fREPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.	**CASE NO: 81425/19**
..... **SIGNATURE**	..... **DATE**

In the matter between:

Q TIQUE 27 (PTY) LTD **APPLICANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

THE MUNICIPAL MANAGER: CITY OF TSHWANE METROPOLITAN MUNICIPALITY **SECOND RESPONDENT**

BALIMI BARUI TRADING (PTY) LTD **THIRD RESPONDENT**

RHEINLAND INVESTMENTS **FOURTH RESPONDENT**

MDZ FLEET SOLUTIONS (PTY) LTD **FIFTH RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an application to review and set aside the award of Tender SS04, ("the Tender"). The Tender was awarded by the first respondent, City of Tshwane Metropolitan Municipality ("the City"), to the third, fourth and fifth respondents ("the successful bidders"), in terms of which they are required to supply the City with petroleum products for a period of three years. The estimated value of the Tender, over the three year period, amounts to R435 000 000. The Tender is in its sixteenth month.

[2] The decision to award the Tender to the respondents constitutes administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("the Act"). In order for the applicant to succeed it must establish one or more grounds for review under section 6(2) of the Act.

[3] The invitation to bid was published on 19 June 2018. The applicant timeously submitted its bid and complied with all the mandatory requirements. The applicant was, however, unsuccessful and the Tender was awarded to the successful bidders on 31 January 2019. Although the decision to award the Tender to the successful bidders was published on the City's website on 6 February 2019, the applicant avers that it only became aware of the City's decision on 30 September 2019 when an article was published by amaBhungane.[1]

[4] The review application to set aside the impugned tender was launched on 30 October 2019 and set down in the urgent court for 3 December 2019. The urgent court struck the matter from the roll with costs. An agreement was subsequently reached

[1] AmaBhungane is an independent, non-profit newsroom based in South Africa.

between the parties for the matter to be heard as a special motion on a semi-urgent basis.

[5] In its amended notice of motion the applicant seeks an order declaring the decision to award the Tender to the successful bidders; and the agreements concluded with them, pursuant to the awarding of the Tender, invalid, and for the decision and the agreements to be set aside. The applicant also seeks an order, insofar as it might be necessary, that the 180 day period in which a review application must be instituted, as referred to in section 7(1) of the Act, be extended as provided for in section 9(1) of the Act.

[6] It is common cause that the City, after awarding the Tender to the successful bidders, overpaid them in the total amount of R10 628 393.38. The applicant therefore seeks, in addition to the above, an order declaring these payments unlawful, and asks the court to order the City and the second respondent, the municipal manager, to immediately commence with steps to recover the unlawful payments that were made to the successful bidders.

[7] The application is opposed by the City as well as the third respondent, Balimi Barui Trading (Pty) Ltd (*"BBT"*), and the fourth respondent, Rheinland Investment CC, (*"Rheinland"*). The fifth respondent, MDZ Fleet Solutions (Pty) Ltd, (*"MDZ"*) abides.

[8] The respondents raised various grounds in opposition of the review. In particular, two preliminary issues were raised. Firstly, the respondents submit that the applicant failed to bring its application within 180 days of the publication of the tender award and that the application for condonation, if any, is wholly insufficient. Secondly, the City states that it has already appointed an independent forensic auditing firm, Ernst & Young, to investigate the Tender and that upon receipt of the forensic report, the City

will bring an application to set aside the tender award if there were any material irregularities. It will also lay criminal charges if there was any corruption involved in the tender award. The application is therefore premature and the court should not adjudicate this matter without the investigation having been completed.

Alleged non-compliance with the 180 days.

[9] It was submitted during argument that the applicant failed to bring a substantive application for condonation, and that the court should, for that reason alone, not entertain the review application. The argument is misplaced. The amended notice of motion, and supplementary affidavit attached thereto, constitutes a substantive application for condonation.[2]

[10] But before I consider any application for condonation for alleged non- compliance with the 180 day period, the first issue that needs to be determined is whether the applicant instituted the review proceedings outside the 180 day period. This is a factual determination.

[11] Section 7(1) of the Act provides as follows:

"7(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) .....

(b) ....., on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[2] See *Pieters v Administrateur, Suidwes-Afrika en 'n* Ander 1972 (2) SA 220 (SWA) and *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE).

[12] The decision to award the Tender to the successful bidders was made on 31 January 2019. The applicant states that it only become aware of the decision on 30 September 2019, after the amaBhungane article was published and thereafter instituted the application within 30 days namely on 31 October 2019. The applicant submits that there is therefore no need to apply for an extension, as the 180 days only started running only after it became aware of the decision. The respondents, on the other hand, contend that the City informed the applicant of its decision on 6 February 2019 when it was published on the website and that the applicant had been aware of the decision, or ought to have been aware of the decision on 6 February 2019. At best for the applicant, so it is argued, the 180 days must be calculated from 16 April 2019. That is the date to which the bid validity period was extended to during January 2019.

