IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5663/13

In the matter between:

CITY OF CAPE TOWN Applicant

And

AURECON SOUTH AFRICA (PTY) LTD Respondent

JUDGMENT DELIVERED ON 14 APRIL 2014

YEKISO, J

[1] By way of a notice of motion issued out of this court, the City of Cape Town ("the City") has launched an application for the judicial review of its own decision taken on 31 October 2012 to award a tender known as Tender Number 459C/2010/11: Provision of Professional Services: Decommissioning of Athlone Power Station ("the Tender") to the respondent. The application is brought pursuant to the provisions of the Promotion of Administrative Justice Act, 3 of 2000.

[2] It is contended on behalf of the City that the decision to award the tender to the respondent falls to be reviewed and set aside on several grounds, these being that a mandatory and material procedure or condition prescribed by the relevant empowering legislation was not complied with; that the decision was taken pursuant to a procedure that was unfair; that the decision was materially influenced by an error of law; that irrelevant considerations were taken into account and relevant considerations were not taken into account in the taking of the decision; and that the decision is otherwise unlawful or unconstitutional as contemplated in section 6(2)(b); section 6(2)(c); section 6(2)(d); section 6(2)(e)(iii); and section 6(2)(i) of the Promotion of Administrative Justice Act.

[3] The City also seeks an order, in the event of an order referred to in paragraph [1] of this judgment being granted, that any contract that may have come into existence between the City and the respondent as a result of the award, be declared *void ab initio;* alternatively, that any such contract be set aside coupled with a further order directing the respondent to pay the costs of this application in the event of the respondent opposing the relief sought.

[4] The City further seeks an order condoning its failure to adhere to the 180-day period imposed by section 7 of the Promotion of Administrative Justice Act for the institution of these review proceedings. This is because the decision to award the tender to the respondent was taken on 31 October 2011 and the 180-day period for the institution of proceedings for judicial review referred to in section 7(1) of the Promotion

of Administrative Justice Act has lapsed prior to the institution of these proceedings. The extension of the 180-day period is required in terms of section 9(1) of the Promotion of Administrative Justice Act. Section 9(1) of the Promotion of Administrative Justice Act provides that the period of 180 days referred to in section 7 may be extended by a court on application by the person or author of the administrative action concerned.

[5] The respondent opposes the relief sought on various grounds. The respondent has simultaneously instituted a counter-application in which it seeks a declaratory order that it was not, and still is not precluded, in terms of paragraph 95 of the City's Supply Chain Management Policy; the Supply Chain Management Regulations made in terms of section 168 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("MFMA") or for any other reason, from bidding for the tender or for any other tender pertaining to the decommissioning of the Athlone Power Station which is based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd. Similarly, the City opposes the relief sought in the counter-application.

[6] Initially the respondent, in its answering affidavit, disputed the applicant's *locus standi*; authority to institute these proceedings; and to the admission of certain hearsay evidence emanating from of the founding affidavit. However, when the matter came before me, I was informed that the authority of the deponent to the applicant's founding affidavit to institute these proceedings on behalf of the City, is no longer

disputed, nor will it be necessary for me to exercise any discretion in regard to the admission of hearsay evidence, the parties having agreed that at least some of the hearsay evidence on which the City, as well as the respondent, seek to rely be admitted into evidence.

[7] However, in as far as the Ernst & Young report is concerned, on which the City's application is largely based, the contents thereof are very much in dispute. It is contended on behalf of the respondent that there is no agreement between the parties as to the probative value of the hearsay evidence relied on by the City emanating from the Ernst & Young report, nor is it conceded that such evidence supports the contentions advanced on behalf of the City.

THE PARTIES

[8] The applicant is the City of Cape Town ("the City"), a metropolitan municipality as defined in section 1 of the Local Government: Municipal Structures Act, 117 of 1998, with its principal place of business situate at the office of the City Manager, Civic Centre, Hertzog Boulevard, Cape Town.

[9] The respondent is Aurecon South Africa (Pty) Ltd, registration number 1977/003711/07, a limited liability company, duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situate at Aurecon Centre, Lynnwood Bridge Office Park, 4 Daventry Street, Lynnwood Manor,

Pretoria. The respondent has a regional office in Cape Town situate at Aurecon Centre, Century Falls, Century Boulevard, Century City, Cape Town.

THE DECISION

[10] The decision sought to be reviewed and set aside was taken by the City's Bid Adjudication Committee on 31 October 2011. The decision, which is in the form of a resolution, reads as follows:

> "RESOLVED that for the reason set out in the report the tender offer submitted by Aurecon South Africa for tender number 459C/2010/11: Provision of Professional Services: Decommissioning of Athlone Power Station in the amount of R9,748,973-50 (excluding VAT) be accepted subject to the conclusion of the section 33 (MFMA) process."

[11] The provisions of section 33 of Municipal Finance Management Act regulate the conclusion of contracts which impose financial obligations on a municipality beyond a financial year. They do not pertain to a consideration of any irregularities in the procurement process. It is contended on behalf of the City that the award of the tender by the City's Bid Adjudication Committee on 31 October 2011, was accordingly a final award, but, pending the fulfilment of the section 33 requirements, no contract had as yet been concluded between the City and the respondent.

