The court also adopted the reasoning in *Dr JS Moroka Municipality v Betram (Pty) Limited*⁵⁰⁸ to the effect that a contracting authority does not have the power to condone non-compliance with clear tender conditions. In this case it meant that the contracting authority could not condone the applicant's late submission of its BEE certificate.

2.2 Excluding bidders from tenders

⁵⁰⁷2014 JDR 1122 (KZD).

⁵⁰⁸ 2013 JDR 2728 (SCA).

In *City of Cape Town v Aurecon South Africa (Pty) Ltd*⁵⁰⁹ the court held that a party that had been involved in any manner in the drafting of the tender specifications was precluded from bidding for the subsequent tender on the basis of fairness.

In this matter a subsidiary of the respondent, as one party to a joint venture, advised the applicant on the decommissioning of a power station under an earlier contract. As a result of this work the applicant subsequently invited tenders for the decommissioning project. The scope of work, which formed the basis of the bid specification in the latter tender as formulated by the applicant's bid specification committee, was largely based on the advice given by the joint venture under the previous contract.

Following adjudication of the second tender process, the tender was awarded to the respondent. However, after allegations of irregularities in the process emerged and a subsequent forensic investigation confirmed the irregularities, the applicant approached the High Court for an order setting aside its own decision in awarding the contract to the respondent. The applicant argued inter alia that the respondent's involvement in the drafting of the tender specifications, through its subsidiary, in the first contract, precluded it from bidding on the second contract and that the subsequent award of the contract to it resulted in an unfair tender process.

The court agreed with this argument, and held that

[a]n interpretation of a clause or regulation which lends credence to an admission of a tenderer to a procurement process the significant portion of which can be traced back to that tenderer is, in my view, inconsistent with the value underpinning fairness and reasonableness. That approach would be entirely inconsistent with a proper concern for refusal to tolerate corruption and maladministration.⁵¹⁰

The court reasoned that the question was not whether the bidder actively participated in the work of the bid specification committee in drafting the specification for the particular tender or in fact attempted to influence the committee, but simply whether the bidder 'was afforded an unfair advantage over the other bidders who took part in the procurement process'.⁵¹¹ The court held that such unfair advantage would contravene s 217 of the Constitution and in particular regulation 27(4) of the Municipal Supply Chain Management Regulations.⁵¹² In the present instance the court held that the

⁵⁰⁹ Unreported, referred to as [2014] ZAWCHC 51, 14 April 2014; available online at <http://www.saflii.org.za/za/cases/ZAWCHC/2014/51.html>.

⁵¹⁰ Para 57.

⁵¹¹ Para 59.

⁵¹² Regulation 27(4) reads: 'No person, advisor or corporate entity involved with the bid specification committee, or director of such a corporate entity, may bid for any resulting contracts.'

respondent did obtain such an unfair advantage because the bid specification was largely based on its own prior work for the applicant.

This is a very wide interpretation of regulation 27(4) of the Municipal Supply Chain Management Regulations, which extends the scope of exclusion of bidders under that regulation. If the outcome of a bid specification committee's work can be traced back to a private entity, even though that entity was not actively involved in the work of the bid specification committee, the entity would ostensibly be excluded from the resultant tender.

2.3 Access to tender information

In *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality*⁵¹³ the court seems to have closed the door to accessing tender information outside of the procedures prescribed in the Promotion of Access to Information Act ('PAIA').⁵¹⁴ This view is contrary to earlier decisions where access to tender information had been granted on the basis of procurement law itself, rather than the access to information regime under PAIA.⁵¹⁵

In the present matter an unsuccessful bidder requested information from the respondent for the express purpose of pursuing an internal appeal against the award of the tender in terms of s 62 of the Local Government: Municipal Systems Act.⁵¹⁶ This would ostensibly have brought it in line with the view expressed by the Supreme Court of Appeal in the *Tetra Mobile Radio* case (albeit under a different statutory appeal mechanism) that the inherent fairness requirement of the internal appeal procedure itself (based inter alia on s 217(1) of the Constitution) grants the would-be appellant 'the right of access to information necessary to formulate its appeal properly'.⁵¹⁷ However, in the present matter the court held that the unsuccessful bidder's letter requesting information was insufficient since the 'right of access to information must be exercised in the manner prescribed by PAIA'.⁵¹⁸ This approach seems to be in conflict with that adopted by the SCA in *Tetra Mobile Radio* and subsequently followed by the High Court in *SMEC South Africa*. Especially in the latter case, which also dealt with an attempt by an unsuccessful bidder to obtain information in order to pursue a s 62 appeal, the court held that the

⁵¹³Unreported, referred to as [2014] ZAECHGHC 55, 19 June 2014; available online at <http://www.saflii.org.za/za/cases/ZAECHGHC/2014/55.html>.

⁵¹⁴Act 2 of 2000.

⁵¹⁵See *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA); *SMEC South Africa (Pty) Ltd v Mangaung Metro Municipality* 2013 JDR 1588 (FB); JQR Public Procurement 2013 (2) 2.3.

⁵¹⁶Act 32 of 2000.

⁵¹⁷Para 15.

⁵¹⁸Para 50.

contracting authority's insistence that the applicant follow the formal access to information procedure to obtain the information was not a good reason for refusing the request.

2.4 Internal appeals against municipal tender awards

Despite some uncertainty in recent times about the applicability of s 62 of the Local Government: Municipal Systems Act⁵¹⁹ to procurement disputes,⁵²⁰ the court in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality*⁵²¹ held that an unsuccessful bidder could not institute a review application of a tender decision before pursuing an appeal under s 62. In contrast to some of the earlier judgments on this issue, nothing in this case turned on the nature of the award notification to the winning bidder. The court in this matter significantly held that the potential outcome of an appeal under s 62 was irrelevant for purposes of s 7(2)(b) of the Promotion of Administrative Justice Act ('PAJA'),⁵²² which requires that all internal remedies be exhausted before an application for judicial review is instituted. On the same reasoning, the court held that it also did not matter whether the timeframe for instituting an appeal under s 62 had lapsed. The applicant still had to bring the s 62 appeal, before it could institute a review application. Where the time period for the internal appeal has lapsed, the appeal will ostensibly be rejected for that reason and only then may the applicant bring its review application.

One surprising aspect of the court's judgment in this matter is its interpretation of the timeframe under s 62(1) for bringing an internal appeal. The section states that the aggrieved party 'may appeal against that decision . . . within 21 days of the date of the notification of the decision'. The court interpreted the timeframe in conjunction with the right to request reasons under s 5 of PAJA.⁵²³ It thus held that

the Applicant had 90 days from 21 August 2012 [the date it became aware of the decision] to request reasons from the First Respondent (section 5(1) of PAJA). The First Respondent had 90 days to give reasons failing which, the decision would have been deemed to be unlawful and liable to be set aside (section 5(2) and (3) of PAJA). If the First Respondent gave reasons, the Applicant had 21 days to give notice of its appeal and the reasons therefore (section 62(1) of the Systems Act), and the appeal would then have been dealt with as provided in section 62. This is the procedure which should and could have been followed by the Applicant.⁵²⁴

⁵¹⁹Act 32 of 2000.

⁵²⁰ See JQR Public Procurement 2009 (1) 2.5; JQR Public Procurement 2010 (1) 2.1.

⁵²¹Unreported, referred to as [2014] ZAECHGHC 55, 19 June 2014; available online at <http://www.saflii.org.za/za/cases/ZAECHGHC/2014/55.html>.

⁵²²Act 3 of 2000.

⁵²³Paras 43, 45.

⁵²⁴Para 45.

It is interesting to note the court's view that the 21-day period under s 62 would only start to run *after* the applicant had received reasons in terms of s 5 of PAJA. It is also worth noting that the court held that the contemplated notification of the decision in s 62(1) need not be in writing or be formal.⁵²⁵

2.5 Judicial review of tender awards: Remedies

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*⁵²⁶ the Constitutional Court handed down judgment on the remedies following the court's finding in 2013 that the award of a tender for social grant payments by the respondent, SASSA, was constitutionally invalid.⁵²⁷ In its judgment the court grappled with the difficult task of balancing the various interests affected by findings of invalidity in the procurement context.

The court stated the 'default position' to be that 'the consequences of invalidity [have] to be corrected or reversed'.⁵²⁸ Ostensibly this would mean that a contract concluded on the basis of an invalid tender award must be set aside and the tender re-run. However, the court emphasised the 'multi-dimensional aspects of the just and equitable enquiry' in the context of procurement disputes and noted that an appropriate remedy will not necessarily 'lie in a simple choice between ordering correction and maintaining the existing position',⁵²⁹ that is between setting the contract aside or maintaining it.

In the present matter the court thus fashioned an order in-between these extremes.⁵³⁰ The court suspended the declaration of invalidity of the contract pending a re-run of the tender process by SASSA within a framework set by the court. In the event that SASSA, upon completion of the tender process, decides not to award a new tender, the suspension of invalidity will remain in place until the current contract runs out.

The court further maintained supervision of the entire process and ordered that periodic status reports be filed with the court. In the event that no new tender is awarded, SASSA must also report to the court on whether and when it will be ready to take over payment services itself (ie discontinue reliance on

⁵²⁵Paras 43, 47, 52.

⁵²⁶2014 (4) SA 179 (CC).

⁵²⁷The earlier judgment on the merits of the review is reported as *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) and noted in JQR Public Procurement 2013 (4) 2.1, JQR Public Procurement 2013 (4) 2.2, JQR Public Procurement 2013 (4) 2.4.

⁵²⁸Para 30.

⁵²⁹Para 39.

⁵³⁰Para 78.

private service providers) and the current contractor must file with the court audited statements, which SASSA must subsequently have independently audited, indicating 'the expenses incurred, the income received and the net profit earned under the completed contract'.

A few aspects of the order merit comment. By extending the suspension of the order of invalidity until the end of the current contract the court maintained the existing position should SASSA decide not to award a new tender. That is, the finding of invalidity will subsequently have no effect, ever. This comes very close to the position the court described in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*⁵³¹ when it stated: 'If the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity.' This statement suggests that the suspension power under s 172(1)(b)(ii) of the Constitution cannot be used to maintain an administrative action, such as the conclusion of a tender contract, in its entirety following a finding of constitutional invalidity. However, following the *Allpay* judgment it is not clear whether a suspension of an order of invalidity under s 172(1)(b)(ii) may in fact be used to keep a contract alive for its full term despite a finding of constitutional invalidity in respect of the tender process behind the contract. The latter position is indeed the effect of paragraph 4 of the court's order in *Allpay*.

The court also made a number of interesting comments about the continued basis of the contractual relationship between SASSA and the current contractor following the finding of invalidity. The court noted that the effect of the suspension of the declaration of invalidity under s 172(1)(b)(ii) of the Constitution is that the contract between SASSA and the current service provider remains valid and enforceable.⁵³² With such an order the court is thus not making a new contract for the parties or amending the current contract. The court declared that the legal basis for this position is to be found in s 172(1)(b)(ii) itself. It seems logical that by ordering a suspension the court is in effect postponing its finding of constitutional invalidity to a later date, with the effect that the legal position prior to the judgment continues until that later date. In the present case that means that the contract between the parties remains valid until that later date. However, what seems strange is the court's further remark that the 'Court's sanction will give any possible future breach by [the current service provider] of these obligations [under the contract] a dimension beyond mere breach of contract'. It is not exactly clear what is meant by this statement if the effect of suspension is as stated above. If the suspension means that the prior position remains in place, any non-performance by the current service provider should simply amount to breach of contract. One wonders if the court is suggesting that the relationship between the parties following the suspended finding of invalidity is no longer a pure contractual one, but takes on a constitutional nature as well.

⁵³¹2011 (4) SA 113 (CC) para 82.

⁵³²Para 63.

The final point of interest in respect of the order relates to the term of the new tender. The court noted that the term of a contract will be within the discretion of the executive.⁵³³ The separation of powers doctrine will ordinarily bar a court from interfering with that discretion. However, in a case such as the present, the court held that it was within its power (under the separation of powers doctrine) to order SASSA to offer a five-year contract in re-running the tender. The court's reasoning here is quite interesting. It noted that if the new tender is only offered for the remainder of the term of the current tender, the current service provider will have an unfair advantage since it would have been able to recoup part of its cost already and could thus offer a lower price for the remainder of the term, which would not be possible for any of the competitors. In the court's view this would perpetuate the unlawfulness of the current tender award. This reasoning is interesting because it would ostensibly apply to all instances where a term contract is set aside and a fresh tender is ordered. In all such cases the incumbent contractor will have the advantage that the court held to be unfair in the present matter. It would thus be necessary in all such cases to order that the tender be re-run for the original term rather than the remainder of the current term and it would be within the reviewing court's power to do so in terms of the separation of powers doctrine.

2.6 Legal status of suppliers under a procurement contract

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*⁵³⁴ the Constitutional Court made interesting and far-reaching remarks about the legal status of private parties when performing under certain procurement contracts. The court held that since the contract involved the supplier rendering a service (grant payment services in this case) on behalf of the contracting authority, SASSA, the supplier itself was performing a public function and was an organ of state for purposes of its actions under the contract.⁵³⁵ This is not surprising given the very broad definition of organ of state in s 239 of the Constitution. What is interesting is that the court inferred from this conclusion the further implication that the supplier's 'commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects'.⁵³⁶ In a later paragraph the court makes it clear that it is the 'assumption of public power and functions in the execution of the contract' that renders the supplier's 'gains and losses under that contract' subject to public scrutiny.⁵³⁷ This laid the basis for the court's order that 'the expenses incurred, the income received and the net profit earned under the completed contract' must be made public in the form of filing with the court.⁵³⁸

⁵³³Para 44.

⁵³⁴2014 (4) SA 179 (CC).

⁵³⁵Para 54.

⁵³⁶Para 59.

⁵³⁷Para 67.

⁵³⁸Para 78.

One wonders about the feasibility of implementing this type of approach across a broader range of (especially service) procurement contracts. To what extent would private suppliers be willing to reveal the type of commercial and financial information the court has in mind here? Does it necessarily follow that performing a public function under a procurement contract converts the commercial back office of the supplier to a public nature as well? What would be the impact of such an approach on the supplier market, especially in those sectors where competition is robust and the commercial layout of contractors is an important dimension of competitive advantage? In the final analysis one must ask whether extending the organ of state status of suppliers this far would not undermine the very reliance on the private market in supplying the state, which is the rationale for all public procurement. Does this not aim to convert the private supplier market wholly into a public domain with potential loss of the advantages that the private market brings to public functions via procurement?

3. Literature

Bolton, P 'An Analysis of the Criteria Used to Evaluate and Award Public Tenders' (2014) 1 *Speculum Juris* 1

Sonnekus, JC 'Procurement contracts and underlying principles of the law – no special dispensation for organs of state (part 1 – the principles)' (2014) *TSAR* 320

July to September 2014 (3)

JQR Public Procurement 2014 (3)

Geo Quinot⁵³⁹

1. Legislation

⁵³⁹ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

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

2. Cases

2.1 Coverage of public procurement rules

In *Eden Security Services CC v Cape Peninsula University of Technology*⁵⁴⁰ the court grappled with the question whether procurement by the respondent public university was subject to public procurement rules. The court held that it was not.

The respondent invited public tenders for security services at its various campuses. The applicants submitted bids, but were unsuccessful. They subsequently challenged the award of the bids in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondent argued that PAJA was not applicable since the award of the tender did not amount to administrative action. In essence the respondent thus argued that its procurement was not subject to public procurement rules.

In a comprehensive judgment, which also included extensive comparative perspectives, the court held that the respondent was neither an organ of state for procurement purposes nor did it exercise public power or fulfil a public function in procuring the security services.

Of particular interest is that the court used the coverage provisions of s 217 of the Constitution to determine whether the respondent was an organ of state in its procurement activities for purposes of the definition of administrative action in s 1 of PAJA. The court thus noted that the respondent was not covered by s 217 and as a result could not be viewed as an organ of state for purposes of the definition of administrative action.⁵⁴¹

However, PAJA also includes actions of non-organs of state in the definition of administrative action. The definitive criterion in this respect is whether the entity is exercising public power or fulfilling a public function. The court thus also assessed whether the respondent's procurement actions amounted to the

⁵⁴⁰ Unreported, referred to as [2014] ZAWCHC 148, 8 September 2014; available online at <http://www.saflii.org/za/cases/ZAWCHC/2014/148.html>.

⁵⁴¹ At para 44.

exercise of public power or fulfilling a public function despite its not being an organ of state.⁵⁴² The court held that the respondent's procurement actions did not involve the exercise of public power, but was rather 'domestic in nature'.⁵⁴³ The court seems to have reached this conclusion on the basis that the particular services procured were aimed at the respondent's internal functioning rather than linked to its external public function of providing education. The court also noted that the respondent was not acting in terms of any section in its general empowering statute, the Higher Education Act 101 of 1997, when procuring the services, which also pointed away from an exercise of public power.

While the court's reasoning in respect of the public function element technically cannot be faulted, it is not entirely clear on what basis, apart from the absence of a legislative source for the action, the court reached the conclusion that the procurement of security services was 'domestic in nature'. In dealing with this type of inquiry, the key issue is always one of causality.⁵⁴⁴ That is, how does one define the relationship between the goods or services procured and the entity's obvious and general public function in reaching a conclusion that the particular procurement does not fall under the entity's general public functions, or in the words of the court in the present matter, is 'domestic in nature'. In *Transnet Ltd v Goodman Brothers (Pty) Ltd*,⁵⁴⁵ a case that the present court also relied on, the SCA held that the purchase of gold watches to present as long-service awards to employees was sufficiently closely linked to Transnet's public function of providing transport services to qualify as the exercise of public power.

2.2 Internal appeals against municipal tender awards

In *ESDA Properties (Pty) Ltd v Amathole District Municipality*⁵⁴⁶ the court had to deal with the issue of internal remedies in the procurement context, including the vexing question of the application of s 62 of the Local Government: Municipal Systems Act 32 of 2000 in this context. This is an issue that has often troubled our courts and that has resulted in divergent judgments.

In the present matter the applicant challenged the award of a tender by the respondent to another bidder. The respondent argued that s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) barred recourse to judicial review at this stage since there were internal remedies that the applicant had not yet exhausted.

⁵⁴² At para 45.

⁵⁴³ At para 49.

⁵⁴⁴ See G Quinot *State Commercial Activity: A Legal Framework* (2009) 113–116.

⁵⁴⁵ 2001 (1) SA 853 (SCA).

⁵⁴⁶ Unreported, referred to as [2014] ZAECHGHC 76, 18 September 2014; available online at <http://www.saflii.org/za/cases/ZAECHGHC/2014/76.html>.

The respondent pointed to two sets of internal remedies in its argument. The first set originated in the supply chain management policy of the respondent. Two sections (108 and 109) in the policy created a dispute resolution mechanism to the following effect:

a person aggrieved by a decision or action taken in the implementation of the supply chain management system may lodge an 'objection or complaint'; that the accounting officer must appoint an independent and impartial person to 'assist in' the resolution of the dispute; that this person must 'strive to resolve' the dispute promptly and submit monthly reports to the accounting officer; that, if a dispute has not been resolved within 60 days, the dispute may be referred to the provincial treasury; and if the provincial treasury is unable to resolve the dispute, it may be referred to the national treasury. Finally, s 109 'must not be read as affecting a person's rights to approach a court at any time'.⁵⁴⁷

The court held that this mechanism did not constitute an internal remedy for purposes of s 7(2) of PAJA for two reasons. Firstly, the mechanism did not create the possibility to 'confirm, substitute or vary' the challenged procurement decision. It rather created a mediation or conciliation mechanism, which is not an internal remedy as envisaged by PAJA.⁵⁴⁸ Secondly, the provisions of the policy expressly reserved an aggrieved bidder's right to approach a court. The court held that the effect of this was that s 7(2) was not triggered by the remedy.

This finding is significant since the mechanism contained in the supply chain management policy of the respondent closely resembles the mechanism prescribed in regulation 50 of the Municipal Supply Chain Management Regulations promulgated under the Local Government: Municipal Finance Management Act 56 of 2003. The implication is thus that the mechanism for the 'Resolution of disputes, objections, complaints and queries' as set out in the Regulations does not trigger s 7(2) of PAJA and an aggrieved bidder in a municipal tender process can proceed to judicial review without recourse to the internal dispute resolution mechanism.

The second internal remedy relied upon by the respondent was the internal appeal created in s 62 of the Systems Act. Various high courts have in recent years come to different conclusions on the impact of s 62 on procurement disputes.⁵⁴⁹ In some judgments the s 62 appeal was held to be available to a

⁵⁴⁷ At para 9 (references omitted).

⁵⁴⁸ At para 11.

