



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 12339/24

In the matter between:

DIMENSION DATA (PROPRIETARY) LIMITED

Applicant

and

**THE CITY OF CAPE TOWN
METROPOLITAN MUNICIPALITY**

First Respondent

**THE CITY MANAGER,
CITY OF CAPE TOWN**

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 13 DECEMBER 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant seeks the review and setting aside of several decisions taken by the second respondent (*“the City Manager”*), and the setting aside of certain clauses of the first respondent’s (*“the City’s”*) Supply Chain Management Policy (*“the SCM Policy”*) which was in effect on 9 June 2022.

[2] The decisions sought to be set aside are the following: (a) the City Manager's decision of 22 February 2024 that the applicant abused the SCM Policy by materially misrepresenting its compliance with certain specifications of Tender 328S: the Supply, Support & Maintenance of Telecommunications Network Security Infrastructure Hardware, Software Licenses & Assurance ("*Tender 328S*") in respect of the prices and discounts that it was entitled to ("*the Ruling*"); (b) the City Manager's decision of 26 April 2024 to restrict the applicant from conducting business with the City and to list it on the City's Register of Tender and Contract Defaulters for a period of five years from the date of decision ("*the Sanction*"); (c) ten decisions of the City to terminate contracts between it and the applicant ("*the termination decisions*"); (d) the City's decision not to conclude a contract with the applicant in relation to tender 415S 2022/23 which it had already awarded; (e) the City's decision not to award tender 372S/2022/23 to the applicant despite it being the preferred bidder. The applicant also challenges clauses 1.1.5, 1.1.7 and 1.1.8 of the definition of "*Abuse*" in clause 1 and clause 58.6 of the SCM Policy, which empowers the City Manager to list a person or any of its representatives on the City's Register of Tender and Contract Defaulters.

[3] The application was brought in two parts, and the paragraph immediately above is a summary of Part B. In terms of Part A, the applicant seeks interim relief to the effect that the City should continue to evaluate and adjudicate the applicant's bids in respect of tenders 372S, 102S and 115S, and be interdicted from awarding contracts in respect of those tenders if the applicant is found to be functionally compliant;¹ and an order suspending the decision to cancel the ten contracts already advertised to. In terms of a court order dated 10 June 2024, Parts A and B are to be determined together, and it is only necessary to determine Part A if this Court is unable to adjudicate Part B within a month of the hearing, which is what has transpired.² The papers are voluminous and have all been taken into account in this judgment. That includes the post-hearing submissions delivered by the parties with the permission of the Court.

¹ It later transpired that the applicant was not the preferred bidder in Tender 102 S, and that Tender 115 S was later cancelled. Accordingly, only Tender 372 S remains for determination out of the three.

² In terms of the court order of 23 July 2024, the City's decision to terminate the ten contracts was suspended, pending determination of Part B which, in terms of the amended notice of motion, was to include review of the termination decision relating to the ten contracts.

[4] It is also common ground that if the applicant succeeds in either the review of the Ruling decision or the Sanction Decision, its review relief in relation to the contract termination decisions and the refusal of the City to conclude the contract in respect of Tender 415S/2022/23 must follow suit. However, the applicant also relies on grounds for review of the termination decisions which are independent of its review of the Ruling and Sanction decisions.

B. RELEVANT FACTUAL BACKGROUND

[5] The City's network security infrastructure is made up of Palo Alto Network hardware devices, which require software licence subscriptions purchased from Palo Alto to function. In industry terms, Palo Alto is the 'Original Equipment Manufacturer' (*"the OEM"*), and in South Africa, it distributes its products through authorised distributors (in the present matter, this is Obscure Technologies) to vendors or resellers such as the applicant. Resellers, in turn, supply end users such as the City with both hardware and software.

[6] Software subscriptions must be regularly renewed with the OEM, and they are linked to the specific hardware device they were bundled with when purchased. In respect of subscription licence renewals, Palo Alto affords favourable discounts to resellers who initially installed the hardware with the end-user.

[7] According to the tender document inviting bids for Tender 328S, the stated intention of the tender was to obtain services of a service provider *'who will be able to assist the City by supplying hardware, software licences, provide Original Equipment Manufacturer (OEM) support and Labour services in order to maintain and support the network security Infrastructure consisting of Palo Alto security devices managed and monitored by the Panorama devices'*.

[8] The scope of the tender was described thus: *'hardware and software supply, OEM support and service assurance and fulfillment of the existing network security infrastructure'*. Further, it was *'mainly to maintain and/or optimise the current infrastructure'*, and it was stated that *'the service provider must be able to maintain*

this existing solution'. It was also stated that, in the event of accelerated big expansions of the security network, the City 'will engage with the service provider and agree on the new services if they require expanded responsibilities beyond what is priced for'.

[9] Section 13.2.1 described the security environment within which the services were to be provided by providing details of the City's existing hardware, as follows:

'The City currently operates the Palo Alto for intrusion prevention and new generation firewall as its network security services. The management platform runs on a panorama solution. The service provider must be able to maintain this existing solution and when required to be able to expand/optimize the solution.

Where new products are required for expansion, the City will request the service provider to supply professional services in order to appropriately plan, design and architecture in order to optimize and implement the solution of the existing security environment.'

[10] The tender document explained that the specific environment of the network security services was made up of the following: 8 x PA5260 PAN devices; 2 x PA820 PAN devices; and 1 x Panorama MS00-25 device. Thereafter, the following was stated: *'As mentioned in the introduction of this section, the security environment may expand during the course of this tender. It is important to note that these performance requirements will also apply on the newly installed systems that will require maintenance and monitoring.'*

[11] The tender document sought bids in respect of three categories relating to the City's network security infrastructure, namely, the supply of spares, software licences and OEM support (Part A1), support services and training (Part A2), and for service fulfilment and assurance (Part A3). Three tables corresponding to the three parts of the tender required bidders to set out their financial offers. The most relevant to these proceedings is Table A.1, headed *'Markup Percentage for Hardware, Software & OEM Support'*, which required bidders to indicate their mark-up on the OEM items they were offering to supply.

[12] The tender document required bidders to '*attach OEM price list in Schedule 15. The OEM price list must clearly indicate: a) OEM ITEM, b) OEM Price for the item, c) OEM Support Price per item (if applicable)*'. It explained that during the bid evaluation, the City would select a basket of quantities from the supplied OEM price list, add the offered mark-up indicated in Table A.1, and then arrive at the bidder's price for the item in question.

[13] On 9 June 2022 the applicant submitted its bid for Tender 328S, and it encompassed all three categories relating to the City's network security infrastructure. In response to the requirement to attach a price list, the applicant submitted a modified copy of Palo Alto's global products price list, which included hardware devices, new software licences, and software licence renewals. It also applied a reseller discount across the board of either 13% or 29% to the original pricing, depending on the type of item listed.

