IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A48/2016

In the matter between:

Q CIVILS (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY First Respondent

FMP CONTRACTORS CC Second Respondent

CORAM: JORDAAN, ADJP *et* DAFFUE, J

HEARD ON: 8 AUGUST 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 8 SEPTEMBER 2016

I INTRODUCTION

[1] The central issue for determination in this application is the lawfulness of a tender process conducted by the Mangaung Metropolitan Municipality. The unsuccessful bidder and the Municipality who called for bids for the upgrading of a street in Bloemfontein are at loggerheads and this court is approached to primarily review and set aside the award of the bid to the successful bidder.

II THE PARTIES

[2] The applicant is Q Civils (Pty) Ltd, ("Q Civils"), a registered construction company specialising in all fields of general construction and civil engineering works.

[3] First respondent is the Mangaung Metropolitan Municipality, ("the Municipality"), duly established in terms of the Local Government: Municipal Structures Act, 117/1998.

[4] Second respondent is FMP Contractors CC, ("FMP"), a close corporation duly registered as such.

III THE RELIEF CLAIMED

[5] Save for a prayer for condonation based on urgency which is not repeated, Q Civils seeks the following relief *ex facie* the notice of motion:

> "2. The First Respondent's decision to eliminate the Applicant from the tender process for **BID 263 (A) - 2014/2015: Upgrading of street and storm water: De Bruyn street** is reviewed and set aside, alternatively is declared to be unlawful and set aside;
>
> 3. The First Respondent's awarding of the bid mentioned in prayer 2 above to the Second Respondent is reviewed and set aside, alternatively is declared to be unlawful and is set aside;
>
> 4. In terms of section 8 of the Promotion of Administrative Justice Act, 3 of 2000, the First Respondent is ordered to conclude an agreement with the Applicant for the construction of the remainder of the work to be performed and related to the bid mentioned in paragraph 2 above.
>
> 5. As far as it may be deemed necessary, the Applicant's non adherence to section 7 of PAJA, related to the exhaustion of alive and pending internal remedies, is condoned as being in the interest of justice.
>
> 6. The First Respondent is ordered to pay the costs of this application. Alternatively, and should the Second Respondent oppose, then in that case, the Second Respondent is to pay the costs of the application, together with the First Respondent, jointly and severally, payment by one, the other to be absolved."

[6] The application is opposed by the Municipality only. FMP opposed the interim interdict proceedings issued under case number 422/2016 by Q Civils in terms whereof the Municipality and FMP were interdicted and restrained by Van Zyl, J on 18 February 2016 from in any way further implementing and/or executing the Municipality's decision to award the aforesaid bid to

FMP, pending the institution of review proceedings for the review and setting aside of the aforesaid decision.

IV THE ESSENCE OF THE DISPUTE BETWEEN THE PARTIES

[7] The questions to be determined are whether the award was made in consequence of an unlawful tender process, and if so, whether Q Civils should be substituted by the court for FMP as the successful bidder.

[8] Several allegations are made by Q Civils in support of the submission that the Municipality's decision to award the bid to FMP should be set aside. It is, as alleged, vitiated by an error of fact in that Q Civils' bid did not exceed any 15% threshold. It is also procedurally unfair insofar as Q Civils wasn't afforded an opportunity to explain its price tendered before a decision was taken. In conclusion it is alleged that the cumulative effect of the irregularities is such that the decision is not only arbitrary and irrational, but also unlawful.

[9] When Q Civils' complaints are properly evaluated, the real issue is in essence its dissatisfaction that its bid was disqualified *"simply because the price* (tendered) *was below a pre-set deviation percentage"* of 15% from the engineer's estimate or the average bid price.

[10] In its opposition of the application the Municipality relies on the fact that it was necessary for its Bid Evaluation Committee ("BEC") and its Bid Adjudication Committee ("BAC") to consider a risk analysis and in order to do that, it was determined before

considering the various bids that those bidders who would deviate by more than 15% from the engineer's estimate or the average bid of the bidders, would be disqualified. The rationale is stated as follows in the Bid Technical Assessment Report under the heading "Risk Analysis":

"In Table 3.5, the percentage deviation of the tendered amount is indicated. The risk to the Municipality increases where rates of tenderers deviate by more than 15% than (sic) the average or estimated rates.

> Too low rates result in cash flow problems to the contractor, slower progress of the works, increased safety risks and reduction in quality of work; but
>
> Alternatively, where rates are more than 15% higher than the average tendered rates, the risk to the Municipality increases with regard to a possible increase in project costs when the quantities increases (sic) substantially."

[11] It was eventually found that Q Civils' bid was 22.66% below the engineer's estimate and 17.12% below the average price tendered by bidders. These deviations are both in excess of the 15% deviation that was applied across the board. Based on this Q Civils together with three other bidders were found to be "non-responsible" by the BEC. Contrary thereto the bid of FMP was 15.03% less than the engineer's estimate and 8.94% less than the bidders' average price. The BEC eventually recommended that the bid be awarded to FMP, which recommendation was ultimately accepted by the BAC which committee resolved to award the bid to FMP.