LEGISLATIVE FRAMEWORK

[12] The procurement of services by organs of state is regulated by the provisions of section 217 of the Constitution of the Republic of South Africa, 1996 ("the

Constitution"). The section provides in sub-section (1) thereof that procurement processes must be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217(1) of the Constitution provides as follows:

> "(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 the system which is fair, equitable, transparent, competitive and cost effective."

[13] Section 217(2), in turn, makes provision for implementation of procurement policies by organs of state or institutions. It provides that organs of state or institutions may implement procurement policies providing for categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination. Section 217(3), by way of conclusion, provides that national legislation must prescribe a framework within which the policies referred to in sub-section (2) in section 217 must be implemented.

[14] The legislation underlying the system and the implementation of procurement policies referred to in section 217(2) of the Constitution includes the Preferential Procurement Policy Framework Act, 5 of 2000 as well as regulations promulgated thereunder. The regulations that applied at the time of the tender process which is the subject of these proceedings are those that were promulgated in Government Notice R725 of 10 August 2001 published in Government Gazette No 22549. Those regulations have since been repealed and have been substituted by new regulations promulgated under Government Notice R502 of 8 June 2011.

[15] The Municipal Finance Management Act referred to in paragraph 5 of this judgment provides, in section 112 thereof, that the Supply Chain Management Policy of a municipal entity must be fair, equitable, transparent, competitive and cost effective. It thus underscores the provisions of section 217(1) of the Constitution.

[16] There also is reference to the MFMA Circular Nr 53 dated 3 September 2010 issued by the National Treasury applicable to all new bid invitations issued on or after 15 September 2010. The circular is intended to be used as a guideline when functionality is included as a criterion in the evaluation of bids. The National Treasury issues such circulars from time to time but the one dated 3 September 2010 has to be read in conjunction with the National Treasury's document dated October 2005 under the title "SUPPLY CHAIN MANAGEMENT: GUIDE FOR ACCOUNTING OFFICERS OF MUNICIPALITIES & MUNICIPAL ENTITIES". There also is reference, both on the basis of evidence tendered and in the parties' submissions to the City's Supply Chain Management Policy which regulates the consideration of the award of the tenders.

THE FACTS

[17] During 2008 a tender for the performance of a high level pre-feasibility study in respect of the redevelopment of the site on which the defunct Athlone Power Station is situated was awarded to the joint venture comprising one of the respondent's wholly owned subsidiaries, Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd. The scope of the joint venture included an obligation to assist the City's Electricity

Services Directorate with a compilation of the scope of work for the decommissioning of the Power Station. A draft scope of work was duly prepared by the joint venture in conjunction with the City's Electrical Services Department during the early part of 2010.

[18] Around the time when the first draft scope of work was circulated, the possibility of the joint venture's brief being expanded to include the compilation of the tender documents for the decommissioning of the power station was mooted by City officials. A Mr Jones, from the City's Electricity Services was one of the persons within the department who was involved in the discussion with regards to the possibility of expanding the joint venture's brief to include the compilation of the decommissioning tender documents under the re-development study contract. After a debate between these officials, it was, however, decided that the joint venture's assistance in the compilation of the tender document would not be required.

[19] During an informal meeting which took place in the office of the City's Electricity Services Department on 1 April 2010 with a view to discussing an early version of the draft scope of work produced by the joint venture, the joint venture's project manager, a Mr Jonathan Webb, was informed by Mr John Davidson, the City's Head of Electricity Generation, that as long as "Aurecon" did not provide any input concerning the structure of preference and was not represented on the City's Bid Valuation or Bid Adjudication Committees, there would not be "a conflict of interest" which would prevent it from tendering for the decommissioning of the power station.

[20] In September 2010 the respondent produced a draft scope of work relating to the provision of professional consultancy services for the decommissioning of the Athlone Power Station site. The draft scope of work was submitted by the respondent obviously in the knowledge that it would in due course be made available to the Bid Specification Committee. The provision of this information was necessary for the Electricity Department to be informed of the required end state to allign the process with the objectives of the Spatial Planning Department as determined in the pre-feasibility studies. The bid documentation relating to the tender which is the subject of these proceedings, was prepared by the Bid Specification Committee and incorporates the respondent's said scope of work.

[21] Once joint venture's pre-feasibility study was completed, tender documents, which ultimately became known as tender number 266C/2010/11, were prepared. The tender called for proposals for the Provision of Professional Services: Decommissioning of Athlone Power Station and was issued on 11 February 2011. Tenders were invited to tender for the decommissioning of the Power Station. The respondent duly submitted its tender. Significant post site meetings queries arose in respect of the tender document which culminated in a decision being taken to cancel this tender. A revised tender document was drafted to address the concerns raised during the first tender process. The revised tender document was re-issued under Tender Number 459C/2010/11 which, according to the document, was advertised on 13 May 2011. Respondent again tendered for the project.

[22] On the closing date after due process, the tender submission documents were forwarded to the City's Supply Chain Management at which point, a Ms Jenny Park, the Supply Chain Practitioner for this particular project, together with her team, conducted a preliminary evaluation of the tender submissions. The preliminary evaluation included the schedule of pricing and the status of each tender submission, which also included the historically disadvantaged individual component of the process.

