REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 9440/2010

In the matter between:

SA METAL & MACHINERY CO (PTY) LTD **Applicant**

and

THE CITY OF CAPE TOWN **Respondent**

JUDGMENT DELIVERED: 18 AUGUST 2010

BINNS-WARD, J:

1] The applicant, which is a company engaged in business as a scrap metal dealer, and is described in the founding affidavit as 'the largest scrap metal dealer in the Western Cape', has applied for an order 'reviewing and setting aside the Respondent's administrative action of issuing request for quotation no. R031000734'. The respondent is the City of Cape Town, which

is a municipality, established in terms of s 12 of the Local Government: Municipal Structures Act, No. 117 of 1998. Although the founding papers make no reference thereto,[1] the application is identifiably one brought in terms of s 6 of the Promotion of Administrative Justice Act, No. 3 of 2000 ('PAJA').

Request for quotation no. R031000734 (to which I shall refer as 'the RFQ') was an invitation issued by the respondent 'for the purchase and removal of scrap high voltage transformers in the attached Pricing Schedule'. The reference to 'scrap high voltage transformers' fell to be understood in the broader context of the RFQ to mean 'scrap transformers, mini substations and switchgear', including 'MV Switchgear', 'HV Switchgear', 'MV Metering Units' and 'Ring Main Units'.

It is evident that all of the items of equipment that were the subject matter of the RFQ were used by the respondent in the reticulation of electricity. It is also evident that the items in issue were not being disposed of for re-use, but only for scrap purposes. One of the 'responsiveness criteria' applicable to the RFQ was the requirement that the 'vendor'[2] had to clearly state in its quotation 'that the Scrap transformers, Mini substations and Switchgear purchased from the City of Cape Town will not be refurbished and reintroduced into the South African market'.[3] In context it is thus no cause for surprise that the allegation by the deponent to the founding affidavit that '[T]he only potential purchasers for the electrical equipment would be scrap metal dealers such as the Applicant' was not denied by the respondent. Indeed, the proof of that allegation is borne out by the evidence that the only parties to whom the respondent's officials drew direct attention to the RFQ, which had been advertised for general attention on the City's website, were scrap dealers; and that all the parties who in any manner expressed any interest in responding to the RFQ were also scrap dealers.

One of the parties directly alerted to the existence of the RFQ by the City's responsible functionary was the applicant. The applicant showed some signs of interest in the RFQ, but it did not submit a quotation. Instead, some two

1 Cf. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at para.s [25]-[27], in which it was indicated that it was desirable in matters such as this for the applicant to expressly identify the provisions of PAJA on which it relies for a judicial review of administrative action.

2 The inappropriate employment of the noun 'vendor' to describe the party which would in fact be acquiring the scrap items from the City at a monetary consideration is typical of the often perverted use of language in matters related to the legislative regulation of government procurement. It is possibly a by-product of the inapposite sub-heading, 'Procurement', to s 217 of the Constitution of the Republic of South Africa, 1996. The sub-heading is inapposite because it is apparent that the constitutional provision and the procurement legislation that has flowed from it pertain not just to the procurement of goods by organs of State, but also to the disposal of goods by such organs.

3 Clause 3.5 of the 'Responsiveness and Evaluation Criteria' section of the RFQ documentation.

weeks after the expiry of the time by which quotations in response to the RFQ had to be submitted, the applicant launched proceedings for an interdict prohibiting the respondent from awarding any contract pursuant to the RFQ pending the determination of judicial review proceedings to set aside the RFQ. By agreement between the parties, and against a suitable undertaking by the respondent, the interdict proceedings were not proceeded with. In terms of the agreement, an order was obtained permitting the disposal of the review on an expedited timetable. The costs of the interdict proceedings were stood over for determination in the review application.