[14] Based upon an evaluation report of its Bid Evaluation Committee (BEC), the City's Bid Adjudication Committee (BAC) concluded that the applicant and another bidder, IT Naledi, which was the incumbent provider of the services at issue, were the only bidders that had submitted responsive tenders. On 14 November 2022, the BAC awarded the tender to the applicant as the main tenderer, and to IT Naledi as standby tenderer.

[15] Subsequently, IT Naledi appealed in terms of section 62 of the Local Government: Municipal Systems Act 3 of 2000 (Systems Act), alleging that the applicant had significantly understated the prices at which it could procure items from Palo Alto, with the intention of undercutting other bidders. The City Manager authorised a formal investigation into the allegations, and on 10 May 2023 the City's Forensic Services Department submitted a Forensic Report, which found that the applicant had indeed misrepresented its OEM pricing for renewal items and that consequently its bid and the BAC's evaluation thereof, were based on misrepresented pricing.

[16] On 6 June 2023 the City Manager upheld IT Naledi's appeal, overturned the BAC's award and declared the applicant's bid non-responsive for non-compliance with pricing specifications in the tender document (*"the appeal decision"*). Consequently, the tender was awarded to IT Naledi.

[17] On 3 August 2023 the City initiated what the parties refer to as a restriction process, in terms of which an Initiation Notice was issued, containing the core allegations against the applicant, namely that it had *'altered an original OEM price list and submitted same as part of [Tender 328 S] under the guise that it was the original price list obtained from Palo Alto via Obscure Technologies.*

[18] A flurry of correspondence ensued. There was also litigation in which the applicant challenged the appeal decision in a review (launched on 14 September 2023), which is pending; and sought to interdict the restriction process pending the review of the appeal decision (First Interdict Application) (launched on 20 December 2023), which has since been withdrawn.

[19] In his Ruling dated 22 February 2024, the City Manager held that the applicant had falsely represented the prices at which it could procure Palo Alto software licence renewals. He found that the misrepresentation was material because it related to, and impacted upon, the price of products which the City would procure under the resultant contract from the applicant. He ruled that the applicant was liable to being listed on the City's Register of Tender and Contract Defaulters for a period of up to five years in terms of clause 58.6 of the City's SCM Policy since it had committed abuse of the City's SCM system. In the Ruling, the City Manager invited the applicant to make representations regarding sanction.

[20] On 7 March 2024 the applicant launched a Second Interdict Application, seeking to interdict the continuation of the restriction process. That application has since been struck from the roll for lack of urgency.

[21] On 22 March 2024 the applicant submitted representations regarding why it should not be placed on the City's Register of Defaulters or sanctioned in the light of the finding that it had committed abuse of the SCM policy. On 26 April 2024 the City

Manager reached a decision regarding sanction, and found that the applicant's misrepresentations were intentional and were aimed at deceiving the City; that there were good reasons to restrict the applicant for the maximum period permitted by the City's SCM Policy; and ruled that the applicant should be restricted from doing business with the City and would be listed on the City's Register of Defaulters for a period of five years.

[22] Between 14 June 2024 to 27 June 2024, the City cancelled ten of the applicant's existing contracts with the City, refused to award Tender 372S to the applicant, and refused to conclude a contract with it in respect of Tender 415S.

C. REVIEW OF THE RULING

[23] The applicant states firstly, that there was no misrepresentation in its bid, and the City Manager's Ruling was based on an objectively incorrect interpretation of the tender document (*"the interpretation argument"*). Secondly, even if there was a misrepresentation, it was immaterial because it could not have affected the award of the tender and could only have prejudiced the applicant and not the City. Consequently, any such 'misrepresentation' fell outside the ambit of 'abuse' as defined in the SCM Policy, and as a result, the City Manager's finding of 'abuse' was *ultra vires*, alternatively, falls to be reviewed and set aside under section 6(2)(e)(iii) of PAJA for failure to have regard to the immateriality of the misrepresentation.

[24] Before examining these arguments, it is well to state what is now trite, regarding the consideration of review applications. As the Supreme Court of Appeal (SCA) explained in *MEC for Environmental Affairs and Development Planning v Clairison's CC*³:

'It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with

³ *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 18; since cited with approval in this Court by Rogers J in *JH v Health Professions Council of South Africa* 2016 (2) SA 93 (WCC) para 23, by a unanimous Full Bench in *Cape Town City and Another v Da Cruz and Another* 2018 (3) SA 462 (WCC) para 70 footnote 91 (not disturbed on appeal), and by Sher J in *Philippi Horticultural Area Food and Farming Campaign and Another v MEC For Local Government, Western Cape And Others* 2020 (3) SA 486 (WCC) para 92.

which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below ... was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.'

[25] It is equally trite that the question in proceedings for judicial review is not whether the best, or most correct, decision has been made, but rather whether it is one that is lawful, reasonable and procedurally fair.⁴

[26] As regards the interpretation of the tender document, the law is settled that the interpretation of documents is an objective, unitary exercise⁵ that requires consideration of language, context, purpose and background.⁶ The '*inevitable point of departure*' is the document's language. But it must be considered together with its context, and neither the text nor the context dominates.⁷ The '*triad of text, context and purpose*' comes together to determine a '*coherent and salient interpretation*'.⁸ Further, a commercially sensible interpretation,⁹ which does not undermine a document's apparent purpose,¹⁰ or lead to an absurdity,¹¹ is to be favoured. But this is no licence for sophistry: the proper interpretation should promote the evident

⁴ See *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA) paras 70-75 and the authorities cited there.

⁵ *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) para 8.

⁶ See *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* 2018 (3) SA 65 (SCA) para 16, with reference to *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 3; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 19.

⁸ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25.

⁹ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12. As was said in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 at 551, 'a commercial construction is likely to give effect to the intention of the parties'.

¹⁰ *Natal Joint Municipal Pension Fund*, para 18.

¹¹ *Natal Joint Municipal Pension Fund*, para 25.

business or practical purpose of a document, while sophisticated semantic analysis which would negate it should be avoided.¹²

[27] Turning to the interpretation argument, in these proceedings the applicant states that the tender document invited bids for only new Palo Alto products (including subsequent renewals), not renewal of existing subscriptions and licences. The only renewal items that fall within the scope of the tender, according to the applicant, would be renewals of subscriptions in relation to new devices that it (applicant) would take out on behalf of the City. And, in respect of such new items and subsequent renewals, it was entitled to the higher discounts which appeared in its amended OEM price list, and consequently, it made no misrepresentations in its bid.

[28] But, as I have already set out earlier, after the tender document described the City's existing hardware devices that make up the City's network security infrastructure, it states in express terms that the scope of the tender is '*mainly to maintain and/or optimise the current infrastructure.*' This wording makes clear that the current infrastructure - all of it - was to remain, and what is sought was its upkeep, or, as the *Oxford Dictionary* defines '*maintain*', '*to cause or enable [the existing infrastructure] to continue*'. The applicant has not been able to point to any part of the tender document itself that suggests otherwise.

[29] The City has pointed to four versions received from the applicant since the discrepancies in its bid were first brought to its attention.

