

January to March 2014 (1)

JQR Public Procurement 2014 (1)

Geo Quinot¹

1. Legislation

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

2. Cases

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

In *Searle v Road Accident Fund*² the court dealt with the question of what the effect is on the tender process where the tender validity period has lapsed.

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

Plasket J agreed with the applicants' argument and found the award of the bid invalid. The judge agreed with the reasoning of the court in *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited*³ where Southwood J held:

As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract.⁴

In the present case Plasket J thus held that after the tender validity period lapsed the respondent could not lawfully take the process forward. The judge also expressly disagreed with the contrary obiter view adopted in *Cato Ridge Electrical Construction (Pty) Ltd v Chairperson, Durban Regional Bid Adjudication Committee*.⁵

2.2 Legally binding procurement rules

¹ BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch), Professor, Department of Public Law, Stellenbosch University & Director: African Public Procurement Regulation Research Unit.

² Unreported, referred to as [2014] ZAECPEHC 19, 25 March 2014; available online at <http://www.saflii.org/za/cases/ZAECPEHC/2014/19.html>.

³ Unreported, referred to as [2011] ZAGPPHC 1, 7 January 2011; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2011/1.html>, noted in JQR Public Procurement 2011 (1) 2.3.

⁴ Para 14.

⁵ 2010 JDR 1523 (KZP).

In *Searle v Road Accident Fund*⁶ the court expressly recognised the legally binding nature of National Treasury's *Supply Chain Management: A Guide for Accounting Officers/Authorities*.⁷ The court held that this instrument was part of what the Constitutional Court described as 'the constitutional and legislative procurement framework' in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*.⁸ As such the document was legally binding and not simply 'an internal prescript that may be disregarded at whim'.⁹

This is a significant finding, seeing that the legal status of this guideline document has at times been questioned.¹⁰

2.3 Standing to challenge procurement decisions

In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*¹¹ the SCA dealt with the question of who has standing to challenge a tender award in review proceedings. In this matter one of the unsuccessful bidders, who did not qualify for the tender due to its CIDB rating being lower than what was required in the tender, challenged the award of the tender in a review application before the High Court. In an appeal to the SCA the contracting authority argued that the applicant did not have standing to bring the review since it did not qualify for the tender and thus could never win it. It consequently could also not contest the eventual award in a review application, so the argument went. The SCA rejected the argument and held that the applicant did have standing to challenge the award in review proceedings.¹²

The SCA held that a bidder has 'the right to a fair and competitive tender process irrespective of whether the tender is awarded to him'.¹³ The court thus held that it was *inter alia* the bidder's interest in a fair tender process flowing from its submission of its bid that provided it with standing in the review application. The court added that the application raised questions about 'good governance and accountability', which implied that the court had to take a wide view of standing.

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

⁶ Unreported, referred to as [2014] ZAECPEHC 19, 25 March 2014; available online at <http://www.saflii.org/za/cases/ZAECPEHC/2014/19.html>.

⁷ Para 73.

⁸ 2014 (1) SA 604 (CC), paras 22, 40.

⁹ Para 73.

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

¹¹ Unreported, referred to as [2014] ZASCA 21, 28 March 2014; available online at <http://www.saflii.org.za/za/cases/ZASCA/2014/21.html>.

¹² Para 17.

¹³ Para 17.

2.4 Judicial review of tender awards: Remedies

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

In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*¹⁴ the SCA overturned an order of the High Court that maintained a contract despite finding the award of the tender to be reviewable. In scrutinising the High Court's findings, the SCA confirmed that a review court may in principle maintain a contract despite reviewable irregularities in the award of the relevant tender. However, the SCA noted a number of reasons why it considered the High Court's use of this power in the instant matter to be flawed.¹⁵ These reasons thus amount to factors that will militate against a review court exercising its remedial discretion in favour of maintaining an invalidly awarded contract.

The SCA noted that the parties to the contract acted dishonestly in obtaining it and that the contract was thus tainted by fraud. Secondly, the court noted that the winning bidder was not qualified to render the services sought in the tender, which was for construction services requiring a CIDB rating which the winning bidder did not have. Thirdly, the SCA criticised the High Court for relying on speculation as to the potential consequences should it set aside the contract. The SCA held that remedies should be granted based on fact and not speculation and that the High Court could and should have obtained the necessary factual information to enable it to deal with the consequences of setting the tender aside. In the absence of such facts it cannot use speculation to justify an order. On this point the SCA relied on the recent approach of the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*.¹⁶ Fourthly, the SCA held that the High Court did not achieve an appropriate balance between competing considerations that inevitably arise in scenarios like these. In particular the SCA noted the competing interests that must be balanced, stating:

In the context of an unlawful tender process for the acquisition of goods and services for the benefit of the public, the finding as to an appropriate remedy must strike a balance between the need for certainty, the public interest, the interests of the successful and unsuccessful tenderers, other prospective tenderers, the interests of innocent parties and the interests of the organ of state at whose behest the tender was invited.¹⁷

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

The second case that dealt with the consequences of setting a tender contract aside is *Searle v Road Accident Fund*.¹⁸ Following its finding that the award of the tender was irregular in this case,¹⁹ the court grappled with the potential effect that invalidity may have.

¹⁴ Unreported, referred to as [2014] ZASCA 21, 28 March 2014; available online at <http://www.saflii.org/za/za/cases/ZASCA/2014/21.html>.

¹⁵ Paras 21–25.

¹⁶ 2014 (1) SA 604 (CC).

¹⁷ Para 24.

¹⁸ Unreported, referred to as [2014] ZAECPHC 19, 25 March 2014; available online at <http://www.saflii.org/za/za/cases/ZAECPHC/2014/19.html>.

¹⁹ See JQR Publication Procurement 2014 (1) 2.1 above.

The court noted its discretion to keep the irregularly awarded contract in place, despite a finding of invalidity, but held that this was not a case to do so. In reaching this conclusion the court was largely influenced by the nature of the contract, which involved *ad hoc* rendering of legal services when required by the respondent. The court held that this type of contract could be invalidated after conclusion without too much disruption to services. In such a scenario the court thus held that the principle of legality should not be sacrificed. However, the court was also not prepared to simply set the award aside. The court held that such an order would be contrary to the public interest since it would leave the respondent without adequate legal representation, which is crucial to its effective functioning and may impact adversely on those litigating against the respondent. The court thus opted for an order that would 'temper the setting aside of the tender in a way that minimises the negative effects'.²⁰ This order involved suspending the invalidation of the tender award for eight months in order to allow the respondent to rerun the tender process and appoint new attorneys before the current contract falls away.

²⁰ Para 105.