

April to June 2016 (2)
JQR Public Procurement 2016 (2)

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1. Legislation

1.1 Restricting public servants from doing business with government

While the Public Administration Management Act² remains on the shelf awaiting proclamation and with it the blanket prohibition on public servants contracting with the state,³ the Public Service Regulations, 2016 have now introduced such a bar for public servants in the national and provincial spheres of government.⁴ These regulations will ostensibly come into operation on 1 August 2016.⁵ 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

In *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province*⁶ 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.

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² Act 11 of 2014.

³ 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.

⁴ 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).

⁵ However, it does not appear as if these regulations have been published in the *Government Gazette*.

⁶ Unreported, referred to as [2016] ZASCA 61, 14 April 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/61.html>.

In this matter a bidder applied for and was placed under business rescue in terms of the Companies Act⁷ 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.⁸ 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.⁹ Relying primarily on *Pretorius v Natal South Sea Investment Trust Ltd (under Judicial Management)*¹⁰ 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.¹¹ 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.¹² 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".¹³ 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*¹⁴ the Supreme Court of Appeal overturned the somewhat puzzling reasoning of the High Court below in respect of past experience as a 'category of preference'.¹⁵ 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'.¹⁶ 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'.¹⁷ 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.

⁷ Act 71 of 2008.

⁸ See JQR Public Procurement 2014 (4) 2.2.

⁹ Para 22.

¹⁰ 1965 (3) SA 410 (W) at 418E–F.

¹¹ Para 23.

¹² Para 25.

¹³ Para 25.

¹⁴ Unreported, referred to as [2016] ZASCA 61, 14 April 2016; available online at <http://www.saflii.org/za/cases/ZASCA/2016/61.html>.

¹⁵ See JQR Public Procurement 2014 (4) 2.3.

¹⁶ Para 15.

¹⁷ Para 15.

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*¹⁸ 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.¹⁹

¹⁸ Unreported, referred to as [2016] ZAGPPHC 351, 13 May 2016; unreported, available online at <http://www.saflii.org/za/cases/ZAGPPHC/2016/351.html>.

¹⁹ Paras 71–72.