29.1 In the combined processes of the Appeal Review, the forensic process, and the First Interdict Application, the applicant stated that it bid only for new products, and not renewal products, and asserted that the tender specifications did not require it to supply renewal items at all, and it did not submit renewal pricing in its response but new item pricing. However, contrary to this version, the amended

¹² *Commissioner, South African Revenue Service v Short and Another* 2018 (3) SA 492 (WCC) para 14; see also *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 at 551: '*Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.*'

OEM price list that the applicant submitted as part of its bid includes renewal items, including renewal items that are relevant to the City's existing network security infrastructure.

29.2 In the Second Interdict Application, the applicant now accepted that its amended OEM price list included software licence renewal items, and that it had applied the higher new item discounts to those items. It said that it did so on the basis that it would first supply the new product and thereafter attend to any renewals required and that this approach could potentially have been more cost-effective than IT Naledi's bid for 'renewal products' in respect of which IT Naledi as incumbent enjoyed higher discounts than it (applicant) did. The City's answer to this, which is not disputed, is that it is not possible for software licences related to the City's existing hardware devices to be bought as new items, because new software licences are bundled together with new hardware when they are first sold to the customer such as the City, and the serial numbers of such hardware are registered with Palo Alto. If the customer wants to continue using the hardware it purchased past the expiry date of the linked software licence, it will have to purchase a software renewal product. The customer does not have the choice of purchasing the software licence as a new product. The only way to achieve this would be to replace all the City's existing hardware devices as soon as the associated software licenses expired. The City's version is uncontroverted, and this second version accordingly cannot (or could not) avail the applicant. In any event, the applicant's bid did not expressly make any reference to such a proposal.

29.3 In its representations on sanction, the applicant set out yet another version, namely that it did not expect to provide the City with renewal products in relation to the City's existing hardware devices, and did not act with the intent to deceive when it included the amended OEM price list in its bid. It explained that it interpreted the tender document to require the submission of an OEM price list reflecting prices for all Palo Alto products, but which had to be altered at the very least, firstly, to reflect South African Rands instead of US Dollar prices - something the tender document expressly required; secondly, to substitute the column in the original OEM price list setting out discount categories with a column that set out the actual discounts which the applicant specifically enjoyed. In addition to the

explanation, the applicant stated that, IT Naledi is the incumbent reseller in respect of the City's existing Palo Alto devices and associated licences, enjoyed discounts which significantly exceeded those enjoyed by the applicant, and accordingly *'it made no sense to issue a tender document inviting bids for the renewal of existing subscriptions in relation to Palo Alto device, and was more reasonable, to simply contract with the incumbent for the supply of renewal subscriptions and negotiate for the benefit of the incumbency discount to be fairly shared between the incumbent supplier and the City by capping the incumbent's mark-up.'* This, the applicant stated was what it reasonably believed the City would do. In the Sanction decision, the City Manager pointed to the fact that the argument regarding IT Naledi's incumbency advantage was raised more than a year after the investigations began into the issue. In other words, that it could not have been held by the applicant when it submitted its bid.

29.4 In its replying affidavit in the second interdict application, the applicant presented its fourth version, namely that its bid self-evidently did not purport to offer to supply the City with renewal items in the first year of the contract, but, on the assumption it would have supplied the City with new devices and subscriptions in the first year, it would then procure renewal items at the discounts indicated in the purported OEM price list in the second or subsequent years. The applicant repeated that it would have been more reasonable and entirely feasible for the City to contract with the incumbent IT Naledi for the renewal of existing software licences, which would be the most cost-efficient solution in view of IT Naledi's undisputed superior discounts in relation to renewal products. The City disputes the cost-efficiency alleged in this version.

[30] I am in agreement with the City's observation that the versions summarized above present differing slants to each prior version proffered by the applicant, and that they are appropriately referred to as different exculpatory versions. However, I do not consider it necessary to deal with them in detail because, firstly, the applicant does not deny its reliance on the various versions along the way, and secondly, in these proceedings it does not directly or wholly rely on any of them in the terms summarized above. But, as the sequence set out by the City demonstrates, the so-called first and second exculpatory versions have long-ago been discarded as either

untrue (in the case of the first version), or untenable (in the case of the second version). What remained, as at March 2024 were the third and fourth versions, in terms of which the City was to contract with a second supplier for the procurement of software licence renewal products associated with all its existing hardware devices, but procure the services of the successful bidder for new items.

[31] Whatever of these versions the applicant still maintains, there is no support in the text of the tender document for an interpretation that software licences related to the City's existing hardware devices were to first be procured by the successful bidder as new items, and only to be supplied the bidder as renewal items at a later stage. Nor for an interpretation that the renewal items would be obtained through another supplier such as IT Naledi, while the successful bidder was to only be responsible for supplying new items. Or for an interpretation that the successful bidder would only be required to supply new items and only later be required to supply renewal items.

[32] Rather, what it is common cause is that the City's existing infrastructure required the renewal of the City's software licences. Furthermore, that the renewal of the City's software subscriptions must be regularly renewed with the OEM, and, in turn, the software subscriptions to be renewed are linked to the specific hardware device they were bundled with when purchased, and the serial numbers of such hardware are registered with Palo Alto. It is not denied that it is not possible for software licences related to the City's existing hardware devices to be bought as new items.

[33] There is simply no support in the tender document for an interpretation that the successful bidder would not have to supply software licence renewals for the City's existing hardware devices. Or, to put it differently, that renewal of the City's existing software subscriptions was excluded from the ambit of the tender.

[34] And even the applicant did not draw or point to any such distinctions or limitations in its bid. Contrary to its current version, the amended OEM price list which was submitted with the applicant's bid included renewal items which were relevant to the City's existing network security infrastructure. The bid gave no

indication that it was only in respect of new items, or that it was specifically not in respect of renewable items.

[35] Faced with these textual constraints, the applicant relies on three contextual considerations for departing from the textual interpretation of the tender document, and for support of an interpretation that what the tender document actually sought was to replace the existing network security infrastructure of the City. First, the difference between this tender and a previous tender, Tender 229S, which indicates the City's intention to distinguish Tender 328S from its '*uncompetitive predecessor*'. Second, that the textual interpretation of the tender document would lead to the tender being '*rigged*' in favour of the current incumbent, IT Naledi, and be in violation of section 217 of the Constitution of the Republic of South Africa 108 of 1996. Third, that its competitor, IT Naledi, submitted a number of alternative bids, two of which were for new systems.

[36] As regards the differences between Tender 328 S and Tender 229 S, although the issue took much of the applicant's papers, the argument resolved itself into the following. Whereas the tender document for Tender 229 S included mark-up tables which expressly referred to the City's existing hardware devices by model number, and listed the licence subscriptions which the City wished to procure, Tender 328 S did not do so. Neither did it identify the subscription licences required, but instead asked bidders to provide the OEM price list, stating merely that '*the City will select a basket of quantities from the supplied OEM pricing*'.