[12] The different viewpoints of the parties will be evaluated *infra* when the evidence is considered together with the parties' submissions and the authorities.

V THE TENDER PROCESS

[13] I deem it apposite to briefly set out the procurement process followed in casu. It was not dealt with in detail in the affidavits, but it should be common cause, bearing in mind the documents filed in terms of rule 53 – the Record of Decision ("ROD").

[14] In January 2015 the engineers, Ndlovu Nganyama (Pty) Ltd as consulting engineers presented to the Municipality an estimate of the costs for the upgrading of De Bruyn Street from a gravel to a surfaced road together with the associated stormwater works. The matter was thereafter referred to the Municipality's Bid Specification Committee to prepare a comprehensive bid specification – the tender document – whereafter approval was obtained for invitations of bids.

[15] Bids were invited in June 2015. Save for certain minimum requirements specified in the invitation as published, the invitation *inter alia* specified that the lowest bid would not necessarily be accepted, that the Municipality's Supply Chain Management Policy ("SCMP") and the PPPFA and its regulations would apply and bids that are invalid, non- responsible in terms of clause 16.2.16 of the SCMP, would be disqualified.

[16] The Municipality requested a Bid Technical Assessment report from the consulting engineer which report dated August 2015 appears in the ROD from page 67 to page 108. In this report the engineer deals in depth with all bids. It is in this report – from page 74 of the ROD and further – that the engineer explains the *ratio* for the 15% deviation referred to above.

[17] The BEC considered the bids. It is important to take note that the engineer, Mr Mamokatsaba of Ndlovu Ngonyama attended the first meeting of the BEC on 26 August 2015. *Ex facie* the minutes he presented the item relating to the particular tender and stated that twenty eight bids had been received, but five disqualified as these were found to be non-responsive. The twenty three others were further evaluated and the committee members were pertinently referred to item 3.5 of the engineer's report pertaining to his risk analysis and the percentage deviations of all these bids. The engineer furthermore confirmed that his estimates were based on current construction projects of local municipalities in the Free State. The engineer indicated in his risk analysis that Q Civils' tender was regarded as "high risk" and also that it quoted "unbalanced rates, some items on the critical sections he has price (sic) too low or too high." The BEC resolved at its first meeting to continue a due diligence process. It is not certain whether Q Civils and the other three bidders were found to be non-responsible at this meeting as the minutes are quiet in this regard.

[18] On 2 September 2015 the BEC met again but was still not in position to make any recommendation. On 16 September 2015 and after finalising its due diligence process, it recommended

FMP to the BAC. It is evident from the report of the BEC submitted to the BAC that it considered the twenty three bidders for functionality and that once this was done Q Civils and seven others were evaluated risk assessment in accordance with the engineer's risk analysis set out above. The bids of Q Civils and three others were found to be non-responsible in terms of clause 16.2.16.2 of the SCMP and disqualified. In paragraph 8.3 of the report the BEC stated that the bids of these bidders were "substantially below or above 15% deviation from the engineer's or the average price submitted." Obviously the committee conflated the wording of the SCMP with the test of the engineer and this led to confusion on behalf of the deponent to the answering affidavit and even the Municipality's counsel as will be indicated *infra.*

[19] The BAC sat on 16 October 2015, considered the relevant report *ex facie* the minutes and awarded the bid to FMP.

VI ALLEGED FAILURE TO EXHAUST AN INTERNAL REMEDY

[20] The Municipality has placed enormous emphasis on Q Civils' alleged failure to exhaust an available internal remedy. It is therefore necessary to consider this aspect before any attempt is made to adjudicate the merits of the review application.

[21] The Municipality placed reliance on regulations 49 and 50 of the Municipal Supply Chain Management Regulations promulgated as envisaged in the Local Government: Municipal Finance

Management Act, 56/2003, which regulations took effect on 1 July 2005.

[22] It is not difficult to understand why the Municipality decided to rely on these regulations; its decision was probably triggered by the contents of the letter of Q Civils dated 13 January 2016 indicating that it did not agree with the award and wished to lodge a formal dispute/objection in terms of regulation 49 regarding the appointment of FMP.

[23] Regulation 49 stipulates that the supply chain management policy of a municipality must allow persons aggrieved by decisions or actions taken by the municipality in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint against the decision or action. Regulation 50 obliges a municipality to "provide for the appointment by the accounting officer of an independent and impartial person…….

a. to assist in the resolution of disputes between a municipality or municipal entity and other persons regarding –
   (i) any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system; or
   (ii) any matter arising from a contract awarded in the course of its supply chain management system; or
b. to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract."

