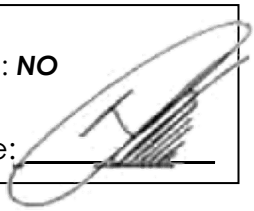
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***15th September 2020*** Signature: 

CASE NO: 16167/2019

DATE: 15th SEPTEMBER 2020

In the matter between:

ILEX SOUTH AFRICA (PTY) LIMITED	Applicant
and	
NATIONAL HEALTH LABORATORY SERVICE	First Respondent
CHETTY, DR KARMANI N O	Second Respondent
ABBOTT LABORATORIES SOUTH AFRICA (PTY) LIMITED	Third Respondent
ROCHE DIAGNOSTICS (PTY) LIMITED	Fourth Respondent
SIEMENS HEALTHCARE (PTY) LIMITED	Fifth Respondent

Coram: Adams J

Heard: 17 and 18 June 2020

Delivered: 15 September 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 15 September 2020.

Summary: Administrative law – public tender – administrative action – such is constituted by *inter alia* the award of a State tender – the disqualification of the applicant's tender was constitutionally invalid –
Remedy – unlawful tender – just and equitable remedy – court declined to set aside the tender –

ORDER

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(1) The first respondent's decision taken on the 29th of November 2018 to award bid number RFB 017/18-19, for the 'Provision of a total HIV Viral Load Services Solution to the National Health Laboratory Services ('NHLS') for a period of three years', in the medium and high throughput categories to the third and fourth respondents ('the decision'), is reviewed and declared constitutionally invalid.

(2) The applicant's application to set aside the decision and any contracts concluded pursuant thereto between the first respondent and the third and fourth respondents for the provision of HIV blood sample testing services to the National Health Laboratory Services implementing the said decision ('the Contracts') is refused with costs.

(3) The applicant shall pay the costs of the first, second, third and fourth respondents of this review application, including the costs consequent upon the employment of two Counsel (where so employed).

(4) The applicant shall pay the costs of the first, second and third respondents relating to the first and second respondents' application to set aside the applicant's opposing affidavit in the third respondent's interlocutory application.

JUDGMENT

Adams J:

[1]. This is an opposed application concerning a public tender for the provision of HIV blood sample testing services for a period of three years. The body that invited the tenders was the National Health Laboratory Services ('NHLS'), a national public entity established as a juristic person in terms of section 3 of the National Health Laboratory Services Act, Act 37 of 2000 ('the NHLS Act'). The NHLS and its chief executive officer are the first and second respondents respectively. The contract was awarded to Abbott Laboratories South Africa (Pty) Ltd ('Abbott'), the third respondent, and Roche Diagnostics (Pty) Ltd ('Roche'), the fourth respondent. The applicant, Ilex South Africa (Pty) Ltd ('Ilex'), and the fifth respondent, Siemens Healthcare (Pty) Ltd, also tendered but were unsuccessful.

[2]. Aggrieved at the award of the contract, Ilex applies to this Court for an order setting aside the decision of NHLS to appoint Abbott and Roche and the contracts that followed upon that decision. The relief sought by Ilex is essentially for an order declaring that the tender process was illegal, invalid and unconstitutional and for an order reviewing and setting aside the said decision. In the alternative, Ilex seeks an order setting aside the award of the tender in favour of Roche.

[3]. Ilex contends that the decision to award the tender to Abbot and Roche and the subsequent contracts concluded between them should be declared unlawful and set aside *ab initio* for the following reasons: (i) the bidders' offers expired on 9 October 2018 prior to the NHLS accepting any bids; (ii) the NHLS failed to comply with its own Request for Bids ('RFB') and the Preferential Procurement Policy Framework Act, Act 5 of 2000 ('PPPFA') regulations in disqualifying Ilex; (iii) the tender process was unfair as there were no comparable price submissions; (iv) the conduct of the NHLS was procedurally unfair during the tender process; (v) the Bid Adjudicating Committee of NHLS

was not properly constituted; (vi) the NHLS's decision was not reasonable and irrational; (vii) the NHLS's decision to split the bid between high and medium throughput suppliers was arbitrary and irrational; and (viii) Roche was awarded the high throughput category at a price it did not offer.

[4]. At the heart of the dispute in this application is public procurement and the notion that it is not a mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public.

[5]. The procurement of goods and services by the state and other public entities is subject to various legal constraints. Section 217(1) of the Constitution requires all organs of state, when they contract for goods or services, to do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. That is taken up in the Public Finance Management Act, Act 1 of 1999 ('the PFMA'), which provides in s 51(1)(a)(iii) that the accounting authority of a public entity (which includes the NHLS) 'must ensure that the public entity … has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. It has also been held that public procurement constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA') and must comply with the provisions of that Act.

[6]. Section 217 of the Constitution, the Preferential Procurement Policy Framework Act, Act 5 of 2000 ('the Procurement Act') and the Public Finance Management Act, Act 1 of 1999] provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA.

[7]. Treasury regulations on state acquisitions require tenders to be evaluated by a bid evaluation committee (BEC) and a bid adjudication committee (BAC). The regulations required the state entity concerned to have a

system for constituting those committees. The system employed by the NHLS was contained in its Supply Chain Management Policy, which directed how the committees were to be constituted and set out in some detail their functions and how those functions were to be performed.