[37] On the basis of this difference between the two tenders, the applicant argues, relying on *Port Elizabeth Municipal Council v Port Elizabeth Tramway*¹³ that the omission of an equivalent of Table 4 found in Tender 229 S from Tender 328 S indicates an intention on the part of the City to change the terms of the tender from one of maintaining its existing network security infrastructure, including the renewal of its existing software licences, to one replacing it.

¹³ *Port Elizabeth Council v Port Elizabeth Tramway* 1947 (2) SA 1269 (A) at 1279.

[38] In my view, the difference between the two tender documents is of no moment, and cannot, in the face of the clear text of the 328S tender document, be elevated to an interpretative aide. I have also referred to the common cause facts regarding the origin of the tender 328S, in terms of which it is undisputed that what the City sought and needed was renewal of software licences on its existing infrastructure.

[39] In any event, the City's response regarding the factual basis for this argument, which shows the applicant's argument to be without merit, is not disputed in the papers. The City's answer is that the mark-up tables cannot be considered in isolation, and both tenders' pricing schedules must be considered in the context of their similarly worded tender specifications. In this regard, the City points out that the tender document for Tender 229 S described the City's intention to contract for products and services in substantially similar terms as those which appear in the tender specifications for Tender 328 S, namely an intention to '*expand, support, maintain and mature*' the City's existing network security infrastructure. Moreover, the tender specifications in both tender documents identified the City's existing hardware devices in near identical terms, with express reference to the model numbers of the City's existing hardware devices.

[40] The City also disputes the applicant's claim that Table 4 in Tender 229S sets out subscription renewals which the City wants to procure, and points out that Table 4 does not identify the licence subscriptions as 'renewals', and this appears clearly in the tender specifications for Tender 229S. It also points out that the tender specifications for Tender 328S do the same. None of this disputed by the applicant, and it must accordingly be considered to be admitted in terms of *Plascon Evans*¹⁴. It means the factual basis for the argument which relies on the alleged 'notable differences' between the two tenders for the interpretation contended by the applicant, is not sustained.

[41] In those circumstances, the reliance on the case of *Port Elizabeth Municipal Council* has no factual foundation. It is correct that, depending on the nature, extent

¹⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] (3) SA 623 (A).

and significance of the change and the drafter, a change in language in subsequent legal instruments dealing with the same subject matter *prima facie*, may signify a change of intention, although this is not inevitable.¹⁵ In light of the discussion immediately above, the change of intention has not been established on the facts of this case. The significance of the omitted Table 4 that the applicant contends for is not sustained on the evidence. In any event, in the face of the clear and unambiguous language of the 328S Tender document, I am not persuaded that the intention advocated by the applicant may be arrived at merely from comparing the two tender documents. In this respect, the facts of this case are distinguishable from *Port Elizabeth Municipal Council*.

[42] As regards the rigging - constitutionality argument, the applicant states that any tender that includes the renewal of the City's existing software licences results in an uncompetitive tender process in favour of the incumbent, IT Naledi. This is because IT Naledi, to the City's knowledge, enjoyed '*protectionist discounts on renewals*', and this is evidenced by the fact that IT Naledi was able to win Tender 229S on the strength of its protectionist incumbency. Consequently, Tender 328S violates section 217 of the Constitution.

[43] One glaring observation regarding this argument is that this Court has not been called upon to strike down or set aside the text of the tender document based on the alleged unconstitutional, anticompetitive and unlawful grounds. This is understandable because the applicant seeks relief granting it the same tender. The lawfulness and constitutionality of the tender specifications of Tender 229S and the Tender 328S have no bearing on its objective meaning in the face of a clear and unambiguous statement of intent in the tender specifications to contract for the maintenance of its existing infrastructure.

[44] And, as the City argues, if the applicant genuinely believed the textual interpretation of the tender document to result in unconstitutionality, its remedy was

¹⁵ *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 186B-C, referring to *Port Elizabeth Council*. see also *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 (4) 885 (SCA) at 889D-E where Schutz JA declined to follow this reasoning in circumstances where the changed terms were drafted by a person who did not seem to be 'one with a ready appreciation of the lawyer's notion that a change in wording is a *prima facie* indication of a change in intention'.

to apply to have the tender document aside, and it has not done so. Instead, it submitted a bid, purporting to comply with the tender, whose terms were clear and unambiguous. It was only a year into the investigations that this argument was raised, when it made submissions in respect of Sanction. Clearly, this argument amounts to retrospective reconstruction of an interpretation which appeals to constitutional considerations for its force. This is impermissible, and I have not been referred to any authority in support of such an approach in the face of clear and unambiguous text of the tender document.

[45] The third peg to the applicant's context-based interpretative aide is its argument that IT Naledi submitted a number of alternative bids, two of which were for new systems. First, it is not disputed that the scope of Tender 328S entailed a possible expansion and the purchase of new items. The bid by IT Naledi was accordingly not misplaced. I also note that the applicant does not go as far as to allege that IT Naledi failed to meet the requirements of the tender. There is no evidence to that effect. Like the applicant, IT Naledi was required to comply with the requirements of the bid, and according to the evidence, it did. Moreover, unlike the applicant's, the respective OEM price lists contained in IT Naledi's bid clearly indicated to the City the ambit of its bid. The two are accordingly not comparable on that score.

[46] There is accordingly no merit to the applicant's context-based arguments. The interpretative aides relied upon by the applicant call to mind the cautions signalled in the tender document - and there were many - regarding the gravity of misunderstanding or misinterpreting its requirements. It was not stated there that, in the case of failing to understand the tender document, the default position would be any of these options. If every tenderer were to be allowed to impose its own subjective, interpretative lens upon a tender document, retrospectively, that would obviate the need for the bid evaluation procedures. It would also go against the very constitutional provision that the applicant seeks to rely on, section 217, which imposes a duty on the City to ensure that public procurement is effected in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

[47] Like most tender documents, the Tender 328S document went to great lengths to caution bidders to understand the gravity of misunderstanding or misinterpreting its requirements. In this regard, it placed a clear and unambiguous responsibility on bidders to familiarize themselves with, and to understand, the tender requirements, and to seek clarification if necessary. Section 2.2.1.1.4, entitled '*Non-compulsory clarification meeting*', '*strongly*' recommended that bidders attend the meeting '*at which they may familiarize themselves with aspects of the proposed work, services or supply and pose questions.*' Section 2.2.8, entitled '*Seek Clarification*', required bidders to '*Request clarification of the tender documents, if necessary ...*'

[48] Significantly, section 2.2.21 required a bidder to warrant that it has:-'*a) inspected the Specifications and read and fully understood the Conditions of Contract; b) read and fully understood the whole text of the Specifications and Price Schedule; and c) thoroughly acquainted himself with the nature of the goods or services proposed and generally of all matters which may influence the Contract...d) requested the [City] to clarify the actual requirements of anything in the Specifications and Price Schedule, the exact meaning or interpretation of which is not clearly intelligible to the Tenderer.*'

[49] Lastly, section 5 of the tender document, which is entitled '*Price Schedule*', dealt with the manner in which bidders were to be evaluated on price. At section 5.11 bidders were cautioned to ensure that they price their bid only '*after fully understanding the requirements as specified in the ... specifications*', and once more referred bidders to the clarification meeting.