In terms of regulation 50 (4)–(6) the person appointed must strive to resolve promptly all disputes, objections, complaints or queries and if these are not resolved within sixty days, the matter may be referred to the relevant provincial treasury. If the provincial treasury cannot resolve the dispute the matter may be referred to the National Treasury for resolution.

[24] It is clear from these two regulations that whoever is appointed to act in accordance with regulation 50, does not sit as an appeal tribunal and does not have the right to set aside a decision pertaining to the award of a bid or to nullify a contract entered into between a municipality and a successful bidder. Such a person clearly does also not have any review authority and therefore no power to enforce an effective remedy. Before an alleged internal remedy can qualify as such in terms of s 7(2) of PAJA it would have to provide a prejudiced person with an effective remedy. See: **<u>Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit</u>** [2009] ZAFSHC 21 ad paras [32] – [34], an unreported judgment delivered on 27 February 2009 and the persuasive article by Bolton P, *Municipal tender awards and internal appeals by unsuccessful bidders,* **<u>PER/PELJ</u>** 2010(13)3 p 71 and further. In any event, the regulation itself clarifies any uncertainties that may exist insofar as regulation 50(7) reads as follows:

> "This regulation must not be read as affecting a person's rights <u>to approach a court at any time</u>." (emphasis added.)

[25] The Municipality's reliance on the following judgments is ill-founded and the submissions in that regard are not valid: In **<u>Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining</u>**

and Development Co Ltd and Others 2014 (5) SA 138 CC s 96 (1) and (3) of the Mineral and Petroleum Resources Development Act, 28 of 2002 was the subject of consideration. Sub-section (1) provides for an internal appeal process and sub-section (3) clearly stipulates that no person may apply to court for review of an administrative decision until such person has exhausted his/her remedies in terms of sub-section (1). This case is no authority in support of the Municipality's viewpoint as it is clearly distinguishable from the facts in *casu* where the regulations do not make provision for any appeal process. The facts in **Koyabe and Others v Minister of Home Affairs and Others** 2010 (4) SA 327 (CC), also relied upon, are totally distinguishable from the facts in *casu*. In paragraph [35] of the judgment the court considered what an internal remedy is and stated: "Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation." In **Koyabe** the applicants were declared to be prohibited persons in terms of the Immigration Act, 13 of 2002 and were to be deported to their home country. They sought the review and setting aside of these decisions, but they failed to firstly refer the matter to the Minister for review in terms of s 8 of the Act. The Constitutional Court eventually found, as the High Court, that the application was premature for failing to exhaust the available internal remedy. The quotation in the Municipality's heads of argument from paragraph [47] of the **Koyabe** judgment is_inapplicable *in casu.* **Nichol and another v Registrar of Pension Funds and Others** 2008 (1) SA 383 (SCA) was also relied on. In this matter the internal remedy available to the appellant was an appeal to the

Financial Services Appeal Board under s 26 of the Financial Services Act, 97 of 1990, which internal remedy was not exhausted. Having found no exceptional circumstances in terms of s 7(2)(c) of PAJA the Supreme Court of Appeal dismissed the appeal. The Municipality's submission, based on the judgment in **Nicholl,** that regulations 49 and 50 created internal remedies is without any merit.

[26] It was pointed out on behalf of the municipality that Q Civils' application was "addressed at" (sic) s 62 of the Local Government: Municipal Services Act, 32 of 2000 ("the Systems Act") notwithstanding the letter of objection relying on regulation 49 as indicated *supra*. According to the municipality Q Civils could in any event not rely on s 62 which is totally inappropriate in *casu* as it is only available to a person whose rights have been affected by a political structure, political office bearer, councillor or staff member. I do not agree with this submission which is in direct conflict with a judgment of the Supreme Court of Appeal. See: **Groenewald NO and Others v M5 Developments (Cape) (Pty) Ltd** 2010 (5) SA 82 SCA paras [18] – [21].

[27] However the internal appeal process provided for in s 62 cannot be seen as an available internal remedy for an aggrieved and unsuccessful bidder where the contract was already entered into with the successful bidder who has already started with execution of the work in terms of the contract. See the unambiguous wording of s 62(3) of the Systems Act and **Loghdey v Advanced Parking Solutions CC and Another** 2009 (5) SA 595 (CPD) at paras [25] to [33] and **City of Cape Town v Reader and Others**

2009 (1) SA 555 (SCA) at paras [34] to [36]. It is important to note that the facts in **Loghdey** can be distinguished from those in **Groenewald** *supra* insofar as no rights had accrued to the preferred bidder (M5) in **Groenewald** at the time of the appeal.

[28] In *casu* the uncontested evidence, *ex facie* the answering affidavit of FMP in the interdict proceedings which was also placed before us, is to the effect that FMP had already started with contract works. By the time the interdict was granted FMP had already performed almost R2m worth of work on the particular project. The appeal authority to be appointed in terms of s 62 could not revoke FMP's accrued rights. I therefore conclude that Q Civils would not be able to obtain effective redress by either making use of the provisions of regulation 50 or s 62. Consequently it was not necessary for Q Civils to prove any exceptional circumstances to justify an exemption in terms of s 7(2)(c) of PAJA and no condonation application was required.

