IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 4460/2017

(1) OF INTEREST TO OTHER JUDGES: NO/~~YES~~

(2) REVISED.

DATE: 7/1/18 SIGNATURE.................

RAUBEX CONSTRUCTION (PTY) LTD	APPLICANT
AND	
ROAD AGENCY LIMPOPO SOC	1st RESPONDENT
SEDTRADE (PTY) LTD	2nd RESPONDENT

JUDGMENT

MULLER J:

[1] The applicant, together with the second respondent, and others, submitted tenders to upgrade a road in the Limpopo Province in response to an invitation to tender published by the first respondent. The

tender was awarded to the second respondent by the first respondent. This application is a sequel to an application for an interim interdict which was granted against the respondents, pending the finalization of a review application to set aside the tender awarded to the second Respondent.

[2] The application falls to be decided on two grounds for review. The first ground is that the tender process was completed prior to the tender being awarded to the second respondent. The second ground relied upon by the applicant is that the rejection of the tender of the applicant as non-responsive was irrational in that the document submitted contained the information required and substantially complied with the prescribed certificate of authority included in the tender data documents. The second ground will only become relevant if the first ground of review is unsuccessful.

[3] I will commence with the main ground of review as it may be dispositive of the application. It is common cause or at least not in dispute that a written invitation to tender was published by the first respondent to invite tenders for the upgrade of a road. The invitation contained a closing date of 13 December 2016 when all tender documents had to be submitted. The invitation stated, in addition, that all those tenders submitted on or before 13 December 2016 shall remain valid for period of 90 days to allow the first respondent the opportunity consider all the tenders received and to award the tender to the successful bidder. It is not in dispute that the expiry date was 13 March 2017.

[4] The first respondent addressed letters to all tenderers on 14 March 2017 in terms whereof an extension of the validity date to 30 April 2017 was sought. The letter stated:

> "Roads Agency Limpopo SOC Ltd (RAL) hereby request that you extent the validity period of your proposal/bid which was received by RAL on or before the afore mentioned date.
>
> Should you agree to extend validity of your proposals /bid they shall be valid until 30 April 2017.
>
> Please note that this extension is subject to the same terms and conditions that you adhered to when you submitted your proposal/bid on or before the closing date.
>
> Your response must reach RAL through this e-mail by no later than close of business Friday 17.03.2017.
>
> Should RAL receive no response on or the said date, it will be deemed that you have no intention to extend the validity period of your proposal/bid in which case your proposal/bid will not be considered further for evaluation."

[5] Some of the tenderers, which included the applicant and the second respondent, notified the first respondent of their consent to the proposed extension. Those who failed to reply were summarily excluded from further participation, ostensibly, because their bids or offers were invalidated due to the expiration of the 90 days period, on 13 March 2017.

[6] The tender of the applicant was thereafter rejected as non-responsive due to the failure by the applicant to complete a prescribed certificate of authority which was included in documents which accompanied the invitation to tender. (The applicant did not complete the prescribed

certificate but included in the tender documents a form which was designed by itself.)

[7] The applicant contended that if the tender was not awarded within the tender validity period of 90 days, the tender process has lapsed. It was also argued that the tender validity period cannot be extended after the expiration of the 90 days. It was argued in the alternative that the contract was in any event concluded after 30 April 2017 whilst the invitation to tender stipulated that the contract must also be concluded during the tender validity period. The relevant term in the tender document states:

> "C1.1 FORM OF OFFER AND ACCEPTANCE
>
> This offer may be accepted by the employer by signing the acceptance part of this form of offer and acceptance and returning one copy of this document to the tenderer before the end of the period of validity stated in the tender data, whereupon the tenderer becomes the party named as the contractor in the conditions of contract identified in the contract data."

The deponent to a supplementary affidavit on behalf of the first respondent confirmed that he has signed the offer and acceptance form on 25 April 2017.

[8] The starting point is the acceptance that the tender process constituted administrative action which entitle all the tenderers to a lawful and procedurally fair process and outcome.[1] Section 217(1) of the Constitution lays down that when an organ of state (the first Respondent) contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost

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[1] The Promotion of Administrative Justice Act 3 2000; s 33 of the Constitution. Also *Logbro Properties CC v Bedderson NO and Others* [2003] 1 All SA 424 (SCA) para 5.

effective. Several legislative measures to give effect to section 217 of the Constitution were put in place. Not all are relevant for the determination of this application, save to the mention The Preferential Procurement Policy Framework Act[2] together with the Preferential Procurement Regulations of 2011 and 2017.[3]

[9] A decision to award a tender is administrative action.[4] In *Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others*[5] it was held:

> "As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete - albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. It failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender."[6]

[10] In *Joubert Galpin Seale Inc and others v Road Accident Fund and Others*[7] the court also considered whether a tender process can be revived after the process has lapsed. The learned Judge followed the

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[2] Act 5 of 2000.

