

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

Case No: 18617/13

In the matter between:

BEACH CLEAN SERVICES SOUTH AFRICA CC

Applicant

and

THE CITY OF CAPE TOWN

Respondent

JUDGMENT: DELIVERED ON 25 MARCH 2014

PILLAY AJ:

INTRODUCTION

1. This matter concerns the respondent's ("the City's") tender for beach cleaning services at certain Cape beaches for the period June 2012 to 30 June 2015 ("the tender").
2. During July 2012 the City invited tenders for the provision of beach cleaning services over a period of three years at sixteen beaches in the Western Cape. There are four components to the tender:
 - 2.1. Deep sand cleaning which entails cleaning of beach sand to a certain depth using a mechanical raking and screening machine.

- 2.2. Kelp removal which includes the removal of kelp from identified beaches by hand or by mechanical means.
 - 2.3. Edge cleaning which entails the manual cleaning of an area of sand on the edge of the beach adjacent to grass, rocks and pathways.
 - 2.4. Waste containment and removal which pertains to foreign particles that are mechanically extracted from the sand and are deposited in a large waste skip, delivered to the beach in question as and when cleaning is done; the skip is then removed and the waste discarded.
3. The applicant and its joint venture partner, Wasteman Holdings (Pty) Ltd (jointly referred to as “the Joint Venture”) as well as eight other entities submitted a bid pursuant to the tender.
4. In its adjudication of the bid in November 2012:
 - 4.1. The City rejected the Joint Venture’s bid as being non responsive; and
 - 4.2. Khazimla Cleaning and Gardening Services CC (“Khazimla”), the last remaining bidder, was awarded the tender.
5. On 19 November 2012, the City addressed correspondence to the Joint Venture advising that its response to the tender had been unsuccessful and that the tender had been awarded to Khazimla until 30 June 2015.

6. Pursuant thereto, on 20 November 2012 the Joint Venture lodged an appeal to the City Manager. The appeal was dismissed on 12 December 2012.
7. The City found the Joint Venture's bid to be non responsive for two reasons:
 - 7.1. It did not tender on all items (more specifically it failed to specify a price for the waste containment and removal service at six smaller beaches).
 - 7.2. It qualified its price escalation figure (by quoting a 6.8% annual escalation, across the board).
8. On 20 December 2012 the Applicant instituted proceedings in this Court under case number 24190/12 ("the prior litigation"). The prior litigation ultimately sought to review and set aside certain decisions of the City relating to the tender. The prior litigation was founded on two main grounds:
 - 8.1. First, that the City's decision to reject the Joint Venture's own tender was invalid.
 - 8.2. Second, that the tender submitted by the successful tenderer was irregular as it had unlawfully utilised some of the Joint Venture's own confidential prices in pricing its tender.
9. In the prior litigation, this Court ultimately ordered:

- “(1) Second Respondent’s [Khazimla’s] tender for the provision of beach cleaning services and the City’s award thereof to it, are reviewed and set aside.
- (2) The City’s rejection of the Applicant’s tender for the provision of beach cleaning services, is reviewed and set aside.
- (3) Applicant is granted the opportunity to furnish further information to the City within a period of two weeks from the date of this judgment with regard to the City’s reasons, as set forth in this application, for declaring the Applicant’s tender non responsive.
- (4) The City is ordered to proceed, after receipt of such information, with the consideration and evaluation of Applicant’s tender.
- (5) The City and the Second Respondent are ordered to pay applicant’s costs, jointly and severally, including the cost of two counsel.”

10. Pursuant to the order of this Court in the prior litigation, the Joint Venture furnished the City with supplementary information on 16 July 2013.

11. On receipt of the supplementary information, on 18 October 2013 the City declared the Joint Venture’s bid to be non responsive and cancelled the tender because it concluded that no further acceptable bids had been received. It is this decision that has given rise to the current litigation.

THE RELIEF SOUGHT AND THE DISPUTE BETWEEN THE PARTIES

12. It is against the aforesaid backdrop that the Applicant (on whose behalf Mr SP Rosenberg SC and Mr NC De Jager appeared) now seeks an order:

12.1. Reviewing and setting aside the decision of the City to declare as unresponsive its bid for the provision of beach cleaning services (“the tender”).

- 12.2. Reviewing and setting aside the decision of the City to cancel the tender.
- 12.3. Awarding the tender to the Joint Venture and directing the City within two weeks of the date of judgment to conclude a contract with the Joint Venture either on the same terms and conditions contained in the tender, or on such terms as the parties may agree.
13. The Applicant's ultimate complaint is that the City failed to take into consideration the supplementary information that it furnished to the City, pursuant to the Order granted by this Court in the prior litigation.
14. The City (on whose behalf Mr RGL Stelzner SC appeared), on the other hand contends that this Court's order in the prior litigation allowed the Joint Venture "to clarify aspects, and not amend its bid because if it were permitted to amend its bid, that would be patently unfair to the other tenderers who were not afforded such an opportunity". The City accepts that it was required to re-evaluate the bid in light of the clarification provided by the Joint Venture.

NON JOINDER

15. The City has taken issue with the non joinder of Wasteman, which as stated, is the other party to the Joint Venture that submitted a tender to the City. I am of the view that there is no merit to the challenge. Indeed, a letter from Wasteman has been attached to the Applicant's replying affidavit which states as follows:

“Wasteman Holdings (Pty) Ltd is aware of the application launched by Beach Clean Services South African CC under case number 18617/2013.

Wasteman has received a copy of the founding and answering papers delivered therein and stands ready and able to deliver the services forming the subject of the beach cleaning tender, should the tender be awarded to the joint venture between Beach Clean Services South Africa CC and Wasteman.”

16. In any event, in **Sanyathi Civil Engineering and Construction (Pty) Ltd v Ethekwini Municipality; Group Five Construction (Pty) Ltd v Ethekwini Municipality [2012] 1 All SA 2000 (KZP) at par 111**, it was held:

“The right to just administrative action and to access to the courts are powerful rights that can hardly be lost by the mere inaction or refusal by a joint venture partner to participate in their enforcement. The issue is less about standing and more about notifying persons of the proceedings so that they can elect to exercise the right of access and participate in the proceedings as plaintiffs or as defendants.”

17. As regards the non joinder of the “original tenderers”, I am in agreement with the Applicant’s contention that these entities elected not to appeal the rejection of their bids, they also did not launch review proceedings in relation to the rejection of their bids and with the exception of Khazimla, were also not party to the prior litigation. In the circumstances, I do not consider it necessary for them to have been joined in these proceedings.