⁵⁴⁹ See JQR Public Procurement 2009 (1) 2.5; JQR Public Procurement 2010 (1) 2.1; JQR Public Procurement 2014 (2) 2.4.

disappointed bidder,⁵⁵⁰ while in others it was held not to be available,⁵⁵¹ at times depending on the nature of the notice to the winning bidder.⁵⁵² A narrower question is whether the s 62 appeal triggers s 7(2) of PAJA. Of course an appeal under s 62 must in principle be available before it can trigger s 7(2), but its mere availability will not automatically mean that s 7(2) is triggered. Section 7(2) will only be triggered if an appeal under s 62 also provides an effective remedy. For an aggrieved bidder this must include the possibility of varying the award decision complained of. In light of s 62(3) it will only be possible to vary the award decision if no rights have vested yet. Thus, s 7(2) of PAJA will be triggered by s 62 of the Systems Act only where no rights have vested following the award decision.

In the present matter the court held that a successful appeal under s 62 would adversely impact on the rights of the winning bidder, in whom rights vested when it was informed of the success of its bid. It followed that relief could not be granted to the applicant under s 62, because of the prescripts of s 62(3). The further consequence was that s 62 did not constitute an internal remedy in the present matter and thus did not trigger s 7(2) of PAJA.

It should be noted that the judgment should not be read to impact on the broader question of the availability of a s 62 appeal in procurement disputes. This matter was concerned only with the narrower question of the impact of s 62 appeals for s 7(2) of PAJA.

3. Literature

Quinot, G 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 *Potchefstroom Electronic Law Journal* 1110–1136 (<http://dx.doi.org/10.4314/pelj.v17i3.08>)

Sonnekus, JC 'Procurement contracts and underlying principles of the law — no special dispensation for organs of state (part 2 — developing the common law, consequences and remedies)' 2014 *TSAR* 536

⁵⁵⁰ *Groenewald NO v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA); *Syntell (Pty) Ltd v The City of Cape Town* (unreported, case no 17780/07 (CPD), 13 March 2008); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T); *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] 3 All SA 560 (ECG).

⁵⁵¹ *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, case no 508/2009 (O), 27 February 2009); *Loghdey v City of Cape Town* (unreported, case no 100/09 (WCC), 20 January 2010).

⁵⁵² *Loghdey v Advanced Parking Solutions CC* 2009 JDR 0157 (C).

October to December 2014 (4)

JQR Public Procurement 2014 (4)

Geo Quinot⁵⁵³

1. Legislation

1.1 Restricting public servants from doing business with government

On 19 December 2014 the President assented to the Public Administration Management Act,⁵⁵⁴ while the date of commencement must still be proclaimed. Section 8 of the Act prohibits all state employees at all levels of government from doing business with the state. The prohibition applies to employees in their personal capacities as well as to companies in which such employees are directors. A contravention of this prohibition constitutes a criminal offence and may lead to termination of employment. The result of this provision is that public servants will no longer be able to bid for public tenders of any contracting authority irrespective of where the employee is employed and who the contracting authority is.

Section 9 of the Act also obliges state employees to disclose their financial interests as well as the interests of their spouse and ‘a person living with that person as if they were married to each other’. This obligation should enable contracting authorities to better manage conflicts of interests between employees and tenders.

2. Cases

2.1 Submission of B-BBEE status level certificates

⁵⁵³ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁵⁵⁴ Act 11 of 2014.

In *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd*⁵⁵⁵ the court held that it was obligatory to submit a B-BBEE status level certificate with a bid in order for the bid to be responsive, regardless of the tenderer's B-BBEE status level. In this matter the contracting authority awarded a bid to a tenderer who did not submit a valid B-BBEE certificate with its bid. The authority subsequently applied for its own decision to be set aside upon review for a number of reasons, one of which was the absence of a valid certificate. The court agreed with this argument and held that 'submission of a valid BBBEE [sic] is a requirement that need[s] to be satisfied by tenderers and is peremptory'⁵⁵⁶ and that

[t]he proper assessment of BBBEE credentials is a jurisdictional fact which had to be objectively present before the tender could lawfully be made. Non-compliance with this jurisdictional fact vitiates the decision.⁵⁵⁷

The court reached this conclusion on both the terms of the particular tender at issue and the Preferential Procurement Regulations, 2011. The terms of the tender required the submission of a B-BBEE certificate as a matter of 'administrative compliant evaluation criteria'. More significant, however, is that the court interpreted the Preferential Procurement Regulations, 2011 as requiring submission of a B-BBEE certificate in all cases. The court reached this conclusion on the basis of regulation 10(2), which states that 'Tenderers other than Exempted Micro-Enterprises (EMEs) must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof, substantiating their B-BBEE rating'. The court pointed to the peremptory wording of this regulation ('must submit') as supporting its reasoning.

This is a surprising ruling, which is contrary to National Treasury's views on the interpretation of the regulations as well as other judgments.

In its *Implementation Guide: Preferential Procurement Regulations, 2011* the National Treasury repeats the above-quoted regulation and then continues to state that '[b]idders who do not submit B-BBEE Status Level Verification Certificates or are non-compliant contributors to B-BBEE do not qualify for preference points for B-BBEE but should not be disqualified from the bidding process'.⁵⁵⁸ National Treasury's Standard Bidding Documents furthermore state that 'a B-BBEE status level verification certificate must be submitted in order to qualify for preference points for B-BBEE'. This again puts

⁵⁵⁵ Unreported, referred to as [2014] ZANWHC 29, 24 October 2014; available online at <http://www.saflii.org/za/cases/ZANWHC/2014/29.html>.

⁵⁵⁶ Para 67.

⁵⁵⁷ Para 80.

⁵⁵⁸ Para 4.2.

forward the view that submission of a B-BBEE certificate is only required for purposes of scoring preference points during the adjudication, but not an absolute requirement to qualify for the tender contract.

Treasury's view was adopted in *Rodpaul Construction CC v Ethekezwini Municipality*,⁵⁵⁹ where the court held that a failure to submit a B-BBEE certificate resulted in no preference points being awarded, but did not result in the bidder being excluded. While the court relied primarily on the tender conditions in the matter in support of its conclusion, it also referred to Treasury's *Implementation Guide* as support for this view.

If Kgoele J's interpretation of the Preferential Procurement Regulations in *African Paper Products* is correct, which is an interpretation that is certainly feasible on the wording of the relevant regulation, it will have a significant impact on the role of B-BBEE in public procurement. A bidder's B-BBEE status will consequently change from the current view that it is solely an award criterion that can provide a preference during adjudication, to both an award criterion and a qualification criterion. Bidders without a verified B-BBEE status, even where such status is that of non-compliant contributor, will not qualify for public tenders, with the exception of EMEs. Amongst others, this will have a significant impact on the viability of foreign suppliers participating in South African public procurement.

2.2 Tenderer's duty to disclose business rescue

In *Umso Construction (Pty) Ltd v MEC for Roads and Transport in the Eastern Cape*⁵⁶⁰ the court held that a tenderer is under a duty to disclose to a contracting authority that it is about to apply for business rescue or has indeed been placed under business rescue.

In this matter a bidder applied for and was placed under business rescue in terms of the Companies Act⁵⁶¹ after bids had closed and it had submitted its bid. The business rescue plan was successfully completed before the tender was awarded to it. At no stage did the tenderer disclose the business rescue proceedings to the contracting authority. The court held that this was a material misrepresentation and amounted to an abuse of the contracting authority's supply chain management

⁵⁵⁹ 2014 JDR 1122 (KZD); see JQR Public Procurement 2014 (2) 2.1.

⁵⁶⁰ Unreported, referred to as [2014] ZAECHC 11, 7 October 2014; available online at <http://www.saflii.org/za/cases/ZAECHC/2014/11.html>.

⁵⁶¹ Act 71 of 2008.

policy justifying the invalidation of the tender award.⁵⁶² The court listed a number of reasons why disclosure of pending or actual business rescue proceedings is an important factor in public tender adjudication with primary reference to the constitutional requirement of a transparent procurement process. These reasons included that the financial well-being of a public supplier, especially in projects involving large amounts of public funds, is a key consideration for the contracting authority in deciding who to award the contract to. Since business rescue implies financial distress, it must be disclosed to the contracting authority. Furthermore, when a bidder is placed under business rescue, the contracting authority will have to engage with the business rescue practitioner rather than the tenderer itself. The court held that it is thus irrelevant that the contracting authority did not qualify as an 'affected person' in terms of the Companies Act for purposes of giving notice of intended rescue proceedings.⁵⁶³ As a matter of public procurement law, the bidder was obliged to inform the contracting authority.

The court held that a bidder must inform a contracting authority of imminent business rescue proceedings when submitting a bid or at the very latest when it enters into business rescue, even if that event occurs after the close of bids.

2.3 Past experience as tender condition

In *Umso Construction (Pty) Ltd v MEC for Roads and Transport in the Eastern Cape*⁵⁶⁴ the court reached the somewhat puzzling conclusion that the requirement of a stated level of past experience as a tender condition was justifiable as a category of preference as contemplated in s 217(2) of the Constitution. In this matter the tender required bidders to have experience in similar past projects, which was viewed as 'a similar project meaning a 10km road with a minimum construction value of R100 million'.⁵⁶⁵ The applicant challenged these criteria as 'unlawful, arbitrary, irrational and meaningless'.⁵⁶⁶ The court rejected this challenge holding that the 'Department's prerequisites with respect to rating and previous experience are, in my view, those very categories of preference which the Constitution refers to [in section 217(2)]'.⁵⁶⁷ This finding is puzzling since s 217(3) of the Constitution further requires that the categories of preference referred to in sub-s (2) must be implemented in terms of a national statutory framework. It is not evident in terms of what framework the contracting authority's approach can be justified in this matter. The only possibility would be the grading system created under the Construction Industry Development Board Act.⁵⁶⁸ However, later in the judgment the court notes that the contracting

⁵⁶² Para 39.

⁵⁶³ Para 34.

⁵⁶⁴ Unreported, referred to as [2014] ZAECBHC 11, 7 October 2014, available online at <http://www.saflii.org/za/cases/ZAECBHC/2014/11.html>.

⁵⁶⁵ Para 40.

⁵⁶⁶ Para 40.

⁵⁶⁷ Para 44.

⁵⁶⁸ Act 38 of 2000.

authority was also not limited to the grading system under this Act, stating, again with reference to s 217(2) that

there is nothing that precludes the Department from adding to the grading category a further category of preference with respect to experience and performance in the road building category specifically. The section indeed refers to the organ of state not being prevented from providing for “categories of preference in the allocation of contracts”.⁵⁶⁹

This interpretation of s 217(2) cannot be supported. Sub-section (3) clearly requires a statutory framework for any category of preference. The result is that in the absence of such a framework, a contracting authority is not at liberty to devise its own categories to provide preference. A further (perhaps more fundamental) problem with the court's reasoning is that one is not dealing with preferencing in the current scenario, but rather with qualification. The notion of preference applies to award criteria, where one bidder is given a preference over another based on particular criteria during the adjudication of the bids and to decide on a ranking of bids. As the term itself suggests, in that exercise preferencing results in one bidder being given a preference over another. In the current scenario, however, bidders were excluded from adjudication if they did not meet the stated criteria. There is no notion of preferencing in this approach. Past experience thus functioned as qualification criteria rather than award criteria. A bidder that met the criteria was found responsive and advanced to the second stage of adjudication as opposed to those that did not meet the criteria and hence were excluded as non-responsive.

2.4 Municipal bid committees

In *Nelson Mandela Bay Metropolitan Municipality v MTN Service Provider (Pty) Ltd*⁵⁷⁰ the court invalidated a tender award on the basis of the unauthorised involvement of a so-called ‘pre-evaluation committee’ in the adjudication process. The supply chain management policy of the local authority in this case followed the familiar minimum committee structure prescribed in regulation 26 of the Municipal Supply Chain Management Regulations, 2005. That is a bid specification committee, a bid evaluation committee (BEC) and a bid adjudication committee. However, prior to the meeting of the BEC, another structure, called the ‘pre-evaluation committee’, scrutinised all the bids for compliance with the formal requirements of the tender. This committee subsequently excluded six of the eight tenderers as non-responsive based on a failure to comply with these formal aspects. The BEC only

⁵⁶⁹ Para 49.

⁵⁷⁰ Unreported, referred to as [2014] ZAECPEHC 84, 4 December 2014; available online at <http://www.saflii.org/za/cases/ZAECPEHC/2014/84.html>.

considered the remaining two bids. The court held that since there was no provision for a pre-evaluation committee to take any decisions in the tender adjudication, the decision of that committee to exclude six bids was unlawful. The knock-on effect was that the entire tender process was flawed in that all subsequent decisions followed this unlawful one.

2.5 Interpretation of tender contracts

In *Sakhiwo Health Solutions (Limpopo) (Pty) Ltd v MEC of Health, Limpopo Provincial Government*⁵⁷¹ the Supreme Court of Appeal held that a service level agreement (or a service delivery agreement (SDA) as it was called in this case) should be interpreted together with the request for proposals (RFP) that constituted the tender process preceding the conclusion of the SDA.

In this case the respondent department followed the familiar route to procuring services for an implementation agent to develop healthcare facilities in the province. The department issued an RFP and following adjudication of the bids it received an award letter to the successful bidder, the appellant. The RFP contemplated that an SDA would be concluded between the parties in the following terms:

The bidder will furthermore be obliged to enter into a SLA [SDA], a mutually binding auxiliary agreement which provides additional or supplementary service delivery standards to be met by the successful bidder . . .⁵⁷²

The SDA contained the following clause:

This document shall be deemed to constitute the sole agreement between the parties, with reference to its HEDP 849/08 Programme, read with the letter of award and letter of acceptance and shall cancel and negate any prior verbal or written communications relating to such subject matter, whether expressed or implied, including any letters, memoranda or minutes.

⁵⁷¹ Unreported, referred to as [2014] ZASCA 206, 28 November 2014; available online at <http://www.saflii.org/za/cases/ZASCA/2014/206.html>.

⁵⁷² Para 15.

A dispute subsequently arose between the parties regarding when the contract between them comes to an end. The appellant argued that the contract endured for a period of five years after the completion of the final project managed by it as constituting the maintenance period required in the RFP. The high court found that the terms of the RFP could not be taken into account in interpreting the SDA based on the well-known principles of interpretation of contracts such as the *Shifren* principle and the parol evidence rule.

The SCA rejected this view as ‘plainly wrong’.⁵⁷³ The SCA held that the RFP and award letter formed part of the contract along with the SDA between the parties and in combination constituted the contractual matrix setting out the rights and obligations of the parties. It followed that the terms of the RFP were not extrinsic to the contract between the parties and the rules of interpretation of contracts did not exclude them. The court held that the effect of the clause in the SDA quoted above was in fact to incorporate the RFP and award letter into the contract between the parties and not to supersede it. This view was also supported by the reference in the RFP to the SDA as ‘auxiliary’ to the RFP. The court thus held that the contract between the parties was created when the department accepted the appellant's bid in the award letter and on the terms of the RFP, which was subsequently supplemented by the SDA.

The case illustrates that careful wording will be necessary if the intention of a contracting authority is that the service level agreement concluded after award of a bid will constitute the entire contract between the parties.

2.6 ADR in procurement disputes

The uncertainty that currently exists in South African law regarding the use of ADR in procurement disputes continues with the judgment in *Ultimate Heli (Pty) Limited v Chairperson: Transnet National Authority Acquisition Council*.⁵⁷⁴ In this application for interim relief pending a review application of the award of a public tender, the court rejected the application inter alia based on the applicant's failure to use the alternative dispute resolution mechanism created in the request for proposals (RFP). The relevant provision in the RFP provided that bidders must submit all disputes to the contracting authority's ‘Procurement Ombudsman’ for resolution before proceeding to judicial review. The court held that this constituted ‘a contractual undertaking by the applicant to first refer its complaints to the said Ombudsman before instituting review proceedings’.⁵⁷⁵ This finding is in tension with other recent judgments in which the courts have questioned whether there exists an adequate contractual

⁵⁷³ Para 11.

⁵⁷⁴ Unreported, referred to as [2014] ZAGPPHC 931, 28 November 2014; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2014/931.html>.

⁵⁷⁵ Para 18.

relationship between bidders and the contracting authority during the bid evaluation stage to constitute the basis for binding ADR mechanisms.⁵⁷⁶

2.7 Damages claims for cancelling tender contracts

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*⁵⁷⁷ the Constitutional Court retained a strict approach to damages claims in the context of procurement.

In this matter the respondent's department awarded a tender to construct a hospital to a joint venture of which iLima Projects (Pty) Ltd (iLima) was a member. However, the joint venture fell apart before the work was completed and the head of the department decided to award the remainder of the contract directly to iLima. In order to complete the project iLima secured bridging finance from the plaintiff. However, the head of department subsequently cancelled the contract with iLima citing various irregularities in the direct award process (such as iLima's tax compliance and building accreditation). When iLima went into liquidation and could not repay the bridging finance, the plaintiff brought a damages claim against the department on the basis that 'the Department . . . unlawfully cancelled the completion contract and thereby intentionally caused it harm'.⁵⁷⁸ The court held that the head of department knew about the bridging finance agreement and foresaw that a cancellation of the contract with iLima would constitute a risk for the bridging agreement. The court also held that the department's reasons for cancelling the contract with iLima were unfounded. However, the court rejected the plaintiff's claim, holding that the department did not act wrongfully vis-à-vis the plaintiff. The court held that the department did not owe any duty to the plaintiff. It rejected an argument that the constitutional value of accountability called for delictual liability in this case, finding that the head of department 'was a bungling public functionary, not one bent on illicit gain'.⁵⁷⁹ Under such circumstances the court held that there is no strong accountability argument in support of delictual liability. The court held that the contractual liability towards the department's counterparty (iLima here) will adequately sanction the 'insufficiency of the state's reasons for cancelling' and serve the constitutional value of accountability.⁵⁸⁰ There is accordingly no need for delictual liability towards further third parties as well.

2.8 Judicial review of tender awards: Remedies

⁵⁷⁶ See JQR Public Procurement 2013 (1) 2.3.

⁵⁷⁷ 2015 (1) SA 1 (CC).

⁵⁷⁸ Para 33.

⁵⁷⁹ Para 47.

⁵⁸⁰ Para 50.

In *Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited*⁵⁸¹ the Supreme Court of Appeal overturned a substitution order granted by the high court in a review application of a tender award.

In this matter the contracting authority committed an error of law in deciding not to award the bid to the highest scoring tenderer, the defendant. The SCA thus found that

once it is accepted that Exco erroneously excluded Trencon from the tender process and that its decision therefore constitutes a reviewable error, as was conceded, it must follow that Exco could not have lawfully awarded the tender to another bidder. Any attempt to do so would, of necessity, have resulted in another reviewable error.⁵⁸²

It was based on exactly this reasoning that the high court found that the outcome of the decision was a foregone conclusion, which constituted extraordinary circumstances under s 8(1)(c)(ii) of PAJA and thus justified a substitution order. The SCA disagreed. The main reason for the SCA's view seems to be that the outcome was not a foregone conclusion, despite its conclusion quoted above. This was based on a clause in the tender conditions which stated that the contracting authority 'did not bind itself to accept any of the applications submitted nor to continue with the tender process'.⁵⁸³ In the SCA's view, once the award of the tender to another bidder was set aside, the contracting authority could thus award to the respondent or abandon the tender process in terms of this clause. This view is highly problematic for a number of reasons. Firstly, the Preferential Procurement Regulations, 2011 limit the circumstances under which a contracting authority can cancel a tender process to three scenarios,⁵⁸⁴ none of which were evidently present in this case. To allow a contracting authority to avoid these conditions simply by including a clause in the tender conditions granting to itself an open-ended discretion not to award the contract, which is tantamount to cancelling the tender process, cannot be a lawful course of action. Secondly, in this case it would no longer have been possible for the contracting authority to reconsider the tender and award it since the validity period of the bids had long lapsed. It is trite that a tender cannot be awarded after the validity period has lapsed, since there are no open offers to accept any more.⁵⁸⁵ The result is that the SCA did in fact issue a substantive order, namely that the contracting

⁵⁸¹ Unreported, referred to as [2014] ZASCA 163, 1 October 2014; available online at <http://www.saflii.org/za/cases/ZASCA/2014/163.html>.

⁵⁸² Para 15.

⁵⁸³ Para 3.

⁵⁸⁴ Regulation 8(4).

⁵⁸⁵ See *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) para 70; *Telkom SA Limited v Merid Training (Pty) Ltd*; *Bihati Solutions (Pty) Ltd v Telkom SA Limited* (unreported, referred to as [2011] ZAGPPHC 1, 7 January 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/1.html>); JQR Public Procurement 2014 (1) 2.1; JQR Public Procurement 2011 (1) 2.3.

authority must abandon the tender process. If the contracting authority still wanted the work to be done it had no choice but to restart the tender process. In light of this inevitable outcome of the order, the SCA's reference to deference is also strange since it is not showing much deference to the contracting authority by forcing the authority to adopt a particular course of action.