[8]. Bids would first be screened for compliance with the administrative requirements of the RFB. Those that survived would then be evaluated by the BEC, which would report and make recommendations to the BAC. The BAC would in turn make recommendations to the Chief Executive Officer and to the NHLS Board, which was authorised to approve finally a competitive bid.

[9]. The implication of the aforegoing process is that some proposals might be unmeritorious, as non-compliant and non-responsive, that they could be disqualified at the stage of assessment by the BEC. All other bids would then be scored according to the formula provided for in the RFB. I shall return to this aspect of the matter shortly.

[10]. In a nutshell, Ilex contends that when it was disqualified it was treated unfairly by a flawed bidding process. There is also a suggestion by Ilex that the NHLS in certain respects acted irrationally and unreasonably. What Ilex says is that it could have won the day, at least on a certain part of the bid, on its financial proposals had it proceeded to that evaluation stage, to which it would indeed have proceeded absent its unlawful disqualification and other alleged irregularities that form the subject of its complaints.

[11]. Before turning to the issues that arise in this case it is convenient to outline the background against which the bids of Abbott and Roche were accepted and the contracts concluded. It is also necessary to summarise the processes that culminated in these contracts.

[12]. The NHLS has the sole mandate to provide pathology services to the South African National Department of Health ('NDOH'). At the relevant time the NDOH reported 7.1 million people living with HIV in South Africa, with the total remaining on anti-retroviral therapy estimated then at 4.1 million people. The 2015 Consolidated Guidelines for the Management of HIV of the World Health Organisation ('WHO') and the NDOH recognised the HIV viral load as the

preferred method of monitoring response to treatment and diagnosing treatment failure. The NHLS, which is the largest diagnostic pathology laboratory service in South Africa with over two hundred and fifty laboratories in the nine provinces, followed and still follows the HIV viral load monitoring regimens recommended by the aforementioned NDOH guidelines. For that purpose the NHLS required assistance from specialised service providers to test blood samples for HIV.

[13]. The invitation to bid – also referred to as an RFB, which, according to the tender documents, is an acronym for 'Request for Bid' – was issued by the NHLS on the 4th of May 2018 and was directed at identifying service providers for the 'provision of a total HIV Viral Load Services Solution to the NHLS nationally for a period of three (3) years'. The RFB contained detailed technical specifications, which incorporated a number of 'mandatory requirements', and provided for the assessment of technical functionality in accordance with express and specified 'technical evaluation criteria'.

[14]. There were a number of elements to the service that was required, but it was directed primarily at the viral load testing of individuals at a number of laboratories across the country and the production of the test results in a coordinated and technologically advanced format. The closing date by which the bids were to be submitted to the NHLS was the 11th of June 2018.

[15]. As aptly put by Ilex in its founding affidavit, the NHLS was seeking a service provider to set up machines in each of its sixteen country wide laboratories and deliver the services of testing blood samples for HIV at particular speeds which are respectively referred to as medium and high throughput volumes. HIV testing at medium and high throughput volumes is highly specialised. There are only few companies in the market that can offer these services.

[16]. After the issue of the RFB the NHLS held a compulsory briefing session on the 17th of May 2018, whereafter Ilex submitted its bid on the 11th of June 2018. A public tender opening took place at the NHLS's offices on the 11th of

June 2018. It was disclosed at that meeting that four parties had submitted bids, namely Ilex, Abbott, Roche and Siemens.

[17]. The evaluation of the bids by the NHLS was done firstly through its Bid Evaluation Committee ('BEC'), also referred to at times in the documentation as the Cross Functional Evaluation Team ('the CFET'), which issued its final report on the 16th of October 2018, which was after the date on which, according to the RFB, the NHLS was to accept any compliant bids.

[18]. Before then, the CFET had done a technical functionality evaluation of the bids and in its report, which was signed off on the 2nd and the 7th of August 2018, made certain recommendations to be presented to and considered by the Finance Evaluation Team. The functional evaluation entailed the CFET members: (1) discussing and evaluating compliance by the bidders of the technical mandatory requirements; (2) scoring each qualifying bid submission for the non-mandatory requirements; and (3) preparing and submitting its functional evaluation report for consideration by the Finance Evaluation Team.

[19]. It was in this report by the CFET that the bidders were scored, on the technical evaluation, by the members as follows: In respect of medium throughput volumes: Roche – 86.5%; Ilex – 88% and Abbott – 85%. In respect of high throughput volumes, Abbott was disqualified and Roche was scored at 85% and Ilex at 84%. In conclusion, the CFET report then recommended that Ilex and Roche be further evaluated for price and B-BBEE in respect of their bids for high throughput volumes. Roche, Ilex and Abbot were similarly recommended to be further evaluated in respect of their medium throughput volumes. The import of this report, from the point of view of Ilex, was that it was found by NHLS to be compliant with the administrative requirements of the bid, as well as with the technical mandatory requirements thereof.

[20]. Thereafter, the tender process and the assessment of bids by Roche, Ilex and Abbotts moved onto the next stage of the evaluation process by the Price Evaluation Committee ('the PEC'), another sub-committee of the BEC. The recommendations by the PEC are contained in its report, tilted 'Consolidated Price Report' and dated the 24th of August 2018. This report and

the findings made therein form the basis of most of the complaints by Ilex in this review application. The Price Committee evaluated two bidders, namely Abbott and Roche, and found in its price evaluation the 'lowest tendered price' to be that of Roche, namely R1 207 500 000 (inclusive of 15% VAT). Abbott's tendered price of R1 371 375 was found to be the second lowest. In the result the committee recommended that 'the lowest bidder be allocated the project as per the order of the merit'. It also recommended 'Abbot as the bidder that will provide the cost effective service for the proposed solution'.

