



**IN THE HIGH COURT OF SOUTH AFRICA  
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case no: 1365/23

In the matter between:

**TMT SERVICES & SUPPLIES (PTY) LTD**  
**t/a TRAFFIC MANAGEMENT TECHNOLOGIES**  
(Reg no. 2000/022850/07)

Applicant

and

**CITY OF JOHANNESBURG**  
**METROPOLITAN MUNICIPALITY**

First respondent

**SYNTELL (PTY) LTD**  
(Reg no. 2003/022275/07)

Second respondent

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**JUDGMENT DELIVERED (VIA EMAIL) ON 27 MARCH 2024**

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**SHER, J:**

1. This is an application to review and set aside an award by the City of Johannesburg ('the City') to the 2<sup>nd</sup> respondent ('Syntell') on 2 December 2022, of a three-year tender to the value of R 177.1 million odd, for the provision of advanced law enforcement and 'crash' management services.
2. The applicant was one of 3 bidders for the tender. It was disqualified by the City's bid evaluation committee ('the BEC') on 6 May 2022 on the grounds that its bid was non-responsive, as it had failed to file certified copies of license certificates for the equipment it was to supply. A second bidder was disqualified for the same

reason. According to the BEC, Syntell was the only compliant and responsive bidder.

### **The background**

3. The applicant is in the business of providing traffic management services to state entities such as municipalities and provincial governments. These services comprise both so-called 'front' and 'back' office services. Front-office services involve capturing traffic violations or 'infringements' with fixed or mobile cameras and equipment. Back-office services consist of processing and analysing the data captured and issuing fines and court process. The applicant supplied these services to the City between 2015 and 2017 in terms of a previous tender which was awarded to it. The subsequent 3-year tender which ran from 2018 to 2021 was awarded to Syntell.
4. In 2018-2019 the City decided to review the operating model in terms of which these services were provided, whereby the City acquired the hardware and equipment which the service provider who was awarded the tender would operate, for which it would be remunerated on the basis of the number of traffic violations that it captured and processed, utilizing the City's equipment.
5. Due to financial constraints the City proposed that in future the hardware and equipment should be supplied by the service provider, who would provide both front and back-office services for the period the tender was to run, for a 'flat' i.e. fixed monthly fee. As before, the services would include the capturing, processing and analysis of traffic infringement and accident data (which would be in photographic, digital and/or documentary form), and would have to interface with several electronic platforms including eNatis (the National Traffic Information System which contains the national register for all motor vehicle licences and registrations), AARTO (the Administrative Adjudication of Road Traffic Offences system which provides for the administration and collection of fines related to road traffic infringements), and the City's Ops Centre.
6. To develop and compile the requisite specifications for the new operating model consultations were held with a variety of roleplayers and technical experts and a bid specifications committee ('BSC') was established, which met on numerous

- occasions during 2021 to formulate specifications for a new tender. Once these were compiled, they were reviewed, before being approved by the City Manager.
7. On 15 February 2022 the City advertised a new 3-year tender, which required bids to be submitted by 22 March 2022. The tender documents contained detailed specifications for the 'front-office' equipment which was to be supplied by the successful bidder, which included a number of fixed and mobile cameras with automatic number plate recognition, identity, photo scanning and data capturing facilities, as well as other devices. The back-office system specifications included electronic data and traffic violation related processing (including notices, summonses and warrants), and payment systems. The bid specifications also made provision for a host of new services to be provided in relation to the capturing, processing and analysis of accident and vehicle impounding related data.
  8. The tender documents specified a list of returnable documents which had to be submitted by bidders which included valid, certified copies of OEM ('original equipment manufacturer') license certificates for all cameras and devices which were to be used, issued by ICASA, the Independent Communications Authority of SA. These certificates were necessary to ensure that the hardware which was to be provided would be compatible with the radio and telecommunications systems which were used by the City's law enforcement. The tender documents clearly stipulated that a failure to provide these certificates would result in disqualification.
  9. To qualify for the tender bidders were also required to attend a compulsory briefing session, which took place on 25 February 2022. During the session the applicant's General Manager François Du Toit enquired whether an indication could be given of the current monthly volume of traffic infringements that were being processed. The presiding official intimated that a 'figure' could be provided but that he would have to consult his colleagues, upon which he immediately indicated that the information would not be supplied as it would not be 'useful' for the tender. The City's head of ICT infrastructure confirmed that the information would not be provided. He pointed out that some of those who were in

attendance had previously provided the services which were on tender, and if they considered the bid specifications they would be able to 'come up with something' i.e. to put in a bid. He said the City did not wish to entertain the request for information as it would delay the process.