[23] The respondent's second tender was submitted on 15 June 2011. In its tender it offered to provide the professional services associated with the decommissioning of the Power Station at a price of R11,113,829-39 inclusive of VAT. The City also received five other tenders in response to its second invitation to tender. Some of the tender prices exceeded that offered by the respondent and some were lower. The tenders received by the City were duly analysed and considered by its Bid Evaluation Committee. Having found all tenders except the respondent's to be non-responsive for failing to comply with the eligibility criteria in respect of "key personnel" as prescribed in the tender data, the Bid Evaluation Committee submitted a report to the City's Bid Adjudication Committee on 25 October 2011, in which it recommended that the respondent's tender, being the only responsive one, be accepted. The Bid Evaluation Committee's recommendation was endorsed by the City's Bid Adjudication Committee which, on 31 October 2011, resolved that the respondent's tender be accepted, subject to the conclusion of the "Section 33 (MFMA) process".

[24] On 4 November 2011 the respondent received a letter from the office of the City's Director: Supply Chain Management in which the respondent was informed as follows:

> "The Supply Chain Management: Bid Adjudication Committee of the City of Cape Town, on 31 October 2011, considered your offer for the abovementioned tender. I have the pleasure of advising you that your tender was accepted in the amount of R9,748,973-15 (excluding VAT), from date of commencement of contract until a date to be determined during the section 33 (MFMA) process."

[25] The respondent was furthermore informed, in the same letter of 4 November 2011, that the award of the tender was subject to a 21 day appeal period and that the respondent would be notified once that period had elapsed whether or not any appeals had been lodged against the award. In the same letter the respondent was further informed that no rights would accrue until appeals, if any, would have been finalised. Finally, it was brought to the respondent's attention that the contract in question is described as a long term contract in terms of section 33 of the Municipal Finance Management Act and that, in view thereof, the implementation of the contract would have to be approved by the Council of the City of Cape Town.

[26] On 8 November 2011 the respondent received yet a further letter from the office of City's Director, Supply Chain Management. The respondent was informed in that letter that an appeal had been lodged against the award of the tender to the respondent and that the appeal was in the process of being resolved. The author of the

letter undertook to advise the respondent of the outcome of the appeal "and the commencement date of the contract" once the appeal had been resolved.

[27] On 17 January 2012 the respondent received two further letters from the City's Supply Chain Management Director's office. In the first letter the respondent was informed that the appeal against the award of the tender had been "resolved" and that the respondent would be contacted by the project manager for the implementation of the project. In the second letter the respondent was informed that "the commencement of the contract is subject to the conclusion of the section 33 of the Municipal Finance Management Act (MFMA No 56 of 2003) process, as indicated in our letter dated 4 November 2011". The author of the letter added that the respondent would be notified in due course once this process has been completed.

[28] No further communication was addressed to the respondent subsequent ot the two letters of 17 January 2012. It appears that a matter of the approval of the tender awarded to the respondent was one of the items on the agenda of the Municipal Council Meeting held on 29 August 2012. It appears that at that meeting, concerns were raised by certain council members about the regularity of the award of the tender to the respondent arising from the fact that the respondent had been permitted to tender for the contract despite the respondent having been involved in the drafting of the applicable scope of work. Deliberations of the council meeting relating to this item were widely reported in the media. It was also reported that the mayor had appointed auditors, Ernst & Young, to conduct an investigation into the matter.

[29] The Ernst & Young report was received by the City on 22 October 2012. It contained findings of numerous "irregularities" which had allegedly been committed by the City's Bid Evaluation Committee and the Supply Chain Management department.

[30] The respondent was informed of Ernst & Young's main findings in a letter dated 23 November 2012 addressed to the respondent by the then Acting City Manager. In the letter, reference was made to the Bid Adjudication Committee's resolution of 31 October 2011 to award the tender to the respondent and to the fact that the section 33 MFMA process had not yet been complied with for reasons set out in the letter. The respondent was also informed, in the same letter, that following the decision of the Bid Adjudication Committee the City had received various complaints relating to the irregularity of the tender process and the award of the tender to the respondent. The respondent was thereupon invited to make representations to show cause why the City Manager should not invalidate and set aside the award by the Bid Adjudicating Committee on 31 October 2011 of Tender Number 459C/201/11 and the resultant contract, to it.

[31] The letter by the Acting City Manager referred to in the preceding paragraph reads as follows in paragraph 11 thereof :

> "11. I am further of the view that, in as much as the lineage of the final scope of work that formed part of the bid specification for Tender 459C/2010/11 can be traced directly to the draft scope of work prepared by Aurecon in 2009, that it is precluded, in terms of clause 95 of the SCM policy and regulation 27(4) of the SCM regulations, from bidding,

both for Tender 459C/2010/11, and for any future tender that is based on the draft scope of work prepared by it in 2009."

[32] In paragraph 12 thereof the letter proceeds as follows:

"12. Aurecon is required to deal, in its aforesaid representations, also with the question of why I should not find that it was at all times precluded from tendering for Tender 459C/2010/11, by virtue of the provisions of clause 95 of the SCM policy and regulation 27(4) of the SCM regulations, and that it remains precluded in the event that any future tender for the decommissioning of the Athlone Power Station is based upon the draft scope of work prepared by it in 2009."

[33] From the content of the aforementioned letter, it is evident that the City Manager's main concern was the possible contravention of clause 95 of the Supply Chain Management Policy and regulation 27 (4) of the Supply Chain Management Regulation, apart from other "irregularities" referred to in the report produced by Ernst & Young.