[21]. Importantly, the Consolidated Price Evaluation Report disqualified Ilex on the following bases:

'- Their copy of the pricing schedule or quote does not correspond with the original.
- Their copy of the original pricing schedule was manually amended with a pen and there is no initial on the changes made.
- Their pricing declaration amount is the same as the annual costs and not for the 3 (three) years and not for the three years as required in the bid documents'.

[22]. On the 8th of November 2018 the BAC submitted a report, which incorporated the aforementioned recommendations in the reports by the CFET and the PEC, to the Finance Committee of the NHLS Board. This report required of the Finance Committee to award the tender to Roche and Abbott in respect of high throughput and medium throughput respectively. The Financial Committee accepted the recommendation and, in turn, made its recommendation on the 23rd of November 2018 to the board of the NHLS. Finally, on the 29th of November 2018 the Board made its decision and resolved to accept the bids of Abbott and Roche, the bid by Ilex having been disqualified in accordance with the recommendations by the PEC.

[23]. Between 29 November 2018 and 23 January 2019 the NHLS took no steps to notify the successful bidders of their decision to accept their bids.

[24]. On the 24th of January 2019 the NHLS advised Abbott that its bid has been accepted in respect of ten listed 'medium throughput sized labs', namely Addington, Nelson Mandela Academic, IALCH, Edenvale, Madadeni, Groote Schuur, Tygerberg, Tshepong, Port Elizabeth and East London. The award of

the bid to Abbott was expressly subject to the following: '(a) Contract will be drafted by NHLS; and (b) SLA Agreement between NHLS and Abbot Laboratories SA (Pty) Limited'. The award was 'accepted' by Abbott on 25 January 2019.

[25]. Also, on the 24th of January 2019 the NHLS addressed a similar written *communiqué* to Roche, advising that its bid has been accepted in respect of six listed 'high throughput sized labs', namely Charlotte Maxeke, Rob Ferreira (Nelspruit), Ngwelezana, Mankweng, Dr George Mukhari Academic and Universitas Academic. The award of the bid to Roche was expressly subject to the same conditions as those imposed on Abbott: Roche was however not agreeable to 'accepting' the award.

[26]. As for the bid submitted by Ilex, on the 13th of February 2019 NHLS advised it (Ilex) that its response to the RFB had been unsuccessful. The notification to Ilex was rather terse and gave no reason for Ilex's unsuccessful bid. NHLS simply advised Ilex as follows: 'We regret to inform you that your response to the above mentioned bid has been unsuccessful'. Eventually, and only after Ilex had availed itself of the discovery processes in anticipation of this review application and during the application, it transpired that it (Ilex) had in fact been disqualified several months prior to that notification on the 24th of August 2018 by the Price Evaluation Committee in their report of that date.

[27]. As indicate above, the reason for Ilex's disqualification, according to the Price Evaluation Report, and the basis for same was the following: the original of their pricing schedule or quote did not correspond with the copy as submitted by Ilex; Ilex's original pricing schedule was manually amended with a pen and there is no initial on the changes made; and Ilex's pricing declaration amount was the same as the annual costs and not for the three (3) years as required in the bid document.

[28]. Ilex is unhappy with this decision by the PEC and is even more aggrieved by the fact that for a period of approximately six months the NHLS did not consider it appropriate to notify them of the fact that they had been disqualified during the very early stages of the bid evaluation process.

[29]. On the 9th of March 2019 Roche 'accepted' the NHLS's acceptance as per their letter of the 24th of January 2018 of its (Roche's) bid with substantial changes to the contents of the said letter. The bid was awarded in respect of six 'high throughput sized labs'. The award of the bid as per the letter of the 24th of January 2018 had been amended, after further negotiations between NHLS and Roche, to expressly provide that services would be rendered for the following price: 'At an amount of R86 per single (one) viral load result per volume, for 3.5 million VL's in 2019'.

[30]. It is the case of Ilex that by the time Roche 'accepted' the award of the bid by NHLS, same had already expired and it could not have been accepted. Moreover, so Ilex contends, because the 'acceptance' was conditional and the conditions had not been fulfilled timeously, i e before the expiration of the bids, the contracts concluded between NHLS and Roche were unlawful. In addition, Ilex contends that the agreement concluded between NHLS and Ilex pursuant to the latter's acceptance of the Bid on the 9th of March 2019 contains additional terms, which afforded Roche a minimum volume of 3.5 million tests for 2019. This means, so the argument goes on behalf of Ilex, that the NHLS and Roche had negotiated on a basis that was never available to the other bidders.

[31]. On the 1st of July 2019 the NHLS, Roche and Abbott commenced with the implementation of the bids. On 2 July 2019 the NHLS and Roche concluded a service level agreement.

[32]. With that background I turn to Ilex's complaints and its grounds of review, which were many, all attacking the award of the tender to Roche and Abbot. The real complaint was however the disqualification of Ilex's tender.