10. At the conclusion of the session bidders were invited to submit any further questions they might have, in writing. On 2 March 2022 Du Toit submitted a detailed list of questions in relation to several aspects of the bid specifications. At the end thereof he asked the City to indicate the 'amount of mobile, fixed-site and handwritten' infringements which were currently being generated on a monthly and/or annual basis, as this information would 'significantly influence' the price which would be submitted. In a note on the side, he said that it was the duty of the invitee to ensure that the tender was not void for vagueness and that all participants were placed on an 'equal footing'.
11. On 22 March 2022 bidders who had attended the briefing were informed that the bid specifications had been amended in some respects and, as a result, the closing date would be extended to 13 April 2022.
12. On 16 March 2022 the applicant sent an email to City officials in which it pointed out that a response to the questions which had been submitted by bidders had not yet been provided. On the same day the City addressed a letter to all prospective bidders in which it sought to supply the requisite answers. The letter did not pertinently deal with the questions which had been posed by the applicant in its list, or its request for information pertaining to the volume of traffic infringements. The applicant noted this in a response which it sent the following day, in which it enquired whether there was a reason for this and whether an answer would be provided to it. The City never responded to this communication.
13. Notwithstanding the City's failure to do so and its failure to provide any data pertaining to traffic infringement volumes, the applicant nonetheless proceeded to submit a bid before the closing date of 13 April 2022.
14. The first meeting of the BEC (which consisted of 9 officials from various departments/sections of the municipality including the Metro Police Department, Public Safety, Group Legal, and Group Strategic Supply Chain Management

- (GSSCM)), took place on 5 May 2022, at which time it was noted that 3 bids had been received, which had been opened in public on 13 April 2022.
15. The BEC then dealt with several preliminary issues before adjourning to the following day, at which time it proceeded to go through the bids to determine whether they were responsive i.e. whether they complied with the qualifying criteria which had been stipulated. During this process it found that only Syntell's bid was properly compliant, and the bids of the remaining bidders were not, as they had supplied copies of ICASA license certificates for their equipment which were not certified. As a result, they were treated as non-responsive and were disqualified.
  16. The BEC thereafter met on a further 5 occasions between 9 May and 23 June 2022 to consider various aspects and after attending a 'live simulated' demonstration of Syntell's systems it concluded that the tender should be awarded to it. At the instance of the Head: Group Internal Audit Services an independent firm of attorneys, Prince Mudau & Associates, was commissioned to conduct a probity assessment into whether there had been compliance by the BEC with the requisite legal prescripts during the evaluation process, and whether the preferred bidder had been correctly selected. As part of their assessment the attorneys reviewed the tender and bid documents. After doing so they were satisfied that two of the bids had been correctly disqualified as non-responsive, for their failure to file certified copies of the required licence certificates.
  17. After reviewing the process that had been followed in evaluating the remaining bidder's submission, they concluded that it had been correctly and fairly scored by the BEC, and accordingly advised that it should proceed with its recommendation that the tender be awarded to Syntell. The BEC met on 2 further occasions thereafter: on 7 November to consider the probity report and again on 22 November 2022, at which time it formally resolved to recommend that the tender be awarded to Syntell.
  18. Pursuant to this GCSCM gave notice that a meeting of the executive adjudication committee ('the EAC') was to take place on 24 November 2022 for the purpose

of the adjudication, in public, of the award of the tender. To this end the BEC provided a detailed report to the EAC in support of its recommendation that the bid should be awarded to Syntell for its bid price of R177.1 million odd. In the report it confirmed that the other bidders had been disqualified because they had not complied with the qualifying criteria, as they had not supplied certified copies of their licence certificates.