**THE EXCHANGE OF CORRESPONDENCE BETWEEN THE PARTIES
SUBSEQUENT TO THE PRIOR ORDER**

18. Pursuant to the Order granted in the prior litigation, on 4 July 2013 the Joint Venture’s attorneys addressed an email to the City’s attorneys which:

- 18.1. Sought clarity as to whether containers were indeed a “required service” for the six beaches in question.
 - 18.2. Sought confirmation as regards the correctness of their understanding of the interpretation of the pricing schedule instructions, viz, that clause 10.2. of Schedule 10 requires bidders to furnish the City with a percentage value of each component of the deep clean, edge cleaning, kelp removal and waste containment and disposal services and that the applicable rate of escalation is based on the relevant CPI.
19. The City’s attorneys responded to the above correspondence on 8 July 2013 and stated inter alia as follows:

“With regard to the issues referred to in your email below that require clarification by our client, we write to advise that our understanding of the Judgment, and more particularly paragraph 3 thereof, is that your client is required to furnish further information to our client with regard to our client’s reasons, as set out in its affidavits filed in the application, for declaring your client’s tender non responsive. We believe that our client’s reasons for declaring the tender non responsive are clear and that there is no obligation on the City to clarify any further issues in terms of the judgment granted.”

THE SUPPLEMENTARY INFORMATION FURNISHED BY THE APPLICANT TO THE CITY

20. In its supplementary information, the Applicant addressed the following two questions:
- 20.1. First, its failure to charge for waste containment and removal on six beaches.
 - 20.2. Second, the fact that its price escalation rate had been qualified.

21. As regards its failure to charge for waste containment and removal on six beaches, the Applicant stated inter alia as follows:

“12. The City contended in the court application that it required that a price be specified for each beach separately to facilitate such proper and more complete costing, accounting and reporting by the first respondent.

13. However, this fails to take into account the nature of the service and in effect means that the service provider should render a service which is not required and levy a charge in respect thereof at the expense of ratepayers. To require bidders to specify charges in their bid documents in respect of services which are superfluous and unnecessary is unreasonable.

....

17. In accordance with the applicant's position as set out in its court papers, we submit that the applicant's tender be evaluated on the basis that a nil charge has been tendered in respect of waste containment and removal services on the 6 beaches where the items had been left blank. In the circumstances, this remains the most cost effective option, and accordingly the most beneficial to ratepayers.

18. Nevertheless, if the City insists on placing bins on the 6 beaches and requires prices in respect of those beaches (and notwithstanding that this would unreasonably inflate the cost of the applicant's tender, as well as change in its tender), the applicant hereby attaches a revised pricing schedule with the prices for those beaches included marked “C”. Given that the only bid that remains to be considered is the applicant's it does not affect the fairness of the process for these prices to be included at this late stage. The prices are reasonable and competitive, and are the same as the bin prices already tendered by the applicant for the rest of the beaches.”

22. As regards the question of price escalation, the Applicant stated inter alia as follows:

“19. Schedule 10 of the tender document deals with contract price escalations. The schedule was unclear and no explanation was given by the City for the complex and extraordinary approach adopted by the City – namely why the City without reference to the actual cost and overheads of tenderers provided its own

arbitrary allocation of 10% towards fixed costs without escalation.

20. The applicant interpreted the instruction in schedule 10 which stated “the tenderer shall indicate below the % values of “A” to “D” he intends using for the duration of the contract” to mean that it could simply insert a percentage for escalation purposes. It therefore did so by quoting an annual escalation rate of 6.8% across the board. This is the same approach it had adopted for the previous tender which had been accepted and implemented by the City.

....

23. In the circumstances, the applicant submits that its bid should be evaluated on the basis that, as explained in the applicant’s papers, it misunderstood the instructions in the price escalation clause, which were unclear. The applicant accordingly attaches a revised schedule 10.2. hereto marked “D” wherein the applicant has furnished the City with a percentage value for each component of the deep clean, edge cleaning, kelp removal and waste containment and disposal services, with the applicable rate of escalation based on the relevant CPI. As is apparent therefrom, the revised scheduled (sic) 10.2. does not make any difference to the tender price.”

THE CITY’S DECISION AND ITS REASONS

23. On 18 October 2013, the City advised the Joint Venture inter alia as follows:

“.... The Bid Evaluation Committee was reconvened on the 27 September 2013, and has re-evaluated the JV’s tender submission based on the further information received as per clause 3 and 4 of the judgment above.

The Joint Venture (JV) between Beach Clean Services South Africa CC and Wasteman Holdings (Pty) Ltd has subsequently been declared non responsive in terms of not adhering to the Pricing Instruction, Evaluation Criteria and the qualified Schedule 10: Contract Price Adjustment and Rate of Exchange Variations.

As the tender and award made to Khazimla Cleaning and Gardening Services CC was set aside and no further acceptable bids have been received, the Supply Chain Management Bid Adjudication Committee of the City of Cape Town on 12 October 2013 resolved that the abovementioned tender be cancelled.”

24. Pursuant thereto, on 18 October 2013 the Applicant's attorneys requested detailed written reasons for the rejection of the Applicant's tender as well as a record of decision, including the minutes and resolutions of the meetings held by the Bid Evaluation Committee and the Bid Adjudication Committee.
25. On 22 October 2013, the City responded to the request for reasons stating inter alia as follows:

“....

The City acted in accordance with the prescripts of the court order and re-evaluated your client's tender giving due consideration to the further information provided by them. It is our instructions that the said further information however could not render your client's tender responsive.

It is not the City's intention to prolong the matter unnecessary (sic) hence we attach a copy of the Bid Evaluation Committee's (BEC) minute concerning the re-evaluation marked "CCT1", a copy of the report to the City's Bid Adjudication Committee (BAC) marked "CCT2" and a copy of the BAC's duly signed resolution marked "CCT3". It is our respectful submission that this documentation contains detailed reasons why your client's tender was rejected.”

26. In light of the fact that the “detailed reasons” for the City's decision appears in the above mentioned documentation, they warrant careful reference.
27. In the report of the Bid Evaluation Committee dated 27 September 2013 the following is stated:

“The Manager Cleansing and Mr Hassim from Legal Services are attending the meeting as observers.

The tender is being re-evaluated in terms of a court order obtained by Beach Clean Services South Africa CC (“Beach Clean”), Case number 24190/12, Western Cape High Court. The said tender was initially awarded to Khazimla Cleaning and Gardening Services (“Khazimla”). Beach Clean together with Wasteman Holdings (Pty) Ltd (“Wasteman”) tendered as a Joint Venture but Beach Clean instituted the legal

proceedings on their own and Wasteman was cited as a respondent. In terms of the Court Order, Khazimla's tender and the awarding of the contract to them was set aside.

Furthermore, in terms of the Court Order, the City's rejection of Beach Clean's tender was reviewed and set aside and they were granted the opportunity to furnish further information to the City whereafter their tender was to be re-evaluated.