[13] Section 7(1)(b) of the Act, referred to above, distinguishes between two possible dates on which the 180 day period can commence namely:

> (i) The date on which the person concerned was *"informed of the administrative action, became aware of the action and the reasons for it"*; or
>
> (ii)The date on which the person concerned *"might reasonably have been expected to have become aware of the action and the reasons"*.

[14] The date on which the applicant was “informed” of the decision is therefore not determinative in the calculation of the 180 days, and the proverbial clock only starts to run when the applicant became aware, or might have become aware, of the action and the reasons for it.[3]

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[3] See *Cape Town City V Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at [41].

[15] So, even if it is accepted that the City "informed" the applicant and all the other unsuccessful bidders of its decision by publishing it on the website, it is not sufficient in determining whether the applicant instituted the application outside the 180 day period, because it must also be established that the applicant became aware of the action and the reasons for it. For example, a person concerned might be "informed" of an administrative decision by way of an email on a certain date, but might only "become aware" of the decision at a much later stage.

[16] The City contends, with reference to *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others ("OUTA")*,[4] that it is not the date on which the applicant became aware of the decision that should be determined, but the date on which the broader public might reasonably have expected to become aware of the City's decision. I disagree. The facts in OUTA is wholly distinguishable. In *casu* the decision to award the Tender is challenged by an individual and it is irrelevant for present purposes when the public at large might have become aware of the decision. The question that therefore needs to be established is the date on which the "person concerned" (the applicant) might reasonably have been expected to have become aware of the action and the reasons.

[17] Mr AM Modise, the director of the applicant and the deponent of the applicant's founding affidavit, stated that he had personally been involved in submitting tenders to organs of state for a considerable period and had been involved in submitting tenders to the City for at least ten years. In all the previous tenders the City had the practice of formally, by way of a letter, informing the unsuccessful bidders of the

[4] [2013] 4 All SA 639 (SCA) at [27].

outcome of the tender. This is also what is envisaged in the City's published standard procedure regarding communication of tender awards. The City states in its answering affidavit that it decided (on an undisclosed date), and without providing any reasons for doing it, to no longer inform unsuccessful bidders by way of a letter of the outcome of the tender process, and that this now occurs by way of publication on the City's website. The City, on its own version, did not inform the applicant or the other bidders that it should regularly visit the website of the City to search for the outcome of the Tender and that there would be no direct communication with them. Under the circumstances I am of the view that the applicant had a legitimate expectation, based on the past conduct of the City and its own procedure, that a letter would again be addressed to the applicant informing the applicant of the outcome of the tender process.

[18] In addition, two further aspects needs to be mentioned: Firstly, the applicant received direct communication from the City, on two separate occasions, informing it of the extension of the bid. The last communication was in January 2019, in which the applicant was informed of the extension until 16 April 2019. Secondly, the applicant was aware that, prior to the publication of the Tender, BBT had been responsible for rendering the same services since 2015. It was, for this reason that the applicant (and presumably also the other bidders) did not find it strange that BBT continued to supply petroleum products to the City and it simply assumed that the City had extended the bid evaluation period.

[19] The applicant had no reason to expect a decision from the City before 16 April 2019. When it received no communication from the City about the outcome of the Tender, it was, in my view, reasonable of the applicant to assume that the City had

extended the bid evaluation period. Especially taking into consideration that BBT continued to render the services to the City as it had been doing since 2015. There was no cause for the applicant to suspect that the decision had been taken much earlier and the City did not take any steps to inform the applicant and the other unsuccessful bidders that it had changed its practise. The failure of the applicant to make enquiries, under the specific circumstances of this case, was not unreasonable, especially taking into consideration that the bid validity period was extended twice. I am satisfied that the objective facts demonstrate that the applicant only became aware of the City's decision on 30 September 2019 and there are no reasons to find that it might reasonably have become aware of the decision earlier than 30 September 2019. Once the applicant was made aware of the fact that the decision had been taken it acted timeously and without any delay.

[20] If I am wrong in this regard and the applicant might have become aware of the decision after 16 April 2019, I am satisfied that the delay was marginal and therefore not unreasonable. Taking into consideration the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and general public, and the importance of the matter, I am satisfied that the interests of justice requires an extension.[5]

Is the application premature?

[21] It is common cause that, following the article in amaBhungane, the City appointed an independent forensic auditing firm, Ernst & Young to investigate the Tender. The City submits that it will bring an application to set aside the Tender award if any

[5] Section 9(2) of the Promotion of Administrative Justice Act 3 OF 2000; *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at [22].

material irregularities are unearthed by Ernst & Young. It is contended that the rush with which the City and the successful bidders have been hauled before the court has led to the record being filed in a piecemeal fashion and that the record is, in some respects, still incomplete.

