

## October to December 2012

### JQR Public Procurement 2012 (4)

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 Cancellation of tenders

In *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality*<sup>2</sup> the court considered the circumstances under which a contracting authority may cancel a tender process. In this matter the applicant was one of two bidders whose bids were considered acceptable and hence scored. When the rival bidder was declared as the preferred one, the applicant lodged an objection, which was upheld. However, when the bid adjudication committee subsequently recommended to the accounting officer that the bid be awarded to the applicant, the officer decided rather to cancel the bid process and re-advertise. The present matter was an application for the review of that decision. The respondent relied inter alia on the Preferential Procurement Regulations that allow an authority to cancel a tender prior to award if no acceptable bids are received (now contained in regulation 8(4)(c) of the Preferential Procurement Regulations 2011). The respondent argued that because of mistakes made in the drawing up of the bid specifications, which in its view resulted in the bid specifications being invalid, none of the bids submitted could be considered acceptable and hence it was justified in cancelling the tender. The court rejected this argument. While it seems that certain requirements for the formulation of bid specifications were indeed not followed, such as the requirements in the Municipal Supply Chain Management Regulations 27(1) and 27(2) that specifications be compiled by the bid specification committee and approved by the accounting officer, the court held that the applicant cannot be penalised for an internal failure by the contracting authority, while the latter clearly acted as if it had complied with all the requirements.<sup>3</sup> The court held that there was no proof that the tender process was invalid from the outset. The court accordingly held that the decision to cancel the tender was vitiated by a material error of fact and had to be set aside. Since the applicant's tender was the only remaining one and was recommended by all the relevant bid committees, the court held that this was an exceptional case within the meaning of s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 that justified a substitution order. The court thus ordered that the contract be awarded to the applicant.

#### 3. Literature

Quinot, G & Arrowsmith, S (eds) *Public Procurement Regulation in Africa* (2013) Cambridge University Press

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<sup>2</sup> 2012 JDR 2251 (KZP).

<sup>3</sup> Para 28.2.