

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 2121/19

In the matter between:

WBHO / PRO KHAYA JV

Applicant

v

THE NELSON MANDELA UNIVERSITY

First Respondent

AVENG GRINAKER – LTA

Second Respondent

Coram: Swanepoel AJ

Heard: 12 September 2019

Judgment delivered: 1 October 2019

JUDGMENT

[1] Seven hundred and thirteen pages of motion papers and a redacted record of 407 pages (which was then supplemented by an additional bundle) was before me on motion court roll in Port Elizabeth on Thursday, 12 September 2019. In court, seven more ringbinders¹ comprising the actual record awaited me.

[2] Unsurprisingly, the subject-matter was a tender review, with two reputable construction companies and the local university the parties. The applicant is the unsuccessful tenderer, whose tender was disqualified for non-responsiveness. The university, first respondent, is defending its tender award to the second respondent, which abides the outcome of the proceedings.

¹ Each ringbinder containing hundreds of pages, but not consecutively indexed and paginated with one consolidated index.

[3] The applicant is a joint venture comprising WBHO Construction (Pty) Ltd and Pro Khaya CC, which challenges a tender for the construction of student housing awarded by Nelson Mandela University (the first respondent), a public higher education institution, to the second respondent, Aveng Grinaker – LTA (described as a “*division*” of the public company Aveng (Africa) Limited) as the successful tenderer.

[4] During July 2018, the first respondent had invited tenders for the design, engineering, procurement and construction of new student accommodation comprising 500 beds, at the first respondent’s campus situated in Summerstrand, Port Elizabeth. The invitation to tender² further provided that “[A]s more funding becomes available, the contract and works may be extended to accommodate additional students as well as additional student accommodation facilities, to a total of 1800 beds”.

[5] This tender invitation was extended in the context of a substantial lack of availability for student accommodation at Higher Education Institutions,³ compared to the demand for such accommodation. The Department of Higher Education and Training (“*the Department*”) and universities such as the first respondent, find themselves politically, socially, morally and financially under pressure to meet such demand.

[6] According to the first respondent, it developed a funding model (record pages 467 and 468, paragraph 44) that would allow the phased construction of 2000 beds, comprising 1800 beds at its Port Elizabeth campus and 200 beds at its George campus, which model was approved by the Minister of Higher Education and

² Pleadings record (hereinafter referred to as “the pleadings record”) page 58 – the separate “*redacted record*” will be identified as such, for the sake of clarity. The full review record, contained in seven ringbinders, will be referred to as “*the review record*”.

³ Such as the first respondent.

Training (*“the Minister”*) during 2018.⁴ During the period preceding ministerial approval, total funding of approximately R225 million had been transferred to the first respondent during the period from 2015 to 2019.⁵

[7] On 6 July 2018, the Minister of Higher Education and Training (*“the Minister”*) notified the first respondent that an amount of R268 million had been approved from the Infrastructure and Efficiency Grant (*“the IEG”*) over the three year period 2018/19 to 2020/21.⁶ Approval for projects being funded through the IEG, was *inter alia* conditional on all the student housing projects meeting the requirements of the Department’s policy and the minimum norms and standards for student housing at public universities. Any projects in which the cost exceeded R300 000 per bed required the Department’s approval prior to commencement.

[8] During March 2018, the Department made R1.1 billion available towards IEG funding to all universities to support student housing infrastructure projects from 2017/18⁷. These funds may be accessed by all the universities, subject to the approval of the relevant funds and the IEG fund not being depleted.

[9] The Minister approved a release of R50 million to the first respondent during March 2018 as funding for the construction of accommodation providing 1850 new beds on the first respondent’s Summerstrand campus and 150 new beds on the first respondent’s George campus, subject to the first respondent contributing a minimum of 10% to the project; compliance with the applicable minimum norms, and the first respondent submitting plans by 30 June 2018 showing how the funds were to be used. Such plans were duly submitted by the first respondent.⁸

⁴ Ms Pandor’s approval of 6 March 2019 appears as “AA12” to the answering affidavit, page 603.

⁵ Pleadings record page 468, paragraph 45.

⁶ Pleadings record page 468, paragraph 46, with reference to “AA9”.

⁷ Pleadings record page 469, paragraph 50.1.

⁸ Page 470.

[10] However, first respondent realised that the IEG funding would not suffice and proposed a funding model encompassing not only IEG funds, but also loan funding from independent financial institutions *“in order to scale the model and accelerate the roll out of beds”*.⁹

[11] The Department¹⁰ supported the funding model, which was approved by the Minister on 6 March 2019. A first tranche of R33.5 million was advanced on 21 March 2019, conditional upon progress reports being submitted and subject to the exclusive allocation of the funds towards the beds project. A predetermined timeframe for the rollout of beds was planned, to be synchronised with funding being made available. The handover of completed student accommodation units was scheduled to occur from May 2021 to July 2022.¹¹

[12] The first respondent’s papers indicate that the first respondent has already paid an amount of R28 million to the second respondent during July 2019 in order to secure formwork and materials.¹²

[13] The first respondent’s deputy-director for infrastructure projects emphasises in first respondent’s answering affidavit¹³ that if the project is to be discontinued for whatever reason, *“the amount of R28 million already paid by the first respondent to the second respondent may well be forfeited or lost”*, and *“the basis for the IEG funds being paid to the first respondent will fall away, without any departmental approval for any alternative project. Absent such approval, the DHET is entitled to request the repayment of funds already transferred or to re-allocate such funds”*.

⁹ Pleadings record page 471, paragraph 56.

¹⁰ Also referred to as DHET in the papers.

¹¹ Pleadings record page 473, paragraph 62.

¹² The Court was informed from the bar, that moulds were *inter alia* being manufactured in Turkey for the turnkey-project.

¹³ Pleadings record page 473, paragraph 63.

Potentially, a huge “*grant loss*” will confront the first respondent should the project not be implemented.¹⁴

[14] The first respondent has raised concerns about any delay arising from re-procurement, which, according to the first respondent, will not only cause financial harm, but will also impact on the student accommodation “*crisis*”.

[15] This is then the factual context of this review brought under the Promotion of Administrative Justice Act 3 of 2000 (“*PAJA*”). The evaluating criteria are section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 (“*the Constitution*”), the Preferential Procurement Policy Framework Act 5 of 2000 (“*the PPPFA*”) and its regulations; the Public Finance Management Act 1 of 1999 (“*the PFMA*”), and last but not least, the tender invitation and documentation: compare ***Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another 2016 (3) SA 1 (SCA)*** at paragraph [43].

[16] In an administrative review, the lawfulness issue and the remedy issue should not be conflated: ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC)***, paragraphs [24] to [26].

[17] Once a ground of review under PAJA has been established “*there is no room for shying away from it*”. (***Allpay***, paragraph [25]). Section 172(1)(a) of the Constitution makes this clear:

“172. Powers of courts in constitutional matters.—

(1) When deciding a constitutional matter within its power, a court—

(a) ***must*** declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and...