The first Ground of Review – the Bids by Roche and Abbot had lapsed

[33]. As indicated above, the closing date for bid submissions was the 11th of June 2018. The 'bid validity period' was 120 days 'commencing on the RFB closing date'. This means that the bids presented by Ilex, Abbott, Roche and Siemens were open for acceptance by the NHLS until the 9th of October 2018.

[34]. By the 10th of October 2018 the NHLS, who was still in the process of evaluating the bids by Abbott and Roche, with the Ilex's bid having already been disqualified on the 24th of August 2018, had not yet accepted any of the offers, which means, so Ilex contends, the bids were no longer open for acceptance by NHLS as they had lapsed the previous day.

[35]. However, on that day, namely the 10th of October 2018, the NHLS addressed a letter to all of the bidders (Ilex, Roche, Abbott and Siemens) in which the NHLS acknowledged that the validity period of the RFB had expired. They therefore enquired from all of these parties whether they would be willing to hold their bids open and valid in all respects for a further period of 120 calendar days.

[36]. It is common cause that the NHLS had a discretion to extend the bid validity period should the evaluation of the bid not be completed within the stipulated validity period. However, Ilex is of the view that this provision in the RFB did not avail the NHLS after the expiration of the bid period – the right to extend the validity period of the bid as provided for in the RFB, so Ilex contends, has no independent life of its own and lapsed with the rest of the RFB on the 9th of October 2018.

[37]. All the same Ilex and the other bidders (Abbott, Roche and Siemens) all agreed in writing to the NHLS's request for an extension of the bid validity period.

[38]. As I have indicated, Ilex contends that this purported extension of the bid validity period is of no moment as the RFB in its entirety had lapsed. In addition, so Ilex submits, its consent to the extension of the bid was procured by the NHLS on the basis of a material non-disclosure, that being that it was not communicated to Ilex that the NHLS's PEC had by then already disqualified it from the bidding process.

[39]. I am inclined to agree with these submissions by Ilex. If regard is had to the applicable principles relating to public tenders and the requirement that there should be transparency, the bids had expired on the 9th of October 2018. To continue with the processes after that date amounted to a reviewable

irregularity and on that basis alone Ilex should be granted the relief prayed for in this review application.

[40]. I do not accept NHLS's view that after the lapsing of the initial bids the NHLS solicited new offers from the tenderers – the solicitation of new offers in those terms would have been contrary to the PFMA and the Constitution. It flies in the face of the philosophy underpinning public tenders as underwritten by the constitution. Those offers did not follow on a public procurement process and were unlawful. The correct course of action would have been for the NHLS to publicly republish the RFB to solicit new offers.

[41]. Once the validity period of the bid submissions had expired without the NHLS having awarded the bid, the tender process was complete and the NHLS was no longer free to continue with that process or take any decisions pursuant to bids submitted in response to the RFB. The NHLS was then compelled to re-advertise the bid.

[42]. As was held in *Telkom SA Ltd v Mend Trading (Pty) Ltd and Others* 2011 JDR 0004 (GNP) at par [14]:

'[14] As soon As soon as the validity period of the proposals had expired without the applicant awarding a tender, the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive'.

[43]. This passage in *Telkom SA Ltd v Merid Trading (Pty) Ltd* was referred to with approval by Plasket J in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP), in which it was held that the *National Treasury's Supply Chain Management: A Guide for Accounting Officers/Authorities*, which provided a step-by-step guide for institutions such as the NHLS to apply when engaged in procurement processes, made it clear that

an 'extension of bid validity, if justified in exceptional circumstances, should be requested in writing from all bidders before the expiration date'. The reason for this provision, so Plasket J held, was clear: by the time the tender validity period had expired, there was nothing to extend because the tender process was concluded.

[44]. I am in agreement with Plasket J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on the 9th of October 2018, the tender process had been completed, albeit unsuccessfully.

[45]. There is another leg to the expiration of the bid argument of Ilex and that relates to the fact that, according to Ilex, even during the purported extended bid validity period, the NHLS did not accept the bids. On the NHLS's version, so Ilex contends, the bid validity period was extended to the 11th February 2019. Roche, so Ilex's argument goes, rejected the NHLS's acceptance of their bid on the 24th of January 2019 and only accepted same on the 9th of March 2019, which, according to Ilex, fell after the expiration of the extended validity period. Accordingly, so Ilex argues, Roche's bid lapsed as it had not been accepted within the validity period.

[46]. I am not persuaded by this argument. The point is that, in terms of the RFB, all the appended documentation, and the proposal in response thereto read together, form the basis for a formal contract to be negotiated and finalised between NHLS and the entity to which the NHLS awarded the bid. This then means that, in my view, when the NHLS accepted Roche's bid on the 24th of January 2019, legally a contract was concluded with the detail still to be negotiated and finalised obviously within the parameters and on the basis of that agreement. That is what happened between NHLS and Roche after the 24th of January 2019.

[47]. The bidders had in any event also agreed that until formal contract documents had been prepared and executed, the Form of Tender, together with a written acceptance from the NHLS would constitute a binding agreement

between them, governed by the terms and conditions set out in the Request for Bid.

[48]. I therefore do not accept Ilex's contention that by the 9th of March 2019, when the final contractual agreement was finalised between the NHLS and Roche, NHLS had not accepted Roche's bid, which, in turn, means that same lapsed before being accepted.