January to March 2015 (1)

JQR Public Procurement 2015 (1)

Geo Quinot⁵⁸⁶

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*⁵⁸⁷ 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".⁵⁸⁸ 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.

⁵⁸⁶ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁵⁸⁷ Unreported, referred to as [2015] ZAWCHC 9, 9 February 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/9.html>.

⁵⁸⁸ Para 60.

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.⁵⁸⁹ The dispute turned on whether three items that formed part of the 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.⁵⁹⁰ 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*⁵⁹¹ 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.⁵⁹²

2.2 Abnormally low tenders

In *Sethakatshipa Business Enterprise v Mangaung Metropolitan Municipality*⁵⁹³ 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.⁵⁹⁴ 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

⁵⁸⁹ Para 19.

⁵⁹⁰ Para 55.

⁵⁹¹ Unreported, referred to as [2015] ZAFSHC 32, 10 March 2015; available online at <http://www.saflii.org/za/cases/ZAFSHC/2015/32.html>.

⁵⁹²⁵⁹² Para 29.

⁵⁹³ Unreported, referred to as [2015] ZAFSHC 32, 10 March 2015; available online at <http://www.saflii.org/za/cases/ZAFSHC/2015/32.html>.

⁵⁹⁴ Para 23, 31.

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.

2.3 Cancellation of tenders

In *CFIT (Pty) Ltd v Minister of Defence*⁵⁹⁵ 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.⁵⁹⁶

Cancelling a tender for a reason other than any of these will be unlawful.⁵⁹⁷ 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',⁵⁹⁸ 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

⁵⁹⁵ Unreported, referred to as [2015] ZAGPPHC 2, 12 January 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/2.html>.

⁵⁹⁶ Preferential Procurement Regulations, 2011, Regulation 8(4).

⁵⁹⁷ Para 50.

⁵⁹⁸ Para 45.

In *Butsana Textile Services CC v National Treasury*⁵⁹⁹ the court held that an authority was not obliged to place any orders for goods under a transversal, framework agreement.

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:⁶⁰⁰

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.

⁵⁹⁹ Unreported, referred to as [2015] ZAGPPHC 163, 26 March 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/163.html>.

⁶⁰⁰ Paras 7, 19.

2.5 Standing to challenge tender awards

In *Trans Creations KZN CC v City of Cape Town*⁶⁰¹ 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*.⁶⁰² 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

⁶⁰¹ Unreported, referred to as [2015] ZAWCHC 32, 23 March 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/32.html>.

⁶⁰² Para 2.

April to June 2015 (2)

JQR Public Procurement 2015 (2)

Geo Quinot⁶⁰³

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*⁶⁰⁴ 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'.⁶⁰⁵ The court held that this term must be read subject to s 2(1)(f) of the Preferential Procurement Policy Framework Act⁶⁰⁶ 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

⁶⁰³ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁶⁰⁴ Unreported, referred to as [2015] ZACC 22, 26 June 2015; available online at <http://www.saflii.org/za/cases/ZACC/2015/22.html>.

⁶⁰⁵ Para 62.

⁶⁰⁶ Act 5 of 2000.

- (b) funds are no longer available to cover the total envisaged expenditure; or
- (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.⁶⁰⁷ 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.⁶⁰⁸ 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*⁶⁰⁹ 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.⁶¹⁰ The court rejected this argument.⁶¹¹ 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.

⁶⁰⁷ Paras 68–70.

⁶⁰⁸ Para 71.

⁶⁰⁹ Unreported, referred to as [2015] ZAGPPHC 179, 7 April 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/179.html>.

⁶¹⁰ Para 66.

⁶¹¹ Para 69.

2.2 Judicial review of tender awards: Remedies

In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*⁶¹² 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,⁶¹³ 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.⁶¹⁴ 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 Act⁶¹⁵ 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

⁶¹² Unreported, referred to as [2015] ZACC 22, 26 June 2015; available online at <http://www.saflii.org/za/cases/ZACC/2015/22.html>.

⁶¹³ Act 3 of 2000.

⁶¹⁴ Para 58.

⁶¹⁵ Act 5 of 2000.

state cannot award to one of the existing bidders, because no bids will ostensibly be open anymore. The only option would be to restart the entire process.⁶¹⁶ 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'.⁶¹⁷ 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.⁶¹⁸

In *Valazone 268 CC v Head of Department Mpumalanga Department of Education*⁶¹⁹ 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'.⁶²⁰ 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.⁶²¹ 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

⁶¹⁶ 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] ZAECHGHC 45, 30 April 2015; available online at <http://www.saflii.org/za/cases/ZAECHGHC/2015/45.html>) para 58, decided prior to the Constitutional Court judgment in *Trencon*.

⁶¹⁷ Para 80.

⁶¹⁸ Paras 75–76.

⁶¹⁹ Unreported, referred to as [2015] ZAGPPHC 179, 7 April 2015; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2015/179.html>.

⁶²⁰ Para 16.

⁶²¹ Para 62.

no grounds to cancel under regulation 8(4) of the Preferential Procurement Regulations, 2011.⁶²² The court held that if the organ of state was concerned about irregularities in the tender process that may suggest that the entire process was unlawful, it should have approached a court for an order setting aside the tender process and ordering re-advertising, rather than re-adjudication.⁶²³

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 Quinot⁶²⁴

1. Legislation

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

2. Cases

2.1 Access to tender information

⁶²² See JQR Public Procurement 2015 (2) 2.1 above.

⁶²³ Para 61.

⁶²⁴ 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*⁶²⁵ 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.⁶²⁶

2.2 Tender contracts and budget allocations

⁶²⁵ Unreported, referred to as [2015] ZAECHC 20, 1 September 2015; available online at <http://www.saflii.org/za/cases/ZAECHC/2015/20.html>.

⁶²⁶ Para 25.

In *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works*⁶²⁷ the SCA dealt with the relationship between the validity and enforceability of tender contracts and budget allocations for expenditure under such contracts.

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'.⁶²⁸ 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'.⁶²⁹ 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.'⁶³⁰

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*⁶³¹ had to grapple with in the challenge against the declaration of toll roads in the Western Cape, is that of

⁶²⁷ Unreported, referred to as [2015] ZASCA 116, 10 September 2015; available online at <http://www.saflii.org/za/cases/ZASCA/2015/116.html>.

⁶²⁸ At para 1.

⁶²⁹ At para 20.

⁶³⁰ At para 21.

⁶³¹ Unreported, referred to as [2015] ZAWCHC 135, 30 September 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/135.html>.

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 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.⁶³² 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 endorsed⁶³³ the well-known comments from the Australian judgment in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia*⁶³⁴ which commented in turn on the key English judgment on fettering in *Rederiaktiebolaget 'Amphitrite' v The King*.⁶³⁵

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

⁶³² At paras 250–254.

⁶³³ At para 251.

⁶³⁴ (1977) 17 ALR 513 (HC).

⁶³⁵ (1921) 3 KB 500.

fetters'.⁶³⁶ 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 or possibility of the fettering occurring'.⁶³⁷ 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.⁶³⁸

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

⁶³⁶ At para 252.

⁶³⁷ At para 253.

⁶³⁸ At para 254 (footnotes omitted).

In *Slip Knot Investments 777 (Pty) Ltd v Mayibuye Transportation Corporation*⁶³⁹ 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 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.⁶⁴⁰

In *Tshenolo Resources (Pty) Ltd v MEC: Northern Cape Provincial Government: Department of Roads and Public Works*⁶⁴¹ 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*⁶⁴² 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.⁶⁴³ 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

⁶³⁹ Unreported, referred to as [2015] ZAECELLC 10; 26 July 2015; available online at <http://www.saflii.org/za/cases/ZAECELLC/2015/10.html>.

⁶⁴⁰ At para 15.

⁶⁴¹ Unreported, referred to as [2015] ZANCHC 27, 18 September 2015; available online at <http://www.saflii.org/za/cases/ZANCHC/2015/27.html>.

⁶⁴² Unreported, referred to as [2015] ZAWCHC 108, 13 August 2015; available online at <http://www.saflii.org/za/cases/ZAWCHC/2015/108.html>.

⁶⁴³ At para 79.

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.

October to December 2015 (4)

JQR Public Procurement 2015 (4)

Geo Quinot⁶⁴⁴

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*⁶⁴⁵ 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

⁶⁴⁴ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁶⁴⁵ [2016] 1 All SA 332 (SCA).

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.

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 2011.⁶⁴⁶ 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*,⁶⁴⁷ 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.'⁶⁴⁸ 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

⁶⁴⁶ 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.

⁶⁴⁷ 2015 (5) SA 245 (CC).

⁶⁴⁸ At para 29.

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.⁶⁴⁹ It also did so explicitly by confirming the concession to this effect made by the contracting authority in argument, adding that 'the IDC could only cancel the tender if one of the grounds stipulated in regulation 8(4) existed.'⁶⁵⁰ 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.'⁶⁵¹

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?'⁶⁵²

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.⁶⁵³

The SCA further reasoned that the cancellation did not amount to administrative action, because 'inaction is not ordinarily to be equated with action'.⁶⁵⁴ 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

⁶⁴⁹ At para 65.

⁶⁵⁰ At para 68.

⁶⁵¹ At para 70.

⁶⁵² At para 28.

⁶⁵³ Local Government: Municipal Finance Management Act 56 of 2003, s 117.

⁶⁵⁴ At para 31.

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 Act⁶⁵⁵ makes it plain that inaction qualifies as much as administrative action as action does. For example, PAJA defines 'administrative action' as 'any decision taken, or any failure to take a decision'⁶⁵⁶ 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.'⁶⁵⁷

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*.⁶⁵⁸ 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.⁶⁵⁹ 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.'⁶⁶⁰

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

⁶⁵⁵ Act 3 of 2000 ('PAJA').

⁶⁵⁶ PAJA s 1(i).

⁶⁵⁷ PAJA s 1(v)(g).

⁶⁵⁸ 2003 (2) SA 460 (SCA).

⁶⁵⁹ See eg (most recently) *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) footnote 62.

⁶⁶⁰ At paras 7, 8.

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.⁶⁶¹ 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 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.'⁶⁶² 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*⁶⁶³ 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'.⁶⁶⁴ 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'.⁶⁶⁵ 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.⁶⁶⁶

⁶⁶¹ At para 32.

⁶⁶² At para 32.

⁶⁶³ [2016] 1 All SA 483 (SCA).

⁶⁶⁴ At para 48.

⁶⁶⁵ At para 50.

⁶⁶⁶ Act 3 of 2000.

2.3 Disqualification of bidders based on prior involvement in projects

The SCA held in *Aurecon South Africa (Pty) Ltd v City of Cape Town*⁶⁶⁷ 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'.⁶⁶⁸ The court also held that regulation 27(4) of the Municipal Supply Chain Management Regulations, 2005,⁶⁶⁹ 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'.⁶⁷⁰

2.4 Registration on supplier database as tender condition

In *Intsimbi Industrial Manufacturing CC v Municipality Manager of the Nelson Mandela Metropolitan Municipality*⁶⁷¹ 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:

⁶⁶⁷ [2016] 1 All SA 313 (SCA).

⁶⁶⁸ Para 41.

⁶⁶⁹ 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.'

⁶⁷⁰ Para 41.

⁶⁷¹ Unreported, referred to as [2015] ZAECPHC 64, 13 November 2015; available online at <http://www.saflii.org/za/cases/ZAECPHC/2015/64.html>.

‘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.’⁶⁷²

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 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.⁶⁷³

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*.⁶⁷⁴ This is one of the first cases that have interpreted s 110(2) of the Local Government: Municipal Finance Management Act (MFMA)⁶⁷⁵ and regulation 32 of the Municipal Supply Chain Management Regulations, 2005 (the MSCM Regulations)⁶⁷⁶ which provide for this possibility.

⁶⁷² Para 39.

⁶⁷³ At para 43.

⁶⁷⁴ Unreported, referred to as [2015] ZAECELLC 16, 24 November 2015; available online at <http://www.saflii.org/za/cases/ZAECELLC/2015/16.html>.

⁶⁷⁵ 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.’*

⁶⁷⁶ 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–*

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 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'.⁶⁷⁷ 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'.⁶⁷⁸

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

(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.'

⁶⁷⁷ Para 13.

⁶⁷⁸ Para 37.

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

In *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*⁶⁷⁹ the Supreme Court of Appeal held that the dispute resolution mechanism created in regulation 50 of the Municipal Supply Chain Management Regulations⁶⁸⁰ does not qualify as an internal remedy as meant by s 7(2) of the Promotion of Administrative Justice Act.⁶⁸¹ 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

⁶⁷⁹ Unreported, referred to as [2015] ZASCA 146, 1 October 2015; available online at <http://www.saflii.org/za/cases/ZASCA/2015/146.html>.

⁶⁸⁰ GN 868, GG 27636 of 30 May 2005, promulgated in terms of the Municipal Finance Management Act 56 of 2003.

⁶⁸¹ Act 3 of 2000 ('PAJA').

January to March 2016 (1)

JQR Public Procurement 2016 (1)

Geo Quinot⁶⁸²

1. Legislation

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

2. Cases

2.1 Standing to challenge tender awards

In *Secureco (Pty) Ltd v Ethekwini Municipality and Others*⁶⁸³ the court dealt with the question of standing to bring a judicial review application of a tender award. In this matter the respondent invited bids to provide it with payroll services, but failed to award the tender before the bids expired and did not request bidders to extend the bid validity periods either. The tender process thus lapsed. The respondent subsequently launched a new tender process for exactly the same services. While the applicant submitted a bid in the first tender process, it did not submit a bid in the second, because it was not aware of the second invitation. The respondent also allowed the bids received in the second tender process to lapse before making an award and attempted to award the bid long after the expiry date, again without requesting bidders to extend the bid validity period.

When the applicant brought an application for the review and setting aside of the tender award in the second tender process, the respondent's sole defence was that the applicant lacked standing. The respondent argued that since the applicant had not submitted a bid in the second tender process, it had no standing to challenge the award in that tender process. As a result, the respondent argued, the court should dismiss the application and let the tender award stand.

The court rejected the defence and found in favour of the applicant. The court held that since the tender award was patently unlawful it was in the public interest to allow the review application to proceed and thus to allow the applicant the standing to bring the review. With reference to the Constitutional Court judgment in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*,⁶⁸⁴ the court noted that "broader concerns of accountability and responsiveness" militate against disposing of cases simply on the basis of standing.⁶⁸⁵ Since the present matter dealt with the lawfulness of an organ of state's award

⁶⁸² BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LL.D (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁶⁸³ Unreported, referred to as [2016] ZAKZDHC 14, 1 April 2016, available online at www.saflii.org/za/cases/ZAKZDHC/2016/14.html.

⁶⁸⁴ 2013 (3) BCLR 251 (CC).

⁶⁸⁵ At para 15.

of a public tender, the court was clearly of the view that this is the type of case where such concerns of accountability and responsiveness called for the matter to be heard. The court noted that it would be contrary to public interest if "such a manifest waste of time and effort by Municipal officials should simply be ignored", which would be the case if the applicant is non-suited on standing alone.⁶⁸⁶

2.2 Condonation in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

In two judgments the courts had to deal with non-compliance with the requirements of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Institution of Legal Proceedings Act') in the procurement context. In both *Premier Attraction 300 CC t/a Premier Security v City of Cape Town*⁶⁸⁷ and in *Nyumba Mobile Homes & Offices (Pty) Ltd v MEC: Department of Health Free State Province*,⁶⁸⁸ applications were brought for purposes of condonation in terms of section 3(4)(a) of the Institution of Legal Proceedings Act. In both of these cases, the applications for condonation were granted, i.e. the applicants were allowed to proceed with their respective cases against the contracting authority despite not having complied with the procedural requirements of the Act.

Section 3(1) of the Institution of Legal Proceedings Act prohibits legal proceedings for the recovery of a debt being instituted against an organ of state, save in cases where written notice of a creditor's intention to do so is provided; or where written consent is granted by the organ of state for the institution of the proceedings, either without notice or after receipt of a defective notice. Various requirements are provided in s 3(2). The relevant provisions of s 3(4) of the Institution of Legal Proceedings Act provide as follows:

- (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that–
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for failure by the creditor; and
 - (iii) the organ of state was not unreasonably prejudiced by the failure.

⁶⁸⁶ At para 13.

⁶⁸⁷ Unreported, referred to as [2016] ZAWCHC 30, 9 March 2016; available online at <http://www.saflii.org/za/cases/ZAWCHC/2016/30.html>.

⁶⁸⁸ Unreported, referred to as [2016] ZAFSHC 44, 17 March 2016; available online at <http://www.saflii.org/za/cases/ZAFSHC/2016/44.html>.

Creditors applying for condonation in terms of s 3 are saddled with the onus of establishing all of the requirements listed in subsection (4)(b)(i)-(iii).⁶⁸⁹

In *Premier Security* the applicant's case for condonation for its failure to comply with the Act was fairly weak. It struggled to establish good cause for its failure to provide timeous notice. Flimsy contentions were proffered, such as the applicant having been "under the impression that compliance with [the Institution of Legal Proceedings Act] would not feature in the litigations".⁶⁹⁰

In contrast, the respondent raised a number of seemingly cogent points against condonation. Nevertheless, the court held that "to deny condonation ... would ensure that applicant could not vindicate any rights which it enjoys under s 34 of [the Constitution], the spirit, purport and objects of which should figure in any such application".⁶⁹¹

The court in *Nyumba Mobile Homes & Offices* employed a purposeful approach to the section 3(4)(b) inquiry. In addition to the explicit requirements provided in the Act, the court had regard to the intention of the applicant as well as the interests of justice. With regards to the latter, the court acknowledged the fact that the applicant provided an important service to the relevant community under the procurement contract at issue. The court concluded in favour of the applicant, using its "discretion in favour of the applicant and granting it the opportunity to have the claim tested according to the dictates of law and justice".⁶⁹²

2.3 Internal failures in a procurement process and liability on the basis of estoppel

In *Premier Attraction 300 CC t/a Premier Security v City of Cape Town*⁶⁹³ the court considered whether a contracting authority could be held liable on the basis of estoppel.

In this matter the applicant sought payment from the respondent for certain additional services rendered in terms of a contract concluded between the applicant and the respondent on the basis of a tender award. However, the additional service requested by the respondent and in turn provided by the applicant was not in terms of an official purchase order, which was required by the respondent's Supply Chain Management Policy as a prerequisite for the respondent's liability. The respondent thus relied on these provisions of the policy as a defence to the applicant's additional claim.

The court relied on a distinction drawn by the SCA in *City Twshane Metropolitan Municipality v RPM Bricks (Pty) Ltd*⁶⁹⁴ 'between an act beyond or in excess of the legal powers of a public authority ... and

⁶⁸⁹ *Premier Attraction 300 CC t/a Premier Security v City of Cape Town* supra at para 19; *Nyumba Mobile Homes & Offices (Pty) Ltd v MEC: Department of Health Free State Province* supra at para 6.

⁶⁹⁰ At para 23.

⁶⁹¹ At para 31.

⁶⁹² At para 19.

⁶⁹³ Unreported, referred to as [2016] ZAWCHC 30, 9 March 2016; available online at <http://www.saflii.org/za/cases/ZAWCHC/2016/30.html>.

the irregular or informal exercise of power granted'. The respondent's defence to the additional claim in *Premier Security* was held to fall under the second category described in this distinction, which meant that the applicant was 'entitled to assume that all the necessary arrangements or formalities [had] indeed been complied with', and was entitled to rely on estoppel in the case of the respondent raising the defence of noncompliance with certain internal formalities, allegedly resulting in the respondent's liability being absolved.⁶⁹⁵

⁶⁹⁴ 2008 3 SA 1 (SCA) at para 11.

⁶⁹⁵ At para 12.

April to June 2016 (2)

JQR Public Procurement 2016 (2)

Geo Quinot⁶⁹⁶

1. Legislation

1.1 Restricting public servants from doing business with government

While the Public Administration Management Act⁶⁹⁷ remains on the shelf awaiting proclamation and with it the blanket prohibition on public servants contracting with the state,⁶⁹⁸ the Public Service Regulations, 2016 have now introduced such a bar for public servants in the national and provincial spheres of government.⁶⁹⁹ These regulations will ostensibly come into operation on 1 August 2016.⁷⁰⁰ Regulation 13 states that

‘An employee shall . . . (c) not conduct business with any organ of state or be a director of a public or private company conducting business with an organ of state, unless such employee is in an official capacity a director of a company listed in schedule 2 and 3 of the Public Finance Management Act’.

Once these regulations are in operation no public servant will thus be allowed to contract with the state at any level of government.

2. Cases

2.1 Tenderer's duty to disclose business rescue and changes in financial position

⁶⁹⁶ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁶⁹⁷ Act 11 of 2014.

