IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
HELD AT JOHANNESBURG

CASE NO: 1436/2021
DATE: 2021-04-20

In the matter between

TAKUBIZA TRADING PROJECTS CC **Applicant**

and

THE CITY OF EHURHULENI (IN LIQUIDATION) **First Respondent**

ZUTARI (PTY) LTD **Second Respondent**
Previously Aurecon South Africa Pty Ltd
Registration No 1977/003711/07

NTIYISO CONSULTING (PTY) LTD **Third Respondent**
Registration No 2018/560868/07

J U D G M E N T

VICTOR J:

> "In our society tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the constitution obliges organs of state to ensure that the procurement process is fair, equitable, transparent, competitive and cost effective. Where the procurement process is shown not to be so, Courts have the power to intervene."[1]

[1] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) ([2015] ZACC 22) para 1:

[1] This matter is a stark reminder that officials who are tasked with the evaluation of tenders must throughout the process remain vigilant and must apply procedurally fair principles.

[2] It is this approach which is consonant with the fundamental right to lawful, reasonable, and procedural fair administrative action that the Constitution affords to everybody. The committee that evaluates a bid, plays a key role in that process and as an organ of state must exact scrupulous standards of procedural fairness at all times.

Background facts

[3] The applicant, Takubiza Trading Projects CC, submitted a tender for the appointment of a finance meter management consultant to manage the water and electricity meter readings and credit control process for Ekurhuleni Metropolitan Municipality (Ekurhuleni). Zutari Pty Ltd and Nitiyiso Consulting Pty Ltd, the first and second respondents respectively were awarded the tender.

[4] The tender covered two separate areas described as Area 1 (North East area) and Area 2 (South West area). The highest scoring tenderer would be appointed to Area 1 and next would be awarded Area 2. In this case the second respondent scored the highest and was awarded Area 1 and the second highest went to the third respondent. The tender was for a substantial sum. Area 1 was R37, 975, 375 and Area 2 was R79, 661, 778 thus totaling in excess of R117, 000, 000.

[5] The applicant contends that its profile in the bid demonstrated extensive experience, capacity, and skill to deliver on the project. This included as per its reference letter, the ability to provide *meter management* services to manage Ekurhuleni's Meter Management Services of its water and electricity meter readings and its *management* of the credit control process.

[6] In accordance with the bid process a contactable reference was required confirming that the bidder had rendered meter management and credit control management services. According to the bid response and the letter of reference, the applicant had the proposed key personnel as well as satisfactory management skills and experience in providing the required services.

[7] It is undisputed that the letter of 22 June 2020 from UMS confirming the applicant's necessary skills was included in the tender documents. The letter confirmed that UMS held an appointment with the City of Tshwane and that it had appointed the applicant as a project manager consultant who was responsible for the *management* of five contract companies for *credit control* in respect of water and electricity and had *managed* three meter reading companies covering some 17 800 meters. The letter also went on to state that they utilised an inhouse system to perform both meter reading *management and credit control management* as well as mobile devices supplied by UMS. The applicant's performance in the contract was commended. A similar commendation letter was included in relation to the work done by the applicant for Ekurhuleni in reading meters. The following is said "All matters have been dealt with on a professional and

competent level. Takubiza Trading is hereby recommended as a solid and reliable company". This recommendation emanated from Mr Pitlo, Ekurhuleni's Area Income Manager.

[8] It is the applicant's case that based on the tender prices and its evaluation it would have scored as the second highest tenderer if it passed the functionality test on correct information. The applicant asserts that there were serious irregularities in the process. It also argued that Ekurhuleni failed to apply the primary requirement that it was the BEC (Bid Evaluation Committee) that had to do the final evaluation which it failed to do fairly and correctly.

[9] The second irregularity contended for is based on the award to the second respondent which was considered and awarded by Ekurhuleni after the tender validity period had expired.

[10] The applicant argued that if either one or both of these issues were found to be in its favour, it would make the whole evaluation process flawed and Ekurhuleni would have to commence with a new tender process.

