



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 17480/2014

In the matter between:

JK STRUCTURES CC

First Applicant

CARP CIVILS CC

Second Applicant

v

THE CITY OF CAPE TOWN

First Respondent

TUBOSEAL SERVICES CC

Second Respondent

TT INNOVATIONS CC

Third Respondent

Court: Justice J Cloete

Heard: 3 December 2014

Delivered: 28 January 2015

JUDGMENT

CLOETE J:**Introduction**

- [1] The applicants (*JK Structures* and *Carp Civils*) seek the review and setting aside of the decisions of the first respondent (*the City*) to reject their tender bids for a particular works category, namely pipe-cracking (also known as pipe-bursting), of a term tender for trenchless rehabilitation of sewers (*the tender*). The City opposes the relief sought. The second and third respondents, to whom the tender was awarded, abide the decision of the court. None of the eight remaining unsuccessful tenderers have challenged the City's decisions.
- [2] It was agreed in an order granted on 8 October 2014 that the City would not implement the impugned tender awards pending the further hearing of the matter, and this agreement was extended after argument pending delivery of judgment herein. The applicants abandoned the alternative relief sought for a referral to cross-examination on certain limited issues.

Background

- [3] On 14 February 2014 the Director of Water and Sanitation for the City called for tender bids in respect of the tender, and made the tender document available to all interested parties. The tender document consists of two categories, namely pipe-cracking (category 1) and cured-in-place lining (category 2). Both applicants submitted a tender bid for pipe-cracking.

- [4] The closing date for the submission of tender bids was 17 March 2014. The contract period for the tender was two years with an estimated value of R113.5 million. It was what is known as a '*term bid*', the purpose being to appoint a pool of bidders with a view to allocating dedicated work projects to those in the pool for the two year period in accordance with the rates tendered by them (which rates are fixed for the first year and are then subject to contract price adjustments).
- [5] According to the City, the first step in the tender process was for its designated officials to objectively evaluate, on the basis of the information contained in each set of bid documents, whether the bidder concerned had the requisite experience and capabilities – the quality or functionality leg of the bid evaluation.
- [6] Thereafter the second step was to compare the various rates of those bidding (as applied to a '*typical works project*') in order to score and rank them in accordance with their respective tender prices. (A part of this scoring process also involved allocating points for the tenderers' BBBEE status).
- [7] The functionality evaluation comprised two evenly weighted components, namely human resources experience and qualifications; and company experience, each with a maximum possible score of 15. The required minimum total score was 21, and had to be achieved by bidders in order to be considered for the second step of the evaluation process.

- [8] The tender document also required tenderers to complete schedules A and B and at least one of schedules C or D of the schedule of rates (the particular schedules being dependent on the works category catered for, in this instance, pipe-cracking). The rates would be utilised for ranking tenderers, and they would be bound by those rates in respect of particular works projects for which they later bid during the term of the tender (subject to price adjustments in the second year).
- [9] A tender would be considered non-responsive if the tenderer did not submit rates for all of the items listed in the rates schedules. Clause F.2.10.5 of the tender document stipulated that a rate had to be inserted for each and every item in the schedule of rates for the works category tendered.
- [10] Although the previous tender had nine successful tenderers, the one under scrutiny was *'intended'* to be awarded to a maximum of four tenderers per works category. Clause F.3.11.3 stipulated that a panel of four contractors per category would be appointed. The parties are *ad idem* that this was a complex tender. The City's tender document itself runs to some 245 pages with highly technical content.

[11] Importantly:

11.1 Clause F.3.8.4 of the tender document provided that the City reserved the right to accept a tender offer which did not, in the City's opinion, materially and/or substantially deviate from the terms, conditions and specifications of the tender document;

11.2 Clause F.3.10 placed an obligation on the City to obtain clarification from a tenderer on any matter which could give rise to an ambiguity in a contract arising from a tender bid; and

11.3 Clause F.2.17 afforded the tenderer the opportunity to furnish clarification to the City at the latter's request after submission of the tender bid for purposes of the evaluation process; and stipulated that *'this may include providing a breakdown of rates or prices and correction of arithmetical errors by the adjustment of certain rates or item prices (or both). No change in the competitive position of tenderers or substance of the tender offer is sought, offered or permitted'*.