19. After considering the report which had been submitted to it the EAC duly resolved, on 2 December 2022, to recommend that the tender should be awarded to Syntell, and the Head: Public Safety in consultation with Group Legal Services should be authorized to negotiate, conclude, and sign the necessary service level agreement ('SLA') with Syntell. The Acting City Manager duly accepted these recommendations and awarded the tender on the same day.
20. On 13 December 2022 the Group Head: GSSCM sent a letter of 'regret' to the applicant's tender email address advising it that its bid had been unsuccessful. The applicant claims not to have received this notification and avers that it was 'oblivious' to the steps that were taken by the City prior thereto, in the process leading up to the award, even though, as previously pointed out the adjudication of the tender took place in public on 24 November 2022. The applicant avers that it only heard about the award of the tender from a newspaper report that was published on 22 December 2022. According to it, at that stage it had 'absolutely no knowledge of anything concerning' its bid. Notably, in its founding affidavit it did acknowledge that it was aware of the announcement that was made when the bids were opened on 13 April 2022 that Syntell's bid was R 177 109 884, which was lower than its bid of R 190 720 851. As the 3<sup>rd</sup> bidder's announced price was R508.1 million odd the applicant must have known that as Syntell's bid was the lowest of the three it was therefore in 'pole position' to be awarded the tender. Curiously, despite this the applicant made no attempt to communicate with the City thereafter, in order to ascertain what was going on and whether the tender had been awarded to Syntell. Instead, it remained supine until publication of the report in the newspaper, in which it was reported not only that the tender

had been awarded to Syntell, but that it was in the process of being implemented.

21. On the same day, 22 December 2022, the applicant's attorney addressed a letter to the City Manager in which he sought confirmation that the tender had been awarded to Syntell and requested certain information, including copies of Syntell's bid and the decisions of the BSC, BEC and EAC.
22. The City responded on 24 December 2022 in a letter in which it confirmed that Syntell had been awarded the tender and pointed out that the decision to recommend the award to it was made at the adjudication which had taken place in public a month earlier. It also indicated that an SLA had been entered into with Syntell the same day.
23. In response to a request from applicant's attorney on 10 January 2023 the City indicated that it was not prepared to halt the implementation of the SLA, as this would be detrimental to residents and would impact negatively on service delivery.

#### **The applicant's case**

24. The applicants entire 40-page founding affidavit was devoted to setting out its case for urgent interim relief (whereby immediate implementation of the award was to be interdicted pending the outcome of the review), and the requirements for such relief.
25. The applicant contended that its clear alternatively prima facie right to procedural fairness in terms of s 6(2) of the Promotion of Administrative Justice Act<sup>1</sup> ('PAJA') had been infringed in a variety of ways. The City had allowed Syntell to compete against other bidders with an unfair advantage, as the bid specifications favoured it over other bidders. The City had treated the applicant unfairly and in a biased manner during the course of the briefing, as a bidder who was seeking merely to delay the process, when it had fairly sought information pertaining to infringement volumes. The City's failure to provide the information because it thought it was unimportant or irrelevant resulted in it acting in an arbitrary fashion and taking irrelevant considerations into account. And not providing the applicant with the

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<sup>1</sup> Act 3 of 2000.

infringement 'numbers' had resulted in an irrational process which undermined the constitutional requirements of transparency, competitiveness, fairness, equitableness and cost effectiveness.

26. No case was set out or pleaded by the applicant in respect of the principal relief which was sought in terms of part B of the notice of motion i.e. the review. Notwithstanding this deficiency a month later the applicant filed a supplementary founding affidavit in which it sought to supplement the grounds of review it claimed to have set out in its founding affidavit, by the addition of a further ground which it said had become apparent after it had considered the record which had been filed by the City, in terms of rule 53. In this regard it said that it was evident from the copies of the licence equipment certificates which had been filed that those which belonged to Syntell had also not been certified, contrary to the BEC minutes of 6 May 2022. Thus, Syntell had also been non-responsive and should also have been disqualified.