[34] On 27 November 2012, the respondent requested the City to provide it with copies of the Ernst & Young report as well as other relevant documentation referred to in the City's letter of 23 November 2012 in terms of the provisions of the Promotion of Access to Information Act. In the same letter the respondent requested a reasonable opportunity to make representations as requested. On 19 December 2012 the records requested by the respondent, inclusive of the Ernst & Young report and annexures thereto, were provided to the respondent's attorneys, Weavind & Weavind. On 31

January 2013 the respondent submitted representations to the applicant in which it dealt with the issues alluded to in the Acting City Manager's letter of 23 November 2012. No further communication was addressed to the respondent by the City other than being informed that the City had resolved to bring a review application out of this court.

ALLEGED IRREGULARITIES

[35] Following upon the production of the Ernst & Young report, and based on the report produced by Ernst & Young, the City officials identified several irregularities on the basis of which, a view was formed that review proceedings be instituted to review the City's own decision in awarding Tender 459C/2010/11 to the respondent.

[36] The following irregularities were identified:

[36.1.] The lineage of the final scope of work that formed part of the bid specification for Tender 266C/2010/11 and, subsequently, for the tender that was awarded to the respondent, being Tender 459C/2010/11, can be traced directly to the draft scope of work prepared by the respondent in 2010. This, the City contends, is a contravention of clause 95 of the Supply Chain Management Policy as well as Regulation 27(4) of the Supply Chain Management Regulations;

[36.2.] Several internal City email communications regarding the pending Power Station tender were either communicated to the respondent or copied to the respondent;

[36.3.] The Bid Evaluation Committee did not always meet as a collective to evaluate the functional scoring in respect of the tender. It is contended on behalf of the City that members of the Bid Evaluation Committee in the persons of Mr Davidson, Mr Van Rooy and Ms Park should have met and scored the functionality of the bidders together. It is contended on behalf of the City that this irregularity compromises the validity of any decision taken during the tender process;

[36.4.] The rules of order were not adhered to as Mr Eybers, who was not an authorised member of the Bid Evaluation Committee, participated in the scoring;

[36.5.] The Bid Evaluation Committee meeting of 5 August 2011 was not properly constituted;

[36.6.] The respondent's non-responsive tender with regard to the withdrawal of the qualification contemplated in schedule 15 of the tender document was allowed resulting in the non-responsive bid subsequently becoming responsive in contravention of clause F.3.8.2 of the Standard Conditions of Tender;

[36.7.] The respondent's failure to submit audited financial statements on the written request of the Bid Evaluation Committee in terms of clause 214.1 of the Supply Chain Management Policy rendered its bid non-responsive on 2 September 2011. This, so it is contended on behalf of the City, should have precluded the respondent from further inclusion in the tender evaluation process;

[36.8.] The members of the Bid Evaluation Committee continued to evaluate the respondent's bid after the bid validity period had expired. It is thus contended on behalf of the City that the validity period of respondent's bid was irregularly extended in contravention of clause 140 of the Supply Chain Management Policy.

[36.9.] The report of the Bid Evaluation Committee to the Bid Adjudication Committee contained material errors on the basis of which the Bid Adjudication Committee would have reached a different conclusion had it been aware of the correct facts and circumstances.

[37] It is on the basis of the aforementioned alleged transgressions that it is contended on behalf of the City that the respondent was afforded an unfair advantage over the other bidders who took part in the procurement process. This, so it is contended on behalf of the City, constitute a basis on which the procurement process falls to be reviewed and set aside on the grounds set out in section 6(2)(b); section 6(2)(c); section 6(2)(d); section 6(2)(e)(iii); and section 6(2)(i) of the Promotion of Administrative Justice Act.

PREPARATION OF THE DRAFT SCOPE OF WORK

[38] In paragraph [17] of this judgment I referred to a tender which was awarded to a joint venture comprising one of the respondent's wholly owned subsidiaries and ODA (Pty) Ltd for the performance of a high level pre-feasibility study on the re-development

of the site on which the Athlone Power Station is situated and the resultant draft scope of work arising from that process. Because of the respondent's involvement in that project, through its wholly owned subsidiary, it is contended on behalf of the City, that it (the respondent) is precluded from bidding in Tender 459C/2010/11 in terms of the provisions of clause 95 of the Supply Chain Management Policy, read with Regulation 27(4) of the Supply Chain Management Regulations. This perceived preclusion of the respondent to bid in the subsequent tender ultimately became the basis of the respondent's counter-application in these proceedings.

[39] In its notice of counter-application the respondent seeks an order that it was not, and still is not precluded, in terms of paragraph 95 of the City's Supply Chain Management Policy, the Supply Chain Management Regulations made in terms of section 168 of the Local Government: Municipal Finance Management Act, 2003 or for any other reason, from bidding for the City's Tender 459C/2010/11 or for any other tender pertaining the decommissioning of the Athlone Power Station which is based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd.

[40] In response to the relief sought in the counter-application, it is submitted on behalf of the City that the bid documentation relating to the tender which is the subject of these proceedings incorporates the scope of work which was prepared by the respondent and approved by the Bid Specification Committee. A point is being made in the City's submissions that while the draft scope of work and the final scope of work are

not identical, significant portions thereof are identical. The submission goes further to point out that, indeed, an examination of the two documents indicates that the draft scope of work was incorporated almost in its entirety into the final scope of work prepared by the Bid Specification Committee.