[3] The 2017 regulations as published under GN R32 in Government Gazette 40553 dated 20 January 2017 took effect on 1 April 2017. The 2011 regulation were published under GN R502 in Government Gazette 34350 dated 8 June 2011.

[4] *Cape Metropolitan Council v Metro Inspection Services CC* 2001(3) SA 1013 (SCA) para 16-18.

[5] 2011 JDR 0004 (GPN); [2011] ZAGPPPHC 1.

[6] Para 14. Reliance was placed by the first respondent on the unreported case of *Defensor Electronic Security Services (Pty) Ltd v Head of the Department Northern Cape Department of Health and Another* Case No CA & R 659/2016 (dated 31 March 2017). The case is distinguishable on the facts.

[7] 2014 (4) SA 148 (ECP) para 70.

judgment in *Telkom SA Ltd supra* but also took into account the provisions of the *National Treasury's Supply Chain Management: A Guide for Accounting Officers/Authorities* to which reference was made in *Allpay Consolidated Investment Holdings*[8] as the "constitutional and legislative procurement framework" which formed part of those provisions that both empower and limit the powers of public bodies involved in procurement of goods and services. The document contains a step by step guide to be applied in the procurement of goods and services and provides that an extension of bid validity should be requested from bidders before the expiration date, if justified under exceptional circumstances.[9]

[11] An invitation to the public to tender[10] for the provision of goods or services is a written invitation to the world at large to make an offer.[11] An offer made pursuant to such an invitation may be rejected or accepted by the first respondent on the terms and conditions set forth in the tender documents.[12] The tender documents submitted to the first respondent *in casu* constitute offers made which will remain open for acceptance for a period of 90 days from the closing date stipulated for offers to be submitted by prospective tenderers. If the first date arrived without any offer being received, the invitation to invite offers would lapse and come to an end.

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[8] 2014 (4) SA 604 CC para 12-13.

[9] Para 73.

[10] A tender as defined in the Preferential Procurement Regulations 2011 means: "a written offer or bid in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services or goods."

[11] *Trever Investment (Pty) Ltd v Friedhelm Investment (Pty) Ltd* 1982 (1) SA 7 (AD) 16G-H.

[12] Christie RH. *The Law of Contract in South Africa* 5th ed LexisNexis Butterworth Durban (2006) 42.

[12] Offers which had been made in time, as stipulated, remain valid until the expiry of the 90 day period. If no offer is accepted by the first respondent by the expiry date, all the offers are rendered invalid and the tender process simply lapse. When the tender process has come to an end, the invalid offers can no longer be accepted. Offers that have been rendered invalid, in my view, cannot be validated by simply attempting to extend the validity date *ex post facto* the lapsed tender process. An agreement with a number of tenderers that only those who consented to an extension of the tender validity date will be eligible for consideration cannot be sustained. No provision was made in the tender documents that when the tender process has come to an end, that offers that had been invalidated as a result, may be revived by agreement.

[13] I am in respectfull agreement with the reasoning in *Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality*[13] where Murphy J relying on *Laws v Rutherfurd*[14]expressed himself as follows:

> "Where the mode of acceptance in a proposed contract is stipulated, it is that mode that must be followed before a contract is concluded. Non-compliance with formalities imposed by one of the parties results in the nullity of the contract. Where a contract is not concluded between the parties because of non-compliance with the prescribed mode of acceptance, no contractual *vinculum iuris* exists and the parties may not assert the contractual remedies under the flawed agreement..."[15] (footnotes are omitted).

[14] The decision to invite tenders for goods and services by the first Respondent and the process followed by the first respondent in awarding a tender to a successful tenderer is an administrative function

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[13] [2015] All SA 674 (GP).

[14] 1924 AD 261.

[15] Para 32.

as sanctioned by section 217(1) of the Constitution which requires that it be done in accordance with a system which is fair, equitable, transparent, competitive and which is cost effective.[16] The Constitution and the associated laws applicable that binds organs of state in relation to tender contracts entered into between organs of state and service providers have had a considerable impact on our law of contract due to the influence of the Constitution in this area of the law. It is not always easy to determine when the principles of the law of contract are applicable and to what extent. However, although the decision to award the tender is administrative, the principles of the law of contract underpin that decision.