#### **The respondents' case**

27. In its answering affidavit the City's Acting Group Head: Legal Services contended that the review had no basis in law and the City had scrupulously followed the requisite legal prescripts.
28. He detailed the process that had been followed by the City and emphasised that the tender sought to introduce a new model for the provision of the required services whereby the equipment, including both hardware and software, was to be acquired by the service provider and not the City, which would effectively remunerate the provider for the services which were rendered on a monthly basis, in contrast to the previous model where its remuneration was based on the number of infringements which were captured and processed.
29. He explained what transpired at the compulsory briefing session and how bidders were given an opportunity to submit any further questions they may have had, in writing. He pointed out that it had been made clear to the applicant at the briefing that the infringement information it sought would not be provided as it was considered to be irrelevant, and that is why the City did not respond to the applicant's request for the selfsame information in its email of 16 March 2022. In



requesting this information for the 2<sup>nd</sup> time the applicant clearly still laboured under the misapprehension that traffic infringement volumes were critical for the provision of the services which were the subject of the tender. This was not correct, as the tender envisaged a complete shift from the former operating model which had been followed in previous tenders.

30. The Acting Head reiterated that when the bid was evaluated by the BEC it was apparent that both the applicant and a 2<sup>nd</sup> bidder had failed to comply with the qualifying criteria as they had failed to submit certified copies of the licence certificates for their equipment, and they had therefore been correctly and properly disqualified on the grounds that their bids were non-responsive. As to the contention, in the supplementary founding affidavit, that Syntell should also have been disqualified on this basis as its certificates were also not certified, he explained that there had been a mix-up in the filing of the record, which had caused confusion. The City's attorneys had been provided by City officials with files containing hard copies of the bid documents. As the files had gone through various processes and committees for evaluation and adjudication, they had been jumbled up, and the papers had not been properly 'repackaged' in the correct order in which they had originally been submitted, before they were provided to the attorneys, and in certain instances the contents of the files were incomplete. It appeared that, as the licence certificates were all issued by ICASA and bore the names of common equipment providers, when compiling the rule 53 record the clerks had simply made copies of one of the sets of certificates which had been submitted (by a non-compliant bidder), instead of copies of the actual certificates which had been lodged by each of the 3 bidders.
31. After a query was raised about the certificates the City's attorneys attended on the City's offices where they were furnished with the original, complete bids which had been lodged by the 3 bidders, in their proper order, together with digital copies which had been made thereof. From these documents they were able to draw the actual certificates which had been filed by each bidder, which were then filed as a supplementary record, on 6 March 2023. From these documents it was clear that the ICASA certificates which had been filed by

Syntell had been certified, whereas those which had been filed by the other 2 bidders had not. In support of these averments reference to the actual certificates that were filed in the supplementary record was made in confirmatory affidavits which were lodged by the City's attorneys.

32. As to the applicant's principal complaint that it had not been provided with traffic infringement statistics the Acting Group Head: Legal Services restated that whilst the previous model was based on a fee per infringement that was captured, the tender proposed a service contract in terms of which a flat monthly service fee would be paid by the City, irrespective of the number of infringements captured and processed, or the fines generated pursuant thereto. Thus, as far as the City was concerned the information that was sought by the applicant in relation to the volume of infringements was unnecessary and irrelevant.
33. In the answering affidavit which Syntell filed, it too contended that historic traffic infringement data was irrelevant for the tender and its pricing, although it could serve as an estimation of future traffic infringement volumes. It pointed out that during 2 of the 3 years between 2018 and 2021 when it had been the incumbent service provider, traffic volumes and infringements had been significantly depressed because of the COVID-19 pandemic, and the number of traffic infringements during this period could accordingly not serve as an accurate basis to forecast infringement volumes for the following 3 years. If anything, the data for the previous 3-year period up to 2018, when the applicant was the service provider, would provide a more accurate and realistic picture of the volume of infringements that could be expected for the 2022-2025 period. What further skewed the potential value of any historic data was that the tender specifications envisaged the deployment of a significantly higher number of infringement 'capturing devices' than had previously been deployed. In this regard, as at May 2021 only 33 'speed' cameras (fixed and mobile) were deployed whereas the tender envisaged the deployment of 110 such cameras. In addition, the tender specifications provided for an additional 6 average-speed-over-distance cameras, 1500 handheld camera units, and 5 portable weighbridge instruments/devices, the use of which would result in a significant increase in the

volume of recorded infringements for the 2022-2025 period. The tender specifications also required new service modules to be supplied as part of the back-office services, which pertained to statutory contraventions, accidents and impounds, which were not dependent on traffic volumes.