The applicant contends that the RFQ is unlawful. It is trite that the procurement or disposal of goods and services by organs of State by means of any process required to comply with s 217 of the Constitution, or the relevant derivative legislation, such as Chapter 11 of the Local Government: Municipal Finance Management Act, No. 56 of 2003 ('the MFMA'), qualifies as 'administrative action' within the meaning of PAJA.[4] As a party with an interest in tendering to acquire the goods in question, the applicant is entitled in the circumstances to assert its constitutional right to lawful administrative action. There is thus no merit in the respondent's allegation that the applicant lacks legal standing to challenge the legality of the RFQ in judicial review proceedings; indeed, the allegation was not pressed with any conviction at the hearing, advisedly so.

The grounds upon which the applicant alleges that the RFQ was unlawful are that the 'RFQ conditions' are alleged to offend against the requirements of:

(a) Section 217 of the Constitution[5] and s 112 of the MFMA (Section 112 of the MFMA is, in essence, a restatement of the principles enshrined in terms of s 217(1) of the Constitution. It also prescribes certain criteria with which the supply chain

4 Cf. e.g. *Logbro Properties CC v Bedderson NO and Others [2003] 1 All SA 424 (SCA) at para. [5].*

5 Section 217 of the Constitution reads as follows:

'**Procurement**

1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

a. categories of preference in the allocation of contracts; and

the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

management policy that every local authority is obliged, by s 111 of the MFMA, to adopt and implement in order to achieve compliance with the aforementioned constitutional principles, must adhere. Section 112 is contained within Part 1 of Chapter 11 of the MFMA, which applies, amongst other matters, to 'the disposal by a municipality or municipal entity of goods no longer needed.'[6]);

Regulation 2 of the Supply Chain Management Regulations;[7]
The Respondent's Supply Chain Management Policy;[8]
Section 2 of the Preferential Procurement Policy Framework Act, No. 5 of 2000 ('the PPPF Act')[9];

6 See s 110(1)(b) of the MFMA.

7 Regulation 2 consists of a further reiteration of the principles enshrined in s 217 of the Constitution and, in addition, amongst other matters, prescribes that no municipality… may act otherwise than in accordance with its supply chain management policy when disposing of goods no longer needed.

8 The relevant provisions of the respondent's supply chain management policy are set out in clauses 337-340:

'337. Disposal management provides for an effective system for the disposal or letting of assets no longer needed, including unserviceable, redundant or obsolete assets.

338. Disposal of assets shall be subject to sections 14 and 90 of the Municipal Finance Management Act and any other applicable legislation.

339. Assets may be disposed of in the following ways:

339.1 transferring the asset to another organ of state in accordance with the provisions of the Municipal Finance Management Act;

339.2 transferring the asset to another organ of state at market related value or, when appropriate, free of charge;

339.3 selling the asset; or

339.4 destroying the asset.

340. Moveable assets may be sold either by way of written price quotations, a competitive bidding process, auction or at market related prices, whichever is the most advantageous to the City.'

9 The long title to the Preferential Procurement Policy Framework Act proclaims its purpose to be 'To give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith'. The relevance of s 2 of the Act to the current matter appears to be the provision therein that, subject to certain exceptions – none of which arise for consideration in the current matter – an organ of state

Regulation 4 of the Preferential Procurement Regulations,2001[10]; and

which has put a contract out to tender must award it to the tenderer who scores the highest points in terms of the points system applicable in terms of the organ's preferential procurement policy. The application of the provision is described in *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others [2005] 4 All SA 487 (SCA); 2008 (2) SA 638 at para. [11].*

10 Regulation 4 regulates the scoring of tenders valued at over R500 000 in respect of the basis upon which preference is to be given in the award of contracts to 'historically disadvantaged individuals' within the meaning of that term as defined in s 1 of Act 5 of 2000.

(b) Section 14 of the MFMA.[11]

2] The grounds upon which the RFQ is alleged to offend against the aforementioned legislation were expressed as follows by the deponent to the founding affidavit: 'The infringement lies in the fact that the rfq conditions are neither fair nor equitable, since the subject-matter of the tender is incapable of being determined. The competitiveness and cost-effectiveness of any tenders that might be submitted would not be capable of being determined by the Respondent. The detriment not only to potential and actual tenderers, but also to the Respondent itself and hence to the general public as represented by the Respondent's ratepayers is in the circumstances self-

11 Section 14 of the MFMA provides, insofar as might be currently relevant:

'**14. Disposal of capital assets**

1)A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2)(a) and (h) in respect of movable capital assets below a value determined by the council.

