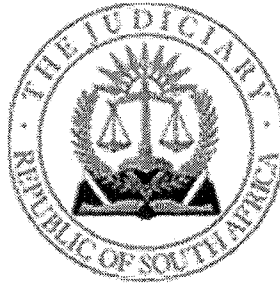
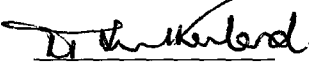


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/501

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
<u>30/5/2019</u> DATE	 RT SUTHERLAND

In the matter between

INFINITE BLUE TRADING 29 CC T/A MOTAU PROJECTS

APPLICANT

and

**CITY POWER JOHANNESBURG (SOC) LTD
SIYANQOBA PHAMBILI TRADING ENTERPRISE CC
JOLOBE TRADING CC
MAZIYA GENERAL SERVICES CC
EXSERDEL ENTERPRISES (PTY) LTD
CHOSEN ENGINEERING (PTY) LTD
COLSTA PROJECTS CC
F AND J MECHANICALS AND ELECTRICALS CC
MATARELWA ELECTRICAL SERVICES (PTY) LTD
NOTHANI ENGINEERING CC**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT
9TH RESPONDENT
10TH RESPONDENT**

CANAAN ELECTRICAL CONTRACTORS (PTY) LTD	11TH RESPONDENT
MASTECH GENERAL TRADING CC	12TH RESPONDENT
WNS PROJECTS CC	13TH RESPONDENT
LEPHATA LA BASHA TRADING AND PROJECTS CC	14TH RESPONDENT
TNJ PROJECT SOLUTIONS CC	15TH RESPONDENT
IMBAWULA TECHNICAL SERVICES AND SUPPLIERS GROUP (PTY) LTD	16TH RESPONDENT
BVELELA ENGINEERING CC	17TH RESPONDENT
MANDEWO IMV PROJECTS CC	18TH RESPONDENT
MUSTARD SEED (PTY) LTD	19TH RESPONDENT
CROMICO TRADING & PROJECTS (PTY) LTD	20TH RESPONDENT
SE MAKROTI TRADING ENTERPRISES CC	21ST RESPONDENT
MERVILLE CIVILS CC	22ND RESPONDENT
LEFHUMO LWA BAREMA TRADING ENTERPRISE CC	23RD RESPONDENT
MOLOI TECH (PTY) LTD	24TH RESPONDENT
MAOPENG ELECTRICAL (PTY) LTD	25TH RESPONDENT
OAKANTSWE CONSTRUCTION & PROJECTS CC	26TH RESPONDENT
THALUKANYO TRADING CC	27TH RESPONDENT
SOLID MANAGEMENT SERVICES (PTY) LTD	28TH RESPONDENT
MUNANDIS ELECTRICAL CC	29TH RESPONDENT
RT SHABALALA CC	30TH RESPONDENT
TAMIBUZZ (PTY) LTD	31ST RESPONDENT
BUSSYNET ADVANCED TRADING JV	
JAKI TRADING (PTY) LTD	32ND RESPONDENT
JUSBEN CONSULTING ENGINEERS CC	33RD RESPONDENT
METHORN CC	34TH RESPONDENT
KP TALKS ELECTRICAL AND CONSTRUCTION (PTY) LTD	35TH RESPONDENT
CAPOTEX TRADING ENTERPRISE CC	36TH RESPONDENT
BIG O TRADING 528 CC	37TH RESPONDENT
UMBUTHO CIVIL & ELECTRICAL CC	38TH RESPONDENT
MASEMIS TLM (PTY) LTD	39TH RESPONDENT
FUTURE ENERGY ELECTRICAL (PTY) LTD	40TH RESPONDENT
RONARATI (PTY) LTD	41ST RESPONDENT