¹⁴ Pleadings record pages 473 to 475

Once an applicant establishes non-compliance with the legality criterion, the consequences of such unlawfulness must then be dealt with in terms of section 172(1)(b) of the Constitution, which provides:

“172(1) When deciding a constitutional matter within its power, a court:

(a)

(b) may make any order that is just and equitable, including:

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect”.

The remedy cart should therefore not be placed before the legality horse, even if the cart is full of costly apples.

[18] Certain features of the tender in this matter are important to the applicant’s disqualification for non-responsiveness:

1. the tender documents made it clear that the project was to be a “turnkey” project and incorporated the terms of the Silver Book of the FIDIC suite of contracts¹⁵– the description of the tender as a FIDC EPC / Turnkey project meant that price certainty was material to the first respondent;
2. Part C2.3¹⁶ required tenderers “to price as accurately and without omissions, the following pricing schedule. A full bill of quantities is

¹⁵ Pleadings record pages 479 to 482.

¹⁶ Redacted record page 99.

not required at this stage, but may be requested in order to facilitate later negotiations". This part continues further:

"The purpose of the schedule is to provide a basis for further negotiations as follows:

- *The Employer has limited funds and the scope of pricing may need to be re-negotiated prior to tender award, so that the project can be awarded and completed within the available funding envelope*
- *As more funding becomes available it is the Employer's intention to negotiate the construction of additional beds and facilities. The schedule will provide a basis to negotiate this additional scope.*

This schedule is not binding and is purely indicative of the indicative construction costs" (a two page itemised price schedule is then attached).

3. Clause 13.8 of the Contract Data (Part C1.2)¹⁷, cross-refers to the General Conditions of Contract for EPC / Turnkey Projects, First Edition, 1999 published by the *Federation Internationale des Ingénieurs-Conseils* (FIDIC) and provides:

"The Contract shall not be adjusted in terms of this Sub-clause".

4. The South African National Standard: Construction Procurement – Part 3: Standard Conditions of Tender, specifically SANS10845-3, were incorporated as Standard Conditions of Tender (Part T1.2, record pages 60 to 71).

¹⁷

Pleadings record page 129.

5. The wording of clause B1 of Part 3 of SANS10845-3¹⁸ makes it clear that these conditions are binding on the employer and tenderer to behave in a particular manner; to “*establish what a tenderer is required to do in order to submit a compliant tender*”; to make known the evaluation criteria to tenderers, and to “*establish the manner in which the employer conducts the process of offer and acceptance and provide the necessary feedback to tenderers on the outcomes of the process*”. Clause 2.17¹⁹ makes it clear that a written offer must be “*capable of acceptance and conversion into a binding contract*”.

6. Clause 4.8 of the incorporated SANS10845-3,²⁰ which relates to the pricing of the tender offer, *inter alia* requires the following of tenderers:

“*Provide rates and prices that are fixed for the duration of the contract and not subject to adjustment except as provided for in the conditions of contract identified in the contract data*” (which contract data, as pointed out above, exclude price adjustments).

Further, clause 4.10²¹ requires that the rates and prices should be stated in the “*monetary value of the contract unless otherwise instructed in the contract data*”.

7. If clarification of the tender documents was sought, this was a “*tenderer’s obligation*” (clause 4.8, record volume 2, page 231), whilst clause 4.14 (record volume 2, page 233) reads that tenders must “*[A]ccept that tender offers which do not provide all the data or*

¹⁸ Review record, bundle 2, page 226.

¹⁹ Pleadings record volume 2, page 228.

²⁰ Pleadings record volume 2, page 232.

²¹ Pleadings record volume 2, page 232.

information requested, completely in the form required, may be regarded by the employer as being non-responsive”.

8. SANS10845-3 then sets out the test for responsiveness in clause 5.8,²² which falls under the heading “*Employer’s undertakings*”:

5.8 Test for responsiveness

Determine, after opening and before detailed evaluation, whether each tender offer that was properly received

- (a) complies with the requirements of the standard conditions of tender in this part of ISO10845*
- (b) has been properly and fully completed and signed, and*
- (c) is responsive to the other requirements of the tender documents.*

A responsive tender is one that conforms to all the terms, conditions and scope of work of the tender documents, without material deviation or qualification. A material deviation or qualification is one which, in the employer’s opinion, would

- (d) detrimentally affect the scope, quality or performance of the works, services or supply identified in the scope of the work;*
- (e) significantly change the employer’s or the tenderer’s risks and responsibilities under the contract, or*
- (f) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.*

Reject a non-responsive offer, and do not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation”.

[19] The first respondent appointed an expert panel to assess tenders submitted, comprising of professional architects; its director for infrastructure; a professional engineer; a representative of its department of architecture as well as a sustainability

²² Redacted record page 124.

engineer.²³ This panel also obtained the views of an expert, one Jacquet,²⁴ on the materiality of deviations.²⁵

[20] Four tenderers, including the applicant, were found to be non-responsive. This is apparent from the November 2018 Tender Evaluation Report (redacted record pages 222 to 234). The reason provided by the first respondent's panel was given as "*material deviation*".

[21] The reason for applicant's non-responsiveness was ascribed to a qualification expressed by the applicant with respect to clause 13.8 of the Contract Data, as follows:²⁶

"8. **13.8** *Our price includes for escalation for the contract duration, provided that the contract is awarded within two months of the date of the tender; failing which Haylett provisions will apply from the date of tender submission until the award of the contract. If the contract completion is delayed beyond the end of May 2020, through no fault of our own, escalation of the work completed beyond this date will apply*".

[22] The first respondent's panel and the expert Jacquet (review record, volume 2, page 385) regarded this as a material deviation. The first respondent regarded this proposal from the applicant as effectively proposing an amendment to the tender conditions or envisaged contract terms, which is prohibited in the tender documentation incorporating SANS10845-3.

²³ Redacted record page 225. See further paragraph 155, pleadings record page 513.

²⁴ With an impressive CV appearing as "AA15" to the answering papers, pages 607 to 612.

²⁵ Pleadings record page 514.

²⁶ See annexure "DB4" to the applicant's founding papers, a letter from the applicant's managing director Eastern Cape, addressed to the first respondent dated 25 October 2018 – pleadings record page 214). This must be read with the Contract Data, which provides that "[T]he contract shall not be adjusted in terms of this Sub-clause".

[23] According to the first respondent, the applicant's tender provided for escalation both in the event of not being awarded within two months of the tender, or if the contract completion was delayed beyond the end of May 2020. The first respondent was also concerned by the applicant's attempt to transfer risk back to the applicant in the event of a delay in completion beyond May 2020 *"through no fault of their own"* (pleadings record court file 2, pages 516 and 517).

[24] In the first respondent's answering affidavit, paragraph 171 (pleadings record court file 2, pages 517 and 518), the first respondent's stance is explained:

"171. By doing so the applicant was seeking to introduce price adjustments specifically not contemplated by the FIDIC Silver Book and was attempting to transfer risks that the first respondent had specifically transferred to the successful bidder. Moreover, there is a significant difference between delays caused by the employer, and that caused through "no fault of the contractor". In terms of the FIDIC Silver Book, if the employer through its fault causes a delay, there would be a claim for the contractor. However, there are numerous circumstances beyond the control of both the employer and the contractor, such as labour strikes, unrest, weather, etc. Under these circumstances the contractor has no claim in terms of the FIDIC Silver Book. The applicant, in terms of its amendment, specifically sought to transfer these risks back to the first applicant in direct conflict of the terms of the tender".