5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.'

evident.' On this basis it was contended that that 'the administrative action of issuing the rfq was (i) 'in contravention of the legislative, regulatory and policy provisions set out above and in any event not authorised by the empowering provisions'; (ii) 'not rationally connected to the purposes of the empowering provisions'; (iii) 'unconstitutional and otherwise unlawful' and (iv) 'materially influenced by an error of law'.

The respondent had in the past dealt with the disposal of redundant equipment of the nature in issue by accumulating a small number, usually about twenty, of the items and then inviting tenders for their purchase. It was decided in 2009 to alter this practice and instead institute a regime of disposing of the equipment on what was described as an 'as and when' basis. This, in essence, would entail the appointment of a contractor, or a number of contractors, who would be committed to purchasing and removing obsolete or redundant equipment as and when the municipality wished to dispose of each item during the contract period, which was contemplated to extend over two to three years. The evident consequence of the proposed change would be that the local authority would be relieved of the need to warehouse the disused items pending their periodic disposal. It was explained by the deponent to the respondent's answering affidavit that the historic practice of periodic disposal gave rise to certain environmental hazards, the manifestation whereof would be ameliorated by the intended new method of disposal. The reason for the proposed change, however, seems to me to be of no relevance. The only relevant enquiry is whether the basis upon which the public has been invited to apply for the award of contracts for its implementation is lawful, or not.

The applicant contends, however, that the historically used approach was 'the most advantageous way for the [r]espondent to deal with the matter'. In expressing itself in this manner the applicant evidently sought to establish a basis to argue that the method of disposal represented by the RFQ did not comply with clause 340 of the respondent's supply chain management policy[12] and therefore offended against the respondent's obligation in terms of s 111 of the MFMA to implement that policy.

The answer to the question of what might be considered a 'most advantageous' means of disposal of goods no longer needed by the City entails a business judgment by the functionary responsible for making the election. The most advantageous of the four means of selling unneeded goods described in clause 340 of the SCMP does not necessarily equate to the means whereby the highest price could be obtained. Depending on the peculiar circumstances, other questions might impact on the determination.

12 Clause 340 of the respondent's supply chain management policy is quoted at footnote 8, above.

The costs of storage, transport, advertising and administrative management are just some of the other considerations that come to mind as in all probability bearing on the decision in a matter such as this. The choosing of the 'most advantageous' method of disposal from those that may be selected in terms of clause 340 of the respondent's SCMP is the function of the respondent's municipal council, alternatively, and indeed in most cases, that of the council's responsible delegates appointed pursuant to the scheme of delegation which a local authority is enjoined by s 59 of the Local Government: Municipal Systems Act, No. 32 of 2000 ('the Systems Act') to have in place. The election involved requires the taking of a business decision entailing the exercise of a value judgment. It is analogous, in a management context, to the type of decision making in which, in a judicial context, a court engages when it exercises a judicial discretion. Absent clear proof of a material misdirection, or gross unreasonableness by the relevant decision-maker, a court will not interfere in such a decision.[13] The applicant has not come close to establishing such a basis for interference with the decision-maker's determination that the RFQ afforded the most advantageous means of disposal in the circumstances. All it has done, by argument, rather than by evidence, is to suggest that higher prices might be achieved in terms of the historically used method because that method, according to the applicant, entailed less risk for the tenderer. The argument is conjectural; and, in any event, as already observed, achievable price is only one of the criteria which the decision-maker would have had to consider.