34. Lastly, Syntell submitted that if the applicant had an issue with the lack of infringement information which it had requested it should have launched a challenge in this regard at the time i.e. in February-March 2022 and should not have waited until after the tender had been awarded in December 2022, 4 months later than the 6 months/180 days period provided for in PAJA, to do so. Its review was accordingly out of time.

### **The applications to strike out**

35. Syntell made application to strike out certain material in the applicant's replying affidavit, on the grounds that it had sought to make out a new case in reply. In the alternative, it contended that it should be allowed to file a further affidavit in relation to traffic infringement statistics which, it said, were publicly available in annual reports which were filed by the Road Traffic Infringement Agency ('RTIA'), from 2015 onwards. The statistics for the 2020-2021 year were contained in a report dated 31 October 2021.
36. The applicant opposed the striking out application and the introduction of a further affidavit in relation to the RTIA reports, on the basis that they were not part of the rule 53 record, and it similarly made application to strike the further affidavit out. It contended that any new material which was contained in its replying affidavit was occasioned by the contradictory and deficient supplementary rule 53 records which had been filed by the City on 14 and 21 February 2023, and 6 March 2023, and was aimed at responding thereto.
37. At the commencement of argument, I was informed that the parties had agreed to withdraw their respective striking applications on condition that both the applicant's replying affidavit and the respondent's further affidavit were before the Court.

### **An assessment**

38. Section 217(1) of the Constitution provides that when an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. The express inclusion of these principles is aimed at safeguarding the integrity of state procurement processes, the prudent use of public resources and the prevention of corruption.<sup>2</sup> These constitutional imperatives are reiterated and given substance to in several legislative instruments, including the Preferential Procurement Policy Framework Act,<sup>3</sup> the Public Finance Management Act,<sup>4</sup> the Local Government: Municipal Systems Act<sup>5</sup> and the Local Government: Municipal Finance Management Act<sup>6</sup> and various regulations which have been promulgated in terms thereof.<sup>7</sup>
39. In *Tetra Mobile*<sup>8</sup> the Supreme Court of Appeal emphasised the importance of fairness and transparency and how these values ‘permeate’ the entire tender process.
40. In assessing whether the award of a tender has been fair the primary focus is on the process and not on the substantive outcome i.e. the result.<sup>9</sup> The purpose of having a fair process is to arrive at the ‘best’ outcome.<sup>10</sup>
41. Thus, fairness is a procedural requirement which is aimed at ensuring the ‘even’ treatment of all bidders to a tender.<sup>11</sup> As they are competitors, they are required to be treated equally.<sup>12</sup> In *Firechem*<sup>13</sup> the SCA held that bidders should all be entitled to tender for the ‘same thing’ and competitiveness is not served by only one or more of them knowing what the ‘true subject’ of the tender is.

<sup>2</sup> Bolton *The Law of Government Procurement in South Africa* (2007) at 57.

<sup>3</sup> Act 5 of 2008.

<sup>4</sup> Act 1 of 1999.

<sup>5</sup> Act 32 of 2000.

<sup>6</sup> Act 56 of 2003.

<sup>7</sup> These include the Preferential Procurement Regulations promulgated in terms of the PPF, the Treasury regulations promulgated in terms of the PFMA, and the Municipal Supply Chain Management Regulations promulgated in terms of the MFMA.

<sup>8</sup> *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & Ors* 2008 (1) SA 438 (SCA) para 10.

<sup>9</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd & Ors v Chief Executive Officer, South African Social Security Agency & Ors* 2014 (1) SA 604 (CC) para 42.

<sup>10</sup> *Id.*, para 24.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, para 40.

<sup>13</sup> *Premier, Free State & Ors v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30.