[41] It is submitted on behalf of the City that, on a proper interpretation of the relevant provisions, in order to prove a contravention of clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations, it is not necessary to show that a tenderer actively participated in the actual proceedings of the Bid Specification Committee or actively attempted to influence the design or content of the specification, or even that the tenderer intended or hoped to influence the outcome of the tender process, or that the outcome was indeed so influenced. It is thus submitted that the ambit of clause 95 of the Supply Chain Management Policy is wide enough that it need merely be shown that the tenderer was "involved with" the Bid Specification Committee in the context of the evidence tendered in these proceedings, especially in the light of the objectives set out in the Constitution, the Municipal Finance Management Act, the Supply Chain Management Regulations and the Supply Chain Management Policy, the objective being to ensure transparency and fairness.

[42] The submission finally concludes that not only should the procurement processes contemplated in the Constitution, the Municipal Finance Management Act, the Supply Chain Management Regulations and the Supply Chain Management Policy

be fair and equitable in that no undue advantage or preference should be given to any party, they must also be seen to be fair and equitable. To allow a party to bid for a contract, the specification for which were to a significant extent determined by the same party, clearly does not fulfil the requirements of fairness.

[43] Because the respondent was allowed to tender in circumstances where it was involved in the preparation of the draft scope of work a significant portion of which became part of the bid specification, caused the respondent to enjoy an unfair advantage over other bidders in that the respondent had been placed in possession of pertinent information relating to the tender prior to the formal initiation thereof. This, so it is submitted on behalf of the City, renders the tender process unfair and constitutes a ground of review contemplated in section 6(2)(c) of the Promotion of Administrative Justice Act.

THE RESPONDENT'S SUBMISSIONS

[44] In response to the City's submissions, it is contended on behalf of the respondent that, for a proper interpretation of clause 95 of the Supply Chain Management Policy, read together with Regulation 27(4) of the Supply Chain Management Regulations, there are two questions that need to be answered, these being whether the City's interpretation of clause 95 and Regulation 27(4) is correct; and if it is correct, whether the Bid Adjudication Committee's decision is reviewable for that reason, even if the Bid Adjudication Committee or the City's Bid Evaluation Committee reasonably believed clause 95 and Regulation 27(4) not to have been contravened.

[45] In support of this approach, the respondent places reliance on the "doctrine of deference" and a discussion of that doctrine in Hoexter: *Administrative Law in South Africa*, Second Edition at pp147 -155. The discussion, in the aforementioned work, refers to two standards of review based in Canadian law, these being reasonableness and correctness. The submission goes further to point out that which of the two standards of review will apply in any given set of circumstances will depend on a variety of factors.

[46] In support of that proposition the respondent relies on a Canadian authority in the form of *Pushpanathan v Canada (Minister of Citizenship & Immigration)* [1998] 1 SCR 982 (Can) in which it was found by the Supreme Court of Canada that one of the most important factors in determining whether the appropriate standard of review is correctness or reasonableness, is the expertise of the tribunal or administrator in question. If a tribunal has been constituted on the basis of a particular expertise with respect to achieving the aims of an Act, whether because of the specialised knowledge of the decision-makers, special procedures or non-traditional means of implementing the Act, then a greater degree of deference will be accorded.

[47] Similarly, where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a balancing between different constituencies, then the appropriateness of court supervision diminishes. The submission goes further to point

out that even pure questions of law may be granted a wide degree of deference where a pragmatic and functional analysis suggest that such deference is the legislative intention.

[48] With regards to the application of the deference doctrine in South African law a reference is made to observations by Corbett CJ in *Hira v Booysen* 1992 SA 4 96 A at 93A-94A in support of a contention that the doctrine of deference to tribunals constituted on the basis of specialised knowledge is consistent with South African law. If *Hira v Booysen* is still good law in South Africa, so the submission goes, it must follow that an incorrect, as opposed to unreasonable, application of clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations will not necessarily result in reviewability. It all depends on the legislative intent. Based on this approach, and in establishing the legislative intent a contextual, as opposed to a literal approach, in the interpretation of clause 95 and Regulation 27(4), has to be applied.

[49] If “correctness”, so the submission goes, is the applicable standard of review, then the Supply Chain Management Policy and the Regulation promulgated incidental thereto must be interpreted according to the rules applicable to written legal instruments in general, such as legislation and written contracts. One of those rules is that such instruments are to be interpreted in the context of the document as a whole, since “context is everything”.

[50] Based on the approach as set out in the preceding paragraphs it is then contended on behalf of the respondent that in the instance of this matter the Bid Evaluation Committee derived its powers from the Supply Chain Management Policy and the Supply Chain Management Regulations. Accordingly, the legislative intent must, first and foremost, be searched for in those regulatory instruments. In an endeavour to search such legislative intent one has to navigate the entire regulations, ranging from Regulation 2(1) which provides that each municipality must, in terms of section 111 of the Municipal Finance Management Act, have and implement a Supply Chain Management Policy that complies with the requirements of that regulatory environment; Regulation 2(3) which provides that no municipality may act otherwise than in accordance with its Supply Chain Management Policy when procuring goods or services; the use of treasury guidelines in the preparation of a draft Supply Chain Management Policy;

[51] Regulation 4(1)(a) provides that the council of a municipality must delegate such additional powers and duties to the accounting officer as needed to enable the accounting officer to discharge the Supply Chain Management responsibilities conferred on it (the accounting officer) in terms of the Municipal Finance Management Act and the Supply Chain Management Policy of the municipality; the provision for sub-delegation of Supply Chain Management powers and duties, including those powers delegated to the accounting officer in terms of Regulation 4(1); the establishment of a Supply Chain Management unit to implement its Supply Chain Management Policy in terms of Regulation 7(1); Regulation 8 which provides for the training of officials involved in

implementing a supply chain management policy in accordance with any treasury guidelines on supply chain management training.