[49]. The same principle applies to Ilex's submission that, as regard Abbott, a written agreement had not been concluded with Abbott until July 2019, by which time their bid had already lapsed. There is no merit in this contention by Ilex and in the contention that 'the suspensive condition' contained in the 24 January 2019 letter from NHLS meant that the bid was never accepted timeously, as the condition had not been fulfilled by the time the validity period expired.

[50]. I am nevertheless persuaded, as indicated above, that the bids by Roche and Abbotts lapsed on the 9th of October 2018 and were thereafter no longer open for acceptance by the NHLS. On that ground alone, the award of the tender to these two companies stands to be reviewed and set aside.

The second Ground of Review – Ilex's disqualification was unlawful

[51]. This complaint by Ilex is the mainstay of its review application. The contention by Ilex is that in disqualifying it on the basis of a technicality which relates to the fact that on the price declaration form the total amount for the three years of the contract had not been stated, the NHLS acted irrationally and unfairly.

[52]. The NHLS is required to comply with the PPPFA and the PPPFA Regulations when evaluating and adjudicating bid submissions, as well as with the provisions of the RFB. Those provisions effectively establish the 'rules of the game', and non-compliance with these rules would be unlawful.

[53]. Ilex contends that non-compliance with the provisions of the tender document (the RFB) – especially a pivotal provision such as those relating to disqualification – carries with it the inevitable result that bidders are not treated

fairly or equitably and do not compete on an equal footing. Compliance with the RFB is therefore essential for preserving the integrity of the tender process.

[54]. As was held at par [40] in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others,* 2014 (1) SA 604 (CC), '[compliance] with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that [the tender adjudicating body] may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution'. See also: *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 43 (SCA) at par 30 and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 12 (CC) at par 50.

[55]. In disqualifying it, so Ilex contends, the NHLS failed to comply with the RFB's provisions on disqualification and the PPPFA and PPPFA Regulations requirement to evaluate (and not to disqualify) an 'acceptable tender'.

[56]. Clause 10 of the RFB contained the provisions relating to the disqualification of a bidder, and provided *inter alia* that the NHLS reserved the right to disqualify a bidder in the event that it did 'not comply with mandatory requirements as stipulated in the RFB', and, in terms of Clause 10.8 a bidder could be disqualified if it failed 'to price according to the costing template'.

[57]. The 'costing template' appears as 'Annex B: Pricing' to the RFB, titled 'HIV Viral Load Price Bid Form', and incorporates a 'Price Declaration Form' The latter form, as completed by Ilex, was in essence the basis on which the bid by Ilex was disqualified, the allegation by the NHLS being that Ilex gave an amount for the provision of HIV Viral Load Tests for one year only, when the form required that a price be quoted for the full period of the tender, being for a period of three years. The RFB itself refers to the 'HIV Viral Load Price Bid Form' as a 'template'. The 'HIV Viral Load Price Bid Form', which is the first page of the costing template, allowed bidders to provide twelve different prices. Importantly, the bidders were required to provide a 'total bid price' (excluding

value added tax) respectively for 5 million, 2.5 million and 1.25 million tests per year. This portion of the template as populated by Ilex was acceptable to NHLS as being compliant with the mandatory bid requirements. Ilex also complied with other mandatory and technical mandatory requirements as evidenced by the evaluation report submitted by the BAC, which incorporated the CFET report, which provided that Ilex complied with the technical mandatory requirements in the high and medium throughput categories.

[58]. The major difficulty with Ilex's bid, according to the NHLS, was this: On the first page of the pricing template, they quoted an amount of R409 750 000 (excluding VAT) for 5 million tests per year, which translated into R81.95 per single viral load test if 5 million tests were performed. So far, so good. Then Ilex simply transferred this total amount of R409 750 000 onto the next page, being the 'Price Declaration Form', as representing their offer 'to provide the provision of the total Viral Load Services Solutions to the NHLS nationally for a period of three years, as detailed in the RFB 017/18-19, for the total tendered sum in words. The problem is that this form, according to NHLS, although it did not expressly say so in as many words, contemplated the total amount quoted for the three period for the provision of 5 million test results per annum.

[59]. The question to be answered is whether this entitled the NHLS to disqualify Ilex. One of the primary disputes between Ilex and the NHLS is whether Ilex was lawfully disqualified owing to the manner in which it completed the price requirements of its bid submission.

[60]. The NHLS is of the view that it was entitled to disqualify Ilex as it had failed to comply with the mandatory requirements, which provides 'that it is mandatory to indicate your total bid price as requested in the Price Declaration Form'. The NHLS's stance is that, if a bidder failed to comply with this requirement that the combined price for the three year period (for 5 million tests per annum) be inserted in the Price Declaration Form, it was entitled to disqualify that bidder.

[61]. Ilex contends that the proper interpretation of the RFB only allows for a bidder to be disqualified for failing to price in accordance with the costing

template and not with the ‘Price Declaration Form’. Any other interpretation, including that adopted by the NHLS, results in an absurdity.

[62]. I am inclined to agree with these submissions on behalf of Ilex. The text of the RFB does not support the NHLS’s approach. In fact the introductory portions of ‘Annex B’ suggest the opposite: ‘bidders will be disqualified should they not price according to the costing template’. The introductory wording in ‘Annex B' reads that ‘it is mandatory to indicate your total bid price in the Price Declaration Form’. This provision is reasonably susceptible to the interpretation given by Ilex.