Urgency

[11] The application was brought by way of urgency. Since Ekurhuleni had already commenced to implement the tender to both the second and third respondents, this implementation would continue unless there is intervention by a Court.

[12] The applicant submits that the contract period is 36 months and an effective remedy by a Court can be granted within this period including finalising all possible appeals.

[13] If the application were to be heard in the ordinary course, it would take a lot of time and the contract would have already lapsed. Ekurhuleni, and both the second and third respondents contest the question of urgency and in particular the third respondent points out that the applicant was slow to get off the mark to bring this application. The third respondent also submits that the Urgent Court is not geared for dealing with matters of this nature. In particular where the papers are voluminous and where there are complex and even some novel points of law. It is necessary to establish the level of prejudice if the matter were to be heard in a hearing in due course. In *Mogalakwena Local Municipality* Tuchten J stated:

> "Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. " [2]

---

2 Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others (35248/14) [2014] ZAGPPHC 536; 2016 (4) SA 99 (GP) (7 August 2014) Tuchten J stated as follows at Para 63 "It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course... at para 64 Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights."

[14] Ekurhuleni after making scurrilous allegations against the applicant for bringing these review proceedings, alleges that the applicant is really embarking on a self-serving mission and a cynical ploy to jump the queue.

[15] In the midst of these urgent proceedings and in the heads of argument Ekurhuleni accused the applicant of dishonesty, deliberate falsehoods, deliberate distortion of facts and allegations that it has mislead the Court. These vitriolic attacks against the applicant were quite unnecessary in the circumstances.

[16] As I have already indicated a party is entitled to protect its constitutional rights and in particular the vast financial implications emanating from a tender of this size. It is clear to me that Ekurhuleni for some unknown reason has taken an aggressive and unexplained attitude towards the applicant for daring to launch these proceedings to protect its rights.

[17] It is necessary to point out that a party to a tender process, where it is of the view that its constitutional right to a fair procurement process has been breached, is entitled to protect its rights by way of court process. There is no negative inference to be drawn if such an application is embarked upon to protect its constitutional rights.

[18] Ekurhuleni argues that no case has been made out for urgency by the applicant and that it has created urgency on a false basis. The second respondent also supports Ekurhuleni's stance on urgency.

[19] Clearly if this matter were to take its normal course, the contract period or the tender period would have lapsed and the applicant would be severely prejudiced. I therefore found that the applicant was justified in bringing this matter by way of urgency in the light of the principles referred to.

Issues

[20] In oral argument the applicant confined itself to two central irregularities:

20.1 There was an irregularity in the BEC process as it failed to do the actual final assessment as required by the Supply Chain Management Policy (SCMP).

20.2 The tender validity period of the tender had expired at the time Ekurhuleni awarded the tender to the second respondent.

Irregularity in the BEC bid evaluation process.

[21] The applicant contends that as a fact the BEC did not evaluate its tender on functionality. Most of that work and the conclusion was done by the functionality evaluation team and the BEC simply accepted its work. Although the BEC asked a few questions, in substance the evaluation was not done by the BEC. This the applicant considers to be the first irregularity. The facts surrounding this are as follows.

[22] The functionality evaluation team which is not the BEC scored the applicant twice. In the first round of scoring, the members of the evaluation team awarded the applicant a score of 86 out of a 100, the minimum threshold being 81. The applicant was the second highest scorer.

[23] The functionality team then went on to score the applicant a second time. Some of the members of the functionality evaluation team misread the requirement of experience in the management of meter services and also the management of the credit control process. The letter from the applicant's reference person was replete with reference to its management skills.

[24] A central consideration on the issues of the functionality evaluation is the failure by the applicant's reference person to reply to an email sent by the evaluation team to confirm the applicant's performance and management skills in a previous contract. UMS failed to respond to the email timeously by Friday 25 August 2020 or at all.

[25] It is the applicant's case that Mr Vermaak of UMS did not receive the request from Ekurhuleni although the email had been sent. It was sent to a general email address of UMS, and not to Mr Vermaak's personal email address and he did not receive it.