[52] Part II of Chapter 2 of the Supply Chain Management Regulations provides for certain requirements with which a municipality's supply chain management policy has to comply in respect of acquisition management. Regulation 26(1) provides that a supply chain management policy must provide for a committee system for competitive bids consisting of at least a bid specification committee; a bid evaluation committee; and a bid adjudication committee, members whereof have to be appointed by the accounting officer taking into account section 117 of the Municipal Finance Management Act and for the attendance or oversight process by a neutral or independent observer appointed by the accounting officer, when this is appropriate, in ensuring fairness and promoting transparency.

[53] Finally, there is a reference made, in the course of this navigation, to Regulation 27(1) which provides for the duties and the responsibilities of the Bid Specification Committee for each procurement of goods and services; Regulation 27(3) which regulates the composition of the Bid Specification Committee which, where appropriate, may include external specialist advisors; and Regulation 27(4) which provides that no person, advisor or corporate entity involved with the Bid Specification Committee, or director of such corporate entity, may bid for any resulting contracts.

[54] Based on what is contended to be a contextual approach in interpreting the relevant regulations, it is contend on behalf of the respondent that the structure of the relevant legislative instruments, that is the Supply Chain Management Policy and the Regulations, suggests an intention to establish municipal procurement systems where municipalities enjoy a great deal of autonomy, not only in the adoption, but also in the implementation of its own procurement practices and policies.

[55] Based on this approach, it is further contended on behalf of the respondent that it is evident from the way the regulations are structured that it was left to the City's Supply Chain Management Department and the practitioners employed by it to implement the Supply Chain Management Policy, which necessarily require them to interpret and apply the provisions thereof where necessary.

[56] The contention boils down thereto that the implementation of the supply chain management policy, including its interpretation, was assigned to a group of well-trained administrators expected to be well-versed in procurement systems in general and the supply chain management, in particular. All of this, so it is contended, is strongly indicative of a legislative intent that the interpretation and application of the supply chain management policy should be deferred to the Supply Chain Evaluation and Adjudication Committee and can only be interfered with where they have acted unreasonably. Finally, it is contended that, in the present instance, the Bid Specification Committee, including its Supply Chain Management practitioner member in the person of Ms Park, clearly did not consider the respondent to be a person, advisor or corporate entity

involved with the Bid Specification Committee as contemplated in Regulation 27(4) of the Supply Chain Management Regulations and clause 95 of the Supply Chain Management Policy. It is thus contended that in the circumstances of this matter it cannot be said that they acted unreasonably in not disqualifying the respondent's tender for that reason. I do not agree.

[57] An interpretation of a clause or regulation which lends credence to an admission of a tenderer to a procurement process the significant portion of which can be traced back to that tenderer is, in my view, inconsistent with the value underpinning fairness and reasonableness. That approach would be entirely inconsistent with a proper concern for refusal to tolerate corruption and maladministration.

[58] There is undisputed evidence that the bid documentation relating to the tender which is the subject of these proceedings incorporates the scope of work which was prepared by the respondent and ultimately approved by the Bid Specification Committee. That draft scope of work and the final scope of work, though not identical, the significant portions thereof are identical. As a matter of fact, the draft scope of work was incorporated almost in its entirety into the final scope of work prepared by the Bid Specification Committee.

[59] As is correctly pointed out in the City's submissions, it is not necessary to show that a tenderer actively participated in the actual proceedings of the Bid Specification Committee, or actively attempted to influence the design or content of the

specification or even that the tenderer intended or hoped to influence the outcome of the tender process, or that the resultant outcome was indeed so influenced. In my view, the ambit of clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations is wide enough that it need merely be shown that the tenderer (the respondent in the instance of this matter), as appears to be the cased on the basis of the evidence presented in these proceedings, more especially in the light of the objectives set out in section 217(1) of the Constitution; clause 95 of the Supply Chain Management Policy; and Regulation 27(4) of the Supply Chain Management Regulations, was afforded an unfair advantage over the other bidders who took part in the procurement process. All the values espoused in all the aforementioned legal instruments underpin a process which ought not only be fair, equitable, transparent, competitive and cost effective, but to be seen as such.

[60] As has already been pointed out in paragraph [42] of this judgment, to allow a party to bid for a contract, the specifications of which are to a significant extent determined by the same party, is clearly inconsistent with the values underpinning fairness. Whilst members of the Bid Specification Committee and the Bid Evaluation Committee may have *bona fide* believed that allowing the respondent to participate in the procurement process does not violate clause 95 and Regulation 27(4), such an approach, in my view, is not only incorrect, wholly unreasonable but also inconsistent with the value underpinning fairness.