Beach Clean via their attorneys, in a letter dated 16 July 2013, submitted further information as per the court order. In terms of the further information provided with regard to how they completed Schedule 10 of their tender offer, which concerns price escalation, they indicated that they interpreted the instructions to mean that they could simply insert a percentage for escalation purposes and therefore they quoted an annual escalation rate of 6.8% across the board. They also stated that they had adopted this for the previous tender and it was accepted by the City. They further stated that they had misunderstood the instructions in Schedule 10 because it was unclear and they attached a revised Schedule 10.

Having noted the amended Price Schedule submitted by Beach Clean, the BEC cannot consider it because it would give them a second chance and an unfair advantage over those other bidders who duly completed their Price Schedules and those who were disqualified for not complying with the instructions in the Price Schedule and whom received no opportunity to amend or submit new Price Schedules. The BEC however considered the further information provided by Beach Clean namely that the relevant items (waste containment and removal) left blank in the Price Schedule should be re-evaluated on the basis that a nil charge had been tendered for those items.

In terms of Clause 7.2.1. (d) of the Evaluation Criteria, valid tenders will be declared Non Responsive and eliminated from further evaluation if the tender does not comply with the instructions contained in the Price Schedule. Clause 4.7. of the Pricing Instructions in the Price Schedule states that tenderers to tender on all items as per the pricing schedule. Clause 7.2.1. (f) of the Evaluation Criteria also expressly states that valid tenders will be declared Non Responsive and eliminated from further evaluation if the tenderer did not tender on all items as per the pricing schedule. Beach Clean's submission that the items left blank should be evaluated on a nil charge confirms that they did not comply with the provisions of the Evaluation Criteria and the Instructions in the Price Schedule. Similar to the amended Price Schedule submitted, the BEC noted the new and revised Schedule 10 submitted by Beach Clean but also cannot consider it. The reason being that it will give them a second chance and will be unfair towards those bidders who duly completed and complied with the provisions of Schedule 10.

The BEC however considered the further information provided by Beach Clean, explaining why they had completed Schedule 10 in their own format and not as prescribed by the tender document. Despite this information, the BEC cannot evaluate their Schedule 10. The reason is because it does not allow for a fair comparison with the other tender submissions received over the term of the tender (i.e the future 2 years). The tender document provides an escalation methodology using CPIX as a basis but Beach Clean ignored the table wherein they had to enter the various percentages relevant per component in a table and merely wrote their required overall percentage for all components together in entirety (sic). The effect thereof is that the BEC are unable to compare and evaluate Beach Clean's price escalation to those received of the other tenderers' price escalation.

The BEC, having re-evaluated the tender after considering the further information provided, found the tender submission of Joint Venture Beach Cleaning Services South Africa and Wasteman Holdings (Pty) Ltd to be Non Responsive. Beach Clean confirmed that the items left blank must be evaluated on a nil charge and therefore they have failed to tender on all items as instructed by the Pricing Schedule as per clauses 7.2.1.(d) and 7.2.1.(f) of the Evaluation Criteria. The further information provided by them with regard to their price escalation methodology also cannot render it valid and acceptable for reasons provided.

Due to the fact that the tender submission of the Joint Venture Beach Cleaning Services South Africa and Wasteman Holdings (Pty) Ltd having been found to be Non Responsive and the Court having set aside Khazimla Cleaning and Gardening Services CC's tender there are no further responsive tenders. It is therefore recommended that this tender be cancelled."

28. In the report to the Bid Adjudication Committee dated 14 October 2013, the following is stated under the heading of "Discussion on Evaluation Process":

"The tender for Khazimla Cleaning and Gardening Services CC and the City's award thereof was reviewed and set aside as per item one (1) of the court judgment.

Beach Clean Services South Africa CC has submitted further information via their attorneys, The Bid Evaluation Committee (BEC) subsequently considered and re-evaluated the JV's tender submission on the 27 September 2013.

Additional rates were submitted by Beach Clean Services South Africa CC for items 5.4., 6.4., 9.4, 11.4., 13.4. and 16.4. (Waste Containment and Removal) of the pricing schedule. In addition, Schedule 10: Contract Price Adjustment and Rate of Exchange Variations was

amended according to composite tables specified in the tender document.

The BEC could not consider the amended pricing schedule and Schedule 10: Contract Price Adjustment and Rate of Exchange Variations as it would give the JV a second opportunity and will be regarded as unfair to the other tenderers.

The BEC considered paragraph 17 of the attorneys letter, that the JV's tender be evaluated on the basis that nil (0) charge has been tendered in respect of items 5.4, 6.4, 9.4, 11.4, 13.4 and 16.4 (Waste Containment and Removal) which was left blank on the pricing schedule.

In terms of clause 4.7 of the Pricing Instructions and clause 7.2.1 (f) of the Evaluation Criteria, tenderers had to tender prices on all items of the pricing schedule to be considered responsive and therefore, nil ("0") charge will render the tender submission non responsive in terms of the said clauses.

Tenderers had to complete composite tables for Schedule 10: Contract Price Adjustment and Rate of Exchange Variations which was relevant to each item of the pricing schedule. The JV submitted a 6.8.% increase in rates for all the tables. By altering the said schedule, the JV makes it impossible to achieve evaluation of "comparative prices" as defined and prescribed in the Preferential Procurement Regulations, 2011. This is particularly relevant as it will impact on the value of the contract over the future two years and therefore the JV is non responsive.

In summation, the Joint Venture (JV) between Beach Clean Services South Africa CC and Wasteman Holdings (Pty) Ltd has been declared non responsive in terms of not adhering to the pricing instruction, Evaluation Criteria and qualified Schedule 10: Contract Price Adjustment and Rate of Exchange Variations.

As no acceptable bids have been received, it is recommended that the tender be cancelled in terms of Regulation 8(4)(c) of the Preferential Procurement Policy Framework Act (PPPFA): Act No. 5 of 2000: Preferential Procurement Regulations, 2011."

(Own Emphasis)

29. On 14 October 2013 the Bid Adjudication Committee resolved as follows:

"In response to questions raised, the officials informed the meeting of the orders granted High Court (sic) with regard to the award made by SCMBAC on 12 November 2012, as listed in the report.

Members of the Committee were concerned that this might set an unfortunate precedent.

RESOLVED that Tender No. 438S/2011/12: Provision of Deep Beach Cleaning Machine be cancelled.”