[25] That the applicant has priced its bid to incorporate escalations is common cause and was confirmed in the applicant's founding affidavit (see paragraphs 30 and 31 of the founding affidavit – pleadings record pages 24 and 25).

[26] That the Haylett Formula is a formula used by the South African Institution of Civil Engineering as being a formula for escalations, is well known and is also common cause between the parties. The first respondent's stance was that the unilateral incorporation of an escalation formula in its tender submission by the applicant was impermissible. The proposal was also inconsistent with the incorporated FIDIC Silver Book conditions. The applicant disagrees.

[27] It is for the first respondent, as employer or institution inviting the tender, and not for this Court, to decide the prerequisites for a valid tender. *Vide: Dr JS Moroka Municipality & Others v Betram (Pty) Ltd & Another [2014] 1 All SA 545 (SCA)* at paragraph [10], applied in *WDR Earthmoving Enterprises & Another v The Joe Gqabi District Municipality & Others (392/2017) [2018] ZASCA 72 (30 May 2018)* at paragraphs [29] and [30].

[28] Whether or not the applicant's tender offer was correctly declared as non-responsive, has to be evaluated from *such* a perspective. A failure to comply with prescribed conditions – or as *in casu*, to seek to unilaterally amend the terms and conditions of the tender - would result in a tender being disqualified as an acceptable tender under the PPPFA,²⁷ unless those conditions were immaterial, unreasonable or unconstitutional (*WDR Earthmoving, supra*, paragraph [30]).

[29] *In casu*, these conditions²⁸ which the applicant sought to amend unilaterally, were evidently material, reasonable and not unconstitutional. The first respondent further had no power to condone non-responsiveness – this is clear from the test of non-responsiveness itself.²⁹ In any event, the incorporated SANS provisions make it clear in paragraph 5.8³⁰ that it is for the first respondent to decide whether in its **opinion** (and not in the opinion of this Court) a material deviation as described in paragraph 5.8, has occurred or is proposed.

[30] There is no irrationality in the first respondent's view that the applicant's escalation proposal, and the insertion of the rider (relating to a delay) - "*through no fault of our own*" - significantly changed the employer's risk. This is objectively so, but it is not for this Court to second-guess the first respondent's assessment on the

²⁷ See section 1 of the PPPFA.

²⁸ Or rather terms.

²⁹ See the concluding paragraph of clause 5.8 of SANS10845-3, quoted above.

³⁰ Redacted record page 124.

basis of correctness – the first respondent’s assessment was *bona fide* and honestly arrived at, was rational and *intra vires* the tender invitation, and was further lawful, reasonable and procedurally fair, as contemplated by section 33(1) of the Constitution. This is moreover a review, and not an appeal. The focus is on the process, not on the merits: ***Shidiak v Union Government 1912 AD 642*** at 651 to 652. Whether or not the first respondent was correct or not, is accordingly not the test.³¹

[31] In Part T2: “*Returnables*” (redacted record pages 97 and 98), any tenderer who wanted to record deviations or qualifications was specifically referred to clause 5.8 of SANS10845-3 “*regarding the employer’s handling of material deviations and qualifications*”. As shown above, clause 5.8 makes it clear, in imperative terms, that non-responsive tenders should be *rejected* and that the first respondent had no discretion in this regard.

[32] The applicant does not explicitly challenge the finding or declaration that its tender offer was non-responsive in its notice of motion. (Compare ***WDR Earthmoving***, *supra*, in which matter the finding that the appellant’s tender was non-responsive, was pertinently challenged (see paragraph [10] of the judgment)).

[33] The relief sought by the applicant in its notice of motion dated 29 July 2019 sought leave that the matter be heard as one of urgency and interim interdictory relief (which was neither attained, nor agreed to at the time of the postponement of the application to the date of the hearing on 12 September 2019), which was aimed at:

³¹ The applicant even sought to introduce an expert’s affidavit on the general applicability of the Haylett formulate, and on its effect, had it been applied. This approach also misses the point, and the difference between a merits and process assessment.

- (i) interdicting and restraining the first respondent from “concluding an agreement with the second respondent pursuant to the award of the tender (tender number T702/2270) in respect of the engineering, procurement and construction of student residences, July 2018, or implementing any agreement concluded between the respondents pursuant to the award of the tender, or instructing the second respondent to carry out any work pursuant to the award of the tender;
- (ii) interdicting and restraining the second respondent from carrying out any work pursuant to the award of the tender, pending the “*finalisation of the application*”.

[34] The relief sought in paragraphs 7 to 10 of the applicant’s notice of motion reads as follows:

“7 **THAT** the decision of the First Respondent to not accept the tender offer of the Applicant in respect of the tender, Contract No. T702/2270, for the engineering, procurement and construction of student residences, and the failure to award the tender to the Applicant, be reviewed, set aside and substituted with an award of the tender to the Applicant, be reviewed, set aside and substituted with an award of the tender to the Applicant in terms of Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act No. 3 of 2000 (“PAJA”) and that this Order serves as the First Respondent’s acceptance of the Applicant’s Form of Offer and Acceptance.

In the alternative to paragraph 7 above -

8 **THAT** the decision of the First Respondent be reviewed, set aside and remitted back to the First Respondent for reconsideration in terms of Section 8(1)(c)(i) of the Promotion of Administrative Justice Act No. 3 of 2000 (“PAJA”), subject to the following directions:

8.1 the First Respondent shall within five (5) days of this Order, request all Tenderers who submitted responsive tender offers, to extend to the validity period of their tender offers for such period as the First Respondent considers necessary to reconsider the tender offers;

8.2 such further directions as this Honourable Court may deem appropriate.

9 **THAT** the First Respondent be ordered to pay the costs of this Application.

Alternatively –

10 *In the event of the Second Respondent opposing this Application, that the Respondents, jointly and severally, be ordered to pay the costs of this Application, the one paying, the other to be absolved”.*

[35] Applicant’s counsel, Adv Beyleveld SC assisted by Ronaasen SC, intimated at the commencement of their address that the applicant no longer sought a substituted award in terms of section 8 of PAJA; only the setting aside of the tender award was sought, with the process having to commence afresh if the applicant succeeded.