⁶⁹⁸ Draft Public Administration Management Regulations on Conducting Business with the State and the Disclosure of Financial Interests in the Public Service, 2016 made under the Public Administration Management Act were published for public comment under General Notice 838 in *Government Gazette* 40141 of 15 July 2016.

⁶⁹⁹ At local government level such a prohibition has long been in place in terms of regulation 44 of the Municipal Supply Chain Management Regulations, 2005 (General Notice 868 in *Government Gazette* 27636 of 30 May 2005).

⁷⁰⁰ However, it does not appear as if these regulations have been published in the *Government Gazette*.

In *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province*⁷⁰¹ the Supreme Court of Appeal confirmed a tenderer's duty to disclose business rescue when participating in a public procurement process, but also went further and recognised a duty to disclose any material changes in a bidder's financial position after a bid was submitted and before the tender is awarded.

In this matter a bidder applied for and was placed under business rescue in terms of the Companies Act⁷⁰² after bids had closed and it had submitted its bid. The business rescue plan was successfully completed before the tender was awarded to it. At no stage did the tenderer disclose the business rescue proceedings to the contracting authority. When the tender was awarded to this bidder, one of the other, unsuccessful bidders challenged the award in review proceedings. The High Court set the tender award aside.⁷⁰³ On appeal, the SCA confirmed the High Court's ruling, holding that the bidder in this case did have a duty to disclose the business rescue to the organ of state.

The SCA found the duty to disclose business rescue in the requirement in the bid documents that bidders must prove their financial ability to implement the tender project. The court held that a bidder that applies to be placed under business rescue is evidently financially distressed and could hence not comply with this tender requirement.⁷⁰⁴ Relying primarily on *Pretorius v Natal South Sea Investment Trust Ltd (under Judicial Management)*⁷⁰⁵ the SCA held that in public procurement contracts such as the present one a duty similar to that in contracts of insurance applies to bidders to disclose material facts, because the organ of state involuntarily relies on the bidder for information.⁷⁰⁶ This included information pertaining to the financial standing of the bidder in the present matter. The court importantly held that this duty endured after submission of bids during the adjudication process.⁷⁰⁷ The court thus found that once the bidder's "financial position had changed materially after it had submitted its bid it bore the duty to disclose that material fact".⁷⁰⁸ The court found further support for this position in the public interest inherent in public procurement.

2.2 Past experience as tender condition

In *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province*⁷⁰⁹ the Supreme Court of Appeal overturned the somewhat puzzling reasoning of the High Court below in respect of past

⁷⁰¹ Unreported, referred to as [2016] ZASCA 61, 14 April 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/61.html>.

⁷⁰² Act 71 of 2008.

⁷⁰³ See JQR Public Procurement 2014 (4) 2.2.

⁷⁰⁴ Para 22.

⁷⁰⁵ 1965 (3) SA 410 (W) at 418E–F.

⁷⁰⁶ Para 23.

⁷⁰⁷ Para 25.

⁷⁰⁸ Para 25.

⁷⁰⁹ Unreported, referred to as [2016] ZASCA 61, 14 April 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/61.html>.

experience as a ‘category of preference’.⁷¹⁰ The SCA held that the organ of state erred in its determination of the applicant’s compliance with the past experience condition. The condition required bidders ‘to demonstrate the completion of at least one similar project in the past seven years’.⁷¹¹ The bid documents further clarified that a ‘similar project is the upgrading of a gravel road to surfaced standards with least 10 kilometres length and a minimum construction value of R100 million’.⁷¹² The organ of state disqualified the applicant, because it submitted proof of a project it was involved in as part of a joint venture over two phases with the value of its contribution in each phase being less than R100 million. The SCA found that this approach was incorrect, since the bid documents did not require bidders to show that they were the sole contractor on such previous contracts and because it did not matter that the project was implemented over phases; the total contribution of the applicant to the entire past project was more than R100 million and it thus did submit a responsive bid.

Not only did the SCA set the award of the tender to a competing (more expensive) bidder aside, the court ordered that the tender be awarded to the applicant, ie granted a substitution order.

2.3 Adjudication of bids in framework agreements

In *Dimension Data (Pty) Ltd v State Information Technology Agency (SOC) Ltd*⁷¹³ the court, while dealing with an application for interim relief, set out the proper approach to adjudicating bids for a framework agreement. The court held that when placing the framework agreement, the contracting authority had to evaluate the competing bids on price and preference points during the second stage of adjudication, even when there was only one bidder remaining following exclusions in the first round of adjudication. The court held that it would not be lawful to leave a consideration of price and preference to the ordering stage after the framework had been placed.⁷¹⁴

⁷¹⁰ See JQR Public Procurement 2014 (4) 2.3.

⁷¹¹ Para 15.

⁷¹² Para 15.

⁷¹³ Unreported, referred to as [2016] ZAGPPHC 351, 13 May 2016; unreported, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2016/351.html>.

⁷¹⁴ Paras 71–72.

July to September 2016 (3)

JQR Public Procurement 2016 (3)

Geo Quinot⁷¹⁵

1. Legislation

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

2. Cases

2.1 Choice of legal route to challenge contractual action

In an important judgment, a majority of judges of the Supreme Court of Appeal adopted a very strict approach to the appropriate legal route to challenge procurement decisions in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*.⁷¹⁶ However, two judges of appeal took an equally strong view in dissent. While this case now provides unequivocal authority for how procurement decisions should be brought on review, it is safe to say that this will not be the final word on the matter and there are quite likely to be further developments in this area. The core of the issue is whether an organ of state (or any other person by extension) may challenge a procurement decision on the basis of legality rather than under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

In this matter the appellant organ of state, SITA, concluded a contract with the respondent without following any competitive tender procedure as prescribed by s 217 of the Constitution, applicable legislation and its own procurement policy. It was common cause that the award of this contract fell afoul of applicable and mandatory procurement rules. A payment dispute consequently arose between the parties under the contract and when the respondent attempted to enforce payment for services rendered, the appellant argued that the contract was unlawful and invalid due to the failure to follow procurement rules in concluding it and therefore could not be enforced. The appellant thus approached the High Court for an order declaring the contract invalid. It did so not on the basis of a review application under PAJA, but on the basis of the constitutional principle of legality, arguing that the failure to comply with s 217 of the Constitution rendered the contract invalid.

The majority held that the appellant did not have a choice between bringing the matter as a PAJA review or a legality challenge.⁷¹⁷ The court stated the position succinctly and clearly as follows:

'In short, if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law ...

⁷¹⁵ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

⁷¹⁶ Unreported, referred to as [2016] ZASCA 143, 30 September 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/143.html>.

⁷¹⁷ At para 33.

In my view, the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies.’⁷¹⁸

In the present matter the difference between bringing the matter as a legality challenge rather than a PAJA review had significant practical implications. PAJA places a strict 180-day time limit on launching review applications (subject to extensions under s 9 of PAJA) that does not apply to legality challenges, which are subsequently only subject to the common-law delay rule which involves a more flexible reasonableness test.

The majority held that the appellant’s decision to award the contract to the respondent amounted to administrative action, rejecting the appellant’s arguments to the contrary. As a result PAJA governed the matter and the regularity of the award had to be determined via the procedure set out in PAJA. A litigant cannot avoid these procedural requirements of PAJA by simply choosing to rely on the principle of legality. Where the challenge to the procurement decision involves a claim that the decision failed to comply with s 217 of the Constitution, it has to be framed as a lawfulness challenge in terms of PAJA on review grounds such as those set out in ss 6(2)(a)(i), 6(2)(b) and 6(2)(f)(i).⁷¹⁹ Since the appellant did not rely on PAJA in this instance, the court dismissed its application.

The minority vigorously advanced the opposite view in dissent. They reasoned that the majority approach was formalistic and that the supremacy of the Constitution meant that no public body, including the courts, could validate conduct, such as the award of the public contract here, that was in clear conflict with the Constitution, s 217 in this case. The minority formulated its positions as follows:

‘A question that needs to be answered in this appeal is whether it is permissible, in the context of the court’s constitutional obligations as set out in s 172(1) of the Constitution for a court to countenance or legitimize a flagrant unconstitutional procurement like the one in this case under the guise that SITA should have proceeded by way of PAJA and not legality. Put simply, can SITA be denied the opportunity to vindicate s 217 and the principle of legality by such procedural technicalities. Certainly not. PAJA owes its existence to the Constitution.’⁷²⁰

The majority view seems to be more closely aligned with the Constitutional Court’s approach in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*⁷²¹ where the court declared:

‘Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be

⁷¹⁸ At paras 33, 38.

⁷¹⁹ At para 21.

⁷²⁰ At para 58.

⁷²¹ 2014 (1) SA 604 (CC) at paras 43–45.

taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA.⁷²²

2.2 The relationship between contracting authorities and SITA in procurement

In *SAAB Grintek Defence (Pty) Ltd v South African Police Service*⁷²³ the Supreme Court of Appeal set out the exact nature of the relationship between contracting authorities and SITA in terms of procurement functions. The court explained that contracting authorities may either procure *from* SITA, in which case SITA would of course take on the role of a supplier, or contracting authorities may procure *through* SITA. Neither of these options, in the court's view, involved SITA procuring on behalf of a contracting authority. This means that even where SITA is involved in a procurement, it is the contracting authority itself that must take the procurement decisions and not SITA. The court formulated this position succinctly as follows:

'All this makes it clear that SITA's role is that of an expert agency facilitating the acquisition of technology services by government departments, but it does not decide whether to acquire the technology, nor does it decide not to proceed with a tender process. That is the function of the relevant department.'⁷²⁴

However, in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*⁷²⁵ the SCA seems to take a different view of the relationship between SITA, suppliers and other state departments. In this case, SITA concluded a contract with the respondent to render IT services to particular government departments. Factually the case seems to be comparable to *SAAB Grintek*.⁷²⁶ But in *Gijima Holdings* the court adopted the view that SITA is the contracting authority, ie the parties to the procurement contract are SITA and the private supplier and not the state department that will be the beneficiary of the IT services to be rendered under the contract. The SCA clearly viewed SITA to be the organ of state taking the relevant procurement decisions at stake in *Gijima Holdings*. This is for example clear in the court's statements that '[o]n 25 January 2012 SITA unlawfully terminated the SAPS agreement';⁷²⁷ 'SITA assured Gijima that it had the authority to conclude the contract';⁷²⁸ and 'Mr Blake Mosley-Lefatola, the erstwhile chief executive officer, signed the agreement on behalf of SITA'.⁷²⁹ In contrast to the approach adopted in *SAAB Grintek*, the SCA in *Gijima Holdings* suggests that there are two distinct contracts at issue where SITA is involved in procurement – one between SITA and the 'client' state department and

⁷²² At para 45 (footnotes omitted).

⁷²³ [2016] 3 All SA 669 (SCA).

⁷²⁴ At para 11.

⁷²⁵ Unreported, referred to as [2016] ZASCA 143, 30 September 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/143.html>.

⁷²⁶ Incidentally, both cases involved SITA's involvement in procuring IT services to be rendered to the South African Police Service.

⁷²⁷ At para 7.

⁷²⁸ At para 8.

⁷²⁹ At para 9.

one between SITA and the private supplier.⁷³⁰ It is not apparent which one of the different views adopted in these two judgments is the correct one.

2.3 Cancellation of tenders

Questions around when and how contracting authorities may cancel a tender remains problematic, as the surprising judgment in *SAAB Grintek Defence (Pty) Ltd v South African Police Service*⁷³¹ shows.

In this matter the South African Police Service (SAPS) issued a tender via the State Information Technology Agency (SITA) for an integrated mobile vehicle data command and control solution in February 2009. Following numerous extensions of the bid validity periods, SAPS took a decision in May 2012 to cancel the tender when SITA had still not finalised it. Bidders were informed of this decision in August 2012. The applicant challenged this decision to cancel on a number of review grounds under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively on the principle of legality.

The arguments premised on PAJA came up against the SCA decision in *Tshwane City v Nambiti Technologies (Pty) Ltd*⁷³² where the court expressed the *obiter* view that the cancellation of a tender process did not amount to administrative action.⁷³³ Applicants invited the court to hold that *Nambiti* was wrong in this respect. The court refused this invitation and confirmed the approach in *Nambiti*. The SCA's ruling in this case, as with that in *Nambiti*, is surprising in light of the Constitutional Court judgment in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*.⁷³⁴ In the present matter, the court did not even refer to *Trencon*, which is clearly relevant to the matter at hand.

The court's reasoning starts by the fairly bald assertion that a 'decision as to procurement of goods and services by an organ of State . . . is one that lies within the heartland of the exercise of executive authority by that organ of State'.⁷³⁵ It referred to *Nambiti* in support of this statement, but in that case the court also just made the statement with very little (if any) reasoning in support of it.⁷³⁶ The real reasoning behind the statement can be gleaned from the further statement in both judgments that 'it is always open to a public authority, *as it would to a private person*, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender'.⁷³⁷ In this latter statement one finds the equation of the state with any private party within a commercial context and thereby revealing the equation of the state's executive power with the residual competence of any person. This is a throwback to a Blackstonian view of the prerogative and common-law powers of the state contrary to the Diceyan view that restricted state powers to legislative and prerogative.⁷³⁸ While the Diceyan view has long been accepted in South African law as

⁷³⁰ At para 4.

⁷³¹ [2016] 3 All SA 669 (SCA).

⁷³² 2016 (2) SA 494 (SCA).

⁷³³ See JQR Public Procurement 2015 (4) 2.1.

⁷³⁴ 2015 (5) SA 245 (CC).

⁷³⁵ At para 18.

⁷³⁶ At para 43.

⁷³⁷ *SAAB* para 18; *Nambiti* para 26 (emphasis added).

⁷³⁸ See G Quinot *State Commercial Activity* (2009) 27–32.

authoritative,⁷³⁹ the Blackstonian view seemingly continues to influence thinking, as is evident in these two cases. The *SAAB* matter, however, extends this reasoning quite far in respect of cancellation of tenders.

Based on this general proposition that contracting authorities share residual legal competence with private parties, which is ostensibly part of their executive powers, the court reasons that the mere regulation of that power cannot convert the power to an administrative nature. The problem with this reasoning is the attempt to sharply distinguish between executive and administrative power. This is of course not a new problem and one that the courts have had to grapple with in many other contexts as well. In *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc*⁷⁴⁰ the Constitutional Court essentially distinguished between policy formulation functions and policy implementation functions, holding that the latter constitute administrative action. Execution as opposed to formulation of policy has become one of the key criteria in distinguishing between administrative and executive actions. Within this approach, it is difficult to see how procurement decisions could ever qualify as executive decisions rather than administrative decisions. It seems that the very nature of procurement is that of implementation of policy – it is action aimed at operationalising a policy function.

One can also criticise the court for its view that regulation 8(4) of the Preferential Procurement Regulations, 2011 ‘certainly does not purport to confer a power on SAPS, in this instance, which it otherwise did not have’.⁷⁴¹ Regulation 8(4) states:

- ‘An organ of state may, prior to the award of a tender, cancel a tender 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.’

On the plain wording of the regulation it does seem to confer a power and one would expect the court to offer some reasoning why it finds it so clear that the regulation does not confer a power. Of course, it follows from the court’s implicit Blackstonian view of state power highlighted above that the power to cancel may be sourced in common-law powers, which would support the court’s interpretation of the regulation, but that is certainly not set out by the court and if one were to question that Blackstonian view, which one must in light of a long line of precedent on the issue, this reasoning would also become questionable.

A final point of criticism that one can raise in respect of this part of the *SAAB* judgment is its reasoning on the ambit and purpose of regulation 8(4). In this regard it stated that:

- ‘All that the regulation does, in my view, is identify in broad, but not exclusive, terms the circumstances in which an organ of State may, in the exercise of its discretion, cancel a tender. It

⁷³⁹ Quinot *State Commercial Activity* 29.

⁷⁴⁰ 2001 (2) SA 1 (CC).

⁷⁴¹ At para 20.

does not seek to constrain the executive decision-making power of an organ of State to determine what goods and services are required to fulfil its public obligations.’⁷⁴²

One wonders what the purpose of regulation 8(4) would be if it were not to confine the circumstances under which an organ of state may cancel a tender. Furthermore, regulation 8(5), which sets out procedural requirements for the decision to cancel a tender, explicitly only applies to decisions taken under regulation 8(4). If the latter is not meant to be exhaustive of the cancellation power, it means that the procedural requirements in regulation 8(5) would also only apply in some instances of cancellation and not others. Such an interpretation seems absurd. When regulations 8(4) and 8(5) are read together, it seems that an interpretation of regulation 8(4) that restricts cancellation to the conditions set out in that regulation is the most justifiable one. But perhaps most damning for this part of the judgment and the court’s interpretation of regulation 8 is the complete absence of any reference to the Constitutional Court judgment in *Trencon*. In that matter the Constitutional Court authoritatively dealt with the cancellation power, which it had to decide in order to reach a conclusion on whether the outcome of the tender process was a foregone conclusion or not.⁷⁴³ The court thus held that ‘the [contracting authority] could only cancel the tender if one of the grounds stipulated in regulation 8(4) existed.’⁷⁴⁴ Equally damning for the entire (Blackstonian) approach of the SCA is the remark by the Constitutional Court in *Trencon* that

‘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.’⁷⁴⁵

Despite its finding that the cancellation of the tender did not amount to administrative action and was thus not subject to review in terms of PAJA in *SAAB*, the SCA assessed the cancellation decision against the principle of legality. Strangely, in contrast to the court’s interpretation of regulation 8(4) above that the circumstances listed in the regulation are not exclusive of an authority’s cancellation power, the court entertained an argument in this part of the judgment that the contracting authority did not have a lawful, substantive reason for cancellation. It concluded that ‘the grounds given by SAPS for cancelling the tender were substantive grounds and that they were covered by reg 8(4)(a) of the Procurement Regulations’.⁷⁴⁶ Given the earlier interpretation of the regulation one would have thought that the simple answer to this argument would have been that any reason for cancellation would do as long as the decision is rational (a question which is assessed separately by the court).

2.4 Turnkey contracting strategy

In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁷⁴⁷ the court dealt with the phenomenon of a ‘turnkey contracting strategy’ in the context of construction procurement. In terms of

⁷⁴² At para 20.

⁷⁴³ See JQR Public Procurement 2015 (4) 2.1.

⁷⁴⁴ At para 68.

⁷⁴⁵ At para 70.

⁷⁴⁶ At para 33.

⁷⁴⁷ [2016] 4 All SA 60 (ECG).

this strategy the applicant municipality concluded a single overarching contract with one service provider to act as implementing agent for a public housing project in a particular area. The authority subsequently sought to have a particular contract ostensibly concluded *under* the turnkey contract set aside upon review. It was common cause that the particular (second) contract between the parties was not preceded by a procurement process, but was concluded on the strength of the existing turnkey contract. The court held that a separate contract could not simply be concluded on the basis 'of an open-ended turnkey contract' without following a competitive procedure. Such an approach would offend against s 217 of the Constitution according to the court. Notably the court stated:

'The *'turnkey contracting strategy'* cannot mean that an entire procurement process for different work projects can be dealt with in one contract, excluding all competition from other contractors.'⁷⁴⁸

2.5 Strict compliance with tender conditions and tax clearance certificates

Despite recent advances in using electronic means to verify bidders' tax compliance status in terms of the Central Supplier Database, tax clearance certificates continue to provide problems, as is illustrated in *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform; In re: Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Reform*.⁷⁴⁹ Hopefully, these types of cases will decrease as usage of the CSD increases following the mandatory use of the CSD from 1 July 2016.

In this matter the bids of the respective applicants in the two review applications pertaining to the same tender process that were consolidated in this case, were rejected as being non-responsive for failure to submit tax clearance certificates for one of their subcontractors. Both bidders included the same subcontractor in their bids, as did a third bidder. The applicants indicated in their bids that a tax certificate could not be submitted in respect of the particular subcontractor since it was a subdivision of a larger entity, the tax certificate of which was submitted. However, the third bidder (which eventually won the tender) submitted a tax clearance certificate for the relevant subcontractor. Although it is not exactly clear from the facts given in the judgment, it appears that the subcontractor became a division of the larger entity following a fairly recent merger, which may explain why a separate tax clearance certificate still existed for the entity despite its having become only a division.

The court held that the contracting authority was correct in finding the applicants' bids as non-responsive since the tender documents clearly indicated that original tax clearance certificates for all subcontractors were required as a mandatory qualification criterion. In this respect the court declared:

'If unacceptable or non-responsive tender or tenders were to be further considered despite failing to comply with and/or conform to mandatory requirements, then certainly the

⁷⁴⁸ Para 62.