[22] There is no merit in this argument. If the applicant is aware of irregularities in the award of the Tender it is entitled to institute review proceedings, and is obliged to do so without delay. The fact that the City has appointed Ernst & Young should not deter any person affected by the administrative action to institute review proceedings.

[23] In any event, Ernst & Young started its investigation at the end of November 2019, and the final report was, at the time of the hearing, not available. The amount involved in the Tender is significant and the indication is that it might take Ernst & Young at least another three months to finalize its report. The institution of review proceedings is, under the circumstances, not premature.

RELEVANT FACTS

[24] The invitation to tender was published during June 2018. The Tender was described as a tender for the appointment of tenderers for the supply, delivery and offloading of fuel to the City for a period of three years. As stated earlier, at the time of the publication of the Tender, BBT was the existing sole service provider of fuel to the City.

[25] It was made clear in the Tender document that the City intended to appoint three service providers, as a panel of tenderers. The tender document referred to six fuel products required by the City. Of these six types of fuel, four related to petrol and two related to diesel. The bidders were required to tender for a specific price on each of

the individual products. Petrol was divided into four categories namely: ULP93; ULP95; LRP93; and LRP95. Diesel was divided into two categories namely: low-grade diesel and high-grade diesel. It is common cause that the only two types of fuel that had been used by the City since at least 2015 are ULP95 and high-grade diesel.

[26] The tender advertisement listed Stanley Kganyago as a contact person regarding technical queries and Ms Kgomotso Makgale as the contact person regarding supply chain enquiries.

[27] The closing date for the Tender was 23 July 2018. It was expressly stated in the tender document that the bid validity period was 90 days. As a consequence the bid validity period expired on 21 October 2018. No award was made on or before 21 October 2018, and on 17 October 2018 the City extended the bid validity period to 17 January 2019. Again no award was made before the expiry of this period and on 15 January 2029 the bid validity period was extended for a second time until 15 April 2019.

[28] On 5 July 2018, the compulsory briefing session was held as advertised. By the closing date (23 July 2018) a total of 85 bids were received by the City. On 25 – 27 January 2019, the Special Bid Evaluation Committee ("Special BEC") evaluated the 85 bids received. During the "pre-compliance" evaluation, fourteen (14) bidders were disqualified for failure to attend to the compulsory briefing session. Seventy two (72) bidders remained for further evaluation. Next the bids had to be evaluated for tax compliance. Twenty five (25) were found not to be tax compliant, but, in terms of the Treasury Instruction, and specifically Clause 4 thereof, the bidders were granted an opportunity to rectify their tax compliance status before the award. They were therefore not disqualified at this stage. Out of the seventy-two (72), three (3) bidders were

disqualified due to being state employees. Sixty nine (69) bidders progressed to Stage 1, the administrative evaluation, during which the bids had to be evaluated against the administrative requirements set out in the list of returnable documents. Eight (8) bidders were disqualified at this stage and sixty- one (61) bids remained.

[29] During Stage 2 the bidders were evaluated on compliance with the mandatory requirements. Bidders had to have a wholesale licence as required by the Department of Energy and failure to comply with this requirement lead to disqualification. Nine (9) of the sixty- one (61) bidders were disqualified for failure to comply with this requirement and fifty- two (52) remained. Bidders now had to be evaluated for functionality (Stage 3). For this stage, bidders had to score a minimum of 80 points on four criteria and sub-criteria. Only ten (10) bidders scored above the 80 point threshold. The applicant, BBT, Rheinland and MDZ were part of the ten (10) bidders who attained the threshold. BBT as well as the applicant, obtained a top score of 100 points each. It would be the price evaluation (Stage 4) that would set the bidders apart.

[30] In terms of the Tender, the 90/10 preference system would be applicable. Bidders were requested to indicate the price of each type of fuel at wholesale price, less the rebate offered to the City, plus the handling fee which would translate into the total price per litre offered to the City for that item of fuel. The total price had to "include the cost of delivery of the required fuel, as well as all the necessary tasks required for the successful implementation and execution of the contract."

[31] BBT tendered as follows for the two fuel products actually used (and therefore required) by the City:

ULP 95: Recommended Price[6]: R16.02. Tendered Price: R18.65.

High – grade Diesel: Recommended Price: R14.49. Tendered Price: R17.49

BBT tendered as follows for the three of the four products not used (and therefore not actually required) by the City:

LRP 95: Recommended Price: R16.02. Tendered Price: R10.05.