[26] The tone of the letter is also an aspect raised by the applicant. The letter did not suggest any sense of urgency or that in the absence of that response by the Friday 25 August 2020, this would result in the applicant

being disqualified in the sense that the functionality score would be below the minimum requirement.

[27] This the applicant submits is a crucial feature because the consequence of a non-reply from a reference person should have been spelled out in the bid document and once there was a non–response from Mr Vermaak, this should have been followed up. The stakes were extremely high in this tender and that is why the entire process should have been characterised by the officials exercising diligence and in particular the members of the BEC should have actually applied their mind when there was no response from Mr Vermaak. This is a digital age where transmissions, emails get lost or in this case was sent to a general email of a company and did not reach the recipient, Mr Vermaak. The BEC could have directed someone to telephone and find out about the non-reply from Mr Vermaak. As already indicated the bid document should have indicated the consequences of a non-response.

[28] The Bid documents simply referred to a contactable reference person. There was no suggestion that a failure by the reference person to respond would result in this catastrophic result for the applicant. In *AllPay* the Court stated: "(t)he purpose of a tender is not to reward bidders who are *clever enough to decipher unclear directions*. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective, and competitive." [3]

[29] It would have been impossible for the applicant to second guess the importance of that provision or be clever enough to know that a non-reply

[3] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) art para 92

from a reference person would amount to a disqualification or that an email sent to a general office would suffice as a fair procedural process. In any event the applicant did not even know that a request for corroborating information had been requested from Mr Vermaak. The bid document once it contained such a provision should have formed an important part of the follow up procedure by the BEC so as to ensure procedural fairness. This must be compared with the diligence Ekurhuleni exercised when it sought to make sure the letter requesting the extension was received by the second respondent.

[30] A further feature of this particular irregularity is the failure by Ekurhuleni to produce the BEC scoring sheet on functionality. It claimed that the BEC did in fact do the evaluation but was unable to produce the score sheet by the BEC. It claimed that the score sheet was misplaced.

[31] The BEC consisted of five members namely Messrs/ Madams Mark Wilson, Mduduzi Mncube, Zanele Kathembu, Linda Ndwaba and Lihle Ndzelu. Only one member of the BEC, Lihle Ndzelu filed a confirmatory affidavit. No scoring sheets by the BEC were provided. Noteworthy is the reference in the minutes of the BEC dated 29 October 2020 where it is stated that:

> "*1.1.2 Bidder 10 [the applicant] – first reference letter no confirmation of previous experience was received after request, SCM to confirm COE work for second reference letter*."

[32] The minutes of the meeting of the BEC of 19 November 2020 also refers to the reason that the rejection on functionality was due to there being no confirmation that the applicant had the necessary meter reading management and credit control management experience.

[33] According to Messrs Lubbe, Wagener, and Ms Mlangeni, of the evaluation team, stated the reason for changing their scores was ascribed to the fact that they had incorrectly assessed the applicant for meter reading and credit control management. The applicant submits that they did not question the authenticity of the letter of reference, they simply misread the contents of the letter and concluded the applicant did not have management experience which it did. This was a crucial error. The BEC report of 22 October 2020 clearly illustrated this error and resulted in the evaluation team and BEC not considering the applicant for management of meter reading and management of credit control.

[34] The evaluation team had already decided by 19 August 2020 on the applicant's lack of management skills when they reduced the applicant's score to 70. Yet the letter to the applicant's reference person, Mr Vermaak, was only sent on 25 August 2020 and then only requesting a response by 28 August 2020. The evaluation team had already made its decision which was followed through by the BEC. This is a flawed procedure.

[35] It is also clear from the record that the evaluation team overlooked or did not take into account that the functionality criteria requiring "*management experience*" was spelt out clearly in the letter of Mr Vermaak. The applicant submits they accepted the letter and did not ask for

confirmation. In my view this was either a negligent omission or a deliberate decision to downgrade the applicant's score. They were not interested in what the response from Mr Vermaak would yield.