RONARATI (PTY) LTD	41 ST RESPONDENT
ONZA CONSTRUCTION (PTY) LTD	42 ND RESPONDENT
THENGA HOLDINGS (PTY) LTD	43 RD RESPONDENT
YANDE ENGINEERING & PROJECTS CC	44 TH RESPONDENT
NOLEWU CONSTRUCTION ELECTRICAL	
CHEMICAL SUPPLIERS CC	45 TH RESPONDENT
MOHLAWE TECHNOLOGIES (PTY) LTD	46 TH RESPONDENT
JTB ENGINEERS SOLUTIONS CC	47 TH RESPONDENT
MVELEDZISO ENGINEERING SOLUTIONS CC	48 TH RESPONDENT
KENT ELECTRICAL SERVICES CC	49 TH RESPONDENT
BARRY BUYS PROPERTY CC	50 TH RESPONDENT
NKATEKO BUSINESS ENTERPRISE CC	51 ST RESPONDENT
MACHITE ENGINEERING CC	52 ND RESPONDENT
INDONISI INVESTMENTS (PTY) LTD	53 RD RESPONDENT
MASHAU SALPHINA ELECTRICAL CC	54 TH RESPONDENT
ZIZWE DSD (PTY) LTD	55 TH RESPONDENT
MAFU HOLDINGS (PTY) LTD	56 TH RESPONDENT
MUALU JV MCCGRI (PTY) LTD	57 TH RESPONDENT
PSK CONSTRUCTION (PTY) LTD	58 TH RESPONDENT
KHASELIHLE CIVILS CC	59 TH RESPONDENT
MATHOHO ELECTRICAL & PROJECTS CC	60 TH RESPONDENT
SECRETE STEPS TRADING (PTY) LTD	61 ST RESPONDENT

J U D G M E N T

SUTHERLAND J:

Introduction

[1] This application concerns a challenge to the validity of a tender process carried out by the first respondent (City Power).¹ The challenger, the applicant, contends that there were material irregularities. The scope of the challenge is limited to three issues, all to do with the assessment for functionality. They are (i) whether due compliance was evidenced in relation to information to be disclosed about security measures, (ii) whether due compliance was evidenced in relation information to be provided about a list of tools and an asset register, and lastly, (iii) whether City Power lawfully and appropriately tested electricians for competence and improperly failed one of the applicant's personnel, supposedly justifying a deduction of points awarded in the tender scoring.

[2] These three issues are addressed in turn. The threshold score which the applicant failed to meet was 75. It was scored 74 after an electrician failed a test and six points were deducted from the 80 score that it was initially awarded. Missing that threshold score had the effect of excluding the applicant from any further participation in the tender process. Plainly, if an irregularity was committed by City Power and points ought to have been awarded which were not, or points deducted which ought not to have been deducted, the result would be that the applicant was improperly excluded. The applicant needs only show one more point should have been credited to establish an improper exclusion.

¹ Only the first respondent, City Power, opposes the relief sought; all other respondents abide the decision of the Court.

The PPPFA regime

[3] Self-evidently, the provisions of the Preferential Procurement Policy Framework Act 5 of 2001 (PPPF Act) and its regulations applied to this bid. The scheme of the legislation aims at transparency. Laborious reference is made for the essence of any bid to be subjected to a points system, clarity of requirements and measurability. These criteria are obvious necessities in an open competitive system.

[4] Section 2 provides:

“Framework for implementation of preferential procurement policy

(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;
- (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph
- (d) provided that the lowest acceptable tender scores 90 points for price;
- (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
- (c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
- (d) the specific goals may include
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994;
- (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
- (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
- (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.”

[5] In the Regulations (GNR32 of 20 January 2017, GG40553) the manner in which functionality is to be addressed is dealt with expressly in regulation 5:

“Tenders to be evaluated on functionality.

- (1) An organ of state must state in the tender documents if the tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) The tender documents must specify—
 - (a) the evaluation criteria for measuring functionality;
 - (b) the points for each criteria and, if any, each sub-criterion; and
 - (c) the minimum qualifying score for functionality.
- (4) The minimum qualifying score for functionality for a tender to be considered further—
 - (a) must be determined separately for each tender; and
 - (b) may not be so—
 - (i) low that it may jeopardise the quality of the required goods or services; or
 - (ii) high that it is unreasonably restrictive.
- (5) Points scored for functionality must be rounded off to the nearest two decimal places.
- (6) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.
- (7) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11.”

Approach to determining invalidity of tender and remedy

[6] The approach to determining a challenge to a tender on grounds of the perpetration of irregularities is trite: a two stage test is conducted, first to declare the tender invalid if so proven and distinctly thereafter, to determine an appropriate remedy.²

² Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security agency and Others 2014 (1) SA 604 (CC);

The Security Score

[7] The score card prescribed thus in item 3:

“Provide security measures to prevent loss of material & safeguard incomplete projects (Attach signed SLA with a security company)” – scoring: (1) Storage – 5 points and (ii) SLA – 5 points.”³

[8] The applicant purported to be responsive in two ways.

8.1 First, in a letter which stated:

“RE: INFINITE BLUE TRADING SECURITY DETAILS

Reference is made to the above captioned subject and the evaluation requirements for bid number 2285S with description: supply of service contract we hereby confirm the security details. We are based in Midrand at 26B Allan Road which premise is owned by the company. We have a service level agreement with ADT; one of the renowned security company; they provide armed security for our premises which include a double storey office and storage facilities as detailed in the attached drawings.