[36] The first respondent’s counsel, Adv Du Plessis SC, assisted by Adv Thobela-Mkhulisi, indicated that:

- (i) the first respondent never agreed to any interdictory relief and only agreed to truncated time periods for the exchange of affidavits in order to facilitate an expedited hearing – the applicant itself then decided not pursue the interdictory relief sought (see paragraph 3(c) on page 559);
- (ii) the second respondent, which does not oppose the review, made it clear through its attorneys Baker McKenzie that the second respondent refused to agree “*to the suspension of the award made under the tender*”. The second respondent motivated its stance by referring to engagements with suppliers (including overseas suppliers) to manufacture and deliver materials, requiring a long lead time if the tender deadlines are met; to municipal approvals having already been obtained and to a workforce which was already mobilised, which

included “*increasing its staffing complement for purposes of carrying out the Tender as per the fixed time period and price*”;³²

- (iii) With reference to a further Baker McKenzie letter of 15 August 2019 (record page 559), it was confirmed that the first and second respondents have already entered into a contract,³³ recorded in a letter from the first respondent’s attorneys dated 27 August 2019 (pleadings record pages 562 to 563);
- (iv) the applicant has declined an invitation to cover the damages which the respondents might suffer “*caused directly by the application being launched*” – see the pleadings record pages 562 and 563 read with the applicant’s response on page 566;
- (v) to add to the existing financial and litigation pressures, second respondent’s attorneys added oil to such simmering fire, by recording that costs running into millions of rands have already been incurred by the second respondent, or were to be incurred “*imminently*”, which included R8 million in respect of project design; R15 million in respect of formwork and another R15 million in respect of plumbing and sanitaryware.

[37] Not only did the applicant not persist in seeking interdictory relief, but it did not pertinently seek:

- (a) the review of its disqualification on the ground of being non-responsive;
- (b) the setting aside of the award to the second respondent

³² Pleadings record, page 557.

³³ The failure to have sought the setting aside of the contract admittedly concluded, may be legally relevant, but did not receive much attention during argument. It was unnecessary for the Court – having regard to the conclusion reached – to assess whether this was a further substantive stumbling block to the applicant in respect of its challenge to the validity of the tender award to the second respondent.

- (c) the setting aside of the concluded contract between the first and second respondents.³⁴

[38] Paragraph 7 of applicant's notice of motion is aimed at seeking the review of the first respondent's "*decision to not accept the tender offer of the applicant in respect of the tender*". The further component of paragraph 7 of the applicant's notice of motion, namely aimed at being awarded the tender, was abandoned at the hearing, as previously mentioned. The relief in paragraph 8 is in the alternative to paragraph 7. The decision referred to in paragraph 8 is still the same decision as referred to in paragraph 7 – the relief sought is just couched in different terms. The first respondent understandably referred to this narrow basis of the relief sought by the applicant and argued that the applicant should not be allowed to generally "*throw darts*" at the award made by first respondent to the second respondent.

[39] This Court shall nonetheless not limit itself to the issue whether the applicant's tender was validly regarded as non-responsive and accordingly disqualified, but will also consider whether the applicant has established on its papers that the award to the second respondent should be reviewed and set aside. The first substantive issue has already received attention, and shall be reverted to shortly. A preliminary issue raised by the first respondent regarding an alleged lack of urgency and a related issue of delay, requires attention. First respondent avers that any alleged urgency was self-created by the applicant, ascribable to an undue delay on the part of the applicant in instituting these proceedings.

[40] The first respondent emphasises the factual context, especially the funding dimension, as well as the socio-economic and political dimension, and criticises the applicant for having procrastinated before launching its application. According to the

³⁴ *Ibid.*

first respondent, the applicant's use of the Promotion of Access to Information Act 2 of 2000 ("PAIA") was unnecessary and nothing but a fishing expedition, aimed at hopefully netting an irregularity.

[41] There may be some merit in some of the criticisms levelled at the applicant in this regard, but in my view, the applicant should not be non-suited by reason of an alleged undue delay in the particular circumstances of this matter. Although the applicant might already have learned of its disqualification on the basis of non-responsiveness during early June 2019, its somewhat cautious approach before launching³⁵ was not necessarily imprudent, as was its use of the statutory information gathering mechanism of PAIA. The applicant furthermore did institute this PAJA review within the 180-day time bar period contained in section 7(1) of PAJA. The standard of assessing delay in both PAJA and legality reviews, is whether the delay was unreasonable. ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC)*** at paragraph [49]. In my view, the applicant did not *unreasonably* delay the institution of this review application.

[42] A degree of urgency evidently attaches to the matter – this is clear from all the letters exchanged between the attorneys representing the applicant and both respondents – and the delay cannot in the circumstances be regarded as so inordinate to effectively result in the dismissal of the application on this ground,³⁶ notwithstanding the admittedly relevant pressing factors previously mentioned.

[43] Which brings one back to the applicant's tender disqualification. Was applicant's tender lawfully (or validly) regarded as non-responsive? In my view, it

³⁵ The applicant allegedly "*luxuriated*" before instituting the application, according to the first respondent's counsel.

³⁶ See ***Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)***; ***Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC)*** at paragraph [51], and footnote 42.

was. The applicant's tender did not adhere to the "*conditions*"³⁷ of tender, or to the tender terms. Compare: ***Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 199 (SCA)***.³⁸

[44] The applicant's tender price was subject to escalation and its proposal did amount to a rather open-ended transfer of risk to the first respondent.³⁹

[45] The opinion formed by the first respondent that the applicant's tender proposal was non-responsive within the meaning of clause 5.8 of SANS10845-3, cannot, in the view of this Court, be faulted, having been rationally arrived at *intra vires* the provisions of the tender documentation.

[46] In any event, no reviewable irregularity as required by section 6 of PAJA read with section 33 of the Constitution, was established by the applicant. To the contrary, the first respondent's panel acted lawfully, reasonably and procedurally fairly in its assessment of the responsiveness of all the tenders received. The validity of the evaluation methodology which was utilised, was furthermore never in issue.

[47] Accordingly, absent a finding of an established reviewable irregularity in terms of PAJA in respect of the responsiveness assessment, the decision of the first respondent to treat the applicant's tender as non-responsive and to reject same in terms of clause 5.8 of SANS10845-3, must stand. This finding disposes of the main thrust of the applicant's case.

[48] Is there any merit in the applicant's broader challenge, assuming⁴⁰ that its notice of motion and founding papers have properly ventilated such broader-based

³⁷ For a distinction between true conditions, terms and time clauses, see ***Jurgens Eiendomsagente v Share 1990 (4) SA 664 (AD)*** at 674 G to I.

³⁸ Leave to appeal against the Supreme Court of Appeal decision was refused by the Constitutional Court, see footnote 36 above.

³⁹ Begging the question: who and how will it be determined whose "*fault*" it was, if contractual completion was indeed delayed beyond the end of May 2020. The first respondent's tender invitation was *inter alia* aimed at averting such risk in the light of the funding uncertainty.

challenge, namely that the first respondent's award of the tender to the second respondent should be set aside?

[49] Some of the applicant's contentions can be dealt with swiftly. The applicant's purported reliance on a so-called "*warranty*", interchangeably referred to as a "*guarantee*", that the tender would have been awarded by a fixed date, is hardly consistent with its simultaneous incorporation of the Haylett formula and escalation provision. In paragraph 26.6 of the applicant's founding papers, De Beer asserts:

*"As I understood it (referring to a clarification meeting held on 2 August 2018 – pleadings record pages 21 and 22) there was an undertaking in the form of a **guarantee**⁴¹ that the award would be made by the 20th December 2018, to enable the project to proceed on a fast-track basis, in order to achieve the completion date of 30th May 2020".*

In paragraph 30 of the founding papers,⁴² it is asserted by De Beer that the applicant presented its bid "*specifically on the basis of a **warranty** that the tender award would be made on the 20th December 2018*".