The applicant, no doubt conscious of the thinness of its case in this respect, sought to contend that it was for the respondent in its answering papers to establish a sufficiently reasoned basis for the alteration in the method of disposal of redundant transformers and sub-stations. That approach was misconceived in the circumstances of this case. In the context of *its* institution of judicial review proceedings, it was for the applicant to make out a case for the impugnment of the decision it sought to challenge. The case needed to be made out by means of evidence, not conjecture.

The initial invitation to treat for the disposal of redundant goods over a two to three year period had been issued by the respondent in tender no. 221/210/09 in October 2009. Three scrap dealers, including the applicant, submitted tenders in response to that invitation. However, before the result of the consideration of the tenders submitted had been determined, the applicant instituted an application for an interdict restraining the respondent from making an award pending judgment in an application by the applicant to have the invitation to tender reviewed and set aside. In those proceedings, just as it did in respect of the interdict proceedings mentioned in One of the parties directly alerted to the existence of the RFQ by the City's responsible functionary was the applicant. The applicant showed some signs of interest in the RFQ, but it did not submit a quotation. Instead, some two weeks after the expiry of the time by which quotations in response to the RFQ had to be submitted, the applicant launched proceedings for an interdict prohibiting the respondent from awarding any contract pursuant to the RFQ pending the determination of judicial review proceedings to set aside the RFQ. By

13 Cf. *Bato Star Fishing* (supra) at para.s [46]-[48].

agreement between the parties, and against a suitable undertaking by the respondent, the interdict proceedings were not proceeded with. In terms of the agreement, an order was obtained permitting the disposal of the review on an expedited timetable. The costs of the interdict proceedings were stood over for determination in the review application., above, the respondent addressed the application with an undertaking, but proceeded, in the interim, with an evaluation of the tenders that had been submitted. All of those tenders were found to be non-responsive. In the absence of any 'acceptable tenders', within the meaning of that term in the PPPF Act, the tender had to be aborted,[14] with the result that the basis for the interim interdict and the related review application fell away.

It was then determined by the respondent that a fresh invitation to tender for a two to three year contract of the sort described earlier should be issued. The delay caused by the failure of the October 2009 tender exercise and the related events had, however, led to the build up of a relatively large accumulation of redundant equipment in the respondent's electricity department warehouses. The respondent decided to address the need created by this situation by issuing the RFQ. The object of the RFQ was to elicit the submission of offers for the purchase of the accumulated stockpile of redundant equipment, as well as for the purchase of any like equipment that might become redundant during a period of six months after the award of any contract pursuant to the acceptance of any quotation submitted in response thereto.

It is appropriate at this stage to describe some of the relevant features of the RFQ. It required tenderers to submit prices for each of six different classifications of equipment. Transformers constituted one of these classes. In respect of transformers, tenderers were required to specify offered prices per unit and by category. Seven categories were specified, ranging from 10kVA -300kVA to 50MVA and higher. Similarly, in respect of 'mini substations', two categories were specified. The RFQ specified that the tender contract would be 'on an as and when required basis (ad hoc)'. This plainly related not to the disposal of the accumulated stockpile, but only to the items that might become redundant during the six month executory period of the contemplated contract(s). The RFQ provided that the respondent reserved the right to determine whether the product would be collected by the tenderer, or delivered by the respondent. However, tendered prices had to be submitted on the basis of including provision for collection by the tenderer from any place 'right throughout the City'.[15] The RFQ provided that the respondent reserved 'the right to accept all, some or none of the quotations submitted either wholly or in part'.[16] Tenderers were required to clearly state any qualifications to their quotations in a separate covering letter.[17] The RFQ

14 See *Sapela Electronics* (supra) at para. [11], where it was held that 'The acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the [PPFA] is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement.'

15 See §6 of the RFQ documentation 'Price Schedule' and the notes thereto.

16 Clause 7.1 of the 'Conditions of Quoting'.

17 Clause 3.3 of the 'Responsiveness and Evaluation Criteria in §15 of the RFQ

provided the telephone number and email address details of a contact person to whom enquiries and requests for additional information could be addressed by interested parties before the closing date[18]. It also provided particulars of the place, date and time of a 'site meeting' and 'strongly recommended that all prospective Vendors attend the site meeting'.[19] A briefing session was held on 28 April 2010 at the respondent's warehouse in Ndabeni, at which the biggest stockpile of accumulated scrapped equipment was stored.