VII THE AUTHORITIES RELATING TO REVIEWS.

[29] Section 217 of the Constitution is the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of State procurement processes. It reads as follows:

> "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 <u>fair, equitable, transparent, competitive and cost-effective</u>.

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."

[30] In order to comply with s 217(3) the legislature adopted the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"). "Acceptable tender" is defined in s 1 of the PPPFA as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". In **<u>Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and others</u>** [2005] 4 ALL SA 487 (SCA) at paragraph [19] Scott JA pointed out that the definition of "acceptable tender" must be construed against the background of s 217 of the Constitution and continued as follows: "In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values." In terms of s 2(1)(f) of the PPPFA "the contract must be awarded to the tenderer who scores the highest points (calculated in accordance with s 2(1)(b)), unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."

[31] The Local Government: Municipal Finance Management Act, 56 of 2003 is equally applicable. Procurement is dealt with in

Chapter 11 and the wording of s 112(1) echoes that of s 217(1) of the Constitution.

[32] A tender process implemented by an organ of state is an "administrative action" within the meaning of PAJA. See: **Logbro Properties CC v Bedderson NO and Others** 2003 (2) SA 460 (SCA) para [5]. Therefore the applicant *in casu* was entitled to a lawful and procedurally fair process. Furthermore, it is well established that the executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. See: **Sapela Electronics** supra at para [11].

[33] The proper legal approach pertaining to procurement processes was set out in the following *dictum* by Froneman, J in **Allpay Consolidated v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC) at para [22] which I quote:

"[22] This judgment holds that:

a. The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.
b. The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.
c. The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

d. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

e. Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

f. The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside."

[34] Froneman J continued in **<u>All Pay</u>** *supra* at paras [28] and [29] to summarise the approach to be followed by a court considering a review application and I quote: "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 under PAJA has been established." Once this exercise has been completed the court must consider the practical difficulties which may flow from declaring the administrative action constitutionally invalid, bearing in mind the just and equitable remedies provided for in the Constitution and PAJA.

[35] In **<u>Bel Porto School Governing Body and Others v Premier, Western Cape</u>** 2002 (3) SA 265 (CC) Chaskalson CJ stated at para [89] for a decision to be justifiable, "…. it should be a rational decision taken lawfully and directed to a proper purpose." Ponnan JA, relying on **<u>Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the</u>**

Republic of South Africa and Others 2000 (2) SA 674 (CC) expressed himself as follows: "It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given." See **Minister of Home Affairs v Somali Association of South Africa** 2015 (3) SA 545 (SCA) at para [18]. However as Nugent JA pointed out in **Minister of Home Affairs and Others v Scalabrini Centre** 2013 (6) SA 421 (SCA) at para [65]: "… an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[36] Insofar as applicant's counsel relied on **Medirite v South African Pharmacy Council** (197/2014) [2015] ZASCA 27 (20 March 2015) it is necessary to mention the following. The South African Pharmacy Council amended the rules relating to "good pharmacy practice" pertaining to the identification and demarcation of pharmacy premises. These premises have to be clearly identified and demarcated if situated on the premises of any other business or practice and it was particularly required that demarcation had to be permanent, solid and closed-off from floor to ceiling height and must enclose all areas attached to the pharmacy, i.e the waiting area, the clinic, the semi-private and the private area. This caused serious concerns to the appellant who operated several pharmacies within Shoprite Checkers and Checkers

Hyper supermarkets, i.e within the precincts of other business premises such as supermarkets, although these pharmacies are run as separate businesses. In paragraph [9] of the judgment the Supreme Court of Appeal reiterated that the "… requirement of rationality is to ensure that the action is not arbitrary or capricious and that there is a rational connection to the facts and the information available to the administrator taking the decision and the decision itself." In that matter the court, accepting that all of appellant's pharmacy premises were clearly demarcated and identifiable, found that a consideration of the merits of the decision was "bedevilled by a singular lack of information as to why the first respondent decided that a wall meeting the prescribed requirements was necessary." See paragraph [11]. The court found that it was not necessary for permanent walls to be built in order to demarcate and identify pharmacy premises and the first respondent's insistence on this requirement was "shrouded in mystery." The evidence presented by appellant showed that the costs of building walls would be substantial, it would have a negative impact on the supermarket business model, interfering with the free flow of customers, and furthermore, bearing in mind the high ceilings or no ceilings at all in these buildings, the erections of walls may adversely affect lightning and ventilation. In conclusion it was found that the administrative action in introducing the particular subsections to the rules was both irrational and unreasonable.