⁷⁴⁹ [2016] 3 All SA 686 (WCC).

consequences would be that the tender process as a whole is not transparent as required by the provisions of the PPPFA and section 217 (1) of the Constitution quoted *supra*.⁷⁵⁰

This strict approach to compliance with qualification criteria is in line with existing jurisprudence and in particular the Supreme Court of Appeal judgment in *Dr JS Moroka Municipality v Betram (Pty) Ltd*.⁷⁵¹ However, in this particular case it does seem overly formalistic given that the tax clearance certificate for the particular subcontractor was before the contracting authority, something which it explicitly noted in taking the award decision. It was also not the case that the applicants merely omitted the relevant tax certificate, both included explanations for why they did not submit tax certificates for this subcontractor while doing so for all other subcontractors. One wonders whether this extremely formal approach to transparency does not undermine the principle of competitiveness also listed in s 217(1) of the Constitution of the Republic of South Africa, 1996 as one of the foundational principles of procurement. The exclusion of these two bidders from the process had a significant adverse impact on the competition for the tender, but had very little beneficial impact on transparency given that the original tax certificate was before the relevant committees in any case and noted as such. Put differently, transparency would not substantially have been enhanced by the submission of a tax certificate for the subcontractor by the two applicants, while competitiveness would have been significantly enhanced. Under these circumstances there is much to be said for the approach of the SCA in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,⁷⁵² now overturned by *Dr JS Moroka Municipality v Betram (Pty) Limited*,⁷⁵³ where the court stated:

‘In this case condonation of the appellant’s failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217.’⁷⁵⁴

2.6 Validity of bidder’s CIDB registration

The date upon which a bidder’s CIDB registration had to be valid as a qualification criterion was dealt with in *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform; In re: Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Reform*.⁷⁵⁵ In this matter a bidder’s CIDB registration was valid within the category prescribed by the tender documents as a qualification criterion at the close of bids. However, the bidder’s registration lapsed prior to the end of the tender validity period and award of the tender. Under these circumstances the contracting authority rejected the bid as non-responsive for a failure to comply with the mandatory CIDB registration requirement. In a review application, the bidder argued that compliance with the registration requirement had to be evaluated on the date of close of bids and not at some point thereafter. The court rejected this argument and held that since the bidder’s CIDB registration was not valid for the entire validity period,

⁷⁵⁰ At para 17.

⁷⁵¹ [2014] 1 All SA 545 (SCA).

⁷⁵² 2008 (2) SA 481 (SCA).

⁷⁵³ [2014] 1 All SA 545 (SCA).

⁷⁵⁴ At para 17.

⁷⁵⁵ [2016] 3 All SA 686 (WCC).

its bid was not valid for the entire period. Consequently the bid was non-responsive and had to be rejected.

2.7 Awarding tenders to non-highest scoring tenderers and pricing benchmarks

In *Q CIVILS (Pty) Ltd v Mangaung Metropolitan Municipality*⁷⁵⁶ the court considered on what basis a contracting authority may award a tender to the bidder that did not score the highest number of points during adjudication in terms of s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'). In this matter the contracting authority rejected the bid of the applicant, because its bid price was more than 15% lower than the engineers' price estimate as well as the average bid price of the bids submitted. The court held that there are three requirements for criteria to qualify as 'objective criteria' in terms of s 2(1)(f) of the PPPFA and that would justify an award to the non-highest scoring bidder, viz the criteria are

- '(a) not listed in paragraphs (d) and (e) of section 2(1) of the PPPFA, [preferential procurement goals or criteria relating to the implementation of the RDP programme]
- (b) which are objective in the sense that these can be ascertained objectively and their existence or worth does not depend on someone's opinion and
- (c) bear some degree of rationality and relevance to the tender or project.'⁷⁵⁷

The court seems to endorse previous judgments that held that these objective criteria must 'be discernible from the information made available to the decision maker', although the criteria do not have to be stated as such in the bid documents.⁷⁵⁸

In the present matter the bid documents informed bidders that bids that were too low or too high would not be considered. The exact benchmark of 15% above or below the estimated price or the average price was, however, not stated in the bidding documents. The court held that this was an acceptable approach and that the use of the 15% pricing deviation benchmark to implement the requirement as stated in the bidding documents did not amount to a reviewable irregularity.⁷⁵⁹

The court furthermore held that it was not required to provide bidders with an opportunity to make representations specifically relating to the 15% benchmark.⁷⁶⁰ In the court's view it 'will become a cumbersome and nightmarish process if every time bidders need to be disqualified, for whatever reason, to allow them an opportunity to address the relevant committee(s)'.⁷⁶¹

⁷⁵⁶ Unreported, referred to as [2016] ZAFSHC 159, 8 September 2016; available online at <http://www.saflii.org/za/cases/ZAFSHC/2016/159.html>.

⁷⁵⁷ At para 40.

⁷⁵⁸ At para 40.

⁷⁵⁹ At para 53.

⁷⁶⁰ At para 49.

⁷⁶¹ At para 49.

These findings seem to be in conflict with the view adopted in *Vuna Health Care Logistics (Mpumalanga) (Pty) Ltd v MEC of Health and Social Development, Mpumalanga Provincial Government*⁷⁶² where the court held that if a contracting authority intends using a pricing bench-mark to measure whether tender prices are realistic or market-related it must communicate such bench-mark to tenderers. If the authority only decides to use such a bench-mark after calling for or receiving tenders, eg during adjudication of tenders, it must also allow tenderers to make representations on that benchmark.

2.8 Timeframe for challenging procurement decisions on review

In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*⁷⁶³ the Supreme Court of Appeal confirmed that organs of state are bound by the 180-day timeframe for bringing review applications of their own procurement decisions under PAJA.⁷⁶⁴ A failure to launch the review application within 180 days, as prescribed by s 7 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), or apply for an extension in terms of s 9 of PAJA, will result in the organ of state being non-suited. In this regard the SCA overturned the High Court judgment in *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited*.⁷⁶⁵

⁷⁶² Unreported, referred to as [2012] ZAGPPHC 126, 22 June 2012; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2012/126.html>.

⁷⁶³ Unreported, referred to as [2016] ZASCA 143, 30 September 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/143.html>.

⁷⁶⁴ At para 24.

⁷⁶⁵ Unreported, referred to as [2011] ZAGPPHC 1, 7 January 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/1.html>.

October to December 2016 (4)

JQR Public Procurement 2016 (4)

Geo Quinot⁷⁶⁶

1. Legislation

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

2. Cases

2.1 Coverage of public procurement rules

In *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality*⁷⁶⁷ the court considered whether the transaction at issue was subject to public procurement law. The transaction involved a tender for providing insurance policies to residents for water loss. The respondent municipality acted as the facilitator of these policies by concluding a contract with a private service provider to offer policies to residents at set prices. The respondent argued that this transaction, while being entered into by means of a tender process, was not a procurement transaction because the organ of state was not itself procuring goods or services, but simply ‘facilitates the provision of services’.⁷⁶⁸ The court rejected this argument and held the transaction subject to procurement law. The court’s finding was based on the fact that the municipality administered the collection of premiums from residents, deducted its costs in doing so and paid the balance to the service provider. Both the municipality and the service provider had a financial stake in the transaction and money flowed from the municipality to the service provider. The court reasoned additionally that there

‘is an incalculable value placed on the trust that residents bestow upon Ethekekwini as their municipality to promote their best interests in awarding a tender for the supply of insurance brokerage services to protect them from losses when water pipe leakages occur, losses that the poor in the townships are unlikely to afford, providing insurance cover that would otherwise be beyond their reach.’⁷⁶⁹

The court held that this meant that the municipality procured insurance in the transaction, which is clearly a supply of service and hence subject to procurement law.

2.2 Advertising of construction tenders

⁷⁶⁶ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Procurement Law Unit.

⁷⁶⁷ Unreported, referred to as [2016] ZAKZDHC 46, 8 December 2016; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2016/46.html>.

⁷⁶⁸ At para 13.

⁷⁶⁹ At para 16.

In *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC*⁷⁷⁰ the court held that a failure to advertise a construction tender in the Government Tender Bulletin did not necessarily result in the tender process being invalidated. The court held that in the case of construction tenders, the general rules of procurement must be read with the construction industry-specific rules for procurement in terms of the Construction Industry Development Board Act 38 of 2000 ('CIDB Act'). The Standard for Uniformity in Construction Procurement, issued under the CIDB Act, provides for tenders to be advertised on the CIDB website. As a result, the court held that publication of these tenders in the Government Tender Bulletin was not required, as would be the case for non-construction procurement.

This conclusion is somewhat curious in light of regulation 16A6.3 of the Treasury Regulations promulgated under the Public Finance Management Act 1 of 1999. This regulation states in part:

'The accounting officer or accounting authority must ensure that –

...

(c) bids are advertised in at least the Government Tender Bulletin . . .'

The wording of the regulation suggests that advertising in the Government Tender Bulletin is mandatory, but may not be the only manner in which tenders are advertised. This implies that advertising rules in sector-specific procurement regimes, such as construction procurement under the CIDB rules, are additional to the standard requirement that all tenders be advertised in the Government Tender Bulletin. The court's statement that 'advertisements in the Government Tender Bulletin were not required' is thus questionable.⁷⁷¹

2.3 Revocation of tender awards

In *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC*⁷⁷² the court confirmed in the context of public procurement the basic administrative law rule that an administrative action remains valid until set aside by a court upon review. In this matter the court held that this principle, espoused in judgments such as *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*⁷⁷³ and *Oudekraal Estates (Pty) Ltd v City of Cape Town*,⁷⁷⁴ applied to a decision to award a tender. A contracting entity thus cannot revoke or repudiate a decision to award a bid, regardless of the reviewability and consequent invalidity of the decision to award.⁷⁷⁵ The only route open to the contracting authority is to approach a court to set the award aside upon review.

⁷⁷⁰ Unreported, referred to as [2016] ZAFSHC 196, 24 November 2016; available online at <http://www.saflii.org/za/cases/ZAFSHC/2016/196.html>.

⁷⁷¹ Para 48.

⁷⁷² Unreported, referred to as [2016] ZAFSHC 196, 24 November 2016; available online at <http://www.saflii.org/za/cases/ZAFSHC/2016/196.html>.

⁷⁷³ 2014 (3) SA 481 (CC).

⁷⁷⁴ 2004 (6) SA 222 (SCA).

⁷⁷⁵ Para 34.

2.4 Time frame for challenging procurement decisions on review

In the procurement matter of *Department of Transport v Tasima (Pty) Limited*⁷⁷⁶ the Constitutional Court dealt with a number of important questions, especially of a broader administrative law nature, on which the justices of the highest court are clearly deeply divided. One of the key matters on which the justices differ is what the effect is of a delay in bringing a judicial review challenge of a procurement decision.

In this matter the respondent had provided services to the applicant Department under a five-year contract that came to an end on 31 May 2007. After that date the respondent continued to render the services on a month-to-month basis until 2010, when the Director General of the Department extended the contract for a further five years, to 2015. From 2012 onward this extension became a matter of dispute between the parties and resulted in a number of high court orders against the Department ordering it to comply with its obligations under such extended contract. When the Department started preparations to take over the relevant services when the extended contract came to an end in 2015, the respondent once again approached the courts to interdict the Department from taking any steps to effect transfer of the relevant services until the transfer arrangements in the contract had been complied with. In a counter-application, the Department applied for the court to review and set aside the 2010 decision to extend the contract. It argued that this extension was unlawful since it was done without following any procurement process.

The Supreme Court of Appeal rejected the counter-application, inter alia on the basis of undue delay in bringing the review (from 2010 when the decision was taken, to 2015 when the counter-application was brought).⁷⁷⁷ In the Constitutional Court the justices differed in their views on the effect of the delay. The minority (Jafta J, Mogoeng CJ, Bosielo AJ and Zondo J) held that the delay in bringing the review application cannot bar the court from pronouncing on the constitutional validity of the action at stake. Jafta J (writing for the minority) stated:

‘The approach adopted by the Supreme Court of Appeal did not only deviate from section 172(1)(a) [of the Constitution] but resulted also in that Court enforcing conduct that was in violation of the Constitution. As guardians of the Constitution, courts are under an obligation to uphold it. A decision that is invalid because of its inconsistency with the Constitution can never have legal force and effect. This is fundamental to the principle of constitutional supremacy.’⁷⁷⁸

The majority (Khampepe J, Froneman J, Madlanga J, Mhlantla J and Nkabinde J), however, held that seeking review in a timely manner is itself a constitutional duty in terms of s 237 of the Constitution, as held in *Khumalo v MEC for Education, KwaZulu-Natal*.⁷⁷⁹ In the majority’s view this meant that the rule of law and legality did not simply trump the rule against delay in the way the minority suggests. The delay had to be considered in every instance and the court had to determine ‘(1) whether, on the facts, the delay is unreasonable or undue; and, if so (2) whether the court should exercise its discretion to overlook the delay and nevertheless entertain the application’.⁷⁸⁰ If the court finds the delay undue and

⁷⁷⁶ Unreported, referred to as [2016] ZACC 39, 9 November 2016; available online at <http://www.saflii.org/za/cases/ZACC/2016/39.html>.

⁷⁷⁷ *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA).

⁷⁷⁸ At para 79.

⁷⁷⁹ 2014 (5) SA 579 (CC).

⁷⁸⁰ At para 152.

exercises its discretion against overlooking the delay, the effect is that the impugned administrative action remains effective. The majority explained this result as follows, *per* Khampepe J:

‘In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally *effective*, despite the fact that it may be objectively invalid.’⁷⁸¹

In the present matter the majority found that the delay was indeed undue, because the Department could not explain the entire period of delay between the taking of the decision to extend the contract and the eventual (counter) application to review that decision. However, the court exercised its discretion to overlook the delay, largely in light of the merits of the review application given the ‘web of maladministration’ that characterised the extension of the contract.⁷⁸²

The majority judgment is important because it has (once again) confirmed the basic approach established in *Oudekraal Estates (Pty) Ltd v City of Cape Town*⁷⁸³ and consequently confirmed in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*,⁷⁸⁴ to the effect that an administrative action will remain legally binding until it is set aside by a court upon a proper application for judicial review and that this approach applies equally in the procurement context. The deep differences between the justices should, however, be noted along with the narrow split between majority and minority sides.

2.5 Contracting authorities and collateral challenges

In *Department of Transport v Tasima (Pty) Limited*⁷⁸⁵ the minority and majority agreed that the Supreme Court of Appeal⁷⁸⁶ erred in holding that an organ of state cannot collaterally challenge its own decision. The court held that in a matter such as the present where a supplier attempts to enforce a contract against a contracting authority, it is open to that authority to challenge the validity of the contract by means of a collateral challenge, ie an application for judicial review of the relevant administrative action collaterally to the enforcement proceedings. The majority held that an organ of state may challenge an administrative decision collaterally (or ‘reactively’ as the majority termed it) if ‘its reasons for doing so are sound’ and there is no undue delay.⁷⁸⁷ However, the majority did not elaborate on what sound reasons may be, apart from referring to the court’s judgment in *Merafong City Local Municipality v AngloGold Ashanti Limited*.⁷⁸⁸

2.6 Standing to challenge tender awards

⁷⁸¹ At para 148.

⁷⁸² At para 166.

⁷⁸³ 2004 (6) SA 222 (SCA).

⁷⁸⁴ 2014 (3) SA 481 (CC).

⁷⁸⁵ Unreported, referred to as [2016] ZACC 39, 9 November 2016; available online at <http://www.saflii.org/za/cases/ZACC/2016/39.html>.

⁷⁸⁶ *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA).

⁷⁸⁷ At para 150.

⁷⁸⁸ Unreported, referred to as [2016] ZACC 35; 24 October 2016; available online at <http://www.saflii.org/za/cases/ZACC/2016/35.html>.

In *Areva NP Incorporated in France v Eskom Holdings SOC Limited*⁷⁸⁹ the Constitutional Court dealt with the question of standing to bring a challenge to an award of a public tender. In holding that the second respondent did not have standing to bring a review application of the tender award at issue, the court overturned the Supreme Court of Appeal decision in this matter.⁷⁹⁰

In this matter Westinghouse Electric Belgium Société Anonyme (WEBSA), the second respondent, instituted an application to review the award of a tender to the applicant by the first respondent, claiming that the tender should have been awarded to it. WEBSA is a company registered in Belgium and a subsidiary of the multi-national corporation, Westinghouse Electric UK Holdings Limited. Another subsidiary is Westinghouse Electric Company LLC. In disputing the *locus standi* of WEBSA to bring the review application, the applicant, who was the successful tenderer, argued that WEBSA was not the party that submitted the tender to the first respondent, but that the Westinghouse tender was explicitly submitted by WEBSA 'on behalf of Westinghouse Electric Company'.⁷⁹¹ The applicant thus argued that Westinghouse Electric Company was in fact the tenderer and only it would have standing to bring the review application. While both the High Court and Supreme Court of Appeal rejected these arguments, the majority of the Constitutional Court agreed. It held that WEBSA did not have standing to bring the review since it was not the tenderer.

In a crisp paragraph, the majority formulated its reasoning as follows:

'So, if company A submitted a bid for a certain tender and lost that tender to company C, company B cannot then institute review proceedings in its own right to set aside the award and to seek an order that the tender be awarded to it just because it and company A belong to the same group of companies.'⁷⁹²

Importantly, the majority pointed out that the second respondent could have brought the review application as an agent of Westinghouse Electric Company, the true tenderer, and would have had standing. However, since the second respondent insisted that it brought the application in its own name and asked for an order that the tender be awarded to it, it lacked *locus standi*.

The minority disagreed with the view that the second respondent lacked *locus standi*. It reasoned that the two Westinghouse companies acted in concert throughout the extended tender process and that all parties accepted that WEBSA was in substance a party to the tender process, regardless of the exact corporate entity within the Westinghouse group in whose name the tender was submitted.

Furthermore, the minority reasoned that it was not in the interests of justice to take such a narrow view of the current matter and dispose of it simply on the questionability of the second respondent's standing. It agreed with the two lower courts' approach to standing in this case, which it described as eschewing 'a "technical or strictly-defined" notion of standing'.⁷⁹³ In the minority's view it was in the interests of justice for the court to consider the merits of the matter. In doing so, the minority

⁷⁸⁹ Unreported, referred to as [2016] ZACC 51, 21 December 2016; available online at <http://www.saflii.org/za/cases/ZACC/2016/51.html>.

⁷⁹⁰ *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA), see JQR Public Procurement 2015 (4) 2.2.

⁷⁹¹ At para 10.

⁷⁹² At para 38.

⁷⁹³ At para 58.

concluded that the award of the tender in this case was not irregular. It thus agreed with the majority that the appeal should be upheld.

2.7 Judicial review of tender awards: Remedies

In *WK Construction (Pty) Limited v Trustees for the time being of the Mzingisi Development Trust*⁷⁹⁴ the court dealt with an appeal on the unusual order granted by the court *a quo* in a review application of a tender award. The judge below ordered the applicant in that matter, a disappointed bidder who had proven in its review application that the award was irregular, to consider reducing its tender price to match the lower price offered by the originally successful bidder. The difference was about R5 million. The judge further ordered that if the applicant did reduce its offer price accordingly, then the contracting authority had to accept the offer, ie award the bid to the applicant, but if the applicant did not reduce its price, the contracting authority could decide to call for fresh tenders.

In appeal against only this part of the order, the full bench of the High Court in the current matter set aside this order and granted a simple substitution order in which the court declared the applicant as the winning bidder on the price it originally offered. The court's finding was based inter alia on the fact that it had been shown that the originally successful bidder had put in too low a price, which resulted in unacceptable commercial risk for the contracting authority in the form of the work not being completed or completed at low quality. If the contracting authority was now forced via the court order to contract on the same, low, price with the applicant, the same risk would emerge. This, in the appeal bench's view, was equally unacceptable.

An interesting remedial development is found in *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality*.⁷⁹⁵ In this matter the court set the award of a tender aside and granted a substitution order in which the court ordered the award to be made to the applicant. However, the court noted that granting a cost order that will follow the success in outcome will mean that taxpayers in the municipality will end up paying for the litigation, while it seemed clear from the evidence that a number of officials were to blame for the failed procurement and resultant litigation. The municipality did not provide the court with the necessary information and evidence during the review to explain why it took the impugned decisions. This, the court held, was a failure to comply with 'the constitutional duty of public officials to function transparently and accountably'.⁷⁹⁶ The court thus ordered the mayor and the municipal manager of the respondent municipality to identify by way of affidavits the names and contact details of a range of people involved in the adjudication and award of the bid and including 'any other person who participated in the awarding Contract'.⁷⁹⁷ Those persons thus identified had to be furnished with a copy of the judgment and were granted leave to submit to the court 'affidavits giving evidence to assist the court to determine the reason for awarding the Contract'.⁷⁹⁸ These persons were

⁷⁹⁴ Unreported, referred to as [2016] ZAECHGHC 145, 6 December 2016; available online at <http://www.saflii.org/za/cases/ZAECHGHC/2016/145.html>.