[61] In reaching the conclusion I did in the preceding paragraph, I am mindful of the evidence of Mr Hans Peter Silbernagl, an experienced independent consulting engineer, about the existing norms and practice in the industry. Mr Silbernagl points out that if the City's interpretation of clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations, is not accepted, it will result in unnecessary and wasteful expenditure which will not be in the best interest of organs of state and tax payers. Mr Silbernagl points out in his evidence that instead of discouraging engineers with intimate knowledge of a particular project because of their prior involvement therewith from tendering for subsequent related projects, they should be encouraged to put such knowledge to good use.

[62] What Mr Silbernagl points out may well be so but, in matters of this nature, where participation in a procurement process is regulated by specific legislative measures, such legislative measures ought to be complied with. Any other approach, no matter how well-intentioned that approach may be, will be inconsistent with the principle of legality.

[63] In the circumstances, I accordingly find that the respondent, because of its prior involvement in the preparation of the draft scope of works, is precluded, and remains precluded, in terms of the clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations, from tendering for the contract. The fact that the respondent was allowed to bid and that its bid was not rejected at the outset, rendered the procurement process unfair and constitutes a

ground for review in terms of section 6(2)(c) of the Promotion of Administrative Justice Act.

IRREGULARITIES

[64] In paragraph [36] of this judgment I identified several alleged irregularities which, according to the City, were committed during the evaluation process and, on the basis of which, according to the contention of the City, the procurement process ought to be reviewed and set aside. These relate to members of the Bid Evaluation Committee not having met as a collective to evaluate the functional scoring in respect of the tender; the alleged violation of the Rules of Order in allowing a person who is not a member of the Bid Evaluation Committee to participate in functional scoring; a meeting of 5 August 2011 not having been properly constituted, amongst other irregularities complained of.

[65] In paragraph [37] I make the point that it is the City's contention that such irregularities constitute a basis on which the procurement process falls to be reviewed and set aside on one, more or all those grounds set out in section 6(2)(b); section 6(2)(c); section 6(2)(d); section 6(2)(e)(iii); and section 6(2)(i) of the Promotion of Administrative Justice Act. Arising from these alleged irregularities, it is contended on behalf of the City that the award of the tender to the respondent failed to comply with the relevant applicable legislation and procurement policies and, on that basis, falls to be reviewed and set aside.

[66] The respondent, on the other hand, whilst not disputing that the irregularities complained of did occur in the evaluation process, nonetheless adopts the position that the irregularities complained of by the City are inconsequential and would not have made a difference to the outcome of the tender evaluation process even if such irregularities did occur, relying on such authority as *All Pay Consolidated Investment Holdings (Pty) Ltd & Others v The Chief Executive Officer of the South African Social Security Agency & Others* 2013 (4) SA 557 (SCA) and, in particular, the observations by Nugent JA in paragraph [21] at 562E-H where Nugent JA observed:

> "There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal. It was submitted that the process of procurement has value in itself, which must lead to invalidity if the process is flawed irrespective of whether the flaw has consequences, and extracts from various cases were cited to support that proposition. … I have pointed out that the public interest has a role to play in cases of this kind. It would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities."

[67] In *All Pay Consolidated Investment Holdings (Pty) Ltd v CEO, SA Social Security Agency* 2014 BCLR 1 (CC) the Constitutional Court disagreed with the approach adopted by the Supreme Court of Appeal. The Constitutional Court pointed out that the suggestion that "inconsequential irregularities" are of no moment conflated the test for irregularities and their import; hence, an assessment of the fairness and the lawfulness of the procurement process must be independent of the outcome of the

tender process. Rather, the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

[68] Arising from the Constitutional Court's judgment in *All Pay,* supra, it is contended on behalf of the City that the approach adopted by the Supreme Court of Appeal to the irregularities, as there were in the matter before it, was detrimental to important aspects of the procurement process. Firstly, it undermined the role procedural requirements play in ensuring even treatment of all bidders. Secondly, it overlooked that the purpose of a fair process was to ensure the best outcome – the two could not be served. On the approach of the Supreme Court of Appeal, procedural requirements were not considered on their own merit, but instead through the lens of the final outcome. Thus, it is contended that this approach conflated the different and separate questions of unlawfulness and remedy. If the process leading to the bids' success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed. I am in agreement with these submissions.

[69] In my view, the approach of the Supreme Court of Appeal to non-compliance with the procedural requirements, as the Constitutional Court held, may lend itself to an undesirable outcome in that deviations from fair processes may themselves all too often be symptoms of corruptions and malfeasance in the process. Thus, insistence on compliance with process formalities, so the Constitutional Court held, has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the

likelihood of efficiency and optimality in the outcome; and (c) it serves as a guard against a process skewed by corrupt influences.

[70] Thus, the submission by the respondent, on the basis of the judgment of the Supreme Court of Appeal in *All Pay*, and other authorities relied on, that adherence to a prescribed procedure is a means to an end and not an end in itself; and that not every departure from a procedure will be visited with invalidity or reviewability, cannot not be sustained in the circumstances of this matter. It therefore follows, in my view, due regard had to the approach adopted by the Constitutional Court in *All Pay*, the City's award of the tender to the respondent, in the light of irregularities that had since been discovered following upon the Ernst & Young report, falls to be reviewed and set aside.