The RFQ was published on the respondent's website on 22 April 2010. The closing date for the submission of responses was 30 April 2010. The functionary responsible for the process was concerned that the request might escape the notice of some of the potentially interested parties by virtue of not having been published in the press and on account of the relatively short time afforded for the submission of quotations.[20] He therefore telephoned representatives of each of the scrap dealers which had submitted tenders in response to tender no. 221/210/09 in October 2009 to advise them directly of the RFQ. The applicant was telephonically informed on 26 April 2010. The functionary's concern was to try to encourage participation so as to enhance the competitiveness of the process.

On 28 April 2010, being the same day as the briefing session, a representative of the applicant telephoned the contact person named in the RFQ and enquired where the accumulated scrapped equipment that was up for sale was stored. He was informed that the items were at the warehouses in Ndabeni, Brackenfell and Bloemhof. The applicant did not send a representative to the briefing meeting, but on the following day it did send representatives to inspect the equipment at the Ndabeni and Brackenfell warehouses. Representatives of five scrap dealing businesses, including one based in Gauteng, attended the briefing on 28 April.

By the time the period for the submission of quotations closed on 30 April, two submissions had been received. The applicant did not submit a quotation. A director of the applicant company, who was the deponent to its founding affidavit in these proceedings, telephoned the respondent's contact person on 29 April 2010 and informed the latter that the applicant could not submit a response to the RFQ because it did not know exactly where the items were.

The complaint obviously could not have related to the accumulated stockpile and must have been directed at the part of the proposal bearing on the six month period during which any contractor would be committed to the purchase and removal of redundant equipment as and when it became available and from wherever in the city it happened to be. Indeed, during argument it was on that aspect that the applicant's counsel also placed the main emphasis. In the applicant's papers the complaint was articulated in the following way: 'that the *merx* is unknown and incapable of determination'.

There is no merit in the complaint that the subject matter of the RFQ was too vaguely defined. The nature and quantity of the goods in the accumulated

documentation.

18 Clause 3.1 of the 'Instructions to Vendors'.

19 Clause 3 of the 'RFQ Specifications' in §16 of the RFQ documentation.

20 The advertisement period and the means of advertising were compliant with the minimum requirements stipulated in clause 245 of the respondent's SCMP.

stockpile were readily ascertainable by inspection, or on enquiry, in terms of the procedures available in terms of the advertised RFQ process. Insofar as the applicant professes to have been concerned that the categories of transformers involved did not by their indicated performance capacities afford a sufficient basis for an adequately formulated offer price, the difficulty could, in my view, effectively have been addressed by qualifying the relevant offer appropriately, as permitted in terms of the RFQ. The applicant gave as an illustration of its concern that a transformer with copper conductor windings would have a much higher scrap value than one with aluminium windings. It could have qualified its quotation by making the distinction a pertinent qualification. On the basis of the evidence in the respondent's answering affidavit it would appear that it is in fact unlikely that any of the transformers subject of the RFQ have conductors with aluminium windings. The applicant could have obtained this information in terms of the RFQ process by posing the question to the respondent's contact person. Equivalent observations would meet the concern by the applicant that it would need to draw a distinction for the purpose of submitting a proposal between transformers that have become redundant through effluxion of time and those that are no longer serviceable because of some catastrophic effect such as fire or explosion, and also the concern by the applicant that some of the transformers might contain toxic polychlorinated biphenyls.

Likewise, with regard to the items that might become redundant during the six month executory period of any awarded contract, these were identifiable with sufficient certainty. Their nature was determined in the RFQ documentation in the manner described earlier in this judgment and their number fell to be determined by objectively identifiable events occurring during a fixed period. That a measure of risk might be entailed, in that the quantity of items, or the distances involved in having to transport them from as yet unidentifiable locations anywhere in the metropolitan area, might impact on the price that should be offered, does not afford a valid basis to vitiate the process as unlawful.