LRP 93: Recommended Price: R15.80. Tendered price: R 9.93

Low-grade Diesel: Recommended Price: R14.44.Tendered Price: R7.45

[32] In determining the price the Special BEC decided to add up all six prices of the six fuel products to get one amount and scored the bidders on the total price. It thereafter resolved to recommend BBT, Rheinland and MDZ for the Tender. It produced a report reflecting a consolidation of all the stages as well as the final recommendations to be tabled at the Special Bid Adjudication Committee ("Special BAC"). The Special BAC held a meeting and recommended that BBT, Rheinland and MDZ be awarded the Tender for a period of three years at the lowest rate per item. This would mean that the lowest bid amount per item or particular type of fuel would be used by all three bidders across the board. The Special BAC was however concerned that the prices had not been evaluated properly and also whether the bidders would accept the prices if they were adjusted downwards. Finally, after discussions, the Special BAC decided to refer the Tender back to the Special BEC to attend to the totalling of the average prices of all bidders, the confirmation of the validity of the prices, and the alignment of the recommendations with what the bidders offered.

[33] In order to solve the concerns raised by the Special BAC, the Special BEC proceeded to calculate the aggregate of the combined tender prices of all six products.

[6] Actual Retail Price at 4 July 2018.

This method used is at the heart of the applicant's complaint. It thereafter provided a further report to the Special BAC. Ultimately the Special BAC resolved that BBT, Rheinland and MDZ would be recommended for appointment at the lowest rate of the tendered price by each bidder. As an example, all bidders were offered for appointment for item ULP93 at a rate of R 9.93 per litre, which was the lowest price as tendered by BBT. For item ULP95, the successful bidders were offered appointment at R13.85 per litre, being the lowest amount as tendered by MDZ. The City contends in following this methodology the Special BAC ensured that the City would benefit from the lowest price per litre. The Special BAC further resolved that the City Manager would negotiate with the bidders to lower their prices taking into consideration the fuel price and service delivery imperatives.

[34] On 5 September 2019 amaBhungane addressed correspondence to amongst others, the Executive Mayor in regards to alleged corruption in the award of the Tender.

[35] It was subsequently discovered that the City, between February and September 2019, overpaid the successful bidders by R1.20 to R1.25 per litre more than the tendered price, totalling an amount of R10 628 393.38. The City explains that the overpayment was as a result of an administrative error during the implementation phase. Apparently an old formula was used in calculating payments without updating it. The City states that it had since corrected the error and requested the successful bidders to re-submit the invoices based on the correct calculation. Two of the successful bidders, BBT and MDZ were willing to pay back the money, but one, namely Rheinland refused to do so. The City states that Acknowledgements of Debt had been drafted for MDZ and BBT, and legal action will be taken against Rheinland. During

argument it was alleged that BBT had already paid back an amount of approximately R500 000.

GROUNDS FOR REVIEW

[36] The approach to be followed by a court in the review of an administrative action under the Act, was formulated by the Constitutional Court ("CC") in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of SASSA and Others:*[7]

> *"[28] The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground has been established.*
>
> *[29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA..."*

[37] The applicant essentially relies on three alleged irregularities as grounds of review. Firstly, the applicant alleges that the tender was awarded to the successful bidders after the bid validity period had lapsed. The City was therefore not entitled to award the Tender or to conclude contracts with the successful bidders after the lapse of the bid validity period. Secondly, the process followed by the BEC during Stage 4 in evaluating the price was fraught with irregularities, and was irrational and procedurally unfair. Thirdly, the City was biased or is reasonably suspected of bias

[7] 2014(1) SA 604 (CC) at [28] to [29].

due to a family relationship between the erstwhile director of BBT, Mr Hendrik Kganyago and an official of the City, Mr Stanley Kganyago.

The tender validity period

[38] According to the tender document, the bids would be valid for a period of 90 days after the closing date. The submitted bids were therefore valid until 21 October 2018. On 17 October 2018, the City addressed a letter to the bidders in terms of which it sought to extent the validity period of the bids to 17 January 2019 ("the first extension"). The letter read as follows:

> *"1. A possibility exist that the tender of which particulars appear above, may not be adjudicated before expiry of the current validity period, and I shall be glad to learn whether you are willing to hold your tender valid IN ALL RESPECTS for the further period indicated. To facilitate the matter the reply form MUST be completed and returned within 7 days from date of the letter.*
>
> *2. Should you not be willing to hold your tender valid for the further period, it will of course lapse on expiry of the current validity period and will therefore be ignored if the tenders are not adjudicated within this period.*
>
> *3. If you are willing to hold your tender valid for the further period, but subject to amendment in any respect, the reason for the nature of the amendment must be clearly indicated in a separate letter, but in any event and should the tenders not be adjudicated during the current validity period, the right is reserved to ignore your qualified extension of validity, particularly if the amendment has the effect of increasing or decreasing the tender price."*

[39] In the first extension letter the City erroneously stated that the bids will expire on 20 October 2018, instead of 21 October 2018. The letter also informed the bidders that they had seven (7) days to respond to the extension, and indicate whether they *"were willing to hold their bids as valid for the extended period"* (until 17 January 2019).