[50] This reliance on such an alleged "*guarantee*" or "*warranty*" is irreconcilable with the applicant's incorporation of an escalation provision as formulated. Further, the breach of a warranty or guarantee in the correct legal sense (i.e. as used in the law of contract) would have entitled the applicant to exercise an election on 21 December 2018, to sue the first respondent for contractual remedies, such as specific performance, or to elect to resile and sue for damages arising from the alleged breach of a "*guarantee*" or "*warranty*". This did not occur. These allegations, contained in a founding affidavit, which simultaneously constitutes a pleading and

⁴⁰ In applicant's favour.

⁴¹ Emphasis added.

⁴² Pleadings record page 24.

contains the evidence (*Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA)* at 600), were either without substance or in any event, legally inappropriate. Irrelevant allegations or inappropriate “*labels*” do not belong in founding affidavits.

[51] Fortunately, applicant’s counsel did not press the warrantee/guarantee contention during argument. This was prudent, because this guarantee/warranty contention simply bolstered first respondent’s argument on the delay/urgency issue. Had such a cause of action indeed arisen by 21 December 2018, and had applicant persisted with the concept of a breach of contract giving rise to an administrative remedy, then the delay in only instituting the application on 31 July 2019 would have been much more significant.⁴³ Such a perceived cause of action could also have been promptly disposed of by way of a circumscribed legal argument. But this bullet was a blank, was going nowhere and was correctly discarded by applicant’s counsel.

[52] The applicant further contends that a procedural irregularity occurred which invalidated the tender process, when the first respondent requested all tenderers to extend the validity period of their tender offers. In paragraphs 34 and 51.1 of its founding papers (pleadings record pages 27 and 39), the applicant accuses the first respondent of having acted unfairly by having requested the applicant to extend its tender offer whilst it was found to have been non-responsive. In paragraph 65 (pleadings record page 45) applicant’s deponent *inter alia* asserts:

“In breach of its duty to be transparent that tenderers had been disqualified, it in fact invited the applicant to extend its tender validity, in April 2019, having already disqualified the applicant in November 2018”.

⁴³ And this mixed contractual/administrative cause of action as suggested, might have activated the 180-day time bar and the presumption of unreasonable delay, referred to in *Opposition to Urban Tolling Alliance v SANRAL [2013] 4 All SA 639 (SCA)* at paragraph [26], referred to in *Buffalo City v Asla, supra*, on page 345.

[53] In paragraph 23.2 of the applicant's supplementary affidavit (page 359), it is asserted that this non-notification was "*deliberate*". These assertions are all denied by the first respondent. The request for an extension of the validity period of all tenders is logically explained in the first respondent's answering papers, paragraphs 161 and 162 (pleadings record pages 515 and 516), and also in paragraph 255 of the answering affidavit (page 543).

[54] The Tender Data (Part 71.2 – redacted record pages 92 to 95) in paragraph 4.16.1⁴⁴, reflect that the "*tender offer validity period is twenty four (24) weeks*". The Tender Data also provide, as already mentioned, that the applicable conditions of the tender are the Standard Conditions of Tender as contained in the latest edition of SANS10845-3. The applicable version of SANS10845-3: 2015, provides in clause 5.16 firstly, that a successful tenderer had to be informed of success *before the expiry of the tender validity period*, but secondly, also requires that unsuccessful tenderers should *only* be informed that their tender offers were not accepted *after* the successful tenderer had been notified (redacted record page 129).

[55] Such a contractually permissible extension of the tender validity period is also contemplated in clause 4.16.1 of SANS10845-3 (redacted record page 122). Contained under the heading "*4. Tenderer's Obligations*", clause 4.16.1 relates to the period of validity and reads:

"Hold the tender offer(s) valid for acceptance by the employer at any time during the validity period stated in the tender date after the closing time stated in the tender data. If requested by the employer, consider extending⁴⁵ the validity period stated in the tender data for an agreed additional period, with or without any conditions attached to such an extension.

⁴⁴ Record page 95.

⁴⁵ Which means that the applicant could also have declined such a request after consideration.

Extend the period of the tender security, if any, to cover any agreed extension requested by the employer”.

[56] Contractually, the first respondent therefore had a right, clearly spelled out, to extend the tender period. Administratively, the extension of the tender validity period was *intra vires* the powers of the first respondent *ex facie* the conditions of tender.

[57] The validity period *in casu* would have expired by 11 April 2019 (review record bundle 2, page 458), but because the successful tenderer had by then not been identified, *all* the tenderers were requested to extend their tender validity periods to 6 June 2019 at 12h00 (answering affidavit pages 515 to 516, paragraphs 161 and 162; redacted record pages 257 to 261).

[58] The importance of extending a tender validity period is evident from ***Telkom SA Ltd v Merid Trading (Pty) Ltd 2011 JDR 0004 (GNP)***, followed and applied in this division in ***Joubert Galpin Searle Inc and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP)***, and referred to (but distinguished on the facts) in ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC)*** at paragraphs [79] to [81].

[59] This Court finds that no reviewable irregularity was committed in the extension of the tender offer validity period by the first respondent.

[60] The applicant contended further that the first respondent impermissibly extended the scope of the contract (see applicant’s supplementary affidavit, pages 350 to 352, paragraphs 10 to 15). First respondent denies this allegation and asserts that at no stage was the substance of the bid altered by the first respondent. In paragraph 235 of first respondent’s answering affidavit (record page 537), the point is made that although the initial phase related to 500 beds, an extension to 1800

beds was expressly foreshadowed in the tender documentation. This is factually correct.

[61] The Tender Notice and Invitation to Tender, Part T1.1 (redacted record page 90) contain(s) the following introductory paragraph:

*“Nelson Mandela University (NMU) hereby invites tenders from experienced and capable building construction entities for the design, engineering, procurement and construction of new student residences (500 beds) within the NMU Campus, situated in Summerstrand, Port Elizabeth. **As more funding becomes available, the Contract and Works may be extended to accommodate additional students as well as additional student accommodation facilities, to a total of 1800 beds**”.*⁴⁶

[62] Part C2.3 – Pricing Schedules / Bill of Quantities (redacted record page 99) provides *inter alia*, with reference to “later” or “further” negotiations, that “[A]s more funding becomes available, it is the Employer’s intention to negotiate the construction of additional beds and facilities. **This Schedule will provide a basis to negotiate this additional scope**”.⁴⁷

[63] Part C3.1 – Description of the Works (redacted record page 102) contains an italicised passage providing unequivocally:

*“Th(r)ough a negotiated process with the successful Contractor, the Contract and the Works on this site may be extended to accommodate an additional 300 students as well as additional student accommodation facilities on other sites on the Campus (total of 1800 beds), should more funding become available.”*⁴⁸ It should be noted however that the bulk electrical, bulk earthworks, storm water and fencing design and implementation will need to be undertaken for the entire erf 1904 (800 beds), regardless of an extension being negotiated”.

⁴⁶ Emphasis added.