⁷⁹⁵ Unreported, referred to as [2016] ZAKZDHC 46, 8 December 2016; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2016/46.html>.

⁷⁹⁶ At para 40.

⁷⁹⁷ At para 72.

⁷⁹⁸ At para 74.

also called upon to submit affidavits to the court to show why they should not be held liable, jointly and severally, to pay 'all costs *de bonis propriis* Ethekekwini incurred in this litigation'.⁷⁹⁹

3. Literature

Du Plessis, M & Coutsooudis, A 'Considering corruption through the *AllPay* lens: On the limits of judicial review, strengthening accountability, and the long arm of the law' (2016) 133(4) *SALJ* 755

⁷⁹⁹ At para 75.

January to March 2017 (1)

JQR Public Procurement 2017 (1)

Geo Quinot⁸⁰⁰

1. Legislation

1.1 New Preferential Procurement Regulations

New regulations, the Preferential Procurement Regulations, 2017, were gazetted under the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA') on 20 January 2017 effective from 1 April 2017.⁸⁰¹ These regulations repeal the Preferential Procurement Regulations, 2011 and constitute the third complete set of regulations governing preferential procurement under the PPPFA.

The 2017 Regulations depart in a number of important ways from the previous regime. They most notably expand the range of tools available to effect preferential procurement. Whereas the preferential dimension of procurement was largely restricted to award criteria under the previous regulations, the new Regulations also introduce set-asides and contract conditions as available mechanisms to implement preferential procurement.

1.1.1 Coverage

The 2017 Regulations state their coverage as the same as that of the PPPFA, ie as applying to 'organs of state' as defined in the PPPFA. This is in contrast to the 2011 Regulations, which ostensibly expanded on the coverage of the PPPFA by also including in its coverage public entities listed in schedules 2 and 3 to the Public Finance Management Act 1 of 1999 ('PFMA').⁸⁰² While it may seem that the 2017 Regulations thus again restrict coverage, this is not the case. In terms of a notice published in the *Government Gazette*,⁸⁰³ separate from the 2011 Regulations, the Minister of Finance, acting in terms of s 1(iii)(f) of the PPPFA, recognised PFMA schedule 2 and 3 entities as subject to the PPPFA. This notice was not affected by the 2017 Regulations and thus remains effective, which means that the 2017 Regulations also apply to PFMA schedule 2 and 3 entities along with the PPPFA.

1.1.2 Price and preference points

While maintaining the basic approach to adjudicating bids using the price and preference points system prescribed by the PPPFA,⁸⁰⁴ the new Regulations drastically alter the threshold for the use of the two different point ratios, ie the 90/10 and 80/20 splits. Under the new Regulations all contracts of a value

⁸⁰⁰ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Procurement Law Unit.

⁸⁰¹ GN R32 in GG 40553 of 20 January 2017.

⁸⁰² Preferential Procurement Regulations, 2011, regulation 2(1).

⁸⁰³ GN R501 in GG 34350 of 8 June 2011.

⁸⁰⁴ PPPFA s 2(1)(a).

between R30 000 and R50 million must be adjudicated using the 80/20 points split, that is 80 points awarded for price and 20 for preference,⁸⁰⁵ while contracts with a value above R50 million must use the 90/10 split, that is 90 points for price and 10 points for preference.⁸⁰⁶ Under the 2011 Regulations, the threshold line between the two systems was set at R1 million.⁸⁰⁷ Already in this respect, the new Regulations signal a significant increase in emphasis on the preferential aspect of public procurement.

The 2017 Regulations introduce a useful approach to determining which points system to use in a particular case. The 2011 Regulations obliged an organ of state to cancel a tender process when it advertised the tender under a particular points split, but only received bids outside the threshold for that particular points split, eg it advertised the tender under the 80/20 split, but all acceptable bids offered a price above R1 million.⁸⁰⁸ The 2017 Regulations allow organs of state to specify in the invitation to tender that either the 90/10 or 80/20 split will be used and that the price of the lowest acceptable bid will be used to determine which one of the two systems will apply. This approach introduces very sensible flexibility into the adjudication of bids.

The formula for calculating the number of points allocated to price has been left unaltered and the number of points for preference is still determined using a set matrix allocating points per Broad-Based Black Economic Empowerment status level of contributor, as measured under the Broad-Based Black Economic Empowerment Act 53 of 2003 ('B-BBEE Act').⁸⁰⁹ The matrixes for each of the two point systems have been slightly altered as follows:

80/20 Points Split:

B-BBEE Status Level of Contributor	2011 Regulations preference points	2017 Regulations preference points
1	20	20
2	18	18
3	16	14
4	12	12
5	8	8
6	6	6
7	4	4
8	2	2

⁸⁰⁵ Preferential Procurement Regulations, 2017, regulation 6.

⁸⁰⁶ Preferential Procurement Regulations, 2017, regulation 7.

⁸⁰⁷ Preferential Procurement Regulations, 2011, regulation 5.

⁸⁰⁸ Preferential Procurement Regulations, 2011, regulation 8(1) and (2).

⁸⁰⁹ Preferential Procurement Regulations, 2017, regulations 6 and 7.

Non-compliant contributor	0	0
---------------------------	---	---

90/10 Points Split:

B-BBEE Status Level of Contributor	2011 Regulations preference points	2017 Regulations preference points
1	10	10
2	9	9
3	8	6
4	5	5
5	4	4
6	3	3
7	2	2
8	1	1
Non-compliant contributor	0	0

The new Regulations confirm that it is not a requirement for a bidder to submit proof of its B-BBEE contributor status to participate in the procurement, but that such bidder will simply receive zero in terms of the matrix above in respect of preference points. The 2011 Regulations did not make it similarly clear that non-submission of proof of B-BBEE status was not a qualification criterion, which led to conflicting views on this point.⁸¹⁰

An important addition to the adjudication system is found in regulations 6(9) (in respect of the 80/20 formula) and 7(9) (in respect of the 90/10 formula). These regulations provide that the bid may not be awarded to the bidder scoring the highest number of points if that bidder's price is not market-related. In such a scenario the contracting authority may negotiate with the highest scoring bidder in an attempt to reduce the price to a market-related price or may cancel the contract. If the organ of state decides to negotiate, but fails to reach agreement with the highest scoring bidder on price, the organ of state may negotiate with the second highest scoring bidder to achieve a market-related price and if such negotiations also fail, the organ of state may negotiate with the third highest scoring bidder. At each step the organ of state may also decide to rather cancel the tender and when negotiations with the third highest scoring bidder fail, the organ of state must cancel.

This is an interesting new mechanism, which is clearly aimed at forcing government suppliers to offer market-related prices and to deal with abnormally low and high prices. However, a few questions emerge. Firstly, it is not clear exactly what the meaning of 'market-related price' is and who will determine it. Does this refer to the price for the required goods and services as offered in the open market, also to private buyers? Or does it refer to the price offered in the procurement market? The

⁸¹⁰ See JQR Public Procurement 2014 (4) 2.1.

difference may be significant, since the risk factors between these markets may be markedly different (eg the supplier in the procurement market runs the risk of the contract being invalidated due to some administrative irregularity, which is not the case when supplying to private buyers and which is clearly a risk for the supplier). How will this price be determined? Can the average price offered by all qualifying bidders in the particular procurement be used as an indication of what suppliers are willing to offer in the market for the type of goods or services required on the terms required under the procurement, or should some further market analysis be conducted? Secondly, would this requirement constitute a possible ground of review in the hands of a disappointed bidder? That is, can a losing bidder approach a court on review and argue that the contract should not have been awarded to the winning bidder, because it did not offer a market-related price (eg using s 6(2)(b) or 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 as basis)? If this is the case, it will certainly open up a potentially significant further basis for judicial challenges against procurement decisions. Thirdly, it is not exactly clear whether this requirement is in line with s 2(1)(f) of the PPPFA, which explicitly requires the contract to be awarded to the highest scoring bidder unless further objective criteria militate against such award. It is clear that the regulations do not consider this market-price mechanism as such a further objective criterion under s 2(1)(f), since these are dealt with separately in the regulations.⁸¹¹ This of course raises questions about the lawfulness of the market-price requirement in the regulations, as it seems to further restrict the obligation under s 2(1)(f) of the PPPFA.

1.1.3 Pre-qualification

The 2017 Regulations introduce a new pre-qualification regime to South African public procurement. In terms of regulation 4, an organ of state is granted the discretion to decide whether it wants to restrict the procurement to certain categories of bidders, which must be stated as such in the invitation to bid. When an organ of state exercises this option, the procurement will be set aside for bids by the identified categories of bidders exclusively. The regulation provides for three broad categories that an organ of state may use, but the choice between them and any combination of the listed categories is left to the discretion of the organ of state. The three broad categories are:

- bidders with a stated minimum B-BBEE status level of contributor;
- exempted micro enterprises ('EME') or qualifying small business enterprises ('QSE') as defined in the B-BBEE Act; and
- bidders subcontracting at least 30% of the contract to one or more of a list of eight categories of bidders, basically EME or QSEs with majority shareholdings by listed categories of people.

Once the pre-qualification has been applied in a given procurement, the bids that meet these pre-qualification criteria will be adjudicated in terms of the normal rules of adjudication, ie functionality assessment followed by price and preference point comparison.

1.1.4 Subcontracting conditions

⁸¹¹ Preferential Procurement Regulations, 2017, regulation 11.

The 2017 Regulations introduce subcontracting conditions to all tenders above R30 million, subject only to the condition that such subcontracting must be 'feasible'.⁸¹² Where it is feasible to subcontract, the organ of state must state in the tender invitation that at least 30% of the contract will have to be subcontracted to a list of qualifying categories of entities, which is largely the same list as that contained in the pre-qualification regulation.⁸¹³ It is important to note that such subcontracting is mandatory for both the organ of state and winning supplier, subject only to subcontracting feasibility.

1.1.5 Cancellation of tender

The new Regulations add one further ground to the list of scenarios under which an organ of state may cancel a tender before award, viz if there is a material irregularity in the tender process.⁸¹⁴ This is a useful addition as it obviates the need for organs of state to approach a court for the review and setting aside of its tender process prior to award where it discovers material irregularities. This further ground for cancellation also means that a decision-maker (either the bid adjudication committee or accounting authority, depending on the prevailing delegations) will have to knowingly satisfy itself that the tender process was regular before taking the award decision.

Regulation 9(3) also now requires prior treasury approval for cancellation of a tender for the second or subsequent time. This new requirement confirms that organs of state may only cancel tenders prior to award in terms of regulation 9 and do not have a free discretion, outside of the regulation, to cancel, contrary to recent judicial pronouncements suggesting the existence of such discretion.⁸¹⁵

1.1.6 Abuse of the preferential regime

The remedies regime for dealing with abuse of the preferential procurement regime under the PPPFA is somewhat altered by the 2017 Regulations. Under the previous sets of PPPFA regulations (2001 and 2011), organs of state could sanction suppliers for failures to meet 'any of the conditions of the contract'⁸¹⁶ or 'any specified goals ... in the performance of the contract'.⁸¹⁷ This very general basis for sanctions has been removed from the new Regulations, which now provide for sanctions only where the bidder has submitted false information in adjudication under the Regulations or failed to disclose subcontracting arrangements.⁸¹⁸ The main remedies available to organs of state remain disqualification of the bidder from the procurement, cancellation of the award and damages. A sanction of a penalty of 10% of the value of the contract is introduced in cases where subcontracting is not disclosed.

Regulation 14(3) provides that debarment decisions, as a sanction under the PPPFA, will in future be taken by National Treasury upon representations by both the organ of state and the affected supplier.

⁸¹² Preferential Procurement Regulations, 2017, regulation 9.

⁸¹³ Preferential Procurement Regulations, 2017, regulation 4.

⁸¹⁴ Preferential Procurement Regulations, 2017, regulation 13(1)(d).

⁸¹⁵ See *Tshwane City v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA); *SAAB Grintek Defence (Pty) Ltd v South African Police Service* [2016] 3 All SA 669 (SCA); JQR Public Procurement 2016 (3) 2.3.

⁸¹⁶ Preferential Procurement Regulations, 2011, regulation 13(1)(b).

⁸¹⁷ Preferential Procurement Regulations, 2001, regulation 15(1).

⁸¹⁸ Preferential Procurement Regulations, 2017, regulation 14(1).

2. Cases

2.1 Disqualification of bidders based on prior involvement in projects

In the eagerly anticipated judgment in *City of Cape Town v Aurecon South Africa (Pty) Ltd*,⁸¹⁹ the Constitutional Court refused leave to appeal the Supreme Court of Appeal judgment, doing so solely on the basis of delay in launching the review application. The court explicitly expressed no view on the primary procurement-law question at stake, namely whether a party that was involved in a process that preceded the invitation to bid and that informed the tender process was disqualified from participating in the subsequent procurement.

The court's refusal to entertain the appeal means that the Supreme Court of Appeal judgment in this matter stands, to the effect 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.⁸²⁰

2.2 Tender committee knowledge imputed to contracting authority

In *City of Cape Town v Aurecon South Africa (Pty) Ltd*,⁸²¹ the Constitutional Court held that the knowledge of individual tender committees can be imputed to the contracting authority as a whole. In this matter the applicant argued that specific information was only within the knowledge of the bid evaluation committee (BEC) in this particular procurement and that the contracting authority itself, including its bid adjudication committee (BAC), did not have this knowledge (presumably because it was not shared by the BEC). The court rejected this argument, holding that knowledge held by committees of the contracting authority cannot be separated from knowledge held by the authority. The court referred specifically to the supply chain management policy of the application in its reasoning, which explicitly includes in the definition of the contracting authority in this case (the city), any 'committee delegated with the authority to act on its behalf'.⁸²² However, Mbha AJ's reasoning for the court on this point would apply equally to most (if not all) contracting authorities:

'It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender procurement process. These committees form part of an internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC, may be deemed to be within the City's knowledge.'⁸²³

2.3 Cancellation of tenders

The uncertainty regarding the exact nature of decisions to cancel a tender process prior to award continues with the Supreme Court of Appeal judgment in *Head of Department, Mpumalanga*

⁸¹⁹ 2017 (6) BCLR 730 (CC).

⁸²⁰ See JQR Public Procurement 2015 (4) 2.3.

⁸²¹ 2017 (6) BCLR 730 (CC).

⁸²² At para 39.

⁸²³ At para 39.

Department of Education v Valozone 268 CC,⁸²⁴ which took a different view from the recent SCA judgments in *Tshwane City v Nambiti Technologies (Pty) Ltd*⁸²⁵ and *SAAB Grintek Defence (Pty) Ltd v South African Police Service*.⁸²⁶ These latter two judgments took the view that an organ of state's decision to cancel a tender does not amount to administrative action and is not restricted to the conditions set out in regulation 8(4) of the Preferential Procurement Regulations, 2011.⁸²⁷

In stark contrast, the court held in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* that the decision to cancel the procurement prior to award in this case was reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000, which means that such action amounts to administrative action. The court furthermore explicitly held that 'the tender could only be cancelled if one of the grounds stipulated in regulation 8(4) existed.'⁸²⁸ Since none of the grounds listed in the regulation existed in the present matter, the court held that the cancellation decision was unlawful. This is directly opposite the same court's statement in *SAAB Grintek Defence (Pty) Ltd v South African Police Service* where it held that 'all that the regulation does ... is identify in broad, but not exclusive, terms the circumstances in which an organ of State may, in the exercise of its discretion, cancel a tender. It does not seek to constrain the executive decision-making power of an organ of State to determine what goods and services are required to fulfil its public obligations.'⁸²⁹

The most recent view emerging from the SCA in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* must be taken as the correct one. Unlike the previous two judgments, this judgment correctly recognised⁸³⁰ that the issue has already been settled by the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*.⁸³¹ Furthermore, this judgment is also in line with the new Preferential Procurement Regulations, 2017, which make it even clearer that the grounds listed in the regulations for cancellation of a tender are meant to be exhaustive.⁸³²

2.4 Time frame for challenging procurement decisions on review

The issue of delay in bringing a review application challenging the regularity of a tender award continues to occupy the higher courts.⁸³³ In *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*⁸³⁴ the Supreme Court of Appeal overturned the order of the High Court that set aside a tender award,

⁸²⁴ Unreported, referred to as [2017] ZASCA 30, 29 March 2017; available online at <http://www.saflii.org/za/cases/ZASCA/2017/30.html>.

⁸²⁵ 2016 (2) SA 494 (SCA).

⁸²⁶ [2016] 3 All SA 669 (SCA).

⁸²⁷ See JQR Public Procurement 2016 (3) 2.3.

⁸²⁸ At para 16.

⁸²⁹ At para 20.

⁸³⁰ At para 16.

⁸³¹ 2015 (5) SA 245 (CC).

⁸³² See JQR Public Procurement 2017 (1) 1.1.5 above.

⁸³³ See JQR Public Procurement (2016) (4) 2.4, dealing with the Constitutional Court judgment in *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

⁸³⁴ Unreported, referred to as [2017] ZASCA 23, 24 March 2017; available online at <http://www.saflii.org/za/cases/ZASCA/2017/23.html>.

based on the delay in bringing the review.⁸³⁵ The SCA held that the merits of the challenge against the impugned administrative action, the award of the tender here, could not be considered until the question of delay in bringing the review application had been resolved. This meant that the regularity or otherwise of the award decision could not be determinative of the delay question, ie the fact that a tender award offended against s 217 of the Constitution cannot determine, on its own, whether the delay in bringing the review application should be condoned. The question of delay must be determined on its own merits in terms of a proper application for condonation and taking into account all relevant considerations. These include an explanation for the entire period of delay and the prejudice to be suffered by other parties and by the public should the delay be condoned, in addition to the prospects of success in the review application itself. In the present matter, the SCA held that the prejudice to be suffered by both the successful bidder and especially the public as a result of the contracting authority's unreasonable delay in launching the review application, should the tender award be set aside at this late stage, strongly militated against condoning the review. The court placed particular emphasis on the potential effect of such invalidation on the public service being rendered through the procurement process. The result was that the award of the tender, even if objectively irregular (a question that the SCA did not engage with), was unassailable and that the contract remained valid and enforceable.

The SCA also rejected the argument that the 180-day period for bringing a review application under the Promotion of Administrative Justice Act 3 of 2000 commences only once an authority becomes aware of the reviewable irregularity. The respondent in this case argued that its council became aware of the irregularities only after concerns were raised by senior officials and a forensic investigation was conducted, and that it was only once the council received this information that the period for bringing the review started running. The SCA rejected this argument, holding that the authority was aware of the decision and the reasons for the decision from the outset and that the 180-day period thus commenced when the decision was taken. This raises the interesting question of the division of powers at local government level regarding public procurement. While the Local Government: Municipal Finance Management Act 56 of 2003 explicitly states that councillors may not be involved in procurement decisions,⁸³⁶ thereby putting procurement decisions exclusively in the hands of the municipality's administrators, the power to litigate rests squarely with the council as the executive authority of the municipality. When a procurement matter at local government level thus degenerates into litigation there is a shift in responsibility. This may result in difficulties, as is evident from the present matter when the council only becomes aware of irregularities in the process after some time.

2.5 Judicial review of tender awards: Remedies

The now notorious saga relating to the procurement of grant payment services by the South African Social Security Agency (SASSA), commonly known as the *Allpay* matter,⁸³⁷ once again occupied the attention of the Constitutional Court in *Black Sash Trust v Minister of Social Development (Freedom*

⁸³⁵ See JQR Public Procurement 2016 (3) 2.4 on the High Court judgment in this matter.

⁸³⁶ Section 117.

⁸³⁷ The main Constitutional Court judgments are reported as *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC). See JQR Public Procurement 2012 (3) 2.2, JQR Public Procurement 2013 (1) 2.4 and 2.5, JQR Public Procurement 2013 (4) 2.1, 2.2 and 2.4, JQR Public Procurement 2014 (2) 2.5 and 2.6.

Under Law NPC Intervening).⁸³⁸ This matter dealt with the failure on the part of the respondents to properly implement the relief granted by the Constitutional Court in the previous round of litigation and the resultant crisis in continuing to provide the public service at issue, viz the payment of social grants. The present matter was not, strictly speaking, a procurement matter. The court noted that

‘[t]he context then [in the previous litigation] was a breach of the constitutional and legislative framework for fair, equitable, transparent, competitive and cost-effective procurement. The constitutional defect here lies elsewhere . . . The primary concern here is the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution.’⁸³⁹

However, the judgment is noteworthy from a procurement-law perspective for the court’s remarks about remedies. After the court found that both SASSA and the private service provider were under a constitutional obligation to continue rendering the services under their agreement in order to ensure that grants continued to be paid to beneficiaries, the court held that it was within courts’ remedial powers to grant any just and equitable order to extend the contractual relationship between the parties.⁸⁴⁰ The court held that such a contractual relationship was not dependent on the conclusion of a consensual contract between the parties, nor was it dependent on compliance with s 217 of the Constitution, that is procurement regulation, for its validity.⁸⁴¹ The contract’s validity was based on the court’s remedial powers under s 172 of the Constitution.⁸⁴²

3. Literature

Bolton, P ‘Public procurement as a tool to drive innovation in South Africa’ *PER/PELJ* 2016 (19) DOI <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1286>

Sewpersadh P & Mubangizi JC ‘Using the law to combat public procurement corruption in South Africa: Lessons from Hong Kong’ *PER/PELJ* 2017 (20) DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1359>

⁸³⁸ Unreported, referred to as [2017] ZACC 8, 17 March 2017; available online at <http://www.saflii.org/za/cases/ZACC/2017/8.html>.