[50] All the above leave very little room, if any, for an interpretation which is contrary to the clear text of the tender document. Or which is contrary to what the City intended – which is also spelled out in the tender document – when it advertised the tender. There is even less room for interpretative arguments - discussed above - which are clearly mounted, for the first time, after adjudication of the bid.

Material misrepresentation

[51] Section 13.1 of the tender document required bidders *‘to supply Original Equipment Manufacture price lists for the products they are offering to assist the City in evaluating the tender. Please attach OEM price list in Schedule-15. The OEM price list must clearly indicate: a) OEM item, b) OEM Price for the item, c) OEM Support Price per item (if applicable)’*. It further explained that, during the bid evaluation, the City would select a basket of quantities from the supplied OEM price list, add the offered mark-up, and then arrive at the bidder’s price for the item in question.

[52] Contrary to these express requirements, the applicant did not supply Original Equipment Manufacture price lists for the products it was offering. Instead, and unbeknown to the City, it provided its own adaptation, which was an altered version of a list it says it had obtained from Obscure Technologies. In explanation, the applicant states that, in order to comply with the tender document, it made some necessary changes to an excel workbook provided to it by Obscure Technologies. First, it converted the prices to reflect in Rands instead of US Dollars. Then, it removed irrelevant sheets from the workbook, renamed a column, replaced discount categories with actual discount percentages available to it on the basis of its ‘diamond tier’ status with Palo Alto, and added two further columns, one showing the ‘USD Cost’ after applying the discount percentages, and the other showing ‘ZAR Cost’ at the rate of exchange required by the tender document.

[53] None of these alterations are disputed by the City. Its complaint, which ultimately led to its impugned decisions, is firstly that the applicant failed to disclose them at the time of submitting the bid, thus giving the impression that it was submitting the original OEM price list received from Obscure Technology, as required by the tender document. Further, that the applicant applied new item discounts to all the products in its altered OEM price list, including renewal items, related to the City’s existing hardware devices. But in fact, it was not entitled to those discounts in respect of renewal products associated the City’s existing hardware devices, and was only entitled to such discounts in the event that it replaced the City’s existing devices.

[54] In respect of the latter complaint, the applicant explains that the discount percentages it inserted into the price list were communicated to its employee by a Palo Alto representative and that it at all times believed that these were the discounts it would be entitled to receive on new Palo Alto products. This was in accordance with its interpretation of the tender document that it was bidding in respect of subscriptions and licences for a new system, not in respect of renewals for an existing system. Thus, it states that it bid on the basis of higher 'diamond tier' discounts to which it would be entitled from the OEM for subscriptions and licences in relation to a new system and not on the basis of the lower discounts that it would be entitled to in respect of subscriptions and licence renewals for the existing system where IT Naledi was given protectionist discounts by the OEM.

[55] It transpired, however, that the applicant was not entitled to the discounts reflected in the price list it submitted. Although Obscure Technologies confirmed that the applicant is a 'diamond innovator' partner, it revealed that the applicant was only entitled to discounts of 5% on support items and 10% on hardware and subscription items. In fact, according to Obscure Technologies, not only had the applicant altered the original OEM price list obtained from Palo Alto, but it had included discounts which were in excess of what it could hope to receive from Palo Alto for the purchase of items it offered to the City, and consequently prices materially lower than those quoted on behalf of Palo Alto to the applicant.

[56] The applicant's attitude in these proceedings is that, because the prices it included in its bid were lower than the OEM renewal prices that the City contends that it should have included, it is fanciful to suggest that it would deliberately and fraudulently have misrepresented prices so as to prejudice itself and benefit the City. Secondly, that any 'misrepresentation' by it regarding the prices it would obtain from the OEM was not a material misrepresentation capable of supporting a finding of 'abuse' or the imposition of a sanction of the sort imposed by the City Manager.

[57] But this is not an answer to the charge of misrepresentation leveled at the applicant. The point of departure is that the tender document stated in peremptory terms, that a service provider was required to *'supply Original Equipment Manufacture price lists for the products they are offering to assist the city in*

evaluating the tender’. This, it did not do. And, save for explaining the changes it effected, it has yet to explain why it did not comply. The fact that it made alterations to the price list may explain how it deviated from the tender requirements, but it does not explain why it failed to comply with the requirements.

[58] As a seasoned tenderer the applicant would have appreciated the premium on strict compliance with tender requirement, especially one relating to pricing. Since this was a requirement from which a bidder had no discretion to depart, the very least it could have done was to explain its departure from that requirement. That would entail disclosing that it was not submitting the original OEM price list, and explaining the alterations that it has since revealed. Alternatively, as the City suggests, it could have attached its altered price list in addition to the original price list.

[59] But the applicant’s non-compliance is worse when viewed in the light of the prevailing circumstances at the time of submitting the altered price list. Seven days prior to submitting its bid, it obtained two quotations from Obscure Technologies, specifically for submission with its bid in this tender. One was a new business quotation (37895), worth a total value of just over R 16.2 million excluding VAT. That quotation reflected the applicant’s discounts as being either 13% or 29%, but was in respect of items with model numbers¹⁶ that are not part of the City’s existing network security infrastructure. Moreover, the discount column contained in the new business quotation was only applicable to the items listed in that quote, which again had no bearing on the current tender.

[60] The other quotation received from Obscure Technologies was a renewal quotation (37898), worth a total value of just over R 15.4 million excluding VAT, and was in respect of renewal items that are related to the City’s existing network security infrastructure¹⁷, and it reflected discounts at either 8% or 5%. This is the only one of the two quotations that could possibly relate to the current tender, because it alone involved model numbers (5260 and 820) that were specified in relation to some equipment in section 13.2 of the tender document.

¹⁶ PAN-5450, PAN-5400, PAN-600, and PAN-460 or no model number.

¹⁷ Indicted by the model numbers PAN-5260 and PAN-820 or no model number.

[61] The applicant submitted neither of the above quotations to the City, and instead submitted its altered version, as already discussed. Regardless of whether it was entitled to alter the price list, the information contained in the list submitted was not correct. In the altered OEM price list, the applicant applied discounts of 13% and 29% across the board, including in respect of renewal items which are listed in the renewal quotation that it had obtained from Obscure Technologies.

[62] It is common cause on the papers that the applicant is not entitled to discounts in respect of certain software licence renewals which appear on the face of its amended OEM price list, insofar as these relate to the City's existing hardware devices. It is also common cause that the applicant knew that it was not entitled to those discounts. According to Obscure Technologies, by the time of submitting its bid, the applicant had been made aware of the fact that it did not qualify for incumbent discounts for the renewal portion of its submission, because it was not the incumbent reseller for the City. Obscure Technologies had informed it that it only qualified for discounts of 5% and 8% on renewal items.

