October to December 2014 (4)

JQR Public Procurement 2014 (4)

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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,[2] 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

In *Superintendent-General: North West Department of Education v African Paper Products (Pty) Ltd*[3] 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'[4] 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.[5]

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

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[2] Act 11 of 2014.
[3] Unreported, referred to as [2014] ZANWHC 29, 24 October 2014; available online at http://www.saflii.org/za/cases/ZANWHC/2014/29.html.
[4] Para 67.
[5] Para 80.

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'.[6] 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 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 Ethekwini Municipality,*[7] 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*[8] 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 Act[9] 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 policy justifying the invalidation of the tender award.[10] 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

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[6] Para 4.2.
[7] 2014 JDR 1122 (KZD); see JQR Public Procurement 2014 (2) 2.1.
[8] Unreported, referred to as [2014] ZAECBHC 11, 7 October 2014; available online at http://www.saflii.org/za/cases/ZAECBHC/2014/11.html.
[9] Act 71 of 2008.
[10] Para 39.

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.[11] 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*[12] 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'.[13] The applicant challenged these criteria as 'unlawful, arbitrary, irrational and meaningless'.[14] 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)]'.[15] 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.[16] However, later in the judgment the court notes that the contracting 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".[17]

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

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[11] Para 34.
[12] Unreported, referred to as [2014] ZAECBHC 11, 7 October 2014, available online at http://www.saflii.org/za/cases/ZAECBHC/2014/11.html.
[13] Para 40.
[14] Para 40.
[15] Para 44.
[16] Act 38 of 2000.
[17] Para 49.

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*[18] 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 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*[19] 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 . . .[20]

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.

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[18] Unreported, referred to as [2014] ZAECPEHC 84, 4 December 2014; available online at http://www.saflii.org/za/cases/ZAECPEHC/2014/84.html.
[19] Unreported, referred to as [2014] ZASCA 206, 28 November 2014; available online at http://www.saflii.org/za/cases/ZASCA/2014/206.html.
[20] 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'.[21] 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.*[22] 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'.[23] This finding is in tension with other recent judgments in which the courts have questioned whether there exists an adequate contractual relationship between bidders and the contracting authority during the bid evaluation stage to constitute the basis for binding ADR mechanisms.[24]

2.7 Damages claims for cancelling tender contracts

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*[25] 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

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[21] Para 11.
[22] Unreported, referred to as [2014] ZAGPPHC 931, 28 November 2014; available online at http://www.saflii.org/za/cases/ZAGPPHC/2014/931.html.
[23] Para 18.
[24] See JQR Public Procurement 2013 (1) 2.3.
[25] 2015 (1) SA 1 (CC).

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'.[26] 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'.[27] 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.[28] There is accordingly no need for delictual liability towards further third parties as well.

2.8 Judicial review of tender awards: Remedies

In *Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited*[29] 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.[30]

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'.[31] 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,[32] none of which were evidently present in this case. To allow a contracting

[26] Para 33.
[27] Para 47.
[28] Para 50.
[29] Unreported, referred to as [2014] ZASCA 163, 1 October 2014; available online at http://www.saflii.org/za/cases/ZASCA/2014/163.html.
[30] Para 15.
[31] Para 3.
[32] Regulation 8(4).

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.[33] The result is that the SCA did in fact issue a substantive order, namely that the contracting 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.

[33] 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.