Supply chain management is part of the business of any local government. In many of its characteristics it is indistinguishable from the conduct of the business of a commercial enterprise. I am not aware of any provision in the legislation relied upon by the applicant which prohibits supply chain managers in the local sphere of government from undertaking business risk in the discharge of their functions. Such constraints as are apparent in the statutory instruments are directed rather at the achievement of responsible management. I have already dealt above in another context with the contention that the prices achievable by the disposal method selected by the respondent might arguably not be as high as by other methods. What I said there applies equally in the context of the applicant's contention currently under consideration. The element of inherent risk that might be entailed in bidding for goods the supply of which is affected by imponderables does not give rise to unfairness or a lack of transparency. Nor is it inherently inequitable, because, in the nature of things, the identified risk cuts both ways as between buyer and seller. It does not adversely affect the competitive nature of the RFQ process because the uncertainty is a factor which affects all

the tenderers. Cost-effectiveness might well afford a justification for the conclusion of a contract of the nature postulated by the RFQ, most especially its six-month executory period; certainly, the applicant has not proven anything to the contrary. The determination of the precise number of transformers that might be rendered redundant during the six-month period might be impossible to determine, but the history of past occurrences would surely provide a rational basis for an estimate forecast by a prospective purchaser for the purposes of compiling a quotation; and also for any assessment of cost-effectiveness by the local authority. If it was thought to be material, the applicant has not shown that it could not obtain this information on enquiry

The applicant's counsel did not press the contention made in the applicant's founding affidavit that the precise number of transformers available in each category was a crucial component to the respondent's ability to evaluate and score the quotations received in a transparent manner. He appeared to accept the respondent's argument that its ability to award separate contracts in respect of the disposal of each category of equipment met this criticism. I consider that he was correct in so doing.

The last issue that must be addressed is the applicant's allegation that the issue of the RFQ contravenes s 14 of the MFMA. Section 14 regulates the disposal by a local authority of its 'capital assets'.

The import of the term 'capital assets' is not defined in the Act. It is a term that is commonly used to denote a number of very different concepts. In South African jurisprudence, for example, the term is most frequently encountered in income tax cases, but its meaning in that context is plainly not consistent with its use in s 14 of the MFMA. Its applicable meaning in s 14 must be sought from the context in which it is employed there, but even that is not readily illuminating.

The applicant's counsel submitted that 'capital assets' denotes all the tangible assets of a local authority. If that were so it is not apparent why that expression was not used. In my view it is significant that Chapter 11 of the MMFA speaks of the disposal of goods no longer needed and provides that the provisions of Part I thereof in that regard must be read with s 14. Reading Part I of Chapter 11 with s 14 demonstrates that s 14 would apply to the alienation of unneeded goods if those goods were 'capital assets' of the local authority, but not otherwise. The construction contended for by the applicant's counsel does not fit comfortably with the apparent objects of the provision, which appear to be twofold: (i) to prohibit taking of any decision by a local authority to alienate capital assets that are needed for the municipality to be able to discharge its core function of providing at least the minimum of basic municipal services to its community,[21][22] and (ii) to introduce procedural constraints directed at minimising the possibility of decisions being made in respect of the alienation of municipal property in circumstances likely to result

21 Cf. s 73(1)(c) of the Systems Act.

22 If, however, a local authority should misdirectedly decide on the alienation of capital assets needed for the provision of basic municipal services, any consequent alienation to a *bona fide* third party effected in terms of such decision would nevertheless be legally effective. This follows from the provisions of s 14(3).

in an unjustifiably adverse effect on the municipality's proprietary status. The proprietary status of any person or body is ordinarily reflected in that person's financial statements. It is difficult to accept that the legislature would have intended to impose the procedural formalities provided in terms of s 14(2) of the MFMA in respect of the disposal of goods not needed for the provision of basic services and the disposal of which would have no impact on the municipality's reportable financial position.