⁴⁷ Emphasis added.

⁴⁸ Emphasis added.

[64] It was no surprise that applicant's counsel had little appetite for this point, which was only developed by the applicant in its supplementary affidavit on sweeping grounds, without sufficient consideration having been paid to these express provisions in the tender documentation.

[65] All the tenderers were fairly and transparently informed of the possibility of the envisaged extension of the works, subject to more funding becoming available. There is also no substance in this challenge to the tender process.

[66] This brings one to the applicant's main, remaining argument at the hearing, albeit in the context of linking the argument to the requirements of section 217 of the Constitution.

[67] In applicant's papers, it is contended that the tender process was vitiated by reason of "*pre-award negotiations*". In the founding papers, the deponent De Beer states, in paragraph 35.1, that he had heard "*rumours*" during February 2019 that the first respondent was in a negotiation with the second respondent (pleadings record page 27). He admits that these "*rumours*" were "*speculative*" and "*led me to believe that the second respondent was engaging with the first respondent and amending its bid by way of a negotiated process*". De Beer then asserts that the first respondent "*has conducted itself contrary to the empowering provisions, having communicated and negotiated with the second respondent, prior to making the award in order to reduce the fixed price tender for 500 beds, which is prohibited in terms of clause 5.7.2 of its SCMP*". It is asserted that the said clause only allows clarification of aspects of bids, and that the negotiations had the effect that second respondent was afforded an "*unfair*" advantage to the detriment of the applicant and other tenderers. In paragraph 45 of the founding papers,⁴⁹ the applicant asserts that "[L]ittle more

⁴⁹ Page 37.

needs to be said about the First and Second Respondents' negotiations, which are prohibited in terms of the empowering provisions, as read with section 217 of the Constitution referred to above and thus renders the entire process unlawful and invalid".

[68] In applicant's supplementary affidavit (pleadings record pages 347 to 365 excluding the annexures), it asserts that "*a perusal of the Record re-affirms that: 8.1 the First Respondent was intent on proceeding with the construction of student accommodation at its Summerstrand, Port Elizabeth (1800 beds) and George (200 beds) campuses; 8.2 in respect of Summerstrand the construction would be undertaken in 3 phases*" and then avers, in paragraph 10.3 (page 351) *inter alia* that: "*[S]ubstantial contracts awarded by way of negotiation rather than through a transparent procurement process would be highly irregular in the circumstances*". But, as will be shown below, the tender invitation did inform all tenderers about the envisaged extension of the Works and about envisaged negotiations with the successful tenderer or "*contractor*" after the tender adjudication process.

[69] The first respondent's procurement policy (referring to paragraph 5.7.6 of the Supply Chain Management Policy of the first respondent), reads as follows:⁵⁰

"5.7.6 Negotiation

All tenderers shall be informed in the request documents that they must submit their best prices as Nelson Mandela University will not enter into negotiation with service providers. However, the Nelson Mandela University may negotiate post award with the successful service provider".

[70] The applicant contends that this means that negotiations could only take place **after** the tender had already been formally awarded, without any final

⁵⁰ Review record bundle 1, page 98.

negotiations on critical aspects such as the price being allowed whatsoever prior to such a formal award. The first respondent avers that such an interpretation would result in a commercial absurdity (answering affidavit page 490, paragraph 100.7). The first respondent refers further to case law in support of its argument that negotiations with preferred bidders are not unlawful if provision therefor was made in the tender invitation.⁵¹

[71] The first respondent also denies as a matter of fact that there is any substance to this ground, by way of a multi-pronged defence. The first respondent denies that the first and second respondents were engaged in pre-award negotiations from November 2018. In the answering affidavit, it is stated that although the second respondent was identified as the preferred bidder during November 2018 (page 513, paragraph 154.8), negotiations only commenced in February 2019, after the management committee of the first respondent gave approval for negotiations with the preferred bidder on 15 January 2019 (page 514, paragraph 15). In terms of the applicable approach to factual disputes of this nature, as laid down in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)***, this must be so accepted in favour of the first respondent.

[72] The first respondent further emphasises that the relevant policy is but one document of various relevant documents and legal instruments which must be considered. The logical point of departure is the tender invitation document, and the tender documentation collectively comprising the tender process. Reference has already been made to the Tender Data, which provides that the conditions of tender are the Standard Conditions of Tender in SANS10845-3 (T1.2, page 92). Under “*General notes to tenderers*” (redacted record page 85), reference is made to the

⁵¹ The first respondent refers *inter alia* to the Supreme Court of Appeal decision in ***Aurecon, supra***, at paragraph [27] and to ***South African Container Stevedores (Pty) Ltd v Transnet Port Terminals and Others 2011 JDR 0357 (KZD)*** at paragraph [72].

means by which a preferred tenderer will be identified in a competitive selection process and provides that preferred bidders will be identified for each successive round of negotiations in the competitive negotiation procedure.

[73] The first respondent argues that the applicant fails to interpret its Supply Chain Management Policy (*“the Policy”*) correctly, or does so selectively. The reference to *“post award”* and to *“the successful service provider”* can be sensibly interpreted to refer to negotiations after a fair tender process was held, with the identified preferred bidder. This accords with the underlying purpose of this provision of the Policy, read and understood in its proper context.⁵²

[74] It further appears that the express incorporation of the PPPFA into the Policy itself, might have received inadequate attention. In the Preamble of the Policy itself (redacted record page 35), under the heading *“Open and Effective Communication”*, reference is made to the requirement of *“Observance of the provisions of the Preferential Procurement Policy Framework Act”*. It makes reference⁵³ to the applicability of section 217 of the Constitution *“and (states) that the Preferential Procurement Policy Framework Act may be applied on a voluntary basis”*. Paragraph 1.3.1 of the Policy (redacted record page 38) makes it clear that the principles of *inter alia* the PPPFA, apply ***“and its regulations”***.⁵⁴

[75] Regulation 7(9)(a) indicates that if a tender scoring the highest points is not *“market-related”*, then a market-related price may *inter alia* be negotiated with the tenderer scoring the highest points, or the tender may be cancelled.

⁵² In the view of the Court, this is also a commercially sensible and reasonable interpretation: compare the KwaZulu-Natal High Court, Pietermaritzburg decision in ***Raubex KZN (Pty) Ltd v The Umhlozinga Development Agency and Two Others***, case number 11393/17.

⁵³ Redacted record page 35.

⁵⁴ Emphasis added.

[76] There is merit in Mr Beyleveld's assertion that this particular regulation presupposes that the bid of the successful tenderer should not have been market-related, to which contention Mr Du Plessis rhetorically posed the question: but what does "*market-related*" really mean in circumstances where the first respondent is dependent upon uncertain government funding? There is no open market in such a setting, in the sense of a commercial market. The availability of government funding is a clear constraint, as is the limited funding capacity of the first respondent itself.