[37] In **Sethakatshipa Business Enterprise and others v Mangaung Metropolitan Municipality** (A917/2014) [2015] ZAFSHC 32 (10 March 2015) the court found that it was a reviewable irregularity to declare a bid as unrealistically low

without affording the bidder any audience on the matter with reference to the judgments of the North West High Court, to wit **Glo Bul Roads (Pty) Ltd v Premier, North West Province and others** case number 1620/11 and **Road Mac Surface (Pty) Ltd v MEC for the Department of Transport and Roads** 2006 ZANWHC 54. Lekale J continued in para [31]:

> "Even if I am wrong in the preceding findings, I am persuaded by available case law that fairness dictates that, before disqualifying first and third applicants' tender as non-responsive, the respondent was supposed to have afforded them a hearing in line with the rules of natural justice. Failure to afford them audience is a material irregularity and constitutes a reviewable irregularity in terms of section 6(2)(c) of PAJA."

In that matter the applicants who were already contracted to the respondent as service providers for two years each submitted a bid for the Bloemfontein region in response to an invitation to deliver emergency door to door domestic refuge collection services. Their bid price was R9 per household whilst the price eventually determined and agreed upon with the successful bidders was R9.28 per household. The court found that the difference between these prices was "not unreasonably huge to render the two bids unreliable" and mentioned that "sight should not be lost of the fact that the relevant bids came from service providers who were, at that stage, rendering the same services to the respondent and who were, as such, familiar with the costs attendant thereon."

[38] In **Metro Projects CC v Klerksdorp Local Municipality** 2004 (1) SA 16 (SCA) Conradie JA said the following in para [13]:

> "In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It <u>may</u> in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it <u>may</u> be fair to allow a tenderer to correct an obvious mistake; it <u>may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation</u>. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness." (emphasis added.)

In <u>**Metro Projects**</u> the Supreme Court of Appeal set aside the award by the municipality to the successful bidder and I quote from para [14]:

> "A high-ranking municipal official purported to give the ninth respondent (the eventual successful tenderer) an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."
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> See also in this regard <u>**Premier, Free State and Others v Firechem Free State (Pty) Ltd**</u> 2000 (4) SA 413 (SCA) at para [30] in respect of the requirement that competitors should be treated equally.

[39] In **<u>Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and another</u>** 2016 (3) SA 1 (SCA) the court reiterated at para [38] that fairness in the procurement process is a value in itself and at para [39] that proper compliance with the procurement process is necessary for a lawful process. In that case Eskom's Board tender committee ("BTC") overrode the recommendations of its technical and executive teams by awarding the contract for replacement of six generators at its Koeberg nuclear power station to Areva and not to Westinghouse. This was done on the basis of undisclosed "strategic considerations." These factors were neither mentioned in the invitation to bid, nor otherwise revealed to the bidders. The strategic considerations were *inter alia* that Areva was involved in the original building of Koeberg and that it had more experience. A firm of consulting engineers appointed by Eskom during the procurement process suggested that these factors be taken into account. The court stated at para [48] that the fact that the BTC considered the strategic considerations without informing the two competing bidders and without making them part of the bid evaluation criteria appeared to be fundamentally unfair and it eventually concluded as follows in para [65]: "In my view, when the BTC took into account each of the strategic considerations, and the considerations of the float, and thus decided to award the tender to Areva, it made the decision unlawfully in terms of s 6(2)(e)(iii) of PAJA. And the failure, if these reasons were decisive, to refer them to the bidders and give them the opportunity to clarify their bids, or to reopen the process and amend the tender criteria to include the factors, made the whole process irrational and unlawful. The award must be set aside."

[40] Objective criteria with reference to s 2(1)(f) of the PPPFA referred to *supra* can be defined as those (a) not listed in paragraphs (d) and (e) of section 2(1) of the PPPFA, (b) which are objective in the sense that these can be ascertained objectively and their existence or worth does not depend on someone's opinion and (c) bear some degree of rationality and relevance to the tender or project. Refer to Landman J's summary quoted in para [22] and approved by the full bench at para [33] in **Road Mac Surfacing** *supra,* as well as the following *dictum* by Musi AJ (as he then was) in **Pelatona Projects (Pty) Ltd v Phokwane Municipality and 14 Others** unreported NCD judgment under case 691/04 at para [31]:

> "This section has two interlinked requirements. Firstly the criteria must be objective criteria, other than those mentioned in subsection (d) and (e). Secondly the objective criteria should justify the granting of the tender to another tenderer. There must therefore be a causal nexus between the two. The additional objective criteria must, in my view, be discernable from the information made available to the decision maker (first respondent). If this is not the case it would mean that the decision maker may look at criteria or information which was never asked from the tenderers. The decision maker will therefore look at information other than that put before it. Such a decision would detract from the fairness of the process. It may well lead to subjective factors being taken into consideration. It is well known that when subjective factors walk in the door rationality flies out of the window. The objective criteria justifying the awarding of the tender to a tenderer other than the one with the lowest tender should not cause the process to lose the attributes of fairness, transparency, competitiveness and cost effectiveness."