The respondent's counsel, while acknowledging a degree of inscrutability in the term as used in the provision, drew on its immediate contextual employment to submit that it related to assets that were in productive use in the provision of municipal services, or which could potentially be applied for such purpose. That construction, while it bears a sensible relation to one of the apparent objects of the section, appears to me too narrow to give effect to the second of its aforementioned discernible objects.

In my view the construction which best meets the contextual employment of the term is that offered in a guideline in respect of capital asset management in terms of the MFMA published on the National Treasury website. It is entitled 'Local Government Capital Asset Management Guideline - October 2008'. Although the position is not entirely clear, the guideline appears to have been published pursuant to s 168 of the MFMA. In terms of s 168 of the MFMA the Minister responsible for finance may make guidelines relating to a number of matters, including the alienation, letting or disposal of assets by municipalities.[23] The sub-heading to s 168 is 'Treasury regulations and guidelines'. A consideration of the guideline shows that in the opinion of the Treasury a 'capital asset' would be any asset of a municipality falling within the following definition: '*Capital Assets are all assets with a life cycle of greater than one year and above the capitalisation threshold (where applicable). For example, this would include property, plant and equipment (infrastructure network, furniture, motor vehicles, computer equipment, etc.), intangible assets, and investment property*.' 'Capitalisation threshold' denotes '*the value above which assets are treated as capital assets and entered into an asset register from which reporting in the financial statements (specifically the Statement of Financial Position) is extracted*'. The guideline labels as 'minor assets' those assets which, on the given approach, would not qualify as 'capital assets'. In this respect it bears mention that in terms of s 121 of the MFMA a municipality is required to produce an annual report in respect of each financial year and that such report must, amongst other matters, contain a statement of the municipality's financial position.

While the definition of 'capital asset' by the National Treasury in the guideline document is by no means legally determinative of the meaning of the term in the Act, it does serve, if regard is had to the stated general objects of the MFMA set out in s 2 of the statute[24] and the apparent specific objects of s 14,

23 See s 168(1)(g) of the MFMA.

24 Section 2 of the MFMA provides:

> The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

as the most plausible of the suggested meanings available to me, and to the extent necessary I would adopt it.
The determination of whether or not an asset is taken into account as a capital asset seems therefore to depend on whether it is taken into account in determining the local authority's financial position. That determination is dependent on the municipality's accounting policy, which, in turn, must be compliant with the applicable generally applicable accounting practices.[25] It follows that the characterisation of goods as a capital asset is factual question. It may be that some or all of the redundant goods that would be the subject of any contract concluded pursuant to the RFQ process in issue might have been completely depreciated in the respondent's books so as no longer to represent capital assets.[26] The issue of whether the goods in question are 'capital assets' within the meaning of s 14 of the MFMA has been insufficiently established on the papers. The indication that the goods are regarded by the respondent as having a realisable value as scrap is certainly an indication in favour of some probability of their being accounted for in the municipality's statement of financial position. In the event, without so holding, I am prepared for present purposes to assume in favour of the applicant that the goods being disposed of are in fact 'capital assets' of the municipality within the meaning of s 14.
Section 14 of the MFMA[27] prohibits a decision by a municipality to transfer or permanently dispose of a capital asset that is needed to provide the minimum level of basic municipal services. Capital assets that do not fall into that category may be transferred or otherwise disposed of if the municipal council, or if the matter has been delegated, as provided for in terms of s 14(4), the municipal manager, has first considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. The documentation attached to the applicant's replying papers indicates that the respondent's municipal manager has been delegated the power to write off assets up to the value of R5 million and 'to dispose of moveable capital assets below a value of R5 million subject to Section 14(2)(a) and (b) of the

> a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
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> b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
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> c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
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> d) borrowing;
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> e) the handling of financial problems in municipalities;
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> f) supply chain management: and
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> g) other financial matters.