[77] The applicant further persisted in its assertion that the "*negotiated process with the successful Contractor*", referred to in C3.1.2⁵⁵ had to be interpreted literally and restrictively, as being a reference to a *contractor to whom an award has been made* and could not be interpreted as referring to a preferred bidder (see replying papers, pages 687 and 688, paragraphs 29.5 and 29.6). I disagree. These words must be interpreted in its actual context. The wording forms part of the tender invitation and tender documentation, which provide that negotiations with the preferred bidder were envisaged after the tender adjudication process had been completed, but *prior to final contracting*. To interpret the words restrictively in the manner as suggested by the applicant, would lead to impractical and unbusiness-like consequences.

[78] To equate the word "*contractor*" with the word "*tenderer*", in this particular context, does not seem to me to strain the import of the relevant passage at all. A "*successful contractor*" is not open for only such a narrow interpretation, namely to mean a tenderer to whom a contract has already been awarded, or with whom a contract has been concluded. The word "*contractor*" in this sense rather has a generic meaning in the particular context, and includes a tenderer, supplier or

⁵⁵ Pleadings record page 208.

potential service provider, in my view. And to have been identified as “*successful*”, does not necessarily imply that a contract should have been awarded or concluded.

[79] The applicant also sought to place reliance on the Implementation Guide to the PPPFA published in March 2017 in paragraph 34 of its replying papers (pleadings record page 690). The applicant admits in paragraph 33.2 of its replying affidavit (pleadings record 689) that “*the PPPFA is incorporated by reference in the SCMP*”. The applicant then avers that although the PPPFA is incorporated by reference, it does not impose or grant the first respondent “*automatic rights or obligations*”. This assertion is somewhat difficult to understand, but fortunately the applicant then proceeds to state as follows in paragraph 34.3 of its replying affidavit:

“In the Implementation Guide to the PPPFA published in March 2017, section 19 thereof prescribes that institutions may include in their supply chain policies a process for negotiating a fair market related price after a competitive bidding process”.

This is an important admission.

[80] However, the applicant asserts that “[T]his process is limited only to a fair market related price and may not allow a preferred tenderer a “second or unfair opportunity”, or to be to the “detriment of any other tenderer”.

[81] The applicant itself then attaches an extract of the Implementation Guide: Preferential Procurement Regulations 2017. Paragraph 19 does contain a heading with the wording “*Negotiating a fair market related price*”. The applicant has latched onto this heading and contends that the first respondent has not alleged that the tender bid of the second respondent was not market related. Such an argument attaches a commercial meaning to the concept of “*market related*” in a setting in which the first respondent was dependent upon government funding to implement a project in the interests of the student community and the public. First respondent

itself has limited funds. The “*benchmark*” (cost) or targeted cost had to be approved by the responsible minister and the Department. The “*benchmark*” or targeted cost was not determined by way of free-market demand and supply concepts. If anything, the first respondent, and obviously the government, would rather want the second respondent, as the preferred bidder, to provide the beds at the first respondent’s campus, more cost-effectively. Final price negotiations with the preferred bidder, prior to finally contracting, would achieve this. Obviously the process still had to be lawful, reasonable and procedurally fair and compliant with section 217, but this is surely a more practical and business-like interpretation. The adjective “*fair*” links the description of “*market related*” to both section 217 and section 33 of the Constitution. What the concept “*market related*” really means in such a setting, given the absence of a clear market affected by ordinary market factors, is certainly open to different views, as has been mentioned previously.

[82] For the applicant to criticise the first respondent for not having addressed this point in more detail in its papers, ignores the fact that the main thrust of the applicant’s belated reliance on these provisions of the Implementation Guide, only forms part of the applicant’s *replying* papers.

[83] In any event, the actual content of clauses 19.1 and 19.2 rather lend support to the first respondent’s contentions, because they read as follows:

“19.1 Institutions may include in their SCM policies a process for negotiating with preferred bidders after a competitive bidding process or price negotiations. The policy may include amongst others the following principles:

- (a) Delegations and threshold values for negotiating by the accounting officer*
- (b) Negotiating may not allow any preferred tenderer a second or unfair opportunity*
- (c) Is not to the detriment of any other tenderer*

(d) *Does not lead to higher price than the bid as submitted.*

19.2 *Institutions must include in the tender documents a condition stating clearly that the award of the tender may be subjected to price negotiation with the preferred tenderers”.*

[84] Price negotiation with preferred bidders is explicitly allowed. Paragraphs 19.1 and 19.2 quoted above, furthermore implicitly do make allowance for price negotiations with preferred bidders in circumstances such as those *in casu*, where the tender documentation *did* provide for such negotiations. Accordingly, the applicant’s purported reliance on the implementation guide to the PPPFMA Regulations does not offer assistance to the applicant. If anything, these provisions support the approach of the first respondent. As will be shown below, no “*second or unfair opportunity*” as envisaged in paragraph 19.1 above was established on the papers. The first respondent convincingly shows in its papers, that a more cost-effective price per bed was achieved during such negotiations with the second respondent as preferred bidder, not a higher price than the bid as submitted.

[85] Competitiveness was still kept in mind, as well as price effectiveness. On the undisputed facts (and keeping ***Plascon-Evans*** in mind), the papers show that by the time that the pre-award negotiations began, there were two preferred bidders: the second respondent and Transtruct, but with the second respondent’s tender offer being R55 million *cheaper* than the tender offer of Transtruct (answering affidavit, page 513, paragraph 154.7).

[86] The award to the second respondent was only communicated to the second respondent on 30 May 2019.⁵⁶ The first respondent explains in its answering affidavits that such pre-award negotiation with the preferred bidders yielded a

⁵⁶ Answering papers, page 500, paragraph 127.

reduced price in relation to the expanded project.⁵⁷ According to the first respondent the negotiated bid was⁵⁸ more favourable to the first respondent to accommodate its limited funds, and price wise more advantageous to the State as the public funder as well.

[87] Not only does ***Plascon-Evans*** apply from a procedural perspective, but the applicant has not shown, despite analysing the voluminous documentation making up the review record, that the result achieved by the first respondent through its negotiations with the second respondent after a fair adjudication process had been conducted substantively, resulted in a result which fell foul of the principles enunciated in section 217 of the Constitution.⁵⁹

[88] The contract between the first and second respondents itself was negotiated *after* the awarding phase, and was only signed on 16 July 2019 (answering papers, page 500, paragraph 128). The benchmark cost,⁶⁰ which was the targeted cost, had previously required (and indeed received) the approval of the Department. The process followed met all the requirements of section 217, and was conducted fairly, transparently, competitively and also cost-effectively in that the best price was achieved.⁶¹

[89] The first respondent has gone to great lengths in its papers to demonstrate the objective benefits or savings achieved per bed as a result of such negotiations with the preferred bidder (answering papers, pages 504 to 507).

⁵⁷ See the review record, bundle 7, pages 10 and 30, and the redacted record pages 358 to 369, and the answering affidavit pages 507 to 508.

⁵⁸ Objectively assessed.

⁵⁹ Compare paragraph 143 on pages 507 to 508 of the answering affidavit.

⁶⁰ In the circumstances, perhaps a more appropriate concept than market-related price.

⁶¹ Such aspersions that were cast in the applicant's papers, on the basis of "*rumours*" and speculation, about "*deliberate*" underhandedness, were inappropriate and without substance.