According to the full bench in **Road Mac Surfacing** objective criteria are "those goals which are not specified and not contained in the PPPFA and which would usually become apparent when the tenders are considered and weighed against each other." These objective criteria do not have to be stated in the tender documentation. See paras [33.2] and [36] of **Road Mac Surfacing**.

[41] In case number 821/2005 adjudicated in **Road Mac Surfacing** *supra* on appeal the Departmental Procurement Committee of the North West Province established a so called "price envelope", being the reasonable price range, to wit a margin of 15% above and 15% below the benchmark, being the price recommended to the committee by the project engineer. In terms hereof bids more than 15% below the benchmark would not be regarded as acceptable bids, the rationale being that if such a low price is accepted, the successful bidder on probabilities may run the risk of not making a profit and therefore would be a risk for the department and the contract may not be completed by the bidder. The bidder who submitted a tender price above the 15% range was considered too expensive and for that reason the bid was also not an acceptable bid. In some instances and specifically where experienced bidders bid substantially higher than the benchmark, the committee would take the average tender price as the benchmark. Landman J in the court *a quo* found that Raubex obtained the highest points and that its price fell within the 15% deviation of the engineer's price and average tender price and that it complied with all bid conditions. On appeal the full bench found that the committee was entitled to consider

objective factors such as that the successful bidder, Roucomm Systems was a Northwest based enterprise, a new entrant to the project as well as having a maximum participation as black economic empowerment entity. Therefore the appeal in that regard succeeded and the orders of Landman J were set aside.

[42] Wallis JA considered objectivity in tender adjudication processes as follows in **South African National Roads Agency Ltd v Toll Collect Consortium** 2013 (6) SA 356 (SCA) at paras [20] – [22] (**"SANRAL"**):

> "[20] As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison. The application of the formula for adjudicating preferences under the PPPFA may provide another example. However, the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise and the exercise of judgment on the part of the person or body undertaking the evaluation. That cannot be a mechanical process. The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was

> made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.
>
> [21] Where the evaluation of a tender requires the weighing of disparate factors it will frequently be convenient for the evaluator to allocate scores or points to the different factors in accordance with the weight that the evaluator attaches to these factors. But the adoption of such a system, without it being disclosed to tenderers in advance, does not mean that the tender process is not objective. If anything, the adoption of the scoring system enhances the objectivity of the process, because, in the event of a challenge to the award of the tender, the basis upon which the evaluation was undertaken emerges clearly.
>
> [22] The prior disclosure of any such points system …..is not ordinarily required, provided that the basic criteria upon which tenders will be evaluated are disclosed………..Disclosure of any such refined process of scoring in relation to a tender evaluation will only be required if its non-disclosure would mislead tenderers or leave them in the dark as to the information they should provide in order to satisfy the requirements of the tender." (emphasis added).

[43] An administrator is bound to the reasons given for his or her decision. See **Transnet Ltd v Goodman Brothers (Pty) Ltd** 2001 (1) SA 853 (SCA) at para [10]. The unsuccessful bidder has the right to reasons in order to enable him or her to decide or determine whether his or her right to lawful administrative action has been violated or not.

[44] Non-responsible bids in terms of the clause 16.2.16.2 of the SCMP are "tenders with a price (sic) that is very high or very low and is (sic) therefore not considered a fair and acceptable market price or quantified and estimated cost by the individual professional/body. A fair and acceptable

market price or cost estimates are defined on the basis of the following factors:

(i) Is the bid price substantially below or higher than that of other bidders?

(ii) In repeat purchases, how does the bid price compare with recent contracts awarded for similar items or work, taking into account quantified, conditions, terms and other important specifications?

(iii) Are there price indices available to determine the changes in labour and material costs?

(iv) Market research information to establish fair market price, foods and services procured regularly?

(v) The above is particularly important for the calculation of preference point system and the implementation of the price matching strategy."

VIII <u>EVALUATION OF THE FACTS IN LIGHT OF THE PARTIES' SUBMISSIONS AND THE AUTHORITIES</u>

[45] An administrator is bound by the reasons given for his/her decision. In its first communiqué to Q Civils – the letter of 16 January 2016 – the reasons for not awarding the bid to Q Civils are set out. The table relied upon shows that Q Civils' bid was 22.66% less than the engineer's estimate and 17.12% less than the average bid. The following is then stipulated after also relying on the SCMP: "It is against this background that Q Civils (Pty) Ltd was disqualified as their price was below 15% deviation from the engineer's price and average price submitted." Clearly 22.66% and 17.12% are in excess of and/or greater than 15% and not below and/or smaller than this percentage. This sentence must be read in proper context, bearing in mind the inability of the author to express himself in proper English. The Municipality and its legal team may be blamed for the imprecise and even confusing use of the