30. The City subsequently sought to explain away the second paragraph of the resolution by stating that the comment played no role in the decision of the BAC; and further that the comment was from “a” member and did not constitute the decision of the BAC. I do not have regard to the second paragraph of the BAC’s resolution in reaching my conclusions in this judgment.
31. In its answering affidavit the City further amplified its understanding of the Court Order and further explained the reasons for its decision in stating inter alia as follows:
 - “14. In terms of the Court Order, the Applicant was given the opportunity of furnishing further information to the City with regard to the City’s reasons for declaring the Applicant’s tender non responsive.
 15. I understood this to mean, and that was the way in which the BEC evaluated the Applicant’s tender, that further information to clarify the Applicant’s original tender can be provided by the Applicant in respect of its original tender and that the BEC would need to reconsider the original tender in light of such further clarification.
 16. Neither I nor the BEC understood this to mean that the Applicant was given an opportunity to re-tender on a different basis to that on which it originally submitted its tender.
 17. If the Applicant were entitled to, for example, change its prices or change the basis on which the original offer was made, this would have been extremely unfair to the other participants in the tender process who were not given such an opportunity.
 18. It would have been doubly unfair in that Applicant would, by virtue of the review application, have become aware of what the prices of the tenderers were, and additionally, with the only other responsive tenderer, Khazimla, having been excluded from the

process, the Applicant would have been the sole participant in a process in which it could effectively then submit its own new prices without any risk of competition from others and without its prices having to be compared to those of others. The Applicant could therefore “name its price” and the City would be compelled to contract with them.

19. Put differently, my and the BEC’s understanding of the order of this Honourable Court was that Applicant was given the opportunity of clarifying its bid and explaining why the bid had been submitted in the manner in which it was done but was not entitled to change its bid or submit new prices.

....

24. In addition, Applicant did not explain why its 6.8% escalation was inserted and why that should be considered to be responsive by the BEC.
25. It changed the basis on which it had made its original bid and amended the original bid of 6.8% escalation to one which now confirmed with the requirements.
26. This, however, was as I understood the Court Order, not intended and did not constitute the furnishing of further information addressing the City’s reasons for declaring the bid non responsive, but instead constituted an amended bid, ex post facto, which once again would have been prejudicial to the other original tenderers who were not given such an opportunity, neither in terms of the Order of this Honourable Court, nor at the time of the original process being conducted.”

(Own Emphasis)

THE APPLICABLE PRINCIPLES TO INTERPRETING A COURT ORDER

32. It is apparent from the foregoing that the proper interpretation of the Order of this Court in the prior litigation as handed down on 3 July 2013 (“the prior Order”) lies at the heart of this matter.
33. As stated, the prior Order refers to further information with “regard to the City’s reasons, as set forth in this application, for declaring the Applicant’s tender non responsive.”

34. The general approach to the interpretation of a judgment or order of Court was stated in **Firestone South Africa (Pty) Ltd v Genticuro AG** 1977 (4) SA 298 (A) as follows (at 304D-H)¹:

“The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. . . . Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.”

35. In **Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc** 1996 (3) SA 355 (A) at 363 A (which arose in the context of an arbitration award where the Arbitrator had not provided reasons), the Court held:

“In the present case the arbitrator did not give any reasons for the orders which he made in his award. Consequently the interpreter is initially confined to the language of the orders. If, however, uncertainty as to the meaning of the orders or one of them, emerges from a consideration of the language used, then recourse may be had to extrinsic circumstances. There is a dearth of authority as to what extrinsic circumstances may be referred to in a situation such as this. No relevant authority was quoted to us; and I have not found any. On general principles and as a matter of logic, however, it seems to me that such extrinsic circumstances include the issues which were submitted to the arbitrator for adjudication and the evidence placed

¹ See too: *Administrator, Cape, and Another v Ntshwa-qela and Others* 1990 (1) SA 705 (A) at 715F-716C; *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 489 (A) at 494E-H.

before him, insofar as such evidence throws light upon what the canvassed issues were.”

36. On the facts of this matter, it is apparent from paragraph 3 of the prior Order that it self-evidently contemplates that regard be had to “the City’s reasons” as set forth in that application in order to determine the nature of the “further information” that the Applicant had been granted a further opportunity to furnish.

37. Before examining the City’s reasons, it is however necessary to examine the nature of the alleged deficiencies in the Applicant’s bid in the prior litigation as well as the relevant tender conditions and criteria that were at issue.

THE COMPLAINTS ABOUT THE APPLICANT’S BID IN THE PRIOR LITIGATION

The Conditions of Tender and Evaluation Criteria

38. The following aspects of the tender document itself is relevant to these proceedings, viz:

38.1. The Conditions of Tender in Part 6 states: “All tender conditions and/or instructions set out below must be strictly adhered to, failing which this tender submission will be declared non-responsive.” Part 6 includes the following conditions:

38.1.1. Clause 6.2. states: “Any portion of the tender document not completed will be interpreted as ‘not applicable’.

Notwithstanding the foregoing, failure to complete any

compulsory portion of the tender document may result in the tender being declared non-responsive.”

38.1.2. Clause 6.7 states: “The CCT may, after the closing date, request additional information or clarification of tenders in writing.”

38.2. Part 7 of the tender document addresses the Evaluation Criteria and provides inter alia as follows:

38.2.1. In clause 7.2.1, valid tenders will be declared non responsive and eliminated from further evaluation if, inter alia: (a) the tender does not comply with the instructions as contained in the Price Schedule (Part 4); (b) the tenderer did not tender on all items as per the pricing schedule.

38.2.2. In clause 7.2.2, tenders will be declared non responsive if the tenderer fails to adhere to a written request (within the specified period set out in such request) to inter alia: (a) comply with the general conditions applicable to tenders as set out in the City’s SCM Policy; (b) comply with one or more of the provisions contained in the Conditions of Tender (Part 6); (c) comply with other terms and conditions of the tender as contained in the tender document. Clause 7.2.2 further provides that the items identified therein do not constitute a closed list.

The pricing schedule

39. As regards the Applicant's failure to have priced all items, the tender document stated as follows in the Price Schedule under the heading of "Pricing Instructions":

- "4.1 All prices shall be tendered excluding VAT but including customs or excise duty and any other duty, levy or other applicable tax.
- 4.2 All prices shall be tendered in accordance with the units specified in this schedule.
- 4.3 All prices must include all expenses, disbursements and costs
- 4.4 The rates tendered must be per single clean up operation.
- 4.5 The tender will be evaluated on the estimated maximum quantities per annum. The City will not necessarily order the estimated quantities. The contract will be for the ordered quantities as and when required by the City, at the City's sole discretion. The contractor must only invoice for the work detailed in official purchase orders.
In addition, the tender will be evaluated on the technical specifications of the Deep Beach Cleaning Machine being offered.
- 4.6 Prices tendered below shall be subject to adjustment in accordance with Schedule 10.
- 4.7 Tenderer to tender on all items as per the pricing schedule.
- 4.8 Council reserves the right to award to one company only."