[36] In *Logbro,* Cameron JA stated:

> "The starting point must be that the tender process constituted 'administrative action' under the Constitution. This entitled the appellant... to a lawful and *procedurally fair process* and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons given for it. [4]

[37] Accordingly, the applicant is entitled to a lawful and procedurally fair process in the *different phases of the evaluation process*, where the issue in the bid document required clarification and verification. This would have resulted in a fair outcome.

[38] While this is obvious and while there may be certain glitches including errors along the way in the process but where those glitches give rise to substantial prejudicial consequences to any one of the bidders then the state organ and in this case, Ekurhuleni cannot be immunised from the consequences.

[39] Applying this procedurally fair process to the question of obtaining a response from a contactable reference person, Ekurhuleni could have used a whole range of steps including follow-up call which it could employ to make sure that that entire process was fair.

---

[4] *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) at para 5

[40] I find that Ekurhuleni does have such a duty. The duty flows from the principle of fairness as stated in *Logbro*. Ekurhuleni, no matter how acrimonious its attitude was towards the applicant, and this is clear from the affidavit and the heads of arguments that were filed, must nonetheless follow a fair procedure.

[41] The first respondent has to bear in mind that it relies on public funding and therefore has assumed various obligations in relation to procurement policy. These are set out in the Local Government Municipal Finance Management Act number 36 of 2003. Chapter 11, Section 62(1) in particular makes it clear that the accounting officer of the municipality must make sure that it takes all reasonable steps to implement the supply chain management policy in accordance with Chapter 11.

[42] Ekurhuleni in this case did have a very detailed supply chain management policy in place and what Section 112(2) of the MFMA requires is that at all times the process must be equitable and transparent.

[43] The applicant contends that if regard be had to the structure of the supply management policy, the follow up of a non-response in a tender as large as this one, required at the very least a follow up or a contact with the actual bidder to enquire as to why its reference person did not respond. In my view that would be a fair process. Ekurhuleni submitted the contrary.

[44] There was an even greater responsibility on the BEC and the officials who were involved in a non-response to take further steps to try

and contact Mr Vermaak. His telephone number was in the letter. Ekurhuleni argued that the policy does not allow telephone calls but a written request. Well in this digital era, it would at least be incumbent on the BEC to instruct the officials of the bid evaluation committee to follow up and enquire whether Mr Vermaak received the letter.

[45] It is Ekurhuleni's case that the functionality evaluation team did its work and once that evaluation was given to the BEC team, that was sufficient compliance with the functionality evaluation.

[46] Ekurhuleni relied on the contents of the various meetings to demonstrate that the BEC did the evaluation. Yet on a vital issue it was clear that everyone including the BEC just accepted there was a non-response and took the matter no further. It is of concern that the BEC took this nonchalant attitude in the light of such a substantially sized tender.

[47] Based on the *Logbro* principles this is not an innocent glitch. If it was a glitch, Ekurhuleni should have followed the non-response up very carefully.

[48] In my view and central to this case is the production of that scoring sheet by the BEC. The excuse that it simply was not available and apparently misplaced is unacceptable. Yet in relation to the second and third respondents it had the score sheets.

[49] Mr Frank, the deponent to Ekurhuleni's answering affidavit as well as a confirmatory affidavit from a staff member does not describe fully the

absence of the BEC's scoring sheets pertaining to the applicant. Mr Frank describes how the applicant was disqualified simply because of the non-response from Mr Vermaak.

[50] He also mentions that on the 25 August 2020, Ms Nathan addressed a letter to Mr Vermaak's company requesting the information about the management services done by it for the City of Tshwane and the proof of appointment letter between UMS and Takubiza Trading Projects. Mr Frank states further that the letter by UMS was in any event insufficient and that the affidavit of Mr Vermaak is equally lacking in detail. Reference has been made to the reference in the letter which refers fully to the applicant's management ability and the affidavit of Mr Vermaak only deals with the fact that he did not receive the letter.