In addition to the armed response provided by the ADT, we have an electric fence and a razor wire around the premises which add protection of intruders. We also have CCTV; motion detectors and a guard room close to the gate to monitor movement of materials from and into the premises. The security provisions extend to sites; especially when they are incomplete sites; ADT also provide additional security, whenever there is a need. All the goods are insured within the relevant confines of the insurance regulations and the company will ensure maximum security is provided to protect all the materials.

Please find the attached drawings showing the actual measurements and detailed configurations.”

[9] Second, by the attaching of a copy of a service level agreement with a security company, ADT, as alluded to in the letter.

³ SLA = Service Level Agreement.

[10] The bulk of the SLA is illegible and is condemned as such by City Power, a fact that is conceded by the applicant who, nevertheless, states in its affidavit that this attribute is irrelevant. This point was not pressed by counsel; correctly so. The function of the requirement to attach the document is the point of departure to determine the significance of the request. The inescapable implication is that it was to be read to establish, at very least, that the contract was current and would remain current for the duration of the tender to be awarded. This was an implied minimum requirement. If, despite being unstated in the bid, there was to be a qualitative assessment of the SLA, more so the document had to be legible so that it could be scrutinised. However, the latter consideration can be ignored; it was right to award 0 points for the SLA.

[11] As to the letter and its contents, it is not evident why it could be thought the scorecard requirements were not met. The information requested appears therein. In the answering affidavit, a bald allegation is made that there was a failure. The scorecard distinguishes between the SLA and the disclosure of information about storage security. In the absence of any plausible criticism of the contents of the latter, the applicant was entitled to be scored, if not 5 points, then some portion of 5 points, the least of which must be 1; this could, of course, only have been done if it was stated that a qualitative assessment would be made. No such indication in the Bid documents exists. However, even with 1 point only, the applicant would have achieved a score of 75 regardless of any other consideration yet to be addressed.

The Tools list and asset register

[12] The scorecard requirement was thus in item 7:

“Provide a list of specialised tools in line with the scope of work (Attach asset register) – [a list 6 different pieces of equipment are listed” Scoring – 10 points.

[13] The applicant provided a list of tools. It also provided what it called an ‘asset register’.

[14] City power in its answering affidavit raises two points.

(1) First, the list in the tender document provided by the applicant contradicts the list in this application. (No more need to be said about this notion except that only the list submitted during the tender process is relevant; the contradiction is irrelevant)

(2) Second, the tool list provided does not have bar codes. This is the reason, so it is alleged that 0 out of 10 was awarded. The question of compliance must be tested in relation to this allegation.

[15] The reason given by City power is fatuous. No stipulation to provide bar codes exists. No case is made out for such a requirement in the answering affidavit.

[16] In argument, it was suggested that the label “asset Register” must be understood to mean, not merely a schedule of equipment, but a record in which every item of equipment is designated by some identifying mark, eg an inventory number, or a bar code. The absence of such detail meant the so-called register did not qualify as a ‘register’. This argument was not prefaced by any allegation in the affidavit. Essentially it implies an industry standard but no evidence is adduced of such a standard. Moreover, no definition of ‘asset register’ exists in the bid documents to lay

down such a requirement. In my view, in the absence of an express stipulation, the reasonable reader of the specification could not be expected to have understood it to mean what has been contended on behalf City Power. Moreover, as regards evidence that this was indeed a relevant criterion, such a fact might have been shown by offering for scrutiny, the successful bidders' asset registers to determine the practice. The absence of such evidence warrants an adverse inference.

[17] Plainly, the scoring was irregular. No rational reason to score 0 is evident. Not every tool on the specification list was included on the applicant's list. If it was appropriate to award less than 10 for that reason (not being a reason relied upon) a score of less than 10 could conceivably have been awarded. However a 0 score is irrational. This constitutes clear evidence of an irregularity.

The testing of electricians

[18] The origin of this occurrence is in notes 2 and 3 to the scorecard. They state:

- “(1) ...
- (2) Testing of electricians will be conducted to those companies that meet threshold.
- (3) An electrician that fails testing will automatically reduce the score under item 5.”

[19] Several problems exist with this requirement and its application.

19.1 First it is dangerously vague. What will the test is composed of? What is a pass mark? How many points are deductible?