42. Whether a tender process has been fair is a matter that must be determined on the facts of each case.<sup>14</sup> The facts will determine whether any 'shortfall' in any of the constitutional requirements listed in s 217 of the Constitution establishes procedural unfairness, irrationality, unreasonableness, or any of the other review grounds set out in PAJA.<sup>15</sup>
43. The applicant contends that even though the tender is predicated on an operating model which differs from the one which was previously in place, the information which it sought pertaining to traffic infringement volumes was still relevant for the purpose of the bid it wished to submit. The fact that the successful bidder would no longer be remunerated on a per infringement basis and would instead be paid a fixed monthly fee to provide the services did not render such information meaningless. The information was necessary for the applicant so that it could properly price its bid, given that it would be required to acquire the equipment specified in the bid specifications. It needed the infringement statistics as these would enable it to arrive at a determination of what it should charge as a monthly fee in order not only to cover its running and operational expenses but also to make a reasonable profit. The greater the number of infringements the higher the running costs (including staff, software and printing costs).
44. The historic data which it had in respect of traffic infringements during the time that it had been the service provider, was 5 years old. It needed the current data as the COVID-19 pandemic had 'radically altered socio-economic patterns of movement', and had vastly reduced traffic volumes, as many people had resorted to working from home and it was difficult to know whether drivers had returned to pre-COVID patterns.
45. I have my doubts about whether the applicant really required or needed the information it sought in relation to the current traffic infringement volumes and whether it was materially prejudiced in any way, by not having them, at the time

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<sup>14</sup> *Metro Projects CC & Ano v Klerksdorp Local Municipality & Ors* 2004 (1) SA 16 (SCA) para 13.

<sup>15</sup> *AllPay* n 9 para 43.

when it put in its bid. I say this because despite not having this information the bid price which the applicant put up was, remarkably, only R 13.6 million or 7.6% more than that which was put by Syntell. Given the numbers involved that indicates a very accurate pricing, which was very close to that which Syntell adopted, with the benefit of up-to-date information, as the incumbent service provider.

46. Be that as it may, for the purposes of the judgment I accept the applicant's submissions as to why it required the information it sought. That said, it does not necessarily follow that the City's refusal/failure to provide the information qualifies as unfairness, so as to allow for the process to be set aside on review, on one or more of the established grounds set out in PAJA, on which the applicant seeks to rely.
47. It is not only the applicant's simple complaint of unfairness that is to be put into the scale and weighed. As the respondents point out, annual traffic infringement statistics were publicly available from the RTIA, and its latest report of October 2021 reflected figures for the 2020-2021 years. The applicant does not deny that it could have obtained these statistics from the RTIA reports and it does not say whether it did, or did not, do so and if not, why not. In addition, the applicant has not provided any explanation for why, in the event that it required statistics/figures from the City instead of, or in addition to those from the RTIA, in order to submit a properly competitive bid, it failed either to take any steps to compel the City to provide or disclose them or to challenge the tender specifications, or the process whereby the matter was put out to tender without such information being supplied, before submitting its bid.
48. As was pointed out by in *Airports Company*<sup>16</sup> where a bidder considers that a decision to go out to tender was taken was on terms which were unlawful or unconstitutional, in that they were in breach of the prescripts of s 217 of the Constitution, or the tender specifications are assailable on the grounds that they are unlawful or unfair, or irrational or unreasonable, they may be challenged on

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<sup>16</sup> *Airports Company South Africa SOC Ltd v Imperial Group Ltd* 2020 (4) SA 17 (SCA).

review. In *SMEC*<sup>17</sup> Rogers J expressed the view (*obiter*) that in such cases it is, in principle, undesirable that a bidder should be at liberty not to do so and should take a chance in the hope that it will be awarded the tender, and thereby keep 'in reserve' an attack on the validity of the tender or its specifications, should it be unsuccessful in winning the bid. These comments were endorsed *en passant* by the Gauteng full court in *IN2IT Tech*.<sup>18</sup>