40. The Pricing Schedule itself made provision for the sixteen beaches that are the subject of the bid. By way of example, the Pricing Schedule is structured as follows in relation to Melkbos beach (the same structure is followed in respect of all sixteen beaches):

ITEM	LOCATION	FUNCTION	AREA M ³	UNIT	ESTIMATED QUANTITY PER ANNUM	RATE (PER VISIT) EXCLUDING VAT
1.1	Melkbos (to be cleaned at a depth of 75mm)	Deep clean	42602	Per visit	7	
1.2	Melkbos (to be cleaned at a depth of 75mm)	Edge clean	42602	Per visit	7	
1.3	Melkbos (to be cleaned at a depth of 75mm)	Kelp removal	42602	Per visit	7	
1.4	Melkbos (to be cleaned at a depth of 75mm)	Waste containment and removal	42602	Per visit	7	

41. It is common cause that the Applicant's bid as regards pricing was considered to be non compliant with the tender requirements because it had failed to insert a price for the last function (which had been left blank), viz, waste containment and removal. It was as a result of this omission that the City adopted the view that the Applicant had failed to comply with inter alia clause 4.7 as quoted above.

42. The Applicant, on the other hand provided the following explanation in regard to its failure to insert a price for waste containment and removal in respect of the six beaches:

42.1. The Applicant intended to render the "waste containment and removal" services at the said beaches, but it did not intend to charge the City

separately in respect thereof. This was consistent with the position in previous years.

- 42.2. A waste bin is only required at a particular beach when mechanical beach cleaning occurs and for the duration thereof. Accordingly, the waste containment and removal function is only usually relevant for one day per beach on a rotational (monthly) basis. There is never a continued need for a waste bin at any beach.
- 42.3. The Applicant, in light of its extensive experience in rendering services, has a comprehensive understanding of exactly where and when waste bins are required. For example, Muizenberg Beach, a large beach, is very close to Sunrise Beach, which is a small beach. It is only necessary to have one 10m³ waste bin, which will be sufficient for both beaches when mechanical cleaning is carried out thereof. This reasoning applies equally in relation to each of the six specified beaches.
- 42.4. It would be unnecessary and an unwarranted cost to ratepayers for the Applicant to have separately and additionally imposed a charge for the provision of these services at the six specified beaches.
43. The Applicant has explained that it is unable to “apportion” the waste containment prices across all beaches inter alia because it is impossible in that:

43.1. Such an exercise can only take place after the waste has been collected at the beaches in question; and

43.2. Each and every time waste is collected the apportionment of costs will necessarily be different.

The contract price for adjustment

44. Schedule 10 of the tender entitled: “Contract Price Adjustment & Rate of Exchange Variations” provided inter alia as follows:

“10.1 No price escalation will be considered for the first year ending 30 June 2013.

10.1.1 Price variation will be considered for the second year commencing 1 July 2013. Price adjustment must be claimed as per clause 10.3 and can be claimed annually.

10.1.2 Price variation will be considered for the third year commencing 1 July 2014. Price adjustment must be claimed as per clause 10.3 and can be claimed annually.

Failure to complete these clauses will result in the Tender prices being deemed to be FIRM.”

45. Schedule 10 also regulates the price composition in respect of each of the four elements of the tender. The same structure is followed in relation to all four elements. By way of example in relation to “Deep Clean”, the tender document provides as follows:

“10.2.1.1 The values of A, B, C and D shall total to 100%. The Tenderer shall indicate below the (%) values of “A” to “D” he intends using for the duration of the contract.

VALUE	COMPONENT	(PRICING SCHEDULE) %	APPLICABLE TABLE
A	Machine		South African CPI (*)
B	Labour		South African CPI (*)
C	Material		South African CPI (*)
D	Fixed	10%	
	TOTAL	100%	

(*) Escalation shall be calculated using the indices of three months prior to the month in which the new price is to become applicable.”

46. It is common cause that the Applicant wrote a figure of 6.8% in the block below the subheading “pricing schedule” and that its intention was that the figure of 6.8% would apply to all the components of the work. It is also common cause the Applicant did not comply with the tender requirements regarding Schedule 10 by having submitted a figure of 6.8% across the board.

47. It is against the backdrop of both the above complaints that the Order and judgment of the Court in the prior litigation must be examined.

THE PRIOR JUDGMENT OF THE COURT AND THE RECORD IN THE PRIOR LITIGATION

48. The judgment referred to numerous judgments dealing with the requirement that a tender system must be fair, equitable, transparent, competitive and cost effective and that an unduly technical and formalistic approach should not be adopted.

49. The Court in the prior litigation concluded as follows:

“[49] In my view the City’s officials erred by failing to adhere to the principles laid down by the Supreme Court of Appeal in the judgments to which I have referred above. They adopted a technical and formalistic approach to the applicant’s tender instead of focusing on the substance of the matter, namely the application of constitutional values referred to above. It would not have been difficult for the officials to direct queries to applicant in order to clarify the issues in question. They do not concern complicated issues. The conditions of tender make provision for queries in regard to items that were not clear. The officials, however decided to rely on the rather technical distinction between the items mentioned in paras 7.2.1. and 7.2.2. in (sic) of the conditions of tender and apply them in a formalistic manner. In the process they appear to have overlooked the provisions of para 6.7. of the conditions of tender.

[50] Applicant had been rendering the services in question for many years. There is no suggestion that its work was not up to standard. There is no allegation that the defects in its tender (if they were indeed defects) were due to any mala fide conduct on its part. No tenderer would have been prejudiced if the applicant had been afforded an opportunity to clarify the alleged defects. Nor would the integrity of the process have been implicated.

[51] Had the respondent’s officials followed the approach set out in the judgments of the Supreme Court of Appeal to which I have referred above, they would in my view have directed appropriate queries to applicant to allow it to cure the omissions in its tender. Their failure to have done so is in my view in conflict with section 217(1) of the Constitution and therefore unlawful.”

(Own Emphasis)

50. I will now give some attention to the content of the affidavits filed in the prior litigation.

51. In the prior litigation, the Applicant averred as follows in its founding affidavit:

“43. The applicant inserted a price (in the column entitled “Rate (per visit) excluding VAT”) for all of the services except in respect of

“waste containment and removal” in respect of the beaches Hout Bay East, Sunrise, Strandfontein Coastal Resort, Monwabisi, Bikini Beach and Strand 2 (Greenways). The reason why these items were left blank is simply because the applicant did not intend to charge the City in respect of those services, for the reason which follows.

....