[15] It was argued by counsel for the first respondent that the letter written to all tenderers requesting their consent to extend the tender validity date was a fresh offer made to them (as opposed to an invitation to make an offer) to contract on the same terms and conditions, but with a tender validity date of 30 April 2017. It is submitted that a new tender process was initiated with only those tenderers participating who consented to the extension.

[16] The argument cannot be accepted. In specifying the terms of the invitation to tender the first respondent acted from a position of superiority as an organ of state and was therefore burdened with a public duty to follow its own procedure and to act fairly in exercising its powers derived from the terms of the invitation to tender. A fair, transparent and equitable tender process is not initiated (nor can it be continued) when a few tenderers consented to an invitation to revive the lapsed tender process and thereby surreptitiously validating their invalid

[16] s 33 of the Constitution requires just administrative action of the process which is lawful, reasonable and procedurally fair.

offers retrospectively. The tenderers, who did not agree to the extension, were excluded from the new process. This new tender process did not comply with prescripts of the Constitution. It can hardly be said that it was a fair, competitive and transparent process embarked upon when the public is excluded from the process.

[17] A process to invite tenders ought to be initiated afresh. It is for this reason that the invalid offer by the second respondent could not have been accepted after the 90 days validity period has lapsed. Due to the aforementioned, the purported consent of the applicant, the second respondent and others, to extend the date fixed for acceptance, after it has expired, is of no moment. The invalidity of the offers could not be reversed after the date set for acceptance has lapsed without any offer being considered and accepted which brought the tender process to an end. The second process which was then initiated in terms of the letter addressed to the tenderers was flawed and lacked openness, transparency, lawfulness and fairness as required by section 33 and 217(1) of the Constitution.

[18] It was also argued that the invitation to tender was not time based but costs based. Clause F2.16 of the tender data reads:

> "Tenders shall remain open for a period of ninety (90) days from the time set for the opening of Tenders and no Tender may be withdrawn during this period.
>
> Should a Tenderer amend (other than according to F3.9) or withdraw his tender after the time set for the receipt and opening of Tenders and during the period of its validity, but prior to his being notified of the acceptance of his original Tender, or should a Tender, after having been notified that his Tender has been accepted.
>
> (a)give notice of his inability to execute the Consultancy Agreement / Contract in terms of his tender, or

(b)fail to sign a Consultancy Agreement / Contract or furnish the security within the period fixed in the conditions reflected in the form of Tender or any extended period fixed by the Employer; or

(c)fails to execute the Consultancy Agreement / Contract according to the defendants

He shall pay either difference between his Tender and a less favourable Tender accepted in terms of the provisions of Tender sub Condition 3.1(d), or if the Employer decides to invite fresh Tenders, all additional expenses which the Employer has to incur in this regard , as well as any difference between his Tender and accepted new Tender; provided that the Employer may fully or partly exempt a Tenderer from the provisions of this sub condition if he is of the opinion that the circumstances justify the exemption.

When, in the circumstances mentioned in Tender sub Condition 3.10(c) it is not deemed desirable to invite fresh Tenders, the Employer may accept another Tender from those already received".

[19] The validity date of the tenders is clearly time based, not only in respect of the date and time stipulated for the offers to be submitted for consideration, but also in respect of the date of their validity. Any ambiguity, in the written invitation to tender must be interpreted *contra proferentem*.[17]

[20] It is, in my view, unnecessary to make any decision with regard the second issue that the offer was non-responsive due to the failure by the applicant to complete the certificate prescribed by the invitation to tender despite submission of a form designed by the applicant.

[21] The tender awarded to the second respondent must be set aside. The process should start afresh.

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[17] *Karson v Minister of Public Works* 1996 (1) SA 887 (ECD) 896C-D.

[22]The applicant was successful and is entitled to its costs, which costs shall include the costs reserved in respect of the interim interdict granted in its favour pending the finalization of this review application. I make the following order:

ORDER

1. That the award of the tender RAL/T640B/2016 upgrading (gravel to bituminous surface) of road D3556 from N11 at Gilead to D357 at pudiyakgopa-38.8 kilometre, Waterberg District Limpopo Province (the tender) is declared invalid and is set aside;

2. That any service level agreement concluded between the first and second respondent relating to the impugned decision be struck down in accordance with Section 8 of the Promotion of Administrative Justice Act 3 of 2000.

3. That the first respondent is ordered to pay the costs of the application, such costs to include the costs reserved on 6 September 2017.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

FOR APPLICANT:	WA Van Aswegen
FOR FIRST RESPONDENT:	SK Hassim SC
	L Pillay
DATE HEARD:	14 December 2017
JUDGMENT DELIVERED ON:	18 January 2018