[63]. It is true that Ilex understood that a bidder, in completing the price declaration form, was required to quote total prices per annum for HIV Viral Load tests at the specified volume levels. And that is what they did – they quoted R409 750 000 per annum for 5 million tests, R204 875 000 per annum for 2.5 million tests and R104 937 500 for R1.25 million tests per annum. In that regard, it is probable that Ilex was influenced by the *nota bene* at the start of the pricing documentation, which reads as follows:

‘It is mandatory to indicate your bid price as requested in the Price Declaration Form. This price must be the same as the total bid price you submit in your pricing schedule.’

[64]. In this regard, it appears that Ilex might have subjectively misread what was stated. Even if one disregards Ilex’s possible subjective misreading, I am of the view that objectively the intention on the part of Ilex was to tender to render the services for a ‘total bid price’, as NHLS understood this to mean, of R1 229 250 000, which translates into R81.95 per single test result.

[65]. In my judgment, the way in which the pricing documentation was formulated and the wording thereof, created vagueness and uncertainty about what exactly was required by NHLS as the ‘total tendered contract sum’. This has a direct bearing on the objective clarity of the evaluation criteria and thus, the fairness of the process. The question is whether it was clear to bidders that the amount required in the ‘Price Declaration Form’ was to be based 5 million test per annum for period of three years. I have no doubt that there was confusion over this question which arose as a result of the wording of the RFB.

It can hardly be maintained that Ilex's confusion was wholly subjective and self-induced.

[66]. Vagueness and uncertainty are grounds for review under section 6(2)(i) of PAJA.

[67]. As was said in *AllPay* (supra), '[t]he purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive'. Because of the uncertainty caused by the wording of the RFB, which led to the disqualification of Ilex, that purpose was not achieved in this case.

[68]. For this reason the decision to award the tender to Roche and Abbott is constitutionally invalid.

[69]. Moreover, The PPPFA and the PPPFA Regulations, properly interpreted, supports a conclusion that the NHLS was not entitled to disqualify Ilex on the basis that it failed to furnish a combined three year price for 5 million tests in the Price Declaration Form. The PPPFA stipulates that an 'acceptable tender' is 'any tender which, in all respects, complies with the specifications and conditions of tender as contained in the tender document'. Only acceptable tenders are to be evaluated in accordance with the PPPFA Regulations. By all accounts Ilex's tender was an acceptable tender.

[70]. It is common cause that Ilex satisfied the minimum functionality requirement (scoring well over 75%) in relation to both the medium and high throughput categories. Accordingly, the NHLS was required to treat Ilex's bid as an acceptable tender and evaluate its bid in accordance with the PPPFA Regulations, which provide that '[e]ach tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system'. I therefore agree that the NHLS was required to further evaluate Ilex in terms of the price and preference point scoring provisions of the PPPFA Regulations.

[71]. Moreover, the RFB expressly required that a total bid price be inserted in the costing template at three different volumes, 1.25 million, 2.5 million and 5

million. The RFB stipulates that the price offered in the Price Declaration Form, which the NHLS seems to regard as the official and definitive document relating to the price quoted, must be the same as the total bid price submitted in the 'pricing schedule', which the NHLS interprets to be the Price Bid Form, which makes provision in total for twelve prices to be quoted at three different levels of volumes, as indicated above.

[72]. It should be borne in mind that the RFB, in relation to the bid price, provided that 'bidders who fail to price according to the costing template provided' will be disqualified. The pricing form itself provides that it is mandatory for a bidder to indicate its 'total bid price' in the 'Price Declaration Form'. Also, 'this price must be the same as the total bid price as the total bid price you submit in your pricing schedule. Should the total bid prices differ, the one indicated in the Price Declaration Form shall be considered the correct price'.

[73]. *Ex facie* Ilex did exactly what the RFB required it to do. In the Price Bid Form it quoted *inter alia* a total amount of R409 750 000 (excluding VAT) for 5 million test results per annum. In the 'Price Declaration Form' Ilex simply repeated what it had stated in the Price Bid Form – therefore, the way I see it, the price in the price declaration form was the same as per the pricing schedule. NHLS disagrees. It is of the view that the price in the price declaration form should have been for the whole three period of the bid. Ilex failed to comply, so the NHLS argues, and therefore, they were rightly disqualified.

[74]. Ilex contends that it expressed its price in the Price Declaration Form as a firm price per annum for the duration of the three year contract as envisaged in the RFB, as confirmed specifically in the price declaration form, which prefaced the quoted amounts with the following undertaking:

'Having read through and examined the Tender Document, RFB No: 017/18-19 General Conditions, The Requirement and all other Annexures to the Tender Document, we offer to provide the Provision of a total HIV Viral Load Services Solution to the NHLS nationally for a period of Three (3) years, as detailed in the RFB 017/18-19, for the total Tendered Contract Sum of in words:'

[75]. I do not think the RFB is to be construed only as requiring a bidder to state in the 'Price Declaration Form' total sum which represents its amount

tendered for conducting 5 000 000 Viral Load Tests per annum for a period of three years. The document itself certainly does not expressly state thus – far from it. In fact, if one reads the 'Annex B: Pricing', consisting of the Price Bid Form and the Price Declaration Form, it has to be said that the way in which Ilex completed the pricing template complies exactly with the requirements. Commercial documents must be construed in a businesslike manner and that would be a businesslike construction.