English language in describing the test suggested by the consulting engineer to be adopted in establishing when a tender price is either "very low" or "very high" or "substantially below or higher" than that of other bidders and "therefore not considered a fair and acceptable market price" in accordance with clause 16.2.16.2 of the SCMP, which test was accepted by the BEC and the BAC. In the process the Municipality and its legal team in several paragraphs of the papers conflated the terminology of the SCMP with the deviation principle suggested by the engineer and strictly applied by the BEC and the BAC *ex facie* the ROD. It does not make sense to speak of "substantially below or above 15% deviation from the engineer's or average price submitted." At other places in the papers different versions appear. Substantially below 15% may be 10% and substantially above 15% may be 20%, but there can be no doubt that every time the Municipality referred back to the engineer's suggestions as adopted by the committees as is clearly evident from the tables presented to the court which also form part of the ROD. The record speaks for itself: four bids in excess of the 15% deviation from the engineer's estimate or the average bid price were found to be non-responsible in terms of the SCMP and the remaining four bids were evaluated further whereupon FMP was eventually successful. It is really an issue of substance over form, but it was not surprising that Q Civils attacked the Municipality and the drafters of its documents for the uncertainty created. Bearing in mind the information before us, I am satisfied that the engineer, the BEC, as well as the BAC considered the factors contained in clause 16.2.16.2 of the SCMP in accepting the 15% deviation as a suitable objective factor or criterium.

[46] Insofar as it is one of the issues raised by Q Civils, I should make it clear that I could not detect any error of fact as alleged: Q Civils' bid did in fact exceed the 15% deviation threshold and its counsel did not try to convince us to the contrary. Contrary to the allowed deviation of 15%, Q Civils' bid was 17.12% lower than the average bid price and 22.66% lower than the engineer's estimate. It passed the test for functionality, but failed the test relating to risk and the bid was found to be non-responsible. The same applied to three other bidders. It was also argued on behalf of Q Civils that the 15% criterium was an arbitrary figure and the rhetoric question was asked as to why was the deviation not fixed at 16% or 14%. Its case is also that the pre-set 15% deviation was unlawful, but no authority for this proposition was offered. In my view the Municipality was fully entitled to preset the 15% deviation criterium and I refer to **<u>SANRAL</u>** *supra* at para [22]. At a stage it was even argued that the Municipality's committees should have used the norm set out in the SCMP, i.e. "the bid is substantially below or higher than that of other bidders." During argument Q Civils' counsel conceded the difficulty that may be experienced if a vague and open-ended factor such as "substantially below or higher" was to be applied and also that the bid committees could have evaluated bids based on a percentage deviation in price, although according to him, they should then have explained the percentage which they failed to do *in casu.* He sought to bolster his argument by referring to **<u>Medirite</u>** *supra*. In that case Leach JA found that the Minister failed to forward any reasons whatsoever for the insistence that a permanent wall from floor to ceiling be built to identify a pharmacy business conducted within a

mall or similar mixed business complexes. Here, the engineer explained the rationale for arriving at the figure of 15% and he orally presented his written report to the BEC. The record reflects, when the tables are scrutinised, that the 15% deviation was accepted by the BEC and the BAC.

[47] I cannot find any fault with the rationale for arriving at the figure of 15%. I find it acceptable that the Municipality's risk will increase if a contract is awarded to a contractor who has put in a bid substantially lower than either the engineer's estimate or the average bid price. The reasons advanced, i.e. cash flow problems, slower work progress, increased safety risks and reduction in quality of the works are sound. The rationality test has been passed. Refer to the **Bel Porto,** **Somali Association** and **Scalabrini** judgments mentioned in para [35] *supra.* The 15% figure, referred to as a "price envelope", is apparently the figure used in the North West Province. I refer to the **Road Mac** judgment *supra* where the court quoted evidence to the effect that a contractor will on the probabilities not make any profit if its bid is 15% below the benchmark and the bid is notwithstanding this awarded to it.

[48] The Municipality's deponent stated under oath that the 15% deviation figure is applied unbiased, objectively and not arbitrarily. In response Q Civils replied that the rationale for applying 15% (and not 13% or 16%) was not clear and it continued as follows: "I understand that bids that are unrealistically low cannot be accepted. Notionally, there is nothing wrong with this principle. But it must be applied in a lawful manner." Q Civils did not state that the 15% deviation

principle was applied in a different manner as that relied upon by the Municipality. It also does not state on what basis the principle was not applied lawfully. In my view the tables presented, those forming part of the ROD and those attached to the application papers (many which have been duplicated) are there for everybody to inspect. The paper trail of the tender process is substantive proof of a fair, equitable, transparent, competitive and lawful tender process.