- 19.2 Second, does this requirement satisfy the PPFA and Regulations? The passages in that legislation, cited above, in my view are not met by these requirements. The process is an illustration of precisely what the legislation was intended to prevent – a loose slippery dimension open to facilitate manipulation of the process.
- 19.3 Third, why was the pass mark 75%? It was argued that such a mark was the threshold for the entire exercise. Textually, this inference cannot be drawn. Nor was it ever suggested to be so in any of the bid briefings.
- 19.4 Lastly, on common cause facts, why was the critical examination question posed to the applicant's electrician and answered by him, declared to be a fail when the same question, in substance, was answered and passed by another artisan albeit with a low score? City Power says nothing to explain this obvious anomaly. The examination, at best for it, was conducted in a self-evidently capricious manner. The list of questions posed is not matched with any model answers that the several examiners would be using if any effort at achieving a comparable examination standard was attempted

Summing up

[20] There are clear irregularities in the scoring.

[21] In my view, the pattern gives rise to a reasonable suspicion of deliberate manipulation of the process to improperly exclude the applicant, and perhaps others too.

The remedy

[22] The relevant facts on these papers are these:

22.1 City Power has, in its affidavit, studiously evaded giving the date these contracts were awarded. By inference it is established that it must have been mid-November 2018.

22.2 The applicant learnt thereof after enquiring in December 2018, that it had been rejected. These proceedings were launched on 7 January 2019.

22.3 This hearing took place on 20 May 2019.

22.4 The elapse of six months is explained by reference to delays in providing the record. A compelling application became necessary. When the matter came before the Urgent Court a week ago it was set down especially on grounds of urgency.

[23] The nature of the contracts is that the successful bidders are put onto a panel of 60 contractors who stand ready to do maintenance work as and when called upon to do so. Probably a roster is used to spread the work.

[24] City Power has not provided any facts or policy consideration that would suggest that the tender should not be set aside, or be allowed to continue notwithstanding invalidity.

[25] A period of temporary continuation by the present successful bidders, ie the 6th to 61st respondents, whilst the tender bids are reevaluated honestly, can be accommodated in an order. A period of three months from date of the order is sufficient for such an interim arrangement.

[26] In the circumstances, the setting aside of the tender which is unavoidable, shall not cause any consequential harm to the public interest.

The Costs

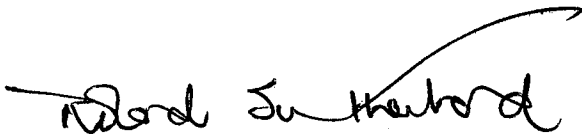
[27] The defences raised to the application were, save in the case of an illegible SLA, vacuous and so feeble that mala fides can be inferred. The lack of cooperation to expedite the litigation aggravates this conduct. The consequences of delay in tender challenges is so obvious that no reasonable person can claim an unawareness of the absolute need to move swiftly. To drag ones feet in such a matter is an abuse of the court process. A punitive costs order is warranted.

[28] In addition, the conduct of the anonymous officials of City Power deserves censure. The matter ought to be referred to the CEO of City Power and to the Mayor for consideration of an enquiry into the integrity and competence with which this bid was mismanaged and maladministered.

[29] Moreover, given the public interest being served by the rooting out of irregular conduct by public officials who perpetrate such irregularities behind a cloak of anonymity and escape accountability, a report on steps taken to address such matters in the case shall be called for.

The Order

- (1) The decision of City Power to award the tender to the panel of tenderers (6th to 61st respondents) is declared constitutionally invalid and is set aside.
- (2) Any service Level Agreements between City Power and the 6th to 61st respondents are declared constitutionally invalid and are set aside.
- (3) The tenders submitted to City Power by the applicant and all other tenderers shall be resubmitted for evaluation ab initio.
- (4) The 6th to 61st respondent are authorised, as an interim measure, to continue to render services to City Power for a period limited to 90 days from the date of this judgment.
- (5) City Power shall take all necessary steps to expedite the fulfilment of order (3) with the 90 days interim period.
- (6) No unilateral extension of the service of 6th to 61st respondent shall be made unless sanctioned by an order of the Court, on good cause shown.
- (7) This judgment shall be brought to the attention of the chief executive officer of City Power and of the Executive Mayor of the City Of Johannesburg who shall take steps to enquire into the conduct of the personnel responsible for the management and administration of the bid with the aim of detecting whether a lack of integrity or incompetence explains the irregularities described in the judgment, and a report on the outcome of such enquiry shall be filed with the Registrar of this Court within 180 days of the date of this judgment.
- (8) City power shall pay the applicant's costs on the attorney and client scale.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 21 May 2019

Date of Judgment: 30 May 2019

For the Applicant: Adv APJ Els

Instructed by Albert Hibbert Attorneys

For the First Respondent: Adv L Nyangiwe

Instructed by Madhlopa & Thenga Incorporated