⁸³⁹ At paras 42–43.

⁸⁴⁰ At para 44.

⁸⁴¹ At paras 48, 49.

⁸⁴² At para 49.

April to June 2017 (2)

JQR Public Procurement 2017 (2)

Geo Quinot⁸⁴³

1. Legislation

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

2. Cases

2.1 Strict compliance with tender conditions

In *Abet Inspection Engineering (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd*⁸⁴⁴ the court applied the purposive approach to compliance with tender conditions as prescribed by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*.⁸⁴⁵

In this matter, the respondent organ of state invited bids with the conditions that bidders had to submit accreditation certificates in respect of their accreditation by the South African National Accreditation System (SANAS) and the Department of Labour (DoL) in terms of the Occupational Health and Safety Act 85 of 1993. The second respondent, Vumela, submitted a bid, but did not submit accreditation certificates in its own name with its bid. It explained in its bid that it had recently taken over a division of another entity as a going concern and which division will render the requested services under the tender. However, while it had applied for accreditation certificates to be issued in its own name, it had not received those yet by the close of bids and was relying on the certificates previously issued to the division under the name of the previous owner, which remained valid. The organ of state accepted this explanation and eventually awarded the bid to Vumela. Subsequent to the close of bids, but prior to the award of the tender and the conclusion of a contract, certificates were issued to Vumela in its own name and these were in turn submitted to the organ of state.

The applicant was a competing bidder and challenged the award of the tender to Vumela on the basis that Vumela should have been disqualified as a non-responsive bidder for failure to submit the required certificates as proof of its accreditation at the close of bids. The applicant argued that by allowing Vumela to submit its accreditation certificates after the close of bids, the organ of state acted unfairly in treating Vumela differently from other bidders and that the process was accordingly irregular and had to be set aside. The applicant thus relied on strict compliance with tender conditions, inter alia on the

⁸⁴³ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Procurement Law Unit.

⁸⁴⁴ Unreported, referred to as [2017] ZAWCHC 39, 8 March 2017, available online at <http://www.saflii.org/za/cases/ZAWCHC/2017/39.pdf>.

⁸⁴⁵ 2014 (1) SA 604 (CC).

strength of the judgment in *Dr JS Moroka Municipality v Betram (Pty) Ltd*.⁸⁴⁶ The court rejected this argument. It held that the applicable test to determine whether the organ of state's conduct amounted to a reviewable irregularity was a purposive, substantive one as set out in *Allpay* and not a formalistic one as set out in *Moroka Municipality*. The court thus asked what the purpose was of the condition to submit accreditation certificates and found that the purpose was to ensure that the successful bidder had the 'requisite capacity and be appropriately skilled to perform the services required'.⁸⁴⁷ In applying this purpose to the facts of the matter, the court found that Vumela had the requisite capacity and skills at the close of bids, given that the Vumela entity that tendered to provide the service had all along been accredited by SANAS and the DoL, albeit in the name of the previous owner, and that formal accreditation to certify such capacity and skill in Vumela's name was simply a formality. This was *inter alia* borne out by the fact that the relevant certificates were issued to Vumela without any substantive process of evaluation; it was merely a clerical exercise of issuing the accreditation previously certified in the name of the previous owner in Vumela's name.⁸⁴⁸ Under these circumstances the court held that it would be formalistic to hold Vumela's bid as non-responsive, which action would have been open to judicial challenge in the court's view. The court held that treating Vumela differently from other bidders by allowing Vumela to submit accreditation certificates in its own name after close of bids did not amount to a reviewable irregularity. Of significance are the court's remarks that the standard of equality to be applied in this context is also one of substance and not form, ie organs of state should embrace substantive equality and not formal equality in their dealings with bidders in line with our law's general approach to equality under the Constitution.⁸⁴⁹ The court also noted that the strict formal compliance with tender conditions ostensibly required by the judgment in *Moroka Municipality* must be viewed as having been overruled by the purposive approach espoused in *Allpay*.⁸⁵⁰

2.2 Cancellation of tenders and bid validity periods

In *Defensor Electronic Security Services (Pty) Ltd v Head of Department Northern Cape Department of Health*⁸⁵¹ the court dealt with the interaction between a cancellation of tenders and a failure to award a tender within the bid validity period. In this matter, the respondent failed to award the bid within the bid validity period, despite that period having been extended twice. It consequently took the position that it could not award the bid since the validity period had lapsed. The court held that the respondent's failure to adjudicate the tender in a timely manner and to take a decision prior to the lapse of the validity period amounted to a cancellation of the tender. As such it was subject to regulation 8(4) of the Preferential Procurement Regulations, 2011,⁸⁵² which contained the conditions under which a tender may be cancelled. Since none of the conditions for cancellation was met in this case, the court held that the respondent's actions in allowing the validity period to lapse was unlawful. The court ordered that

⁸⁴⁶ [2014] 1 All SA 545 (SCA). See JQR Public Procurement 2013 (4) 2.3.

⁸⁴⁷ Para 79.

⁸⁴⁸ Para 83.

⁸⁴⁹ Para 95.

⁸⁵⁰ Para 60.

⁸⁵¹ Unreported, referred to as [2017] ZANCHC 24 (17 March 2017), available online at <http://www.saflii.org/za/cases/ZANCHC/2017/24.html>.

⁸⁵² Now contained in regulation 13(1) of the Preferential Procurement Regulations, 2017.

the validity period of the bid be extended and that the respondent must adjudicate the tender within the extended validity period.

2.3 Standing to challenge tender awards

In *WDR Earthmoving Enterprises CC v Joe Gqabi District Municipality*,⁸⁵³ a full bench of the Eastern Cape High Court took a narrow view of standing to challenge tender awards. In this matter the applicant challenged the decision of the respondent to exclude its bid as non-responsive *and* challenged the eventual award of the tender to the fourth respondent. The court rejected the first challenge and held that there was no reviewable irregularity in the municipality's decision to declare the applicant's tender non-responsive and that the applicant's tender was accordingly lawfully excluded. On the second challenge, the court held that once the applicant's tender was excluded as non-responsive 'it no longer had a legally protected interest in the outcome of the process'.⁸⁵⁴ Accordingly, the applicant lacked standing to bring a review application of the tender award.

This approach is in tension with the much more generous approach to standing adopted in *Secureco (Pty) Ltd v Ethekeeni Municipality*.⁸⁵⁵ In that matter, the Durban High Court found that an applicant that did not participate in the challenged procurement process at all, but in a prior tender that was aborted in favour of the challenged process, had standing to bring a review application in respect of the second tender. The court reasoned that 'broader concerns of accountability and responsiveness' militate against disposing of cases simply on the basis of standing.⁸⁵⁶

2.4 Time frame for challenging procurement decisions on review

In *Joburg Market SOC Ltd v Aurecon South Africa (Pty) Limited*⁸⁵⁷ the court applied the approach to determining the time frame for challenging procurement decisions upon review established by a recent series of Supreme Court of Appeal and Constitutional Court judgments.⁸⁵⁸ Of interest in this particular case is the court's detailed assessment of the merits of the challenge and its ruling that condonation of the unreasonable delay was justified in light of the merits of the review.

In this matter, the organ of state brought a review application to set aside its own decision to award the public tender to the first respondent just over a year after the award, based on irregularities in the

⁸⁵³ Unreported, referred to as [2017] ZAECGHC 45 (13 March 2017), available online at <http://www.saflii.org/za/cases/ZAECGHC/2017/45.html>.

⁸⁵⁴ At para 33.

⁸⁵⁵ Unreported, referred to as [2016] ZAKZDHC 14, 1 April 2016, available online at www.saflii.org/za/cases/ZAKZDHC/2016/14.html. See JQR Public Procurement 2016 (1) 2.1.

⁸⁵⁶ At para 15.

⁸⁵⁷ Unreported, referred to as [2017] ZAGPJHC 145 (30 May 2017), available online at <http://www.saflii.org/za/cases/ZAGPJHC/2017/145.html>.

⁸⁵⁸ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA); *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA); *Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality* [2017] 2 All SA 677 (SCA); *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC). See JQR Public Procurement 2016 (3) 2.8; JQR Public Procurement 2016 (4) 2.4; JQR Public Procurement 2017 (1) 2.1; JQR Public Procurement 2017 (1) 2.4.

award process. In assessing the reasonableness of the delay on the part of the organ of state, the court confirmed that the time period under the Promotion of Administrative Justice Act 3 of 2000 (and ostensibly also under the principle of legality, although the court is not particularly clear on this point) will start running when the decision is taken. The court rejected the argument that the time period only starts running when the organ of state's board of directors become aware of the irregularities in the award process, in line with the approach adopted by the higher courts in this respect.⁸⁵⁹ The court noted that any internal difficulties in identifying the irregularities cannot impact on the determination of the period of time that has lapsed since the decision was taken and the reasonableness thereof, but may be relevant in considering whether to grant condonation of the unreasonable delay.⁸⁶⁰ The court found that the delay was unreasonable and went on to consider whether it should condone the delay and nevertheless entertain the review. In this assessment, the court held that 'the nature and effect of the irregularities' in the award of the tender forming the basis for the review are important considerations.⁸⁶¹ This two-pronged assessment, ie focusing on both nature and effect, is neatly illustrated in the court's consideration of the facts. In considering the irregularities, the two factors that seem to have had the biggest influence on bringing the court to the conclusion that it should condone the delay were firstly that 'the irregularity complained of is such that the process is deviated from and interfered with in a manner which could denote or lead to corruption', although the court explicitly noted that it was not necessary for it to reach a conclusion on whether corruption was in fact present. This factor thus speaks to the nature of the irregularities. The second factor was 'the award of the tender at a price which was significantly higher than the recommended tender',⁸⁶² which speaks to the effect of the irregularities. The court's strong emphasis here on the importance of price in adjudicating bids in South African public procurement law is also of interest. The court declared that '[p]rice is a central issue in the procurement process and the fact that it is directly impacted on by the irregularity [is] cause for concern' and that the interests of justice dictate condonation since '[i]t is also in the public interest to ensure that goods and services are secured for the best and lowest price possible'.⁸⁶³

2.5 Contracting authorities and collateral challenges

The clear and continued disagreement between the justices of the highest court, the Constitutional Court, regarding the question whether a formal application for the review of an irregular administrative action is obligatory in order to avoid the enforcement of that action,⁸⁶⁴ is mirrored in contrasting High Court judgments on this question in the context of public procurement. Two recent examples are *MD Business Solutions (Pty) Ltd v Ikhwezi Local Municipality*⁸⁶⁵ and *Gobela Consulting CC v Makhado*

⁸⁵⁹ Paras 7–11.

⁸⁶⁰ Para 11.

⁸⁶¹ Para 19.

⁸⁶² Para 39.

⁸⁶³ Para 39.

⁸⁶⁴ See *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC).

⁸⁶⁵ Unreported, referred to as [2017] ZAECHC 56 (18 May 2017), available online at <http://www.saflii.org/za/cases/ZAECHC/2017/56.html>.

Municipality.⁸⁶⁶ The central question in both these cases was whether the court should enforce a public contract against an organ of state where the latter argues that the contract is invalid for a failure to comply with procurement law, but failed to properly bring a review application (or counter-application) for an order to that effect. The respective high courts reached opposite conclusions on this question in the above two matters.

In the *MD Business Solutions* case, the Eastern Cape High Court held that in the absence of an application (or counter-application) to have the tender award set aside and the contract thus declared invalid, based on the patent failure to comply with procurement law when the award was made, the award must be considered valid and must be enforced. In the court's own words:⁸⁶⁷

'As Ikwezi [the respondent organ of state] brought no counter-application to challenge the validity of the administrative decisions taken to contract with MD Business Solutions, that is the end of the matter: there is no properly raised challenge to those decisions that is before me and, that being so, those decisions must be regarded as effective.'

In *Gobela Consulting*, on the other hand, the Limpopo High Court reached the exact opposite conclusion. The court held that since the award of the tender and hence conclusion of the contract in the present matter did not comply with procurement laws, the contract was invalid and would not be enforced. The court rejected the plaintiff's argument that the contract had to be considered valid and enforceable in the absence of a counter-application by the organ of state to have it declared invalid. Curiously, the court relied⁸⁶⁸ on the dissenting minority judgment of Jafta J in the Constitutional Court matter in *Kirland*⁸⁶⁹ as authority for its position.

Considering the majority Constitutional Court judgments in *Kirland* and *Tasima*,⁸⁷⁰ the *MD Business Solutions* judgment must be considered as correct and the *Gobela Consulting* one as incorrect. That is, a formal application (typically as a counter-application in the enforcement proceedings) to have the relevant tender award set aside is required to avoid enforcement on the basis of a failure to comply with procurement laws. However, the deep differences on this point between the justices of the Constitutional Court, which is evident from the various judgments in *Kirland* and *Tasima*, as well as the narrow split between majority and minority, suggest that this issue will remain a live one for some time to come.

3. Literature

Sugudhav-Sewpersadh, P 'South Africa/Russia nuclear power deal: A mockery of the constitutional procurement principles' (2017 May) *DR* 58

⁸⁶⁶ Unreported, referred to as [2017] ZALMPPHC 10 (8 June 2017), available online at <http://www.saflii.org/za/cases/ZALMPPHC/2017/10.html>.

⁸⁶⁷ Para 22.

⁸⁶⁸ Paras 17, 20.

⁸⁶⁹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

⁸⁷⁰ *Department of Transport v Tasima (Pty) Limited* 2017 (2) SA 622 (CC).

July to September 2017 (3)

JQR Public Procurement 2017 (3)

Geo Quinot⁸⁷¹

1. Legislation

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

2. Cases

2.1 Adjudication criteria

In *Contour Technology (Pty) Limited v Chairperson of the Bid Adjudication Committee: Modimole Local Municipality*,⁸⁷² the court invalidated a tender award, because the organ of state disregarded the adjudication methodology prescribed by the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). The organ of state adjudicated all bids for functionality as a threshold requirement, but then found it too difficult to compare the qualifying bids on price given the pricing formula used by one of the bidders. It thus awarded both qualifying bidders the full 90 points for price and proceeded to award the tender on the basis of functionality scores. The court held that this approach was unlawful. Under the PPPFA, organs of state are obliged to score bids with reference to price and are not allowed to pass over this stage of adjudication in favour of revisiting the functionality criteria in taking the award decision. The court also rejected an argument that this approach is justifiable in terms of s 2(1)(f) of the PPPFA, which allows organs of state to award bids on the basis of objective criteria other than price. The court held that reliance on this section was misplaced, because the tender conditions did not identify these criteria as objective criteria to be taken into account in awarding the tender, and because the organ of state did not rely on these criteria *after* it had adjudicated the bids on the basis of price, but *instead* of adjudicating on the basis of price. Such an approach was not allowed. While not stating it in so many words, the judgment strongly suggests that a second recourse to functionality criteria is a suspect adjudication methodology under the PPPFA.

2.2 Strict compliance with statutory and tender conditions, tax affairs and negotiations

In the high-profile litigation in which the Passenger Rail Agency of South Africa (PRASA) sought to have its botched acquisition of locomotives set aside, *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*,⁸⁷³ the court held that tender conditions must be strictly complied with, including those relating to tax compliance, and that the scope for post-award negotiations was limited to the conditions of tender. The court set the award of the tender aside for a failure to comply with these rules.

⁸⁷¹ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Procurement Law Unit.

⁸⁷² Unreported, referred to as [2017] ZAGPPHC 496, 11 August 2017, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2017/496.html>.

⁸⁷³ 2017 (6) SA 223 (GJ).

The court found that the tender awarded to the respondent differed materially from what was advertised and contained in the tender conditions. While the tender called for the lease of locomotives, the respondent offered to sell locomotives, which offer the applicant accepted in awarding the bid to the respondent. This, the court held, amounted to an unfair tender process, because the award did not match the tender conditions and other bidders were not given the same opportunity to offer a sale instead of a lease.⁸⁷⁴

The court also set the award aside on the basis that the respondent did not comply with the condition relating to the submission of a valid tax clearance certificate. This part of the judgment turned on the fact that the respondent did not have a VAT number as it was not trading at the time when it submitted the bid and its tax certificate thus did not contain a VAT number. The court held that the absence of a VAT number on the respondent's tax clearance certificate meant that it did not submit a valid clearance certificate as required by the tender conditions.⁸⁷⁵ Accordingly, the respondent should have been disqualified.

The court held that the non-compliance with the tender conditions, especially those relating to the offer of sale as opposed to lease, could not be cured by way of post-award negotiations. The court endorsed Phoebe Bolton's arguments⁸⁷⁶ regarding the very limited scope for such negotiations and that the eventual tender contract could not differ materially from the tender conditions following negotiations.⁸⁷⁷

In respect of statutory conditions, the court held that the applicant failed to comply with s 54(2) of the Public Finance Management Act 1 of 1999 (PFMA), which requires public entities to obtain prior approval from their executive authorities and to inform the relevant treasury of the details of the acquisition of significant assets.⁸⁷⁸ The current transaction involved such acquisition and PRASA's failure to obtain the approval from the Minister of Transport (its executive authority) and to inform National Treasury of the transaction amounted to a reviewable irregularity in the procurement.

An interesting further basis upon which the court held the procurement to be irregular relates to failures in the needs assessment. The court found PRASA's conduct in demand management wanting and held this to be in violation of regulatory requirements under the PFMA and PRASA's procurement policy.⁸⁷⁹

In *Belrex 528 CC v Chairperson, Cape Town Regional Bid Adjudication Committee*,⁸⁸⁰ the court adopted a less strict approach to compliance with formal tender conditions. In this matter the organ of state awarded a tender to the applicant, but shortly after 'revoked' the award on the basis that the applicant had failed to sign a returnable document. The organ of state took the view that the applicant's tender was accordingly non-responsive and that it had no choice but to revoke the award. The court upheld a

⁸⁷⁴ Para 55.

⁸⁷⁵ Para 58.

⁸⁷⁶ P Bolton 'Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by Way of a Tender Process' (2006) 17 *Stellenbosch Law Review* 266.

⁸⁷⁷ Para 73.

⁸⁷⁸ Para 70.

⁸⁷⁹ Paras 68– 69.

⁸⁸⁰ Unreported, referred to as [2017] ZAGPPHC 613, 27 September 2017, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2017/613.html>.

challenge to the purported revocation, finding that the standard conditions of tender allowed the organ of state a discretion to accept bids even though they do not strictly comply with all tender conditions. The organ of state thus made an error of law when it took the decision to revoke the award on the basis that it had no choice in law but to do so. In reaching this conclusion, the court relied on the Supreme Court of Appeal judgment in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,⁸⁸¹ where the SCA, on almost identical facts, held that the organ of state should have condoned the formal omission in the bid. Interestingly, the court in the current matter distinguished the later SCA judgment in *Dr JS Moroka Municipality v Betram (Pty) Limited*,⁸⁸² which came to the opposite conclusion. In the present matter the court read the *Moroka* judgment as restricted to cases where the omission in the bid was not innocent or an oversight, where it was material and where correction could result in harm to another party such as competing bidders. Since none of these factors were present in the current matter, the court held that the case had to be decided in line with *Millennium Waste* and not *Moroka*.

2.3 Unsolicited bids and deviations

In *Lornavision (Pty) Ltd v South African Broadcasting Corporation SOC Limited*,⁸⁸³ the court emphasised the strict approach to unsolicited bids in South African procurement law and invalidated a contract for a failure to comply with the requirements for accepting unsolicited bids. In this matter, the court held that there was no evidence that this case was exceptional, urgent or an emergency, which would justify a deviation from the norm of open competitive bidding. The court also held that there was no evidence to show that the relevant services could not be competitively procured, in fact the court noted that there was ample evidence to show that a number of other service providers were available to offer the same services. As a result, the ‘substantially higher threshold of scrutiny in [unsolicited bids] consideration and approval’⁸⁸⁴ was not met and the contract held unlawful. In a neat formulation of the justification for adopting a strict approach to unsolicited bids and to deviations, the court noted

‘The necessity of the frameworks set out in the SABC’s [procurement] policy [under the Public Finance Management Act 1 of 1999 and the Preferential Procurement Policy Framework Act 5 of 2000], ensure that, insofar as is practically possible, it is important to attract the largest possible pool of competitors and ensure the achievement of both the provision of equal opportunity to all prospective competitors and thus ensure the most cost-effective method of procuring services. This, in turn, ensures that the SABC attains cost-effectiveness in the performance of its mandate and value-for-money when it does so in the utilization of external service providers, an imperative that ensures proper use of public funds.’⁸⁸⁵

In setting aside the contract, the court made the further interesting remark that s 217 of the Constitution confers a ‘constitutional right on every potential supplier to offer goods and services to the public sector when needed’.⁸⁸⁶ This is an important remark for it is at times not self-evident what rights are at stake when an interested party wants to challenge the award of a public tender. This statement

⁸⁸¹ 2008 (2) SA 481 (SCA).