[76]. What is clear as day is that Ilex's offer was for a period of three years at R409 750 000 per year if they were required to do 5 000 000 test in a year. There cannot possibly be any other interpretation to be attached to their price declaration. The only question is whether this difference in interpretation entitled the NHLS to disqualify Ilex from the bid. In other words, should the NHLS have done, as suggested by Ilex, and simply multiply by three the maximum amount stated, to get the actual sum, which they intended to quote.

[77]. I am inclined to agree with the contention on behalf of Ilex. There was no legal basis on which to disqualify them.

[78]. Similarly, the other grounds on which the NHLS disqualified Ilex was devoid of any merit. The original Costing Template was manually amended only by means of the insertion of commas at the appropriate places to indicate for example the cents part of the unit prices. How could that possibly be a ground for the disqualification of a bid especially if regard is had to the fact that the total prices correlated with the unit prices. Ilex's very reasonable explanation for the manuscript insertion was that the word format of the Costing Template provided by the NHLS did not allow for the insertion of commas. The Price Declaration Form submitted by Ilex contained no manual amendments.

[79]. In the circumstances I find myself in agreement that Ilex's disqualification was arbitrary, irrational and unlawful. The NHLS's disqualification of Ilex therefore fails to comply with the RFB, the PPPFA and the PPPFA Regulations.

[80]. The decision is accordingly tainted by this failure and is an unlawful exercise of public power contrary to the principle of legality embodied in section 1(c) of the Constitution; and an unlawful administrative decision which is subject

to review in terms of sections 6(2)(d), 6(2)(e)(iii), 6(2)(f)(i), 6(2)(f)(ii) and 6(2)(i) of PAJA.

[81]. In the light of these findings, it is not necessary, in my view, to consider the other grounds raised by Ilex. Suffice it to say that it appears that Ilex could have succeeded on one or more of the other grounds.

[82]. In all of the circumstances and for the reasons mentioned above the NHLS's decision to award the tender to Roche and Abbott is constitutionally invalid.

The Remedy

[83]. The difficulty faced by a court when a contract should be set aside as being constitutionally invalid, as in this matter, was expressed by the SCA in *Millenium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) and later in *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA). What was said in the former case bears repeating:

'The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

[84]. There can be no doubt that immense disruption would be caused, with dire consequences to millions of South Africans living with aids, if the contracts concluded by the NHLS with Roche and Abbott were to be summarily set aside. It is unthinkable that that should occur.

[85]. Such an order was sought by Ilex in its amended notice of motion. In essence Ilex asked for an order setting aside these contracts concluded between NHLS and Roche and between NHLS and Abbott. In the alternative, Ilex asked that the contract between NHLS and Roche be set aside and re-allocated to it. In his Heads of Argument and during the oral hearing of the application Mr Mundell proposed an order which would have the effect of suspending the order setting aside the contracts pending a new tender process to be directed by the court.

[86]. NHLS's stance is that, even if reviewable irregularities are found to exist, the award should not be set aside because, so NHLS contends, a re-tender would compromise one of the key principles of a public tender, namely competiveness. Abbott aligns itself with the approach adopted by NHLS relative to the relief to be granted. The public interest should be the lodestar, so Abbott contends. In addition, Abbott argues that its position as an innocent tenderer should not be overlooked. It would be severely prejudiced and suffer irreparable harm should the award of the tender to it be set aside. In its answering affidavit Abbott sets out details of the financial loss it would suffer if the award of the tender is set aside.

[87]. Simirlarly, Roche adopted the approach that, even if a declarator of unlawfulness is made with respect to the impugned decision, the ensuing contracts should not be set aside. Only as a last resort, so it was submitted on behalf of Roche, should the award of the tender be set aside, in which event the NHLS should simply to be afforded the opportunity (as the functionary with the technical expertise) to deal with a new tender as it deems appropriate. Roche therefore submits that the Court should refer the matter back to the NHLS only with directions that a new tender should be advertised.

[88]. This Court is constitutionally authorised, once it has found conduct to be unlawful, to craft an order that is appropriate to the circumstances. Section 172(1)(b) of the Constitution provides that, following upon a declaration of constitutional invalidity, a Court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity;

and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[89]. The approach to section 172(1)(b) was dealt with in *AllPay Consolidated Investments (Pty) Ltd v Chief Executive Officer: South African Social Security Agency and Others* 2014 (4) SA 179 (CC). The Constitutional Court held that the emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b) and that the corrective principle operates at two levels. First it must be applied to correct the wrongs that led to invalidity. Second it must prioritise the public good.

[90]. The following excerpt from *AllPay 2* adequately captures this approach:

'[29] In *Steenkamp* Moseneke DCJ stated:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. . . . Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

The emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made "to allow the competent authority to correct the defect". Remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.

[30] Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.'

[91]. In the present matter, the appropriate remedy would need to take account of the national importance of the service that is being provided, the disruption that it would cause and importantly the interests of the public. From the point of view of the public interest serious questions arise if the contracts are now terminated. The service of the provision of HIV Viral Load tests must be carried out without interruption These are the identifiable interests that need to be weighed up when the Court decides on a remedy which is 'just and equitable', in addition to having regard to the interest of the innocent successful bidder and the financial effect on the public purse in the event of the award being set aside. It should also be borne in mind that the unfairness *in casu* does not lay in the process of inviting tenders. It lies only in the disqualification of Ilex's tender from the process of evaluation.

