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Public Procurement

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January to March 2013 (1)

JQR Public Procurement 2013 (1)

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1. Legislation

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

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*² 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.³ The court reasoned that these two principles dictate that tenderers have certainty when preparing bids regarding the adjudication criteria that would be applied.⁴ In addition, the court held that transparency would also be compromised where the tender adjudicator does not know which criteria to apply.⁵ 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

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² Unreported, referred to as [2013] ZAWCHC 3, 6 February 2013; available online at <http://www.saflii.org/za/cases/ZAWCHC/2013/3.html>.

³ Paras 70–74.

⁴ Para 72.

⁵ Para 73.

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*⁶ 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 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.⁷ 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

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

⁷ Paras 109–110.

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.⁸

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 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 Mzansi (Pty) Ltd*⁹ 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.

⁸ Para 114.

⁹ Unreported, referred to as [2013] ZASCA 14, 18 March 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/14.html>.

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.

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'.¹⁰ 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'.¹¹ 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.¹²

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,

¹⁰ Para 8.

¹¹ Para 9.

¹² Para 11.

including the SCA, have in the past endorsed the so-called two-contract approach to the construction of public procurement processes¹³ following the English judgment in *Blackpool and Fylde Aero Club v Blackpool Borough Council*.¹⁴ 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 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.¹⁵ 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

¹³ 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.

¹⁴ [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.

¹⁵ 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.

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'¹⁶ as opposed to judicial review as the primary mechanism to resolve disputes.

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*.¹⁷ 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.¹⁸

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)*.¹⁹ 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

¹⁶ *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.

¹⁷ Unreported, referred to as [2013] ZASCA 29, 27 March 2013, available online at <http://www.saflii.org/za/cases/ZASCA/2013/29.html>.

¹⁸ Para 21.

¹⁹ 1919 AD 30.

regarding the composition of the committee was contained in an internal circular of SASSA, which could not be considered law.²⁰ 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*,²¹ 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

In *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of the South African Social Security Agency*²² 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.’²³ 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*.²⁴ However, this ruling seems to reverse the approach adopted in *Transnet Ltd v Goodman Brothers (Pty) Ltd*,²⁵ 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.

²⁰ Para 59.

²¹ Unreported, referred to as [2013] ZAECCELLC 2, 8 January 2013, available online at <http://www.saflii.org/za/cases/ZAECCELLC/2013/2.html>, paras 13, 16.

²² Unreported, referred to as [2013] ZASCA 29, 27 March 2013, available online at <http://www.saflii.org/za/cases/ZASCA/2013/29.html>.

²³ Para 95.

²⁴ 1995 (3) SA 710 (W).

²⁵ 2001 (1) SA 853 (SCA).

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.²⁶

3. Literature

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

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1. Legislation

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

2. Cases

²⁶ Compare in this regard *Simunye Developers CC v Lovedale Public FET College* (unreported, referred to as [2010] ZAECGHC 121, 9 December 2010; available online at <http://www.saflii.org/za/cases/ZAECGHC/2010/121.html>) and *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C).

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2.1 Two-contract approach to public tenders

In *CShell 271 (Pty) Ltd v Oudtshoorn Municipality*²⁸ the Supreme Court of Appeal expressly endorsed the so-called two-contract approach to public tendering.²⁹ 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, 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.³⁰

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 Mzanzi (Pty) Ltd*³¹ 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'.³²

2.2 Awarding tenders to non-highest scoring tenderers

In *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality*³³ the court, in an application for interim relief, dealt with the requirements for awarding a tender to the bidder that did

²⁸ Unreported, referred to as [2013] ZASCA 62, 24 May 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/62.html>.

²⁹ On this approach to public tendering, see Quinot G *State Commercial Activity: A Legal Framework* (2009) 163–168.

³⁰ Para 21.

³¹ 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.

³² Para 8.

³³ Unreported, referred to as [2013] ZAKZDHC 16, 6 May 2013; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2013/16.html>.

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').³⁴

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.³⁵

The first respondent relied in essence on s 2(1)(f) of the PPPFA in taking this decision.³⁶ In assessing whether the applicant had established a *prima facie* right for purposes of interim relief, the court found 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'.³⁷ 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'.³⁸

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*,³⁹ which held that only criteria listed in the tender documents can be relied

³⁴ 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'.

³⁵ Para 10.

³⁶ 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.

³⁷ Para 12.

³⁸ Para 12.

³⁹ 2005 JDR 1033 (BG).

upon for s 2(1)(f) purposes. On the other side are judgments such as *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit*⁴⁰ and *Simunye Developers CC v Lovedale Public FET College*,⁴¹ 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.

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*⁴² and *Easypay (Pty) Ltd v Mangaung Metropolitan Municipality*⁴³ 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

⁴⁰ 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.

⁴¹ Unreported, referred to as [2010] ZAECGHC 121, 9 December 2010, para 33; available online at <http://www.saflii.org/za/cases/ZAECGHC/2010/121.html>.