[51] In my view if one has a close look at the contents of the letter, it is quite clear that the applicant had the necessary management expertise which was consistent with the first evaluation where its score was 86 out of a 100.

[52] And with the score of that magnitude, Ekurhuleni's failure to follow up results in a procedurally unfair process is irregular.

[53] As regard the evaluation sheet, it shows that the BEC did not actually apply its mind to the dramatic shift from 86 which the applicant scored to the later figure of 70.

[54] And it also raises suspicions that Mr Kgomo of Ekurhuleni changed his score on 19 August 2020 because there was no proof of work done for the Tshwane Municipality, but the verification letter only went out on the 25 of August 2020.

[55] Mr Lechle Nzele, a member of the BEC stated that the BEC was satisfied that the applicant was correctly rejected for functionality and in this regard the applicant contends, that he too, did not apply his mind with any degree or focus on the disparity between the two scores and that it was simply an easy task to rely on the non-response.

[56] The applicant draws attention to the fact that Mr Frank simply states Mr Nzele, correctly rejected bid on the lack of functionality. He also makes the positive averment that it is only the BEC who can do the evaluation, whilst it is clear that the evaluation team did the work. I am of the view that the BEC did very little independent evaluation of the bids. It is correct that an evaluation team perform preliminary tasks, but it is the BEC that must be responsible committee.

[57] Section 18.35.1 of the SCM Policy states:

> "The EMM departmental project manager is responsible for the compilation of the recommendation report, ***which shall be vetted by the BEC appointed to conduct that specific evaluation*** for compliance by the SCM practitioner and the acquisition manager before submission to the relevant bid committee/s"

[58] It is clear that the SCMP requires the BEC to conduct the specific bid for compliance before submitting to the relevant bid committee which in this case was the BAC.

[59] It is the applicant's case that it complied with all that was required and that the reference letter spelled out in detail its management experience in relation to the functionality criteria.

[60] Procedural fairness is of utmost importance in the context of this case. In *Associated Portfolio,* Dambuza JA stated:

> "Section 33 of the Constitution provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Section 3(1)(a) of PAJA incorporates the procedural fairness requirement by providing that 'administrative action which materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair'. What is fair in the particular circumstances will depend on the context of each case. But the core of the right comprises the giving to the affected person of 'adequate notice of the nature and purpose of the proposed administrative action'; a 'reasonable opportunity to make representations'; and a 'clear statement of the administrative action' (s 3(2)(b) of PAJA)." [5]
>
> Footnotes omitted.

[61] The importance of procedural fairness was emphasised in *AllPay*. Froneman J held that:

> "Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair. "[6]

[5] Associated Portfolio Solutions (Pty) Ltd and Another v Basson and Others 2021 (1) SA 341 (SCA)Section 3(2)(a) of PAJA. Para 26 See also Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA) para 19.
[6] Ibid para 40

Bid validity extension period.

[62] The second irregularity on which the applicant relies is that notwithstanding that the second respondent's offer lapsed, Ekurhuleni proceeded to award it the tender in respect of Area 1. This was in direct conflict with paragraph 18.21.1. of Ekurhuleni's SCMP policy.

[63] The purpose of the tender validity period is not only to require tenderers to keep their offers open for a stipulated period, but also one of the rules laid down by the relevant organ of state. This rule is simply that the tender will be finally adjudicated upon within a stipulated period. If that does not happen within the validity period, the tender process comes to an end, or it must be validity extended. The extension must be agreed to before the expiration of the validity period.

[64] The distinction is important because it is not simply a matter of asking the tenderers to extend the period of their offers, it should also obtain the consent of all the bidders to this extension period prior to its expiration. It is common cause that the extension period had already expired before the second respondent agreed to the extension. In my view it is clear that the request for the extension period had already expired by the time that the second respondent responded by agreeing to the request.

[65] The request was made on the Friday afternoon by Ekurhuleni and the second respondent only replied on the Monday. The bid expired on the Friday. Whatever the reason was, the rule pertaining to the validity period of the bid must be strictly complied with. This is so on a proper reading of section 16.6 of the SCMP.