⁸⁸² [2014] 1 All SA 545 (SCA).

⁸⁸³ Unreported, referred to as [2017] ZAGPJHC 208, 1 August 2017, available online at <http://www.saflii.org/za/cases/ZAGPJHC/2017/208.html>.

⁸⁸⁴ Para 43.

⁸⁸⁵ Para 42.

⁸⁸⁶ Para 102.

suggests that even *potential* suppliers have a constitutional right that may be implicated in tender awards.

2.4 Duty to investigate abuse of procurement system

Regulation 38 of the Municipal Supply Chain Management Regulations of 2005, issued in terms of the Local Government: Municipal Finance Management Act 56 of 2003, requires the supply chain management policy of a municipality to include ‘measures for the combating of abuse of the supply chain management system’, which must enable the accounting officer to take a number of steps in response to allegations of abuse. In *Singatha Afrika Management Services (Pty) Ltd v City of Cape Town*,⁸⁸⁷ the court provided some guidance on what the nature of the accounting officer’s duty is under this regulation. The court held that the regulation contemplates that ‘the character of the relevant duty placed on the municipal manager (qua accounting officer) in terms of the regulation is investigative’.⁸⁸⁸ This, in the court’s view, meant that the accounting officer (or his/her delegatee) cannot simply adopt a strict adjudicative role, but must on its own initiative where necessary engage in investigation to ascertain the true state of affairs before taking action. This includes calling for oral evidence even where none of the parties have done so. In the present matter the court held that the presiding officer appointed by the municipal manager to deal with the alleged abuse was faced with conflicting factual claims and was in no position to determine the veracity of either version on the papers. By taking a decision on this basis, the officer acted irrationally in the court’s view. The court accordingly set aside the sanctions imposed by the respondents on the applications for the alleged abuse of the supply chain management system by the applicants.

In *Holoby Trading 2 CC v Head of Department of Roads and Transport; Holoby Trading 2 CC v Head Gauteng Department of Roads and Transport*,⁸⁸⁹ the court held that a decision to refer a supplier’s conduct for investigation into alleged abuse may be reviewed, if not in terms of the Promotion of Administrative Justice Act 3 of 2000 as an administrative action, then at least in terms of the principle of legality.

2.5 Time frame for challenging procurement decisions on review

In *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*,⁸⁹⁰ the court confirmed that the time frame for bringing a review application to challenge the award of a tender started to run when the decision was taken and not from the date when the applicant became aware of the irregularities.⁸⁹¹ However, the court noted that the latter date would be relevant when it must exercise its discretion in whether to condone a delay in bringing the review application.⁸⁹² This would especially be the case where those involved in the irregularities actively concealed them and the evidence indicating such irregularities. The chances of success in the review application is another factor to be taken into

⁸⁸⁷ Unreported, referred to as [2017] ZAWCHC 85, 22 August 2017, available online at <http://www.saflii.org/za/cases/ZAWCHC/2017/85.html>.

⁸⁸⁸ Para 17.

⁸⁸⁹ Unreported, referred to as [2017] ZAGPJHC 268, 19 September 2017, available online at <http://www.saflii.org/za/cases/ZAGPJHC/2017/268.html>.

⁸⁹⁰ 2017 (6) SA 223 (GJ).

⁸⁹¹ Para 29.

⁸⁹² Para 33.

account.⁸⁹³ In the present matter the court condoned a delay of over two years in launching the review application based on the fact that the board of the applicant only became aware of the irregularities at a much later stage in light of extensive attempts to conceal the irregularities by those involved and the very high chances of success in the review. The strong indications of corruption also weighed heavily in favour of condoning the delay.

The judgment in *Lornavision (Pty) Ltd v South African Broadcasting Corporation SOC Limited*⁸⁹⁴ follows a similar approach to condonation of delay. In this case, the court further stated that the merits of the case and a strong likelihood of success could trump 'insufficient or unsatisfactory explanation for the delay'.⁸⁹⁵ It is thus clear that an adequate explanation for the entire period of delay is a factor in condoning the delay, but is not a pre-requisite, even though the court in *Belrex 528 CC v Chairperson, Cape Town Regional Bid Adjudication Committee*⁸⁹⁶ described such explanation as a 'hurdle' that an applicant for condonation must first pass before a court may consider other factors.⁸⁹⁷ In this respect it would seem that the scales tip fairly easily in favour of condoning delay in procurement cases where irregularity in the award decision can be shown. It seems that the public interest in procurement is a significant factor in favour of condonation in such cases. As the court stated in *Lornavision* in deciding whether it was in the interest of justice to condone the delay, '[o]nce it is proven that the contract with...was awarded contrary to the stipulated requirements of public procurement policies, the interests of justice require that it be reviewed and set aside'.⁸⁹⁸

2.6 Damages claims for cancelling tender contracts

In *Sizazonke Electrical CC v Eskom Holdings Limited*,⁸⁹⁹ the court refused a claim for damages based on both contractual and delictual grounds in the context of a procurement. The judgment is of interest in sustaining the distinction in the procurement context between remedies based in administrative law, primarily judicial review, and those based in private law, primarily delict and contract.

In this matter, the plaintiff was a successful tenderer to provide services to the defendant organ of state in terms of an overarching procurement process. Following an accident, the defendant suspended the contract and eventually also the plaintiff from contracting with the defendant for a period of five years, ie debarred the plaintiff for a failure to comply with the tender conditions pertaining to safety measures. The plaintiff successfully challenged the defendant's decision to suspend it in judicial review proceedings and the court set aside that decision, but granted no further relief.⁹⁰⁰ In the present case, the plaintiff claimed damages for loss of income from the defendant for the period of suspension. It based its claim on an averred repudiation of the tender contract, alternatively on delict.

⁸⁹³ Para 33. Also see *Electoral Commission v Abland (Pty) Ltd* (unreported, referred to as [2017] ZAGPPHC 503, 3 August 2017, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2017/503.html>), where the same approach was taken.

⁸⁹⁴ Unreported, referred to as [2017] ZAGPJHC 208, 1 August 2017, available online at <http://www.saflii.org/za/cases/ZAGPJHC/2017/208.html>.

⁸⁹⁵ Para 87.

⁸⁹⁶ Unreported, referred to as [2017] ZAGPPHC 613, 27 September 2017, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2017/613.html>.

⁸⁹⁷ Para 35.

⁸⁹⁸ Para 108.

⁸⁹⁹ Unreported, referred to as [2017] ZAGPPHC 305, 7 July 2017, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2017/305.html>.

⁹⁰⁰ The review judgment is unreported, case number GPP 30038/11, 20 October 2011.

In rejecting the claim, the court distinguished between the administrative errors made by the organ of state in suspending the plaintiff and the damages claim. For the former, the court held that the judicial review proceedings constituted the appropriate remedy, but did not provide the basis for the latter. In order to succeed with its damages claim, the plaintiff had to show that the defendant acted unlawfully in terminating the contract in terms of either contract law (for the repudiation claim) or in delict. The finding of the review court in the preceding judicial review application had no bearing on this requirement. The court noted that the review court invalidated the decision to suspend the plaintiff 'on procedural grounds', which had no bearing on the lawfulness of the organ of state's conduct.⁹⁰¹ The same applied to arguments regarding the fairness of the defendant's actions, which were relevant for the review proceedings, but not the damages claim. The court held that the defendant's conduct was lawful in terms of both contract law and the law of delict, and that the damages claim thus had to fail.

2.7 Judicial review of tender awards: Cost orders against officials

In two further instalments in the *Westwood Insurance Brokers* matter, the High Court fleshed out the awarding of cost orders against public officials involved in irregular procurement decisions in their personal capacities.⁹⁰²

In the original review application, the High Court set aside the award of the tender and granted a substitution order in favour of the applicant. The court described the irrationality of the award of the tender as 'obvious and egregious'.⁹⁰³ In respect of costs, the court held that

'To apply the general rule that costs should follow the result would lead to taxpayers carrying the costs ultimately. They are unsuspecting victims of the illegalities perpetrated by officials appointed to serve their best interests. A way has to be found to indemnify them against all costs that Ethekekwini has to pay arising from this matter, including its own attorney and client costs.'⁹⁰⁴

The court subsequently ordered the judgment to be served on all those involved in the procurement process and called on them to show why they should not be held liable in their personal capacities for the costs. In *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality*,⁹⁰⁵ the court subsequently ordered a number of officials as well as the originally successful bidder to indemnify the respondent for the costs. A number of factors moved the court to grant the cost order against the implicated officials. One of the primary factors in the court's view was the egregious nature of the reviewable irregularity, which the court described as 'not merely irrational but bizarre'.⁹⁰⁶ The court found that no explanation could be offered to explain the mistakes made and that this justified the costs order against those that made the mistakes. Another key factor was the failure of all involved to offer any explanation for their conduct. The court found that everyone involved persisted to defend their actions despite the earlier

⁹⁰¹ Paras 38 and 43.

⁹⁰² The first judgment, *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality* (unreported, referred to as [2016] ZAKZDHC 46, 8 December 2016) was discussed in JQR Public Procurement 2016 (4) 2.7.

⁹⁰³ *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality* (unreported, referred to as [2016] ZAKZDHC 46, 8 December 2016) para 68.

⁹⁰⁴ Para 67.

⁹⁰⁵ Unreported, referred to as [2017] ZAKZDHC 15, 5 April 2017, available online at <http://www.saflii.org/za/cases/ZAKZDHC/2017/15.html>.

⁹⁰⁶ Para 43.

finding of reviewable irregularity and thereby failed to act in an accountable and transparent manner as was constitutionally required of them. The court held that this continued failure to comply with their constitutional duty justified the costs order. It is noteworthy that the court emphasised the duty to explain public conduct as part of the constitutional obligation of transparency and accountability, regardless of what that explanation may be. The court thus found the relevant officials' conduct wanting in large extent because of their failure to account. The court was especially scathing in respect of senior officials, noting that 'officials holding senior positions had a duty to explain their acts and omissions not only to avoid a cost order but also to account as is their constitutional obligation'.⁹⁰⁷

In respect of the Bid Adjudication Committee (BAC), the court sanctioned its members for their failure to properly apply their minds and for simply rubberstamping the recommendations of the Bid Evaluation Committee (BEC). In this respect, the court held that the BAC's duty to 'consider' the report and recommendations of the BEC 'means much more than the BAC simply endorsing the decision of the BEC without interrogating the correctness of it'.⁹⁰⁸ The court also held that the fact that they served on the most senior committee in the procurement process, 'the apex of the committee system', was an aggravating factor.⁹⁰⁹

The court suggested that blame and thus costs may be apportioned between individual officials depending on where their individual failures fell 'in the range from ignorance, incompetence, negligence, corruption or something else'.⁹¹⁰ However, in this matter no evidence was placed before the court to enable it to distinguish between individuals' culpability and it thus held everyone equally liable. Significantly, the court held that everyone was equally blameworthy in their failure to account for their actions, as the court put it 'their on-going refusal to explain, account, accept responsibility, and recognise that but for the interdict their decision would have resulted in a calamity of intolerable proportions'.⁹¹¹

Subsequent to the costs judgment, the municipality applied for leave to appeal that judgment and the High Court granted leave to appeal to the full bench, setting out its reasons in *Westwood Insurance Brokers (Pty) Ltd v Ethekekwini Municipality*.⁹¹² One of the grounds of appeal upon which the court granted leave was that the 'court failed to consider that its order would terrorise and paralyse employees into not doing their jobs out of fear that every little error would be met with extreme sanction', holding that another court may come to a different conclusion on the liability of employees. However, the High Court reasoned that the three-committee system prescribed for procurement decisions is designed to avoid errors and that if each committee does its work properly and every member of every committee fulfils his or her duty honestly, there should be little fear of paralysis.⁹¹³ This does not mean that errors will not be made, but the court held that where errors are made, officials could avoid liability by providing a full account for how the error occurred. This confirms the court's emphasis on transparency and accountability as core elements in holding officials personally liable for costs in procurement disputes. It

⁹⁰⁷ Para 57.

⁹⁰⁸ Para 76.

⁹⁰⁹ Para 90.

⁹¹⁰ Para 89.

⁹¹¹ Para 90.

⁹¹² Unreported, referred to as [2017] ZAKZDHC 29, 31 July 2017, available online at <http://www.saflii.org/za/cases/ZAKZDHC/2017/29.html>.

⁹¹³ Para 38.

is also noteworthy that the court stated that decisions of a committee will be attributed to each member of the committee, ie each member will be liable for the decisions of the committee, *unless* the member dissented.⁹¹⁴ The court did not expand on this statement, but the implication is that a member of a committee may avoid personal liability if he or she dissents from an erroneous decision by the relevant committee.⁹¹⁵

3. Literature

M Brooks 'The Legality of Centralised Public Procurement in South Africa' (2016) 3:1 *African Public Procurement Law Journal* 42.

G Kramer 'Electronic Public Procurement as a Tool of Reform in South African Public Procurement' (2016) 3:1 *African Public Procurement Law Journal* 1.

⁹¹⁴ Para 40.

⁹¹⁵ The court posed the interesting question, but found no answer, of 'whose interests does Ethekeini represent in applying for leave to appeal against a judgment that is entirely in its favour and those of the people its officials are elected or appointed to represent?'

October to December 2017 (4)

JQR Public Procurement 2017 (4)

Geo Quinot⁹¹⁶

1. Legislation

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

2. Cases

2.1 Cancellation of tenders

In an application for interim relief, the court in *Siphindlela Majojobela (Pty) Ltd v Member of the Executive Council for the Rural Development and Agrarian Reform, Eastern Cape*⁹¹⁷ handed down one of the first judgments on cancellation of tenders under the new Preferential Procurement Regulations, 2017.

In this matter the respondents issued an invitation to bid, but subsequently purported to cancel the invitation and issue a revised invitation to bid. The first respondent's reason for the cancellation was that it discovered during bid evaluation that the original specifications for the tender were incorrect and that revised specifications had to be issued. The applicant, a bidder in the original process, challenged the decision to cancel and in the present matter sought interim relief to interdict the respondents from proceeding with the tender process until the applicant's review application had been heard.

In justifying the decision to cancel the tender, the respondents relied on reg 13(1)(a) of the Preferential Procurement Regulations, 2017, which allows for tenders to be cancelled prior to award if 'due to changed circumstances, there is no longer a need for the goods or services specified in the invitation'. The respondents argued that the discovery during bid evaluation by the scientific specialists that the specifications as advertised were inadequate to meet the conditions pertaining to the relevant public purpose served by the procurement, constituted 'changed circumstances' and thus justified cancellation. The court held that it 'is questionable ... whether the discovery of an "irregularity on the specification" amounts to a "changed circumstances" as the sub-regulation requires for the exercise of a valid discretion' to cancel. However, this was a question for the review court to decide.⁹¹⁸ The court confirmed that the approach to be taken in adjudicating the lawfulness of a decision to cancel is to firstly determine by way of interpretation of reg 13 'what the sub-regulation requires to justify the cancellation' and then to establish whether the reasons put forward by the organ of state in support of the purported cancellation meet those requirements.⁹¹⁹ The court thus clearly confirmed that the provisions of reg 13 constitute material conditions for the lawful cancellation of a tender.

⁹¹⁶ BA LLB (Stellenbosch) LLM (Virginia) MA (UFS) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Procurement Law Unit.

⁹¹⁷ Unreported, referred to as [2017] ZAECHC 8, 6 October 2017; available online at <http://www.saflii.org/za/cases/ZAECHC/2017/8.html>.

⁹¹⁸ Para 23.

⁹¹⁹ Para 23.

The court also held that since the cancellation of the tender amounted to administrative action, bidders were entitled to procedural fairness. This entitlement was at the very least based on a legitimate expectation on the part of bidders that their submission of bids would lead 'to a fair outcome in the closed bid for the original tender'.⁹²⁰ The provisions of s 3 of the Promotion of Administrative Justice Act 3 of 2000 accordingly applied in favour of bidders to the decision to cancel. The respondents' failure to engage the bidders in any manner in taking the cancellation decision accordingly constituted proof of a *prima facie* right sought to be protected by the applicant as basis for the interim relief.

2.2 Tax clearance certificates

In *Civil and General Contractors CC v Chris Hani District Municipality*⁹²¹ the court considered what the duty of an accounting officer is in relation to tax clearance of the preferred bidder. In this matter, the applicant challenged the award of a tender to a competitor on the basis that the municipal manager's decision in awarding the tender was unreasonable because of his failure to verify the tax compliance status of the winning bidder. The winning bidder did submit an original tax clearance certificate as required by the tender conditions, but questions were raised in respect of its tax status during evaluation, although no further action was taken. The court held that reg 43 of the Municipal Supply Chain Management Regulations, as well as the municipality's own supply chain management policy, required the municipal manager to confirm with SARS that the preferred bidder's tax affairs were in order before making an award. The municipal manager could not simply rely on the tax certificate. The court set out the relevant requirements relating to tax compliance status as follows:

'In my view, the submission of a valid tax clearance certificate is a threshold requirement to ensure that only tenderers whose tax matters are *prima facie* in order are evaluated in the tender process. Upon conclusion of the evaluation process, the municipal manager is required before awarding the tender to the recommended bidder to confirm with SARS that such tenderer's taxes are in order.'⁹²²

Since the municipal manager did not make any further inquiries in respect of the preferred bidder's tax status beyond reliance on the tax certificate, the court held that the award was unreasonable since 'a reasonable decision maker in the municipal manager's position would have certainly verified the tax compliance status of Urban Africa Services due to the assertions in the engineers' report and per his duty as provided in the SCM policy'.⁹²³

The judgment is interesting because of the basis for the review, viz reasonableness. These types of cases have mostly been decided on lawfulness grounds in the past, on the basic argument that the applicable rules (either in regulations or supply chain management policy) demand that bids only be awarded to tax compliant bidders and an award to a tax non-compliant bidder thus fell afoul of the rules, making the award unlawful. The current case did not follow this trend, but rather focused on what a reasonable decision-maker would do given the regulatory requirements.

⁹²⁰ Para 25.

⁹²¹ Unreported, referred to as [2017] ZAECHC 128, 14 December 2017; available online at <http://www.saflii.org/za/cases/ZAECHC/2017/128.html>.

⁹²² Para 22.

⁹²³ Para 26.

2.3 Choice of legal route to challenge contractual action

The Constitutional Court judgment in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*⁹²⁴ is of particular significance for general administrative law even though it dealt with a procurement-related dispute. The court held in this case that an organ of state cannot rely on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or s 33 of the Constitution to challenge its own actions, regardless of whether those actions amount to administrative action.

In this matter the applicant entered into a settlement agreement with the respondent. In terms of the agreement, the respondent was appointed as a service provider to the applicant. However, no normal procurement procedure was followed to conclude the settlement agreement and/or to enter into the service agreement between the parties. When a payment dispute consequently arose, the applicant sought an order setting aside the agreements between it and the respondent on the basis that the conclusion of those agreements was unlawful for a failure to adhere to procurement rules.

When the matter reached the Constitutional Court, the core question was whether the applicant, as an organ of state, can or must rely on PAJA in bringing its review application or whether it could rely on the constitutional principle of legality. The question was thus what the appropriate legal route was for an organ of state to challenge its own procurement action.

After analysing the right to administrative justice in s 33 of the Constitution and PAJA, the court concluded that that right only accrues to private persons and not to organs of state. In the court's words: 'In the end, we are fortified in the conclusion that section 33 of the Constitution creates rights enjoyed only by private persons. And the bearer of obligations under the section is the State.'⁹²⁵ It followed that an organ of state could not rely on s 33 or PAJA to challenge its own actions. The court held that an organ of state was restricted to the principle of legality when it wanted to challenge its own procurement decisions. On the basis of legality, a court could assess an organ of state's own actions against applicable procurement law such as the principles set out in s 217 of the Constitution. In the present matter, the court found that the applicant's actions did not conform to s 217 and thus had to be declared invalid.

⁹²⁴ 2018 (2) BCLR 240 (CC).

⁹²⁵ Para 29.