47. I point out that when the Bid Evaluation Committee opened and considered the applicant’s tender, and noticed these blank spaces in the pricing schedule, if there was any doubt in that committee’s mind as to what was intended by the applicant (i.e. whether it intended to charge for these items or not), this uncertainty could have been cleared up by simply directing a request to the applicant (by letter or telephone) to clarify the matter. Having regard to the simplicity of the explanation furnished above, this could easily and quickly have been disposed of. Indeed, the City’s own tender document makes provision for queries to be raised with and answered by tenderers in correspondence (see e.g. paragraph 7.2.2. of the evaluation criteria).
48. I submit that, having regard to the extensive history of the applicant rendering these services, one would have expected the Bid Evaluation Committee to appreciate that the applicant is well aware of exactly what is required in the rendering of these services and how those services (have been and) are billed.
49. In summary therefore, the applicant only indicated a charge for the waste containment and removal function in those instances where a bin was strictly necessary, and the pricing block was left blank and where a bin would not be required.”

52. The City stated *inter alia* as follows in its Answering Affidavit in the prior litigation:

- “3.3. Items 7.2.1.(d) and (f) of section (7) of the tender (the Evaluation Criteria section, page 19 of annexure “RV1” to the founding affidavit) make it clear that tenders which meet² the preceding requirements for “validity” will be declared “non responsive” and will be eliminated from further evaluation if the tender does not comply with the instructions contained in the price schedule and the tenderer did not tender on all items as per the pricing schedule.

² This wording appears to be an error and the words “do not” should precede the word “meet”.

- 3.4. Items 4.2. and 4.7. of section (4) (the Pricing Schedule, page 7 of the tender document) made it abundantly clear that all prices were to be tendered in accordance with the units specified in the schedule and the tenderer was to tender on all items as per the pricing schedule.
- 3.5. Applicant's tender was non-responsive on two grounds:
- 3.5.1. The waste containment and removal sections of the tender, items 5.4, 6.9, 9.4, 11.4, 13.4 and 16.4 were not completed (tender document pages 9-12).
- 3.5.2. Section 10: Contract Price Adjustment and Rate of Exchange Variations (pages 49-50) were qualified. Instead, of providing a specific percentage value for each of the items reflected under item 10.2. (being in respect of machine, labour and material for deep cleaning, labour and material for edge cleaning, material and labour for kelp removal and transport container / skip, labour and disposal for waste containment and disposal), the various separate items being required to total 100% for each component, with the South African Consumer Price Index to be applied to each component, Applicant qualified the whole schedule by simply providing for escalation of 6.8% for all items in toto.
- 3.6. Since the bid was non responsive it was eliminated for further evaluation in accordance with the provisions of Item 7.2.
-
- 3.19. The explanation for the overall tender price of the joint venture being less than that of the Second Respondent is attributable to the fact that the joint venture failed to complete every specific item, as required in the tender conditions, which rendered the bid non compliant, non responsive and therefore unacceptable.
-
12. The pricing schedule (schedule (4)) provides for itemised rates per function per beach visit.
13. It is furthermore based on estimated quantity (number of visits) per annum.
14. The reason for this is that the service is an ad hoc service which the City would require the successful tenderer to render as and when the cleaning of the beaches is required.
-

15. As specified in item 1.6 of schedule (5) the contract includes the collection, transport and legal disposal of all debris collected.
16. Contractors must include proof of disposal at an approved disposal site together with invoices.
17. Waste skips may be used for the temporary storage of the collected debris.
18. All skips must be immediately removed at the end of the daily cleaning operations.
19. No profit may be made on disposal of tariff as charged by any disposal facility.
20. This relates to the “waste containment and removal” item in the pricing schedule, which was left blank by the joint venture on many of the beaches.
21. The City will be charging the successful tenderer for the acceptance of such debris at its waste disposal sites.
22. It was for this reason, inter alia, that it was imperative (and therefore set as a strict requirement in the bid document) that the item be completed, not only in order to ensure that that service for the specific beach would be rendered (i.e. that the waste would be disposed of) but also that the tenderer (the City) could account / track the costs per beach for each of the relevant items.
23. The City for its own accounting, planning, monitoring and reporting purposes required this. This was why the bid further required statistics of each visit / cleaning of each beach, etc (as provided for in item 1.7 of the schedule (5)).
24. The tender document in various places emphasised (and repeated) the importance that the tender document be properly completed.
-
118. If Applicant / the joint venture was not going to charge First Respondent for services in respect of certain beaches, it needed to have reflected that there would be no charge in respect of these services.
119. Leaving it blank firstly rendered the bid non responsive and therefore unacceptable in light of the conditions set.

120. In addition, it posed the question how the joint venture would recover the costs of waste containment and removal in respect of these beaches, particularly since the City would be charging them for the receipt of this waste and further disposal thereof.
121. Leaving the item blank furthermore raised the question whether these services would indeed be rendered in respect of these beaches and finally left First Respondent unable to apportion the relevant costs in respect of these services on these beaches to those beaches.
122. The very reason the price specifications were stipulated as they were in the invitation to bid was in order to facilitate such proper and more complete costing, accounting and reporting by the First Respondent.
- ...
124. If a container is not required on each beach on a continuous basis, or if no continuous need for a waste bin to remain at any beach is required, it was nevertheless incumbent on the joint venture bidder to provide a cost in respect of services which needed to be rendered at that beach, if only on a proportionate basis appropriated to the beach in question in terms of whatever other mathematical formula the joint venture wishes to use.
-
127. By loading certain charges onto certain beaches and not charging for other beaches, when the services were required at all beaches, apart from rendering the bid non responsive, also resulted in First Respondent being unable to do a proper cost apportionment or accounting of services per beach which was part of the reason for the bid specifications have been set in the way they were."

(Own Emphasis)

53. The City's justification in the prior litigation for the flat escalation rate was as follows:

53.1. The flat escalation rate applicable to all components qualified the rate set by the First Respondent inter alia in that First Respondent sought to rely on the Consumer Price Index whereas the flat rate submitted by

the joint venture of 6.8% may or may not have complied with the CPI over the forthcoming years.

53.2. If 6.8% was lower than the CPI it was indeed a qualification of the escalation rate set by the First Respondent, which would have resulted in First Respondent and the ratepayers being prejudiced in that the services in the future would be paid at an escalated rate lower than the CPI. In addition, the Joint Venture's qualification of the escalation rate rendered it unfair to other bidders who complied with the conditions of tender and sought to allocate the different percentages to the different components of their tenders with reference to the CPI requirement set by First Respondent.