[66] The SCMP determines the validity period as set out in 16.6 of the policy and the extension of the validity period is set out in 18.21.

The relevant paragraphs are as follows:

"16.6 **DETERMINING THE VALIDITY PERIOD**

16.6.1 The validity period specified in the quote/bid documentation shall allow EMM sufficient time to finalise the evaluation and award of the quotation/bid.

16.6.2 The validity period shall be determined before the quote/bid is published and shall be clearly specified in the bid documentation.

16.6.3 Generally validity periods shall be reasonable and shall depend on the item or commodity being procured.

16.6.4 Alternatively, quotes shall be valid for at least 21 calendar days and bids shall be valid for at least 90 calendar days from the closing date of the quote/bid. A longer period may be set for bids, if problems with the evaluation are envisioned, but preferably not longer than 120 calendar days. Approval is to be obtained within the CMO's delegated powers for periods shorter than 21 or 90 calendar days for quotes and bids respectively.

16.6.5 SCM shall ensure that an extension of validity is requested in writing from all bidders before the validity expiry date.

16.6.6 The failure of SCM to ensure that the validity of quotes/bids still under evaluation *is extended* ***before*** *validity expiry* shall amount to negligence on the part of the SCM practitioner and SCM acquisition manager dealing with the quote/bid."

"18.21 **EXTENSION OF VALIDITY PERIOD**

18.21.1 Extension of validity ***shall be finalised*** while the quotations/bids are still valid.

18.21.2 If a bidder should reduce his quoted price as a result thereof, the reduction may be considered only if the provider would have been the successful contractor irrespective of the reduction. In other words the case is evaluated at the original quoted price and if successful, it is accepted at the reduced price.

18.21.3 In cases where the quoted price is increased when the validity period expires and the quotation/bid concerned is either no longer recommended for acceptance or is recommended for acceptance at the higher price, the disadvantageous or incremental costs shall be reported to the Council annually."

[67] In my view paragraphs 16.6.5 and 18.21.1 have to be read together. The reference in bold in the two section clearly mean that the extension of the validity "*shall be finalised"*. The applicant contends that this means that the extension shall be finalised while the bid is still valid. I agree with this interpretation of the SCMP. It is clear from the undisputed facts in this case that it can be concluded that Ekurhuleni made the awards after the validity period lapsed and Ekurhuleni incorrectly revived the validity period. This is impermissible in these circumstances as every bid must have an equal chance. To flaunt the validity of the bid period is contrary to the provisions of section 217 of the Constitution.

[68] Ekurhuleni is required to request an extension before the validity period expires from all the participants in the tender and the extension of the validity period shall be finalised while the bids are still valid.

[69] The bid expires when the validity period expires. That would have been at midnight on the Friday 9 October 2020, and it is clear that the response only came in on the Monday 12 October 2020. Whilst the second

respondent cannot be blamed for this fact, nonetheless the lapsing of the validity period was the cut-off point, and any response thereafter meant that that extension requested was invalid. Accordingly on the 12 October 2020 there was nothing left to extend, the tender no longer existed and the awards that were made after the lapsing of the validity period are in direct conflict with Section 217 of the Constitution.

[70] The second respondent dealt in great detail with the extension of the validity period. It points out that the error is not of a material nature, and it should not in any way disqualify the second respondent. It argued that in these circumstances it would be grossly unfair and amount to unequal treatment which is prescribed in the SCMP and by Section 217 of the Constitution. I find that argument to be flawed as in this case there has to be adherence to proper administrative law principles.

[71] Second respondent submits that Ekurhuleni only had two options and that was to cancel the tender process and to commence the entire tender process afresh. The bidders would not have been given a fair opportunity to extend the validity period. The other option was of course to accept the second respondent's tender offer to extend on the Monday. Even though their tender had strictly speaking expired by the time their agreement to extend was communicated to Ekurhuleni. It chose the second option, and the question now arises whether that was legally permissible for it to do so.