25 See s 122(3) of the MFMA.

26 In the submission made to the respondent's City Manager for authority to write off and dispose of the accumulated stockpile of redundant equipment at the Ndabeni warehouse, a copy of which was attached to the applicant's replying papers it is stated that '[T]he asset value of the units is zero.'

27 The relevant provisions of the section have been quoted in footnote 11, above.

MFMA, provided that, in respect of capital assets above a value of R200 000,00 the City Manager shall first consider a recommendation from the Supply Chain Management Bid Adjudication Committee'. As the contemplated total contract value of the transactions subject to the RFQ is estimated to be in the region of R2 million, it would follow that the disposal of the goods in question falls within the authority of the City Manager. It is evident from the latter's authorisation of the RFQ process that the assets are not considered necessary to provide the minimum level of basic municipal services. That is no cause for surprise considering their redundancy and the acceptance by the applicant that they have residual utility only as scrap metal. The second consideration namely, the matters referred to in s 14(2)(b) of the MFMA, are matters on which the City Manager will only be able to reach a considered conclusion after the prices offered as a result of the RFQ process are put before him.

One of the questions he will have to ask himself is how the market value of scrapped transformers and mini sub-stations falls to be determined. A market value is the price at which a commodity is disposed of by the notional willing and informed seller to a notional willing and informed purchaser. The exercise takes it as a given that both notional parties would be persons acting reasonably.[28] It seems to me, having regard to the character of the contracts contemplated by the RFQ, which, as I have already found, has not been shown to be non-compliant with the respondent's supply chain management disposal framework, that it may be that a request for proposals might in fact be the best method available to determine the relevant market value to which the City Manager must apply his mind. Even if I am wrong in this respect, the fact remains that the process that the applicant seeks to impugn has not reached the stage where the disposal of the goods in question is assured. The terms of contract offered by the parties that have submitted quotations have still to be approved by the City Manager after consideration of a recommendation from the respondent's Supply Chain Management Bid Adjudication Committee before any contracts for disposal of the goods can be concluded. I therefore agree with the submission of the respondent's counsel that the process the applicant seeks to impugn in these proceedings has not been shown to be one that will necessarily result in an unlawful outcome because of a vitiating non-compliance with s 14 of the MFMA.

The applicant's counsel contended, however, that it is evident that the City Manager will be unable to take a decision in terms of s 14(2)(b) in respect of items of equipment that will become redundant during the six-month executory phase of the contract. I do not agree. The goods in question all fall into classes and categories defined by the terms of the RFQ, subject to further definition by any qualifications introduced by the successful tenderer and acceptable to the respondent. There is therefore no difficulty in the way of the City Manager knowing what type of item is subject to disposal and at what price. The applicant's counsel contended that a further disability

28 Cf. e.g. *True Motives 084 (Pty) Ltd v Mahdi* 2009 (4) SA 153 (SCA) (2009 (7) BCLR 712) at para. [30]; *Bestuursraad van Sebokeng v M&K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 384H; and *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A), especially at 722C-D.

affecting the City Manager's decision in respect of the executory portion of the contemplated contract(s) is the absence of any basis to project the market prices over that period. In my view the submission is premised on an unrealistically narrow conception of the object of the provision. The municipal manager is not bound in terms of s 14 to dispose of goods only at the highest achievable price, or even at the determined market price. He would satisfy the requirements of the provision if he had regard to the best available indicator of the current market price and weighed the economic advantage of a period fixed contract against the possibly countervailing advantages of sticking with the historic process of disposal described earlier.[29]
In the result the application for the review and setting aside of the RFQ must fail. Counsel were agreed that the costs of the related interim interdict application, which were reserved, should follow the result. The following order is made:

1. The application is dismissed with costs, including the costs of two counsel.

The applicant is ordered to pay the respondent's costs in the interim interdict application stood over for later determination in terms of the order of court made on 18 June 2010, such costs also to include the costs of two counsel if such were employed.

A.G. BINNS-WARD

Judge of the High Court

29 Cf. *Waterval Joint Venture Co. (Pty) Ltd v Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W); [2008] JOL 21434 (W) at para. [33].