49. In my view in such circumstances unless the process can otherwise be found to have been unlawful a bidder should not be allowed to participate in a tender only to challenge it when the decision goes against it. I say this because, to my mind, the need to be fair is a requirement of the process that cuts both ways: it applies not only to the state organ which puts out a tender but also to the bidders who participate therein. If it was unfair for the applicant not to have been in possession of the current traffic infringement statistics at the time when the tender was advertised it was equally unfair towards its competitors and the City for it to have acquiesced in the tender process instead of challenging it on this basis, and only seeking to raise the unfairness after the award went against it. In my view, bidders who adopt such a strategy must not be allowed to raise unfairness as a ground by way of a subsequent challenge which is brought more than the PAJA requirement of 180 days i.e. 6 months after the time when they first became aware of the unfairness in the basis of a tender or its specifications.
50. I share the respondent's sentiments that the time for raising a challenge based on unfairness in relation to the playing field on which bidders are to compete, is when the tender is advertised, and in my view the applicant's failure to take up the challenge at the time is good and sufficient reason not to allow it to do so now. Insisting that a bidder should raise any issue it may have pertaining to an alleged unfairness, before a tender process unfolds, will ensure that it is resolved for the benefit of all bidders before they gird up and compete with one another, thereby avoiding the incurring of unnecessary expense and effort in relation to the preparation and submission of bids, their laborious evaluation and

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<sup>17</sup> *SMEC South Africa (Pty) Ltd v The City of Cape Town & Ors* (WCD 8277/21,14097/21) [2022] ZAWCHC 131 para 92.

<sup>18</sup> *IN2IT Tech (Pty) Ltd v Gijima Holdings (Pty) Ltd & Ors* [2023] ZAGPJHC 478 para 39.

adjudication by committees of state officials, and a subsequent legal challenge after the tender has been awarded and is in the process of being implemented, when services are being delivered in terms thereof. The prejudice which is suffered by all parties (including taxpayers), when a legal challenge is brought after a tender has been awarded, which may result in the award thereof being set aside, is manifestly greater than any prejudice which might eventuate were the challenge to be brought to the basis of the proposed tender or its specifications, before it is awarded. Insisting that any challenge to the basis of a tender or its specifications on the grounds of unfairness is brought at the time when it is advertised will promote and foster adherence to the other constitutional values of transparency, cost-effectiveness, competitiveness and equitableness, as required by s 217 of the Constitution. Allowing it to be brought after a tender has been awarded defeats the objective of ensuring that effect is given to these values *during* the process.

### **Conclusion**

51. For these reasons the application must fail. I point out, in closing, that although other grounds of review were raised in the founding papers (which were largely procedural in nature) they were rightly not proceeded with during argument, and it is accordingly not necessary for me to traverse them.
52. As far as costs are concerned the applicant conceded that, save for one caveat, there was no reason why, in accordance with accepted principles, these should not follow the event as this was essentially a commercial dispute and not an instance where the *Biowatch* exception applied.
53. Both the applicant and Syntell complained that the City's failure to file a proper record at the outset as required in terms of rule 53 had increased costs unnecessarily, as it only managed to have a complete and true record before the Court on its 3<sup>rd</sup> attempt, in March 2023, when it filed a further supplementary record. As a result of the City's remissness both parties had lodged unnecessary interlocutory striking out applications - Syntell in response to the applicant's additional contentions as to the state of the record in its replying affidavit, and the applicant in response thereto, in respect of its alternative prayer for the



admission of an additional affidavit (albeit that it dealt primarily with the RTIA reports, a new issue which had not been dealt with in Syntell's answering affidavit). Both parties contended that the City should pay for its failures by being mulcted for the costs of these applications. The City's counsel conceded that it had made a hash, initially, of its duty to file a proper record which had increased the costs unnecessarily.

54. In the circumstances, I make the following Order:

- 54.1 The application for the review of the decision by the City of Johannesburg on 2 December 2022, to award tender A907 for the provision of advanced law enforcement and 'crash' management services for a period of 3 years, to the second respondent, is dismissed.
- 54.2 Save for the costs referred to in paragraph 54.3 the applicant shall be liable for the costs of the application, including the costs of two counsel where so employed.
- 54.3 The first respondent shall be liable for the costs of the striking out applications which were lodged by the applicant and the second respondent, including the costs of two counsel where so employed.



**M SHER**

**Judge of the High Court**

(Signature appended digitally)

**Appearances:**

Applicant's counsel: LW Ackermann

Applicant's attorneys: Pepler O'Kennedy (Tygervalley)

First respondent's counsel: F Nalane SC & N Ralikhuvhala

First respondent's attorneys: Mncedisi Ndlovu & Sedumedi (Johannesburg)

Second respondent's counsel: M O'Sullivan SC & T Sarkas

Second respondent's attorneys: Hayes Inc (Cape Town)