⁴² Unreported, referred to as [2013] ZAKZDHC 16, 6 May 2013; available online at <http://www.saflii.org/za/cases/ZAKZDHC/2013/16.html>.

⁴³ Unreported, referred to as [2013] ZAFSHC 44, 4 April 2013; available online at <http://www.saflii.org/za/cases/ZAFSHC/2013/44.html>.

the adjudication process.⁴⁴ 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.⁴⁵ 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*⁴⁶ 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 and transparently.⁴⁷ 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 2000.⁴⁸ 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.

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⁴⁴ Para 23.

⁴⁵ Para 18.

⁴⁶ Unreported, referred to as [2013] ZAFSHC 106, 27 June 2013; available online at <http://www.saflii.org/za/cases/ZAFSHC/2013/106.html>.

⁴⁷ Para 15.

⁴⁸ Paras 12–15.

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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*⁵⁰ 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 of High Court judgments, including the judgment of the court *a quo* in this matter,⁵¹ 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.⁵²

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-

⁵⁰ Unreported, referred to as [2013] ZASCA 102, 12 September 2013; available online at <http://www.saflii.org/za/cases/ZASCA/2013/102.html>.

⁵¹ See JQR Public Procurement 2012 (3) 2.1.

⁵² Paras 17–22.

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.⁵³ 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’.⁵⁴ Regarding fairness the court declared:

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.⁵⁵

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.⁵⁶ 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,

⁵³ Paras 18–22.

⁵⁴ Para 18.

⁵⁵ Para 20.

⁵⁶ See JQR Public Procurement 2011 (4) 1.1.

among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.⁵⁷

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 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*⁵⁸ 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'.⁵⁹ 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*⁶⁰ 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.

⁵⁷ Preferential Procurement Regulations, 2011, regulation 1(k).

⁵⁸ Unreported, referred to as [2013] ZAECGHC 76, 1 August 2013; available online at <http://www.saflii.org.za/za/cases/ZAECGHC/2013/76.html>.

⁵⁹ Para 54.

⁶⁰ Unreported, referred to as [2013] ZAGPPHC 196, 12 July 2013; available online at <http://www.saflii.org.za/za/cases/ZAGPPHC/2013/196.html>.

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.⁶¹

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 complete the contract and/or disputes.⁶² 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 Quinot⁶³

1. Legislation

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

2. Cases

⁶¹ Para 51.

⁶² Paras 52, 55, 56, 59.

⁶³ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

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*,⁶⁴ although it is not quite yet the end of the road.⁶⁵ 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 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.⁶⁶ 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.⁶⁷

⁶⁴ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁶⁵ 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.

⁶⁶ Paras 22–23, 30.

⁶⁷ Para 27.

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.'⁶⁸ 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 bidders, the tenderers' 'reasonable opportunity to make representations' under s 3(2)(b)(ii).⁶⁹ 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 award criteria that will determine the award, the award process fails to comply with s 3 of PAJA and is procedurally unfair.⁷⁰

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 3.⁷¹ 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*⁷² 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

⁶⁸ Para 45.

⁶⁹ Para 90.

⁷⁰ Para 91.

⁷¹ Para 60.

⁷² 2005 (6) SA 313 (SCA).

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*⁷³ 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.⁷⁴ 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'.⁷⁵ 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 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.⁷⁶

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*⁷⁷ 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

⁷³ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁷⁴ Para 68.

⁷⁵ Para 72.

⁷⁶ Para 72.

⁷⁷ 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.

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 2000.⁷⁸ 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 such non-compliance.⁷⁹ 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.⁸⁰ 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*⁸¹ 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'.⁸² 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*⁸³ 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.⁸⁴ The existence of a ground

⁷⁸ Para 16.

⁷⁹ Para 16.

⁸⁰ Para 18.

⁸¹ 2008 (2) SA 481 (SCA).

⁸² Para 17.

⁸³ Unreported, referred to as [2013] ZACC 42, 29 November 2013; available online at <http://www.saflii.org/za/cases/ZACC/2013/42.html>.

⁸⁴ Paras 22, 25, 29.

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.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸

In *Kwa Sani Municipality v Underberg/Himeville Community Watch Association*⁸⁹ 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.⁹⁰ The court aligned the judgments in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*⁹¹ and *Oudekraal Estates (Pty) Ltd v City of Cape Town*,⁹² 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*⁹³ 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'.⁹⁴ 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

⁸⁵ Para 25.

⁸⁶ Para 29.

⁸⁷ Para 56.

⁸⁸ Para 26.

⁸⁹ Unreported, referred to as [2013] ZAKZPHC 6, 30 October 2013; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2013/60.html>.

⁹⁰ Paras 41–43.

⁹¹ 2008 (2) SA 638 (SCA).

⁹² 2004 (6) SA 222 (SCA).

⁹³ Unreported, referred to as [2013] ZAGPPHC 319, 1 November 2013; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2013/319.html>.

⁹⁴ Para 8.

that under Regulation 10(4) of the Preferential Procurement Regulations, 2001,⁹⁵ 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.

⁹⁵ Now contained in regulation 8(4) of the Preferential Procurement Regulations, 2011.