[63] Despite that knowledge, the applicant submitted a list which represented that it was entitled to those discounts. In the altered version the applicant represented that it enjoyed discounts of 29% for hardware and 13% for support services on all items for which it had submitted a bid. It did not qualify for such discounts in respect of renewal items because it was not the incumbent reseller. And contrary to a version supplied by the applicant during the forensic investigation, some of the items contained in its altered OEM price list, only qualified for renewal discounts, not in respect of new items.

[64] The applicant relies on a transcript of its employees' meeting of 6 June 2022, where the applicant's pricing strategy in the bid was discussed, as contemporaneous evidence that its interpretation of the tender document was genuinely held, and not a stratagem to defraud the City or to misrepresent its pricing. First, I point to the observation made by the City, that the transcript of the meeting of 6 June 2022 does not deal with the altered price list in any way, and sheds no light regarding the amended price list that was eventually submitted with the applicant's bid. At best for

the applicant, the recording indicates that, as at 6 July 2022, the participants in that meeting believed that the applicant could rely on the new business quotation (37895) for its bid. Yet, despite that purported belief, the applicant submitted an amended OEM price list which included renewal items contained in the renewal quotation and included applicable discounts and resultant prices on those items. The apparent disjuncture, or unexplained leap of logic, between the two events has not been explained by the applicant.

[65] All of the above leads ineluctably to the conclusion that the applicant knowingly misrepresented the facts. As the City points out, absent any indication in the applicant's bid that it was offering to supply new items only, the City would have been, and was, misled into believing that the higher discounts, and lower prices, applied to the renewal of the City's existing software licences. Or, to put it differently, the unqualified manner in which the applicant completed and submitted the OEM price list as part of its bid had the result, which in the circumstances the applicant must have foreseen, of deceiving the City into thinking that it was entitled to the discounts which its purported OEM price list reflected in respect of all items, including renewals of the City's existing software licence subscriptions in respect of the City's existing hardware.

[66] The effect on the City is that the basket of quantities that it had selected for evaluation purposes were not entitled to the discounts applied the applicant. The evaluation and adjudication of the applicant's bid was accordingly based on incorrect pricing. Another effect is that the applicant was selected as a successful bidder in circumstances where its bid was in fact non-responsive because it did not comply with the pricing specifications set out in the tender document. Another bidder, in fact, qualified.

[67] It is no wonder that the explanations of the Original Equipment Manufacturer, Palo Alto and its authorised distributor, Obscure Technologies, were obtained during the investigation process, because their roles were necessarily implicated. The information submitted by the applicant represented prices at which it could source items from them. And they were constrained to confirm that the applicant's amended

OEM price list misrepresented the prices at which it would be able to procure the renewals of the City's existing software licence.

[68] These are only some of the consequences of the applicant's conduct which contribute to the reason that it is no answer to argue, as it does, that it only would absorb the financial implications of its pricing. There were other, more significant consequences than financial implications for its conduct, although these are not all specifically mentioned in the City's documents and pleadings. The statutory purpose which informed the City Manager's authority under the City's SCM Policy to safeguard the integrity of the City's SCM system is unrelated to any prejudice that might arise to the City from a non-compliant bid.

[69] The City Manager was accordingly justified when he held, based on the considerations that he took, that, by submitting the purported (but not actual) OEM price list the applicant misrepresented its compliance with the tender requirements. Furthermore, the misrepresentation was material because the price list it had submitted was incorrect in material respects. The entries for renewal products incorrectly stated applicable discounts which were significantly higher than those in the actual OEM price list, and resulting in prices which were lower than those in the actual OEM price list.

[70] The applicant's argument is that its misrepresentation was not material because it did not affect the award of the tender; and the misrepresentation could have only benefitted the City and prejudiced it, because only it (applicant) would have been bound by the lower prices indicated in its bid in any subsequent contract. Consequently, the City Manager acted *ultra vires* clause 58.6 of the SCM Policy when he found that the misrepresentation amounted to an '*abuse*' under that clause, alternatively he failed to have regard to the lack of materiality.

[71] The applicant adds that the suggestion that its 'misrepresentation' impaired the City's ability to assess whether it could perform the contract is without substance because the City knew that the applicant was a company of unquestioned substance which, at the time, was the incumbent provider to the City in terms of 15 different IT contracts running into billions of rands of turnover; and was part of a business group,

whose financial statements had an annual turnover of more than a trillion rand for the financial year ending 31 March 2022.

[72] In the SCM Policy, the definition of 'Abuse' includes a '*misrepresentation on information submitted for the purposes of procuring a contract with the City*'. And if the information was submitted for the purposes of procuring a contract with the City, it is deemed material because it translates to abuse. This is not a high threshold to reach in the circumstances of this case.

[73] As the City correctly summaries the position on this score, either the applicant offered to renew the City's existing software licences, in which case, the prices reflected in its amended OEM price list were understated, with the result that it was awarded the tender when, on its own version, it would not have been awarded the tender had it bid for renewal items at the much lower, non-incumbent, discounts. Or, the applicant did not offer to supply renewal items, or offered to supply renewals only in limited circumstances, but it failed to state this in its bid with the result that its bid was accepted as responsive when it otherwise would have been declared non-responsive as it was, on appeal, when the true facts came to light. In either event, clause 58.6 is met.

[74] It cannot be gainsaid that the information supplied by the applicant was '*submitted for the purpose of procuring a contract with the City*'. Why else would it be included in the bid? And, specifically in this case, the OEM price list was supplied to meet the requirement contained in the tender document '*for the products they are offering to assist the City with*'. Nothing more was required in terms of the SCM Policy in order to reach a conclusion that the misrepresentation was material, as the City Manager did in the Ruling.

[75] As for the subjective considerations espoused by the applicant and the relative weight of prejudice to either party, they are not relevant considerations for purposes of determining whether an 'abuse' was committed in terms of the SCM Policy, and were not directly relevant to the inquiry required of the City Manager in reaching his conclusion in this regard.

[76] Lastly, I observe that the serious consequences and materiality of misrepresenting information contained in the bid would have been known to the applicant when it submitted its bid because of the cautions sounded in the tender document, which included the following two clauses: (a) section 2.3.6, which provides that any tenderer who engages in fraudulent practices will be '*instantly*' disqualified; and section 1.13 of the General Conditions of Contract, which defined a '*fraudulent practice*' to mean '*a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of any bidder ...*' And once more, the considerations of section 217(1) of the Constitution already adverted to apply in regard to the materiality finding because organs of state contracting for goods and services '*must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*'. That provision would have little value if the City was to take into account the subjective considerations relied upon by the applicant in this discussion.

[77] I accordingly find no merit in the applicant's review application against the Ruling decision of 22 February 2024. I have found no basis to conclude that the decision was based on an error – whether factual or legal, or that it was irrational or unreasonable. The review against the Ruling must accordingly fail.

