

**April to June 2014 (2)**

**JQR Public Procurement 2014 (2)**

**Geo Quinot<sup>1</sup>**

**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. *Rodpaul Construction CC v Ethekekwini Municipality*<sup>2</sup> 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*<sup>3</sup> to the effect that a contracting authority does not have

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<sup>2</sup>2014 JDR 1122 (KZD).

<sup>3</sup>2013 JDR 2728 (SCA).

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

In *City of Cape Town v Aurecon South Africa (Pty) Ltd*<sup>4</sup> 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.<sup>5</sup>

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'.<sup>6</sup> 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.<sup>7</sup> In the present instance the court held that the 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

<sup>4</sup> Unreported, referred to as [2014] ZAWCHC 51, 14 April 2014; available online at <http://www.saflii.org.za/za/cases/ZAWCHC/2014/51.html>.

<sup>5</sup> Para 57.

<sup>6</sup> Para 59.

<sup>7</sup> 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.'

In *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality*<sup>8</sup> 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').<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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'.<sup>12</sup> 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'.<sup>13</sup> 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 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 Act<sup>14</sup> to procurement disputes,<sup>15</sup> the court in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality*<sup>16</sup> 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'),<sup>17</sup> 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

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<sup>8</sup>Unreported, referred to as [2014] ZAECGHC 55, 19 June 2014; available online at <http://www.saflii.org.za/za/cases/ZAECHGHC/2014/55.html>.

<sup>9</sup>Act 2 of 2000.

<sup>10</sup>See *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.

<sup>11</sup>Act 32 of 2000.

<sup>12</sup>Para 15.

<sup>13</sup>Para 50.

<sup>14</sup>Act 32 of 2000.

<sup>15</sup> See JQR Public Procurement 2009 (1) 2.5; JQR Public Procurement 2010 (1) 2.1.

<sup>16</sup>Unreported, referred to as [2014] ZAECGHC 55, 19 June 2014; available online at <http://www.saflii.org.za/za/cases/ZAECHGHC/2014/55.html>.

<sup>17</sup>Act 3 of 2000.

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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

## 2.5 Judicial review of tender awards: Remedies

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*<sup>21</sup> 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.<sup>22</sup> 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'.<sup>23</sup> 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',<sup>24</sup> that is between setting the contract aside or maintaining it.

In the present matter the court thus fashioned an order in-between these extremes.<sup>25</sup> 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

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<sup>18</sup>Paras 43, 45.

<sup>19</sup>Para 45.

<sup>20</sup>Paras 43, 47, 52.

<sup>21</sup>2014 (4) SA 179 (CC).

<sup>22</sup>The 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.

<sup>23</sup>Para 30.

<sup>24</sup>Para 39.

<sup>25</sup>Para 78.

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 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*<sup>26</sup> 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.<sup>27</sup> 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

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<sup>26</sup>2011 (4) SA 113 (CC) para 82.

<sup>27</sup>Para 63.

suspended finding of invalidity is no longer a pure contractual one, but takes on a constitutional nature as well.

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.<sup>28</sup> 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*<sup>29</sup> 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.<sup>30</sup> 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'.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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

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<sup>28</sup>Para 44.

<sup>29</sup>2014 (4) SA 179 (CC).

<sup>30</sup>Para 54.

<sup>31</sup>Para 59.

<sup>32</sup>Para 67.

<sup>33</sup>Para 78.

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