53.3. The qualification is to the CPI requirement set by the City. The apportionment between the various items was to allow the First Respondent to properly record, monitor, account for and report on the various components of the work in question and apply the CPI (and in certain cases the appropriate index, for example in the case of wages) to the constituent components of each set of process in accordance with the indicated percentages. If material were to constitute say 60% of the total price for a certain item and CPI on material 5% and the total price for the one item was R 10 000.00, the price increase on materials in respect of the work in question would be 60% of R 10 000 x 5%. If CPI for wages happened to be say 5.5.% and wages were 30% of the total cost for the item in question, a different calculation would have been required. The Applicant's bid simply does not allow for this

exercise to be done, and not does it permit the Applicant to compare its bid to that of other bidders. It requires 6.8% to be applied to the total sum of R 10 000.00 in the example which would have a very different result to the other examples provided herein. It was therefore held to be non responsive.

THE INTERPRETATION OF CLAUSE 3 OF THE PRIOR ORDER

54. In light of the judgment and affidavits filed in the prior litigation (as read with the Order), I am of the view that clause 3 of the Order of the Court in the prior litigation allowed the Applicant to furnish further information in order to “cure” the following “omissions” in the tender:

54.1. The Applicant’s failure to provide prices for waste removal in respect of certain of the beaches.

54.2. The Applicant’s failure to have complied with Schedule 10 in relation to escalation.

55. I do not agree with the City’s interpretation of clause 3 of the Order and more particularly that clause 3 of the Order allowed for a clarification but not an amendment of the Joint Venture’s bid for the following reasons:

55.1. First, it would serve little purpose for the Order to have given the Applicant the opportunity to “clarify its bid” and explain why it had been submitted in the manner in which it was but not entitle the Applicant to alter or amend its bid. In light of the complaints raised by the City as

read with the content of Schedules 4 and 10 (the relevant portions of which have been quoted above), it is difficult to conceive of what “clarity” could be provided that did not entail an amendment to the bid, particularly in circumstances where in terms of paragraph 4 of the Order the City is directed, after receipt of the information to consider and evaluate the Applicant’s tender. The City’s interpretation begs the question as to what consideration and evaluation the City could have given to the further information if all that was required from the Applicant was an “explanation” of why the bid had been submitted in the form that it had. Of relevance in this regard is the Court’s reasoning in the prior judgment in respect of paragraphs 7.2.1. and 7.2.2. of the conditions of tender where it stated as follows: “The conditions of tender make provision for queries in regard to items that were not clear. The officials, however decided to rely on the rather technical distinction between the items mentioned in paras 7.2.1. and 7.2.2. in (sic) of the conditions of tender and apply them in a formalistic manner. In the process they appear to have overlooked the provisions of para 6.7. of the conditions of tender.” In my view, the effect of the quoted passage of the prior judgment is that the Court found that the City’s distinction between paragraphs 7.2.1. and 7.2.2. was a “technical” one and had been applied in a formalistic manner, thereby suggesting that paragraph 6.7. (i.e. that the City may request additional information or clarification of tenders in writing after the closing date) applied in relation to the items identified in clauses 7.2.1. and 7.2.2.

55.2. Second, the City's interpretation of the prior Order is also irreconcilable with some of its own earlier correspondence:

55.2.1. An email that the City addressed to the Applicant's attorneys on 11 September 2013 states inter alia as follows:

"Writer therefore requests your client to hold further action over pending the outcome of Khazimla's application on 19 September 2013. We are currently in the process of reconvening the Bid Evaluation Committee to inter alia evaluate your client's tender offer with regard to the further information provided. The further effect of the judgment is that another tender offer, which was initially non responsive, must also now be considered and evaluated. Your client will be notified thereof though."³

(Own Emphasis)

In light of the City's interpretation of the Order (viz, that it did not permit any amendment to a bid that had been submitted), it is difficult to conceive of why another tender offer (which had initially been found to be non responsive) needed to be reconsidered and evaluated again.

55.2.2. A further email from the City dated 3 October 2013 which refers to a formal report from the BEC on "the outcome of the re-evaluation". Again, it is difficult to understand what re-evaluation would have been necessary in light of the City's interpretation of the prior Order.

³ The Applicant's attorneys did not accept that a tender from another tenderer (Sisonke) had to be considered and evaluation pursuant to the judgment, which stance the City ultimately agreed with.

- 55.3. Third, I agree with the Applicant that there were no other competing tenderers' interests to take into account and that the Applicant's bid was the only bid in contention.
- 55.4. Fourth, I do not accept that what the prior Order contemplated was for the costs of the waste containment on the smaller beaches to be apportioned for reasons proffered by the Applicant, viz: (a) apportionment can only take place after waste has been collected because it is only at that stage that waste and volume of the waste collected can be determined and that the apportionment would vary each time waste is collected; (b) the tender document itself makes no reference to the apportionment; (c) an apportionment would, in any event entail an amendment to the bid in that it would, of necessity, entail an alteration on prices already submitted. I am of the view that had this been the objective of the prior Order, it could very easily have stated so in terms, particularly given that the question of apportionment was raised in the prior litigation. In any event, the Order was not limited to Schedule 4 but also included Schedule 10; accordingly its ambit could, by no means have been limited to the question of apportionment.
- 55.5. Fifth, on the City's interpretation, it is difficult to conceive of what the prior Order contemplated in respect of Schedule 10. It is noteworthy in this regard that the tender document itself provided that a failure to complete Schedule 10 will result in the Tender prices being deemed to

be FIRM. The Preferential Procurement Regulations, 2011 published under GN R502 in GG 34350 of 8 June 2011 defines “firm price” to mean “the price that is only subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy, or tax, which, in terms of the law or regulation, is binding on the contractor and demonstrably has an influence on the price of any supplies, or the rendering costs of any service, for the execution of the contract.” The City’s Supply Chain Management Policy contains the same definition.⁴ It is significant in this regard that instead of the prior Order having found that the consequence of the manner in which the Applicant had filled in Schedule 10 was that the tender price would be deemed to be FIRM; the effect of the prior Order was to allow the Applicant to provide further information in order to address the City’s complaint in relation to Schedule 10.

56. For these reasons, I am of the view that the prior Order did indeed permit the Applicant to cure the omissions in its bid. This, of necessity, in my view, entailed an amendment to the Applicant’s bid.

57. I am not persuaded by the City’s reasoning that the prior Order did not contemplate an amendment to the bid because such an interpretation would have given the Applicant a “second chance” and an “unfair advantage” over other bidders. If this was indeed the City’s concern, it ought to have challenged the prior Court Order. This, it failed to do. I am minded in this regard of:

⁴ Clause 1.37.

57.1. The recognition by the Constitutional Court that tender processes require “strict and equal compliance by all competing tenderers on the closing day for submission of tenders”.⁵

57.2. Furthermore, the City’s own Supply Chain Management Policy (July 2013) contemplates instances where there may be negotiations with preferred bidders; this negotiation however, is subject to certain constraints. For instance, clause 251 provides:

“251. The City Manager may authorise the negotiation of the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders provided that such negotiation:

251.1 does not allow any preferred bidder a second or unfair opportunity.