The seven (7) days in which the bidders had to respond fell outside the bid validity period.

[40] The applicant, BBT, Rheinland and MDZ responded to the extension letter and agreed to the extension. BBT responded on 17 October 2018, and Rheinland and the applicant responded on 19 October 2018. MDZ responded on 23 October 2018, two days after the expiry of the validity period.

[41] On 15 January 2019 and before the expiry date in terms of the first extension, the City addressed a second letter to the bidders requesting an extension of the bid validity period until 15 April 2019 ("the second extension"). Save for the date of extension, the contents of the second letter was the same as that of the first letter. Therefore, the bidders had seven (7) days to respond. The applicant, BBT MDZ and Rheinland all responded timeously and agreed to the second extension.

[42] The applicant contends, with reference to *Telkom SA Limited v Merid Trading (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others,* [8] and *Joubert Galpin and Others v Road Accident Fund,*[9] that because MDZ failed to timeously agree to the first extension, "*the validity period of the proposals had expired"* and 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."* [10]

[43] The facts *in casu* are materially different from the facts in the *Telkom* and *Joubert* matters. In *Telkom* the validity period was not extended before the expiry date, *"either*

[8] 2011 JDR 0004 (GNP).
[9] 2014 (4) SA 148 (ECP).
[10] *Telkom SA Limited v Merid Trading supra* at [14]

unilaterally by any of the proposers or by agreement between the applicant and the proposers who had submitted proposals".[11] In that matter the applicant only sent an email to each of the proposers requesting them to extend the validity period of their proposals approximately two months **after** the validity period had expired. Similarly in *Joubert* there was an attempt to "revive" a tender that had already lapsed *ex post facto*. The court held in both cases that because the bid validity period had already expired before an attempt was made to extend the period, and because there was no tacit agreement between the parties to extend, the tender process was completed and no contracts could be entered into thereafter.

[44] The *National Treasury's Supply Chain Management: A Guide for All Accounting Officers,* provides for an extension of the bid validity period, and states that it should be requested in writing before the expiry date. In the present matter there was a written and express extension of the bid validity period, three days before the period lapsed on 21 October 2018. The City states that the letter of extension was sent out to all bidders by way of a bulk email. There are no facts pleaded by the applicant to gainsay the City's version. In fact, the applicant admitted to receiving the first extension letter and responded positively before the validity period had lapsed.

[45] In terms of the extension letter, if a bidder does not provide a response to the extension letter and an adjudication is made during the extended period, that bidder would be excluded from the adjudication process. The failure of a bidder to timeously respond, as in the case of MDZ, or not to respond at all, cannot affect the extension of the bid validity period, if the bid was extended before the expiry date. It might impact

[11] At [7].

on the validity of the contract entered into with that specific bidder, but that is not the issue raised by the applicant in the papers or ventilated during argument.

[46] I am not convinced that MDZ's failure to respond timeously to the extension constitutes an irregularity amounting to a ground of review under the Act.

Irrational Decision

[47] The applicant contends that the method used in evaluating the price during Stage 4, was irrational, procedurally unfair and unlawful.

[48] Although the tender document referred to six fuel products required by the City, it is now common cause that only two types of fuel were in fact needed by the City for use, namely ULP95 Petrol and high-grade Diesel. The City's response to this oddity is that it does not mean it will "never be ordered". The fact however remains that there is no evidence to suggest that any of the other four fuel types have been purchased by the City during the previous tender, or during the current tender.

[49] As stated earlier, at the time of the publication of the Tender, BBT was the existing sole service provider to the City. The price BBT tendered in respect of the two products that were in fact required by the City (ULP95 Petrol and high-grade Diesel) were very high (much higher than its competitors and the recommended price) and the tender prices in respect of the four products that were in fact not required or used by the City were very low, in some instances more than R6 per litre lower than the recommended price. If the City actually purchased these products from BBT, BBT would conduct its business at an incredible monthly loss.

[50] This was a discussion point during the evaluation of the bids, but the City nevertheless proceeded to score the tenderers by calculating the aggregate of the

combined tender prices in respect of the prices of the two products that were in fact required by the City for use, and the tender prices in respect of the products that were in fact not required by the City for use. The use of this method of evaluating the tenders on price evidently had the result that BBT was evaluated to be the bidder with the lowest price (and scoring the highest points on the aspect of price), notwithstanding that BBT's tender prices in respect of the two products that were in fact required by the City for use was by far the most expensive.