D. REVIEW AGAINST SANCTION

[78] The only challenge against the Sanction is based on irrationality. The applicant states that the City Manager was mistaken when he asserted in the Sanction that the evaluation basket selected for assessment of IT Naledi's tender comprised only 8 renewal items out of a total basket of 28, when in fact all 28 items were IT Naledi's subscription renewal items. This mistake resulted in the City Manager failing to have regard to a relevant factor, namely that the admitted competitive advantage enjoyed by IT Naledi extended to the full evaluation basket of Palo Alto products. Accordingly, says the applicant, the Sanction decision is liable to being set aside in terms of section 6(2)(f)(ii) of PAJA because it is not rationally connected to one of the reasons the City Manager gave for the decision.

[79] The relevant part of the Sanction decision in this regard is paragraph 22, and it contains the first of the 'difficulties' identified by the City Manager in respect of arguments raised on behalf of the applicant at that stage. In turn, those arguments related to the constitutionality of the tender when regard is had to IT Naledi's incumbency status; the applicant's consequential interpretation of the tender; and the Palo Alto discounts and resulting prices included in the applicant's bid. It was in respect of these arguments that paragraphs 21 and 22 of the Sanction stated as follows:

"21 I have ten difficulties with these submissions.

22 First, Dimension Data's submission that IT Naledi would invariably win if the Tender had invited bids for the renewal of the City's existing subscriptions in respect of the Palo Alto devices (hardware) which [it] had introduced into the City' network, is unfounded and incorrect and as a seasoned bidder Dimension Data would have known that to be the case. Section 13.1 of the tender stated that the City would select a basket of quantities from the OEM pricing supplied by the bidders and add each bidder's tendered mark-up percentage to determine their final price. The extent of the advantage enjoyed by IT Naledi as the incumbent reseller in respect of such renewal items, in the City's evaluation of the bids, would depend on the number and weighting of the renewal items in the basket of quantities selected by the City. As things turned out, the basket selected by the City's SCM Bid Evaluation Committee (SCMBEC) comprised 3 parts in the form of tables. Table A1, headed 'Markup Percentage for Hardware, Software & OEM Support', comprised five items, only one of which was a renewal item (8 units out of a total of 28 for this part). Table A2, headed 'Adhoc Support Services & Training', comprised 6 items. Table A3, headed 'Service Fulfillment and Assurance', comprised a single item, but as the SCMBEC explained in para 3.6 of its report to the SCMBAC, 'Carried the most weighting... as this will be the most significant cost of this tender'. (own emphasis)

[80] It is difficult to ignore the fact that paragraph 22 was introduced via paragraph 21 as comprising one of the grounds for rejecting the applicant's arguments. In other words, that paragraph 22 forms the first of ten reasons for rejecting the applicant's

submissions. It is in this regard that the applicant relies on *Patel v Witbank Town Council*¹⁸, which emphasizes that where an administrative actor bases a decision on multiple reasons, if any one of those reasons is bad, the bad reason taints the entire decision, and one out of many decisions is sufficient to vitiate the whole decision. In *Patel*, the following was stated:

“(W)hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision ... This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it.”

[81] The above passage and reasoning have been quoted with approval and adopted by the Supreme Court of Appeal in *Westinghouse Electric Belgium SA v Eskom Holdings*¹⁹ where the court made clear that once a bad reason is put forward to justify a decision *“it is not possible to say that the reasons given for it provide a rational connection to it”* and the decision falls to be reviewed and set aside under section 6(2)(e)(iii) of PAJA.²⁰

[82] Equally difficult to ignore is the specific reason for including the phrase ‘8 units out of a total of 28’ complained about. As is evident from the text of the paragraph, the phrase was included to explain how IT Naledi’s bid was evaluated in light of the statement in section 13.1 of tender document that the City would select a basket of quantities from the OEM pricing supplied by a bidder and thereafter add the bidder’s markup percentage to determine the final price. More specifically, when he mentioned the phrase, the City Manager was explaining *‘the extent of the advantage enjoyed by IT Naledi as the incumbent reseller of such renewal items’*, and he

¹⁸ *Patel v Witbank Town Council* 1931 TPD 284.

¹⁹ *Westinghouse Electric Belgium SA v Eskom Holdings* 2016 (3) SA 1 (SCA) at paras 44 to 46

²⁰ *Westinghouse Electric Belgium SA v Eskom Holdings* 2016 (3) SA 1 (SCA) at paras 44 to 46.

explained that *'it would depend on the number and weighting of the renewal items in the basket of quantities selected by the City'*.

[83] The phrase *'8 units out of a total 28'* was accordingly the very nub of the explanation. It was the City Manager's attempt to apply the *'number and weighting of the renewal items in the basket of quantities selected by the City'* in respect of IT Naledi. Yet, it is common cause that all 28 items contained in the basket selection for the assessment of IT Naledi's price list were subscription renewal items. Accordingly, the facts relied upon for the assertion in paragraph 22 were not correct.

[84] The City says this is immaterial, and what matters ultimately is that, amongst other things, the renewal items referred to accounted for only part of the tender. It explains that the context in which the issue of the number of renewal items in the BEC's evaluation basket arose was the applicant's representations to the City in which it questioned whether the tender document was equitable and competitive given IT Naledi's incumbency-based advantage, and gave assurance that it did not act with the intent to deceive. It also emphasizes that both arguments were found to be without merit.

[85] Furthermore, the question of which renewal items were included in the basket did not emerge from the tender document, but emerged later, during the evaluation stage, because the tender document had not specified what was to be included in the basket of quantities that were to be later considered by the BEC. In this regard, reference is made to the remainder of paragraph 22 of the Sanction, which shows what occurred in consequence of the tender document as distinct from what was stated in the tender document. Indications in that regard are firstly, the statement in the paragraph that evaluation of the bids would depend on the number and weighting of the renewals in the basket of quantities selected by the City; as well as the reference by the City Manager to *'as things turned out'*.

[86] The City points out that, other than to have known that there would be a basket of quantities taken into account, the applicant would not have known what this consisted of in order to inform its interpretation of the tender specifications which it relied upon significantly in its representations. As a result, the question of what

subsequently emerged (even if the City Manager's statement was incorrect) played no 'appreciable' or 'significant' role in his reasons as to why the applicant's interpretation of the tender document did not constitute an innocent mistake.

[87] It is correct that the detail of the basket items to be selected for evaluation was not set out in the tender document, and that it only arose during the evaluation stage, and the effect is that the applicant could not have held the interpretative argument it espoused at sanction stage because these were unknown quantities at the stage when it submitted its bid. That, however, only deals with the applicant's argument relating to its interpretation of the tender, which the City ultimately held not to be genuine.

[88] It does not deal with the fact that the applicant relied considerably on the argument that IT Naledi was at an unfair advantage as a result of its incumbency status. The most decisive way to deal with that argument was to set out 'statistics', which what the City Manager sought to do by referring to the phrase '8 out of 28 basket items'. Such was the importance of the phrase to the Sanction decision. The result of the mistake is that it cannot be concluded from the decision that the City Manager had proper regard to whether IT Naledi had the alleged competitive advantage which extended to the full evaluation basket of Palo Alto products.