[49] It was also submitted that Q Civils should have been allowed an opportunity to explain its bid price. The reliance on **Metro Projects** is misplaced. The court referred in that matter to the "ever-flexible duty to act fairly" and continued that fairness must be decided on the circumstances of each case, e.g. it may be necessary, particularly in a complex tender, to ask for clarification from a bidder or bidders before a proper evaluation can be undertaken. The court clearly did not lay down a rule of the Medes and Persians that has to be followed in each and every case. It will become a cumbersome and nightmarish process if every time bidders need to be disqualified, for whatever reason, to allow them an opportunity to address the relevant committee(s). In **Sethakatshipa Business Enterprise** *supra* Lekale J insisted that the municipality should have afforded the unsuccessful bidders an opportunity of a hearing and the failure to do so constituted a material irregularity. In my view the bid price of the unsuccessful bidders who were engaged in similar services on behalf of the municipality at the time, was not even 3% lower than the contract price eventually agreed upon. It could not be regarded as substantially too low. The small difference in

price and the fact that the unsuccessful bidders were executing similar services at the time and knew all about costing of the particular services must have persuaded the court to arrive at the particular decision and in that regard it cannot be faulted. However the facts *in casu* are totally distinguishable and if the court tried to lay down a general rule, I am of the view that that would be wrong. Refer again to **Metro Projects** and my exposition *supra.* In any event, in our matter the relevant committees had to do with quite a simple tender pertaining to the upgrading of a road, something that frequently has to be adjudicated, and without meaning to be derogatory, cannot be described as a complex tender. The facts *in casu* differ completely from the facts in **Westinghouse** *supra* and we are not bound by that judgment which in my respectful opinion is no doubt correct bearing in mind the particular facts.

[50] The Municipality's deponent stated under oath that Q Civils was fully aware of the application of the 15% deviation principle and even benefitted as a result in another recent tender process with reference to the bid number, notwithstanding the fact that it did not submit the lowest bid. The particular contract was in respect of the upgrading of Kenneth Kaunda Road in Bloemfontein. I refer to paragraph [9.5] of the answering affidavit as well as the Municipality's letter of 16 January 2016 and annexure M3.1. Q Civils" response is a bare denial and I quote: "This is denied – and it does not even serve to embolden any defence." I am satisfied that, following the principle laid down in **Plascon-Evans**, the Municipality's version can safely be accepted, especially insofar as further evidence has been tendered where the 15% deviation

principle was applied in several recent bids pertaining to construction contracts.

[51] I am satisfied that a 15% deviation from either the engineer's estimate, or the average bid price – the benchmark – is an objective factor and that it qualifies as an objective criterion for purposes of s 2(1)(f) of PPPFA. Therefore, although Q Civils might have scored the highest points, the Municipality's BAC was not bound to award the bid to it and was fully justified to award the bid to FMP which it did. This cannot be faulted.

[52] The bid invitation stipulated *inter alia* that the lowest bid would not necessarily be accepted, that the SCMP and PPPFA would be applied and that invalid and non-responsible bids in terms of clause 16.2.16 of the SCMP would be disqualified at the opening of bids. Q Civils' bid was not disqualified from the outset, but nothing turns on this. In **<u>Road Mac</u>** *supra* the full bench found that it was unnecessary to disclose certain objective criteria relied upon by the Province's tender committee in the bid invitation. Refer also to **<u>SANRAL</u>** *supra* at para [22]. In **<u>Westinghouse</u>** *supra* the Supreme Court of Appeal severely criticised Eskom for the manner in which so-called "strategic considerations" were figuratively speaking brought in through the back door whilst these considerations were never part of the particular bid and falling outside the parameters of the bid criteria. I considered this judgment, but it is distinguishable from the facts *in casu.* Here, all bidders knew from the outset that a too low or too high bid, or put otherwise, a bid substantially below or higher than that of other bidders, will be disqualified. In order to set an objective yardstick

or criterion, a deviation figure of 15% was accepted. This figure has been used by the Municipality in several other similar tender processes, in one case even to the advantage of Q Civils.

[53] In summary, I am satisfied that the process followed *in casu* was in line with the Constitution, the PPPFA and the SCMP. Also, that the evaluation of the bids was "undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude." See: **SANRAL** *supra* at para [20]. I also find, in line with para [22] of that judgment it was not required to disclose the 15% deviation in the invitation to bid, even on the basis that Q Civils or any of the other bidders were unaware of this criterium. Unlike as submitted by Q Civils, there was no unfairness in the process and the decision reached was not arbitrary, irrational or unlawful.

[54] In conclusion I find that no irregularity has been committed and consequently the other questions referred to in **Allpay** *supra* do not need any consideration.

IX ORDER

[55] Consequently the following order is issued:
The application is dismissed with costs.

JP DAFFUE, J

I concur

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AF JORDAAN, J

On behalf of applicant:	Adv. S Grobler
Instructed by:	Peyper Attorneys Bloemfontein
On behalf of respondent:	Adv. AH Burger SC
Instructed by:	Moroka Attorneys Bloemfontein