251.2 is not to the detriment of any other bidder; and

251.3 does not lead to a higher price than the bid as submitted.”

THE CITY FAILED TO COMPLY WITH THE PRIOR COURT ORDER

58. In light of the interpretation I have given to the prior Court Order, the question that follows is whether the City did indeed comply with the prior Court Order.

59. In terms of paragraph 4 of the prior Order of this Court, the City was obliged to consider and evaluate the Applicant’s tender after receipt of the further information.

⁵ Steenkamp NO v Prov Tender Board, EC 2007 (3) SA 121 (CC) at par 60 and All Pay Consolidated Investment Holdings (Pty) Ltd [2013] ZACC 42 at par 39. See too: Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA) at par 13; Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) at par 19.

60. It is apparent from the City's "detailed reasons" (as quoted above) that the City was very concerned about giving the Applicant a "second chance" and an "unfair advantage" over other bidders. This stance, in my view, precluded the City from properly considering the further information that the Applicant submitted pursuant to the Court Order.
61. In the result, I am of the view that the City committed a reviewable irregularity in declaring the Applicant's bid non-responsive notwithstanding the supplementary information of 16 July 2013. In this regard, I am satisfied that the City committed a mistake of law and/or failed to take all relevant considerations into account and/or failed to act in accordance with the principle of legality.

THE ENVIRONMENTAL CONCERNS

62. In its answering affidavits, the City contends that:
- 62.1. Mechanical beach cleaning has become "controversial" in light of certain destructive consequences (including destruction of sand organisms).
- 62.2. It is currently in further discussions with its Environmental Department as to the advisability of doing deep beach cleaning at all.
- 62.3. In view of these "environmental issues", it has become "entirely inappropriate for any contract to now be awarded to the Applicant or any other bidder."

63. At the outset, it is significant that the City's decision to cancel the tender was not due to any environmental issues. The reason was the purported absence of any acceptable bids. I have referred to the relevant documentation from the City in this regard.

64. As regards the question of reasons in respect of administrative action, in **Jicama 17 (Pty) Ltd v West Coast District Municipality** 2006 (1) SA 116 (C),⁶ this Court has previously held:

"[11] I agree with counsel for the applicant that, having found that a binding agreement had come into effect between the parties, it is not open to the first respondent to raise the other defences raised for the first time in its answering papers. The applicant has come to court in order to deal with the reason which was conveyed to it as being the basis on which the decision to cancel the tender had been made. The reason why the first respondent should not now be allowed to supplement the basis on which its previous decision was taken is eloquently set out in a judgment of the Court of Appeal in *R v Westminster City Council, Ex parte Ermakov*, viz:

'(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it

⁶ See too: *National Lotteries Board v SA Education & Environment Project* 2012 (4) SA 504 (SCA).

is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.”

65. Furthermore, Regulation 8(4) of the Preferential Procurement Regulations, 201 published under GN R502 in GG 34350 of 8 June 2011⁷ provides as follows:

- “(4) An organ of state may, prior to the award of a tender, cancel a tender if-
- (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
 - (b) funds are no longer available to cover the total envisaged expenditure; or
 - (c) no acceptable tenders are received.”

66. I am of the view that despite the environmental concerns having been raised in the City’s answering affidavit, they were not the City’s reasons for its decision to cancel the tender. Accordingly, in my view the City has failed to demonstrate

⁷ These grounds for cancellation are also contained in clause 255 of the City’s Supply Chain Management Policy.

that its decision to cancel the tender fell within the purview of Regulation 8(4)(a) referred to above.

67. In any event, the City's stance is that it is presently in further discussions with its Environmental Department as to the advisability of doing deep beach cleaning at all. Accordingly, it has not yet definitively determined that the services are no longer required in terms of Regulation 4(a). Indeed, until the prior judgment of this Court the City was prepared to have awarded the tender to Khazimla notwithstanding the alleged environmental concerns.
68. Furthermore, the City is in any event itself cleaning all beaches mechanically and has been doing so since July 2012, using a beach cleaning machine akin to that of the Applicant.
69. In the result, I am of the view that the City's environmental concerns were not and could not have been the reason for its cancellation of the tender on 14 October 2013.
70. In light thereof, coupled with my finding that the City committed a reviewable irregularity in declaring the Applicant's bid non-responsive notwithstanding the supplementary information of 16 July 2013, it must follow that the City's decision to cancel the tender must also be reviewed and set aside.

AN ORDER FOR SUBSTITUTION

71. In terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"), a Court is empowered in "exceptional cases" to substitute or vary administrative action or correct a defect resulting from

administrative action. The Applicant seeks an Order of this nature in these proceedings.

72. In **Erf One Six Seven Orchards CC v Greater Jhb Metropolitan Council (Jhb Administration)** 1999 (1) SA 104 (SCA) at 109 the Court held that the general principle is that the matter will be sent back to the decision-maker unless there are special circumstances giving reason for not doing so. In essence substitution of a decision entails a question of fairness to both sides.⁸
73. In **University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others** 1998 (3) SA 124 (C) at 131D - J the Court summarised the guidelines concerning substitution:

“Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary. . . . The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant. . . . Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. . . . It would also seem that our Courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course the mere fact that a Court considers itself as qualified to take the decision as the administrator does not per se justify usurping the administrator's powers of functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view.”

74. In this matter, there is no evidence of bias or incompetence; nor is there reason to believe that the City will not apply its mind fairly and properly to the

⁸ See too: *Commissioner, Competition Commission v General Council of the Bar of SA* 2002 (6) SA 606 (SCA) at par 14.

supplementary information that the Applicant has furnished it with. I am also mindful of the specialised nature of the services that form the subject-matter of this tender. Accordingly, I am of the view that there is no basis for this Court to substitute its decision for that of the decision-maker.

CONCLUSION

75. In the result, I make the following order:

75.1. The Respondent's decision (taken on or about 14 October 2013) to declare as unresponsive the bid of the Applicant and its joint venture partner, Wasteman Holdings (Pty) Ltd (collectively referred to as the "Joint Venture") submitted pursuant to tender number 438S/2011/12 (for the provision of deep beach cleaning, "the tender") is reviewed and set aside.

75.2. The Respondent's decision to cancel the tender taken on or about 14 October 2013 is reviewed and set aside.

75.3. The Respondent is ordered to reconsider and evaluate the Joint Venture's bid (as supplemented by the information submitted to the Respondent on or about 16 July 2013) within three (3) weeks from the date of judgment.

75.4. The Respondent is ordered to pay the Applicant's costs, such costs to include the costs of two counsel.

K PILLAY

Acting Judge of the High Court

25 March 2014