[90] In paragraph 141.1 of the answering papers (record page 506), first respondent states as follows:

“141.1 *Ultimately the project was brought within the benchmark by removing from the total project value, the amount of some R23.9 million relating to infrastructure and services relating to the entire campus... resulting in a total development cost to be funded from the IEG grant of R599 for 2000 beds (including George campus of 200 beds)... This was in line with the cost framework approved by the DHET on 6 March 2019*”. (This is a reference to a letter signed by Mrs Pandor *qua* responsible Minister at the time – AA13, pleadings record page 603).

[91] In ***Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 199 (SCA)***, clause F.4.2 of the Standard terms of Contract made provision for negotiations with preferred tenderers after a “*competitive tendering process*”, provided that such negotiations:

- (a) does not allow any preferred tenderer a second or unfair opportunity;
- (b) is not to the detriment of any other tenderer; and
- (c) does not lead to a higher price than the tender as submitted.⁶²

In paragraph [27] of the ***Aurecon*** judgment, the following is stated:

“The similarly worded clause 231 of the SCMP grants the City Manager the same right. These provisions make clear that the mere proposal of qualifications cannot in itself render a bid non-responsive. It was common cause that when Aurecon was asked to withdraw its qualifications it had become the City’s preferred tenderer. In that case the City was entitled to negotiate the final terms of the contract with it. Needless to say, the other tenderers had already been eliminated from the process in the initial evaluation for failing to meet the

⁶² Which accords with three of the four subparagraphs in paragraph 19.1 of the Implementation Guide, *supra*, paragraph [83].

relevant eligibility criteria. There would, therefore, have been no room to negotiate anything with them. In any event, it is not known what amendments they should have been allowed to make, so it is not possible to determine if the BEC could have exercised its direction in their favour".⁶³

[92] In the matter of ***South African Container Stevedores (Pty) Ltd v Transnet Port Elizabeth Terminals and Others 2011 JDR 0357 (KZD)*** at paragraph [72], Ndlovu J held that "[T]he concept of post-tender negotiations is not uncommon in public tender dealings and has been found to be a legally acceptable practice as long as, it seems to me, it is included in the tender document as a requirement in the tender process".

[93] On the facts of this matter, the tender documentation *did* refer all the tenderers to the envisaged expansion of the works; to the government funding constraints; to the first respondent's own funding constraints and importantly, to the envisaged pre-award price negotiations.

[94] First respondent's counsel has argued, with respect to the effect of the negotiations with the preferred bidders, that on the papers the first respondent has shown that savings were achieved to the advantage of the first respondent, its student body, and ultimately also the government who "*stood in the wings to disburse public funds towards student housing*". Having regard to the first respondent's papers, he is correct.

[95] The applicant has not established that the first respondent was allowed a second or unfair opportunity; that such negotiations were to the detriment of the applicant or other tenderers or led to a higher price than the tender as submitted.

⁶³ ***Aurecon***, paragraph [27].

[96] The applicant has not shown that the negotiations with the second respondent as preferred bidder, and the outcome of such negotiations, constituted a reviewable irregularity in terms of section 6(2) of PAJA, if this Court evaluates the process which was followed (as described in the papers and applying **Plascon-Evans**), against the constitutional yardstick of section 217.

[97] The applicant suggested finally, that because the second respondent's B-BBEE submitted certificate had expired, the second respondent's tender offer was defective (this is a point proffered in paragraphs 18.1 and 18.2 of the applicant's supplementary affidavit, pleadings record pages 354 to 355). However, the PPPFA regulations 6(3) and 6(4)⁶⁴ provide that a tenderer who fails to submit such proof may *not* be disqualified, but may only "score points out of 80 for price", but "scores 0 points out of 20 for "B-BBEE". And this is precisely what happened: the second respondent *did* score zero for B-BBEE. There is accordingly no substance in this point, which was correctly not advanced at all during oral argument presented on behalf of the applicant.

[98] The applicant's primary problem was to overcome the hurdle of its own disqualification for non-responsiveness. The Court has found that the applicant has not, for the reasons as explained above, succeeded in surmounting this hurdle.

[99] This first hurdle became a stumbling block, because the applicant's tender offer did *not* comply in all respects with the first respondent's tender requirements. This determination was objectively and even-handedly arrived at by a panel of experts during a fair adjudication process. The expert panel – whose views must be

⁶⁴ Regulations 6(3) and 6(4) read:

"6(3) A tenderer must submit proof of its B-BBEE status level of contributor.

6(4) A tenderer failing to submit proof of B-BBEE status level of contributor or is a non-compliant contributor to B-BBEE may not be disqualified, but-

(a) may only score points out of 80 for price; and

(b) scores 0 points out of 20 for B-BBEE".

accorded a degree of judicial deference⁶⁵ – fairly and impartially assisted the first respondent, which formed an opinion that the applicant’s tender offer did not meet the definition of responsiveness in terms of the conditions of tender.

[100] Whether or not the Haylett formula is a standard escalation formula and whether or not the applicant’s tender price would have escalated or not if the tender was awarded earlier, misses the point. The escalation provisions and the risk responsibility proviso which was incorporated in the applicant’s tender offer, were simply not in line with the tender invitation and with the tender provisions which included the FIDIC Silver Book. Non-responsive tenders, such as the applicant’s, had to be rejected. There was also no equitable *audi*-principle or rule in play, somehow obliging the first respondent to assist the applicant in making its non-responsive tender, responsive – to the contrary, the first respondent had no such power or discretion.⁶⁶ It had a duty to reject non-responsive tender offers such as the tender offer of the applicant.⁶⁷ These findings dispense with the main relief sought by the applicant, which cannot be granted.

[101] Insofar as the applicant has also challenged the award of the tender to the second respondent on broad grounds, this Court finds that the process which was followed by the first respondent did comply with the requirements of the tender documentation and with the legal requirements of the applicable legal framework, including those contained in section 217 of the Constitution.

⁶⁵ ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)***, paragraphs [46] to [48].

⁶⁶ ***Dr JS Moroka Municipality & Others***, *supra*, at paragraphs [12], [15] and [16].

⁶⁷ An acceptable tender under the PPPFA in any event “means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document” (section 1 of the PPPFA – referred to in ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC)*** at paragraph [34]. See also ***Dr JS Moroka Municipality & Others***, *supra*, at paragraph [16].

[102] Consequently, the relief sought by the applicant (in paragraphs 7 (as amended from the bar) and 8) cannot succeed. The ancillary interdictory relief initially sought, has already fallen by the wayside.

[103] In the circumstances, the application is dismissed with costs, including the costs of two counsel.

Swanepoel AJ

Dated: 30 September 2019

APPEARANCES:

FOR THE APPLICANT:	Adv A Beyleveld SC and Adv O.H. Ronaasen SC, instructed by Friedman Scheckter Attorneys
FOR THE 1 st RESPONDENT:	Adv M Du Plessis SC and Ms J.Y. Thobela-Mkhulisi, instructed by Joubert Galpin Searle Incorporated
FOR THE 2 nd RESPONDENT:	Baker McKenzie Attorneys No appearance (a notice to abide was delivered)