[51] Section 217 of the Constitution states that:

> *"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.*
>
> *(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
>
> > *(a) categories of preference in the allocation of contracts; and*
> >
> > *(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
>
> *(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."*

[52] The framework within which the policy must be implemented is prescribed in the Public Finance Management Act, 1 of 1999 and the Preferential Procurement Policy Framework Act, 5 of 2000. The *Implementation Guide to Preferential Procurement Regulations, 2017*, issued by National Treasury provides in clause 4 that Accounting Officers and Accounting Authorities must:

> *"4.1.1 Properly plan for the provision of goods and services, to ensure that the procurement plan is aligned to the needs identified in the strategic plan of the institution*

and that goods and services are delivered at the right time, right price, right place and that the quantity and quality will satisfy those needs.

4.1.2 As far as possible, accurately estimate the costs for the provision of the required goods or services. This is in order to determine and stipulate the appropriate preference point system to be utilized in the evaluation and adjudication of the tenders and to also ensure that the prices paid for the services, works and goods are market related.

The Implementation Guide also provides in clause 17, with regards to the evaluation of tenders on the aspects of price, as follows:

*"**Step 1: Calculation of points for price***

17.1.1. The PPPFA prescribes that the lowest acceptable bid will score 80 or 90 points for price. Bidders that quoted higher prices will score lower points for price on a pro-rata basis.

17.1.2....

17.1.3. The formulae to be utilized in calculating points scored for price are as follows: ....

90/10 Preference point system ((for acquisition of goods or services with a Rand value above R50 million (all applicable taxes included).

$$Ps = 90\left(\frac{1- Pt-P\ min}{(P\ min)}\right)$$

Where
Ps = Points scored for price of tender under consideration
Pt = Price of tender under consideration
P min = Price of lowest acceptable tender."

[53] In its calculation the BEC seemingly took the aggregate price as the “Pt” and did not use the singular price for each of the products.

[54] In *CTP Limited and Others v Director-General Department of Basic Education and Others*[12] the Supreme Court of Appeal held:

> *"[30] Regarding the deviation from the implementation guide, it has to be noted that this guide is not legislation but a policy. The objects of a policy are to achieve reasonable and consistent decision making, to provide a guide and a measure of certainty to the public. It is trite that when the government makes a policy, its officials are not entitled to simply ignore it, but must act in accordance with it. They can only deviate from it if there is a reasonable basis for such deviation in which case that basis should be clearly articulated."*

[55] In determining whether a decision is rational, Hoexter,[13] states that rationality means that a decision must be supported by the evidence and information before it. It must also be objectively be capable of furthering the purpose for which the power was given and for which the decision was taken. The court in *Trinity Broadcasting (Ciskei) v Independent Authority of South Africa,*[14] recognised rationality as a ground for review and determined the test in terms of the Act as follows:

> *[20] In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable in that sense in order to withstand review. Apart from that being a too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf Bel Porto School Governing Body and Others v Premier, Western Cape, and Another. As made clear in Bel Porto, the*

[12] (447/2018) [2018] ZASCA 156 (20 November 2018).
[13] Cora Hoexter, Administrative Law in South Africa (2011) 340.
[14] 2004 (3) SA 346 SCA at paragraph 21.

review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h)).

[21] ..... In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?

[56] The inclusion of the non-required goods was at variance with clause 4 of the Implementation Guide, in that it is irrational to call for a tender on non-required products when it bears no rational connection with the purpose of the Tender, namely, to procure the required products. The Implementation Guide permits only the inclusion of goods in tenders to satisfy identified needs.

[57] Although there is room for flexibility in matching an evaluation process to the nature of a bid, the City was obliged to follow applicable legislative prescripts and a process that was aimed at achieving the constitutional objectives of a fair, equitable, transparent, competitive and cost-effective procurement process. As pointed out in *CTP*,[15] in evaluating bids, the City was not at liberty to do as it wished in evaluating the tenders. The methodology in the evaluation process that the City opted for, namely to evaluate the tender price by calculating the aggregate of the combined tender prices

[15] At [34]

in respect of the required products and the non-required products, was irrational and procedurally unfair, for the following reasons:

(i) To deduce a singular price for each bidder by computing the aggregate of the individual tender price on each of the required products and the non-required products is irrational and unfair in that the singular price so calculated, does not constitute the tender price on each product tendered. It is only if the pricing on each product was evaluated individually, as prescribed in clause 17 of the Implementation Guide, that a reliable result could be achieved.

(ii) To include the individual tender price on each of the four non-required products to calculate an aggregate price, is irrational and unfair in that the singular price so computed does not reflect the true tender price on each of the required products.