[72] Both Ekurhuleni and the second respondent submit that it was entitled to do so, and that the applicant is simply being opportunistic in seeking to use that point to set aside the tenders. The second respondent

and Ekurhuleni argue paragraph 18.21.1 of the SCMP does not require the whole extension process to be completed before the original expiry date. They also contend that paragraph 16.5.1 of the SCMP only requires the written request for an extension to predate the expiry date.

[73] Ekurhuleni submitted that in broad terms however the purpose of both provisions can only be to ensure transparency and fairness to all tenders as long as all tenderers are given a fair and equal opportunity to extend the validity period of their bids and that is immaterial whether they agreed to do so before or after the expiration of the validity period.

[74] Ekurhuleni also submitted that there could be no prejudice to the applicant in relation to the procedure followed. They argue that this case is distinguishable from *Telkom* and *Joubert* Galpin[7] in that the request was made well after the validity period had expired and this of itself meant that the first respondent had to comply substantially with the process. In *Telkom,* Southwood J held:

> "The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete — albeit unsuccessfully — and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive."[8]

[75] The second respondent also relied on the judgment of Windell J in *Q Tique 27 (Pty)* Ltd where the court held that *Telkom* and *Galpin* are

[7] Joubert Galpin Searle Inc and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP) ([2014] 2 All SA 604):
[8] Telkom SA Ltd v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Ltd [2011] ZAGPHC 1: applied.

distinguishable as the extension in those cases was sought after the validity period expired and the Judge held that a non-response cannot affect the extension of the bid validity period and was not an irregularity. In applying constitutionally valid procurement principles Froneman J held in *AllPay* held that compliance was required for a valid procurement process and its components were not mere 'internal prescripts' that could be disregarded at whim." [9] The validity extension period cannot be disregarded at a whim. I agree with the principle in *Telkom* "the tender process was complete — albeit unsuccessfully and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract."

Conclusion

[76] I find that Ekurhuleni failed to apply procedural fairness on the critical issue of contacting the reference person in assessing the functionality of the applicant. I also find that Ekurhuleni was not entitled to simply overlook the fact that it had failed to comply with the principles in relation to the extension of the bid validity period. Ekurhuleni was also obliged to follow a fair procedural process in relation to the bid evaluation process. It did not do so therefore the entire bid process must be set aside on both grounds.

Costs

[77] The costs must follow the result. Ekurhuleni has created this problem, and they are liable to pay the costs.

[78] As to the urgent interlocutory application, Ekurhuleni provide the documents in tranches thus necessitating the amendments of its Notice of

[9] Allpay Ibid Para 40, See Also Plasket JA in Valor IT v Premier, North West Province And Others 2021 (1) Sa 42 (SCA) Para 41

Motion. Ekurhuleni's failure to provide all the documentation at the same time pursuant to Rule 53, necessitated the interlocutory application and was necessary. The same applies to the continued request for the BEC scoring sheet.

Order

The following order is made:

1. The decision of the first respondents to award tender PSFO7-2020 to the second and third respondents' is reviewed and set aside and declared constitutionally invalid.

2. The service level agreement concluded between the first respondent and the second respondent, and the service level agreement concluded between the first respondent and the third respondent are set aside and declare it constitutionally invalid.

3. The declaration of invalidity is suspended for a period of 150 days. Calendar days. To enable the first respondent to commence with the new tender process for the appointment of service providers.

4. The first respondent is ordered to pay the applicant's cost and the cost of the second and third respondents.

5. The first respondent is ordered to pay the reserved costs in respect of the interlocutory order urgent, in respect of the interlocutory urgent

application to compel the first respondents to deliver the complete record.

_____
M Victor
Judge of the Gauteng Local Division

Adv APJ Els
Counsel for Applicant

Adv U Dayanand-Jugroop
Counsel for First Respondent

JA Van der Westhuizen
AJR Booysen
Counsel for Second Respondent

B Gradige
Counsel for Third Respondent