[89] Given the centrality, though newly-found, of this argument in the applicant's representations regarding sanction, the result is that the error tainted the whole decision. The erroneous assertion was the only reference or explanation in the Sanction decision of what was taken into account in evaluating IT Naledi's bid, an issue which the City Manager was constrained to deal with on account of it being raised by the applicant in the context of its argument regarding the alleged advantage of IT Naledi's incumbency status. In the words of the SCA in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*²¹, the issue of the numbers (8 out of 28 in this case) played an appreciable role in the Sanction decision. I am accordingly not persuaded that the City's answer in this regard meets the hurdle

²¹ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2007 (1) SA 576 (SCA).

raised by the case law referred to earlier namely *Patel v Witbank Town Council* and *Westinghouse Electric Belgium SA v Eskom Holdings*.

[90] I accordingly conclude that the Sanction decision falls to be reviewed and set aside under section 6(2)(e)(iii) of PAJA.

E. CONSEQUENCES OF SETTING ASIDE THE SANCTION DECISION

[91] In light of the above conclusion, I consider it unnecessary to decide the alleged invalidity of clauses (1.1.5, 1.1.7, 1.1.8, 58.6 and definition of 'abuse' in clause 1) of the SCM Policy which concern the powers of the City Manager to initiate a blacklisting process against bidders by placing them on the City's Register of Tender and Contract Defaulters. That relief is sought in paragraph 1 of the amended notice of motion.

[92] Related to the relief sought in paragraph 1 of the amended notice of motion is the relief sought in paragraph 4 of the amended notice of motion, in terms of which the applicant seeks review of the respondents' decision to initiate steps in terms of clauses 57 to 60 of the SCM Policy, which include 58.6. I also note that the applicant was silent regarding this relief, both in the heads of argument and in Court.

[93] It is furthermore common ground that if the applicant succeeds in the review of the Sanction Decision (or the Ruling decision), its review relief in relation to the contract termination decisions and the refusal of the City to conclude the contract in respect of Tender 415S/2022/23 must follow suit because the City's stance in relation to both arose from the Ruling and Sanction decisions. Accordingly, the challenges in respect of those decisions must be upheld.

[94] As regards the interim relief, what remains for determination is Tender 372S. In terms of paragraph 9 of the court order of 10 June 2024 the City undertook to not finally adjudicate this tender, effectively pending the determination of Part B. In terms of paragraph 8.3 thereof any order made in respect of Part A was to operate pending the determination of Part B. The effect is that the court order of 10 June 2024 has provided the interim relief in this regard, until now.

[95] It is furthermore common cause that the applicant was selected as the preferred bidder for this tender. It is also not disputed that the reason that the City refused to award the contract to the applicant is the Sanction decision. I am accordingly of the view that no purpose would be served by adjudicating the interim relief now that Part B has been decided, and that the interim remedy should be discharged.

[96] Besides, the parties' contentions in the interim interdict have become academic. The City's main contentions against the interim relief were firstly, that the applicant failed to establish a *prima facie* case and did not establish the clearest of cases, as contemplated in *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*²², and pointed to its poor prospects of success in what has now been ventilated as Part B of the case. The Court's finding in respect of the Sanction decision establishes that the applicant did have some prospects of success in its main case, and accordingly, a *prima facie* right.

[97] In the second place, the thrust of the City's opposition to the interim relief concerned the balance of convenience. Relying on *National Treasury v Opposition to Urban Tolling Alliance*²³, it referred to harm to the separation of powers principle that would ensue if the interim relief were granted. On this score, it placed reliance on time-sensitive considerations related to its intended deadlines and service delivery imperatives, which would be jeopardized if the interim relief is granted. It would be unable to carry out the finalization of its tender processes, which have a cut-off date of 31 December 2027 for the award of the tender, so that the new payroll system can go live on one January 2028.

[98] In reply, the applicant pointed out that this is more than three years away, and that in the circumstances, it could not seriously be suggested that the City would suffer any prejudice if it had to wait an extra month or two before making its

²² See *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) para 42.

²³ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 26. See also *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 43.

appointment under Tender 372S. The applicant also argued that it would have suffered irreparable prejudice if it were to succeed in its Part B relief only to find itself frozen out of a contract in respect of RFT 372S, which runs into hundreds of millions of rands, because the City had concluded a more expensive contract with one of its competitors in the meantime.

[99] These arguments illustrate that, contrary to the arrangement between the parties which found its way into a court order, no purpose would be served by adjudicating the interim relief at this stage. The issues raised there, which were raised pending the determination of Part B, are not paramount or even live, considerations at this stage. As a result, the existing interim relief in respect Tender 372S should be discharged.

F. COSTS

[100] Both parties have been partially successful. The applicant has been successful only in respect of the Sanction decision. In those circumstances, it is appropriate that each party should pay its own costs. I am also of the view that both sides are entitled to costs of two counsel, given the volume and complexity of the issues raised.

G. ORDER

[101] In the circumstances, the following order is granted:

1. The interim relief obtained in paragraph 9 of the court order of 10 June 2024 in respect of Tender 372S is discharged.
2. The applicant's review against the second respondent's Ruling decision of 22 February 2024 is dismissed.
3. The following decisions are hereby declared unlawful, and are reviewed and set aside:

3.1 The second respondent's Sanction decision of 26 April 2024.

3.2 The respondents' decision not to conclude a contract with the applicant in respect of RFT 415S/2022/23.

3.3 The respondents' decisions to terminate the following 10 contracts:

a. Contract 172S/2019/20 for the Supply, Installation and Maintenance of Audio Visual and Video Collaboration Systems;

b. Contract 265S/2019/20 for the Supply, Support, Maintenance and Services of ICT Security Related Infrastructure, Software, Services and Licensing;

c. Contract 091S/2022/23 for the Provision of Environmental Upgrades, Maintenance and Support of Data Centres;

d. Contract 273S/2022/23 for the Supply, Installation and Maintenance of CCTV Camera Systems;

e. Contract 265S/2022/23 for the Supply, Installation and Maintenance of Queue Management Systems;

f. Contract 238G/2021/22 for the Supply and Delivery of SIP Analogue and other Telecommunication Devices

g. Contract 342S/2021/22 for the Maintenance of Telecommunications Facilities for the City of Cape Town

h. Contract 225S/2022/23 to Supply, Install and Maintain Telecommunication Management Systems for the City of Cape Town;

i. Contract 201S/2022/23 for the Provision of Mobile Data Services.

j. Contract 197S/2021/22 for the Supply, Installation, Transitioning, Maintenance and Support of Integration Middleware.

4. Each party is to pay its own costs, including costs of two counsel, on a party party basis, on Scale C.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	:	Adv M Chaskalson SC Adv P Buckland
Instructed by	:	T Mfusi Eversheds Sutherland SA Inc.
For the respondents	:	Adv K Pillay SC Adv K Saller
Instructed by	:	D Olivier Fairbridges Wertheim Becker