[92]. As regards the interest of the public purse, the key question is whether a re-tender or for that matter the completion of the tender process with Ilex as one of the qualifying bidders and the subsequent award of the tender to Ilex would cost the NHLS more than it is currently paying for the service. Because the cost of ordering a fresh tender or the completion of the tender process, without the unlawful disqualification of Ilex, is the normal consequence of an unlawful tender process, any expense considerations must be viewed in the light of the benefits of a more competitive tender. This underlies the principle in section 217 of the Constitution that fair public tendering leads to more cost-effective solutions.

[93]. Mr Roux, Counsel for the NHLS, submitted that, even if Ilex was not disqualified, it would have scored the least number of points compared to Abbott and Roche, which, in turn, means that its tender would in any event have been unsuccessful. This conclusion is based on the simple fact that Ilex's quoted prices in South African rands to provide the service at any and all of the throughput volume levels were consistently the highest prices quoted. This means, so the argument was concluded, that it is clear that there may be significant financial benefits to not setting aside the contracts despite the fact that they were tainted by constitutional invalidity.

[94]. There appears to be merit in this argument. The point is that even when the tender is redone or the tender completed at the associated costs, it is unlikely that that process would result in the state entity receiving a more cost-effective solution. It is therefore probable that setting aside the award of the tender and the subsequent contracts would have no financial benefit to the public purse.

[95]. In my judgment the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time and other considerations, notably the fact that there is a real possibility that if the defect is remedied by the completion of the tender process the result would be the same, an invalid administrative act must be permitted to stand. I am of the view that I should exercise my discretion in favour of declining to set aside the awards.

[96]. In sum, I intend to decline to set aside the award of the tender to Abbott and Roche whilst at the same time declaring the award to be constitutionally invalid.

Costs

[97]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. In this matter the respondents have by and large been successful and that is despite the order declaring the award of the tender invalid.

[98]. I can think of no reason to depart from that general rule and it follows that an order for costs should be granted against applicant in favour of the respondents.

[99]. There is just one other aspect relating to costs which I need to deal with and that relates to an interlocutory application by NHLS to set aside an affidavit by Ilex in Abbott's application for condonation. Shortly after the application was lodged, Ilex withdrew the said affidavit, which rendered the application unnecessary. There cannot be any dispute that Ilex should pay NHLS's costs of

that application. There is however a dispute in regard to Abbott's costs in relation to that application, Abbott having filed an affidavit in support of the NHLS's application to set aside Ilex's irregular step, being the filing of the opposing affidavit in the interlocutory application. I am of the view that Ilex should pay the costs relative to that application of both the NHLS and Abbott, which was the applicant in the interlocutory application.

Order

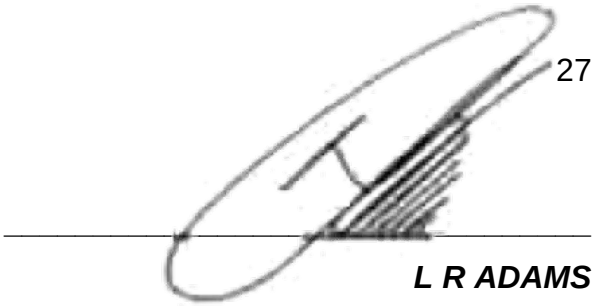
In the result, I make the following order:

(1) The first respondent's decision taken on the 29th of November 2018 to award bid number RFB 017/18-19, for the 'Provision of a total HIV Viral Load Services Solution to the National Health Laboratory Services ('NHLS') for a period of three years', in the medium and high throughput categories to the third and fourth respondents ('the decision'), is reviewed and declared constitutionally invalid.

(2) The applicant's application to set aside the decision and any contracts concluded pursuant thereto between the first respondent and the third and fourth respondents for the provision of HIV blood sample testing services to the National Health Laboratory Services implementing the said decision ('the Contracts') is refused with costs.

(3) The applicant shall pay the costs of the first, second, third and fourth respondents of this review application, including the costs consequent upon the employment of two Counsel (where so employed).

(4) The applicant shall pay the costs of the first, second and third respondents relating to the first and second respondents' application to set aside the applicant's opposing affidavit in the third respondent's interlocutory application.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	17th and 18th June 2020
JUDGMENT DATE:	15th September 2020
FOR THE APPLICANT:	Adv A R G Mundell SC
INSTRUCTED BY:	Webber Wentzel Attorneys, Johannesburg
FOR THE FIRST AND SECOND RESPONDENTS:	Adv B Roux, together with Adv S Tshikila
INSTRUCTED BY:	Cliffe Dekker Hofmeyr, Johannesburg
FOR THE THIRD RESPONDENT:	Adv A Stein SC, together with Adv S Stuart
INSTRUCTED BY:	Bowman Gilfillan, Johannesburg
FOR THE FOURTH RESPONDENT:	Adv M Chohan, together with Adv A Govender
INSTRUCTED BY:	Werksmans Attorneys, Johannesburg
FOR THE FIFTH RESPONDENT	No appearance
INSTRUCTED BY	No appearance