[71] In the light of the conclusion I arrived at in the preceding paragraph it is not indeed necessary for me to deal with the rest of the other irregularities referred to in the evidence. Similarly, it is not necessary for me to deal with the rest of the defences raised in the respondent's submissions, inclusive of the defence of estoppel. In as far as the defence of estoppel is concerned, this defence can, in the circumstances of this matter, not be sustained as same would effectively result in the confirmation of an illegality.

THE DECISION OF THE BID ADJUDICATION COMMITTEE

[72] On 25 October 2011 the Bid Evaluation Committee submitted ts report to the Bid Adjudication Committee for adjudication and, possibly, adoption. The Bid

Adjudication Committee convened on 31 October 2011 and resolved that the tender be awarded to the respondent subject to the conclusion of the process in terms of section 33 of the Municipal Finance Management Act.

[73] As has been shown elsewhere in this judgment, the report could not have been compliant with all the necessary formalities and several irregularities discovered since the Ernst & Young report became available. It, therefore, follows that whatever defects there could have been in the evaluation process were not drawn to the attention of the Bid Adjudication Committee. Where minor defects in the adjudication process are drawn to the Bid Adjudication Committee's attention, such defects may, in appropriate circumstances, be accepted as minor breaches, which may be condoned by the City Manager in terms of clause 296 of the Supply Chain Management Policy. The problem in the instance of this matter is that no defects had been drawn to the Bid Adjudication Committee's attention by way of the Bid Evaluation Committee report. As the Bid Adjudication Committee was not aware of deviations when it awarded the tender, it could not have waived any rights as regards the rejection of the tender as the respondent would seek to make a point in its submissions. It, therefore, follows that the Bid Adjudication Committee, in considering the award of the tender in the light of such non-compliance, failed to take relevant considerations into account. Such conduct falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act.

CONDONATION

[74] In its notice of motion the City seeks, in so far as it may be necessary, an order condoning its failure to adhere to the 180-day period imposed by section 7 of the Promotion of Administrative Justice Act for the institution of review proceedings. The decision to award the tender to the respondent was taken on 31 October 2011 and 180-day period for the institution of proceedings for judicial review referred to in section 7(1) of the Promotion of Administrative Justice Act thus elapsed prior to the institution of these proceedings. Accordingly, in its application for condonation, the City requires an extension of the 180-day period in terms of section 9(1) of the Promotion of Administrative Justice Act.

[75] The Ernst & Young report which revealed the extent of irregularities that took place in the course of the procurement process was made available to the City on 22 October 2012. It was as a result of irregularities revealed in the Ernst & Young report that the City became aware of such irregularities and decided to institute these proceedings. It was, therefore, only on 22 October 2012 that the City learnt what the full extent of the "reasons" for the award of the tender and the 180-day period contemplated in section 7(1)(b) of the Promotion of Administrative Justice Act only started to run from that date. These proceedings were instituted on 16 April 2013, thus within the 180-day period imposed by section 7 of the Promotion of Administrative Justice Act.

CONCLUSION

[76] In paragraph 13 of the founding affidavit, the deponent of the affidavit on behalf of the City makes it clear that not one of the irregularities referred to in the founding affidavit entails any fraudulent, dishonest or corrupt conduct on the part of the City, any of its officials or of the respondent. It, therefore, follows that the findings made, and any conclusions of law made in the course of this judgment, should not be construed as a reflection either on the part of the City, its officials or the respondent.

[77] In paragraph [63] of this judgment I concluded that the respondent, because of its prior involvement in the preparation of the draft scope of works, is precluded, and remains precluded, in terms of clause 95 of the Supply Chain Management Policy and Regulation 27(4) of the Supply Chain Management Regulations, from tendering for the contract. Similarly, in paragraph [70] I concluded that, due regard had to the approach of the Constitutional Court in *All Pay,* the City's award of the tender to the respondent, in the light of irregularities that had since been discovered following upon the Ernst & Young report, falls to be reviewed and set aside. In paragraph [73] I concluded that the Bid Adjudication Committee, in considering the award of the tender in the light of non-compliance with the relevant formalities, failed to take relevant considerations into account and that such conduct falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act. In the light of those conclusions, it follows that the relief sought by the City in terms of paragraph 2 and paragraph 2A of its notice of motion, duly amended, ought to be granted and the counter-application be dismissed.

[78] In the result, the following order is made:

[78.1.] It is ordered that the award dated 31 October 2012 by the City's Supply Chain Management's Bid Adjudication Committee of Tender 459C/2010/11: Provision of Professional Services: Decommissioning of Athlone Power Station, be and is hereby set aside.

[78.2.] It is hereby ordered that any contract that may have come into existence between the City and the respondent as a result of the award referred to in the preceding paragraph be and is hereby set aside.

[78.3.] The respondent's counter application is dismissed with costs.

[78.4.] The respondent is ordered to pay the City's costs on a party and party scale, duly taxed or as agreed, and which order shall include costs consequent upon employment of two counsel.

[78.5.] The respondent's counter application is dismissed with costs, duly taxed or as agreed and which costs order shall include costs consequent upon employment of two counsel.

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N J Yekiso
High Court Judge

CASE NO: 5663/13 – CITY OF CAPE TOWN v AURECON SOUTH AFRICA (PTY) LTD

14 APRIL 2014 – YEKISO J

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