(iii) To include the individual tender price on each of the four non- required products to calculate an aggregate price, is irrational and unfair in that the pricing of non-required product is wholly irrelevant in evaluating price.

(iv)The irrational and unfair evaluation process resulted in the use of an unreliable singular price used to apply the method prescribed in clause 17 of the Implementation Guide, rendering the process at variance with the Implementation Guide and thus unlawful.

(v) The evaluation method opened the process up for abuse and corruption, in that if a tenderer knew in advance that only two of the six products would actually be purchased by the City, it would make sense to tender high in respect of those products, but very low on the other products. This would then translate

into aggregate tender price. When the Tender is then awarded to such tenderer, it can still demand that the City pay to it the high prices tendered in respect of the required products.

[58] The City contends that “ultimately, it was the members of the Committee that resolved that it was safer to include all the products in the basket", and that the “procedure cannot be faulted because of the groundless suspicions of the applicant”. The City does not dispute that BBT tendered the highest price in respect of the two products actually required by the City, and does not dispute the practical effect the decision of the BEC to use an aggregate had on the evaluation of the bids during Stage 4. It however contends that it matters not, because the City in any event decided to pay only the lowest tendered price (these prices were the prices tendered by the Rheinland and MDZ) and the various committees indeed “secured the best deal for the City ratepayers”. The City, however, did the complete opposite and proceeded to overpay the successful bidders by seemingly paying them the high prices tendered for by BBT. These overpayments only ceased after September 2019, coincidentally after an article appeared on the amaBhungane website, in which reference was made to alleged corrupt tender practices relating to the tender and after the applicant launched the present review application.

[59] The City’s attempt to justify its decision is what the CC in *Allpay supra* described as a *“misapprehension”* that must be dispelled. At [24] Froneman J held as follows:

> *“[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their*

own merits, but instead through the lens of the final outcome. This conflates the different and seperate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed."

[60] The stance the City adopted in this matter is at odds and compromises the "no difference principle" rejected in *Allpay*. It conflates procedure and merit by considering that it was inconsequential and made no difference to the outcome, by predicting that the result would be a foregone conclusion.

[61] In all the circumstances, the administrative action was irrational and procedurally unfair, in that it is not rationally connected to the purpose for which the administrative action was undertaken and the information before the City. The administrative action was unconstitutional and unlawful, as contemplated by the provisions of section 6(2)(i) of the Act, and stands to be reviewed and set aside.

Alleged Bias

[62] At the time the Tender was submitted and awarded Mr Hendrick Kganyago, was a director of BBT, and was only replaced by Mamouba Rahab Kganyago on 30 April 2019. In the declaration of interest signed by Mr Hendrick Kganyago (in the tender submitted on behalf of BBT) he stated that he had no relationship (family, friend, other) with *"persons in the service of the state and who may be involved with the evaluation and/or adjudication of the Tender".* It has subsequently been established that Mr Stanley Kganyago, who formed part of the discussions of the Bid Specification Committee ("BSC"), and Mr Hendrick Kganyago are related to one another.

[63] The innuendo is that BBT must have received insider information from Mr Stanley Kganyago about tender specifications and how the tender would be evaluated, even before the publication of the invitation to tender. The applicant submits that it is the only reasonable inference in explaining why BBT tendered in a manner it did. It is further submitted that the suspicion is compounded by the fact that, notwithstanding the decision taken by the City to only effect payment to the panel based on the lowest price tendered, it then proceeded to pay the panel in accordance with the extremely high rates tendered for by BBT.

[64] The City contends that the allegations are pure speculation at this stage as Mr Stanley Kganyago was not a member of any of the relevant committees, (BEC, BAC or BSC) and the transcripts do not reveal any manipulation on his part in favour of the BBT.

[65] The test for bias was set out in *Roberts v S.*[16] There must be a suspicion that the administrator that took the decision might be biased; the suspicion must be that of a reasonable person in the position of the aggrieved party, and the suspicion must be based on reasonable grounds. It is trite that not only actual bias but also the reasonable apprehension of bias will suffice.[17] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [18] the court held:

> ".....The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an

[16] 1999(4) All SA 285(A)
[17] *South African Commercial Catering and Allied Workers Union and Others v Irvin &Johnson Ltd (Seafoods Division Fish Processing)* 2000(3)SA 705 (CC)
[18] 1999(7) BCLR 725 (CC) at [48]

> impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel…"

[66] On a proper reading of the record and the facts relied upon by the applicant, I come to the conclusion that the applicant has failed to place itself within the four corners of the test as set out in *Roberts*. There are no facts supporting an apprehension of bias and there is no merit in this ground of review. I will refrain from giving any opinion on the conduct of any of the individuals implicated, and the less I say about the relationship between Mr Hendrick Kganyago and Stanley Kganyago at this stage the better. The investigation conducted by Ernst& Young has not yet been completed and might become the subject of the further legal proceedings.

OVER PAYMENTS

[67] The respondents are in agreement that the City, between February and September 2019, overpaid the successful bidders in an amount of R10 628 393.38 (R3 937 613.25 to BBT, R3 115 911.12 to Rheinland and R3 574 869.01 to MDZ).

[68] The fact that the successful bidders invoiced and received payment on the basis of rates originally quoted by BBT, is a matter not relevant to the question of whether the tender process was flawed. Whilst the apparent overcharging, be it by mistake or by design, is wrong, the City has taken steps to rectify the overpayment. BBT and MDZ have indicated their willingness to repay the City the amounts that they unlawfully received and the City has indicated that legal proceedings will be instituted against Rheinland for the repayment of the monies overpaid.

[69] I accept the City's explanation and there is no justification and this stage to make any orders against the City in this regard.

REMEDY

[70] Section 172 of the Constitution stipulates that a court must declare any law or conduct inconsistent with the Constitution invalid to the extent of the inconsistency and may make any order that is just and equitable.[19] This was reiterated in *Allpay* in which it was held that:

> "[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172 (1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172 (1)(b)."

[71] A court therefore has no discretion in relation to making declarations of invalidity, but has a wide discretion to grant "*appropriate*" or "*just and equitable*" relief. It is not a closed list of remedies. In *Fose v Minister of Safety and Security,*[20] the CC remarked that appropriate relief will in essence be relief that is required to protect and enforce the Constitution, and, depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights. Consistent with the flexibility inherent in a court's remedial power, a claimant in a

[19] Section 172(1)(a) and (1)(b).
[20] 1997 (3) SA 786 (CC) at [19].

constitutional matter should not be limited to the particular relief at first expressed in its notice of motion (or particulars of claim).[21]

[72] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,*[22] and in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*,[23] the court had to fashion a remedy where the invalid administrative acts have already been acted upon by the time they were brought under review. In *Millenium* Jafta J explains the difficulty as follows:

> *"[23]……That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."*

[73] In *Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Limited and Others,*[24] the CC said the following:

> *"[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared*

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[21] *Modderfontein Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Cenre, Amici Curiae)* 2004 (6) SA 40 (SCA) at [18].
[22] 2004 (6) SA 222 (SCA).
[23] 2008 (2) SA 481 (SCA).
[24] 2011 (4) SA 113 (CC).

unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality."

[74] There were very few facts placed before this court to indicate what the financial and practical consequences would be if the court were to grant the relief sought by the applicant. BBT submitted that it had appointed a substantial number of staff and resources to implement and execute its obligations under the tender, and that it "assumes that the City will deal with the chaos that will result if the tender is set aside". The City contends that in the event of the tender being set aside it must be given 12 months to draft new specifications, advertise, evaluate and adjudicate the tender. It also submits that no case is made out for this court to substitute the City's decision with that of its own.

[75] The amount involved in the Tender, is substantial. Although the tender is for only three years, more than half of the tender period still remains. The most appropriate order for this court to make, in upholding the review, is simply to set aside the award and the contracts entered into.

[76] In the result the following order is made:

1. The point *in limine* that the court does not have jurisdiction to entertain the review proceedings, founded on the provisions of section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 is dismissed;

2. The decision of the first respondent to award Tender SS04-2017/18 ("the Tender") to the third, fourth and fifth respondents is reviewed and declared constitutionally invalid and set aside;

3. The agreement concluded between the first and third respondent, pursuant to the awarding of the tender, is set aside;

4. The agreement concluded between the first and fourth respondent, pursuant to the awarding of the tender, is set aside;

5. The agreement concluded between the first and fifth respondent, pursuant to the awarding of the tender, is set aside;

6. The declaration of constitutional invalidity and the setting aside of the award of the Tender in 1. above, as well as the orders in 2., 3., 4. and 5., above are suspended until 31 August 2020.

7. The first, second, third and fourth respondents are ordered to pay the applicant's costs, jointly and severally, including the costs consequent upon the employment of two counsel.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel For Applicants:	Adv. PG Cilliers SC and APJ Els
Instructed By:	Albert Hibbert Attorneys
Counsel for First and Second Respondent:	Adv JA Motepe SC and Ivis Manganye
Instructed By:	Rambevha Morobane Attorneys
Counsel For Third Respondent:	Adv J D Williams SC
Instructed By:	Weavind & Weavind Inc
Counsel For Fourth Respondent:	B G Savvas
Instructed By:	Legodi Attorneys
Date Matter Heard:	14-15 May 2020
Judgment Date:	24 June 2020