[12] These clauses apply to all of the requirements contained in the tender document, given that they are not made subject to the criteria for declaring or considering a tender non-responsive (as provided in clause F.3.8.3).

[13] Furthermore, clause F.3.8.2 provides that:

***F.3.8.2** A responsive tender is one that conforms to all the terms, conditions and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer's opinion, would:*

- (a) detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work.*
- (b) significantly change the Employer's or the tenderer's risks and responsibilities under the contract, or*
- (c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.'*

Errors in tender documentation and completion thereof in response

[14] The City's initial tender document contained certain errors, only two of which (relating to completion of rates in the rates schedules) are relevant to the present dispute.

[15] Insofar as JK Structures is concerned, the relevant portion of the initial tender document on page 118: Schedule A read as follows:

Item No	Payment	Description	Unit	Rate
A310		(m) Excavator (20 t)	h	
A320		(1) 0.5 t capacity	h	
A330		(2) 1.0 t capacity	h	

- [16] The City had not intended that line items A320 and A330, which the bidder had to individually price, should relate to a 20 ton excavator (reflected as item (m)), but instead to a light duty vehicle, which therefore required the insertion of a new heading between line items A310 and A320, namely '*(n) Light Duty Vehicle*'.
- [17] It accordingly issued a notice on 7 March 2014, directing bidders to insert this heading. However it compounded its error by instructing them to insert it, not between line items A310 and A320 but between line items A320 and A330. After the City picked up this further error, it issued another notice on 12 March 2014, directing bidders to insert the heading above line item A320. It is not in dispute that JK Structures received both of these notices.
- [18] The tender bid was signed by Mr John Klopper on behalf of JK Structures on 14 March 2014. JK Structures completed the relevant portion of the schedule as follows:

Item No	Payment	Description	Unit	Rate
A310		(m) Excavator (20 t)	h	
A320		(1) 0.5 t capacity	h	180
		(N) LIGHT DUTY VEHICLE		40
A330		(2) 1.0 t capacity	h	55

[19] It accordingly followed the first instruction issued by the City, but not the second. It did not insert a rate opposite item A310 (for the 20 ton excavator), left the new item (n) in the wrong place; and inserted a rate opposite the new item (n).

[20] According to JK Structures, what it meant to convey was the following:

Item No	Payment	Description	Unit	Rate
A310		(m) Excavator (20 t)		180
		(n) Light duty vehicle:		
A320		(1) 0.5 t capacity:		40
A330		(2) 1.0 t capacity:		55

[21] Insofar as Carp Civils is concerned, the relevant portion of the initial tender document on page 117: Schedule A read as follows:

Item No	Payment	Description	Unit	Rate
A40	B.8.3.3	General responsibilities and other fixed-charge obligations	Sum	
A50	PSA 4.3	Testing carried out by commercial laboratory	Prov Sum	
A60		% Profit + attendance for Item A40	%	

[22] Line item A60 was incorrect because it referred to line item A40, when it should have referred to line item A50. The City points out that as a matter of commercial

common sense, a contractor will not add a percentage profit mark-up in respect of its own price for rendering a service, because the profit margin is already incorporated in that price. It is normally added on disbursements, expenses or charges of third parties incurred by the contractor in rendering its services. Item A40 relates to the contractor's own price, whereas item A50 relates to the contractor's third party expenses.

- [23] In completing the tender document, Carp Civils left line item A60 blank. It thus did not provide any rate at all. After the closing date of the tender, when the City became aware of its own error, it sent out a clarification letter on 3 June 2014, the relevant portion of which read as follows:

'Clarification No. 2

In terms of Clause F.2.17 of the Standard Conditions of Tender, you are hereby kindly requested to provide clarification.

1. Item A60

The intention of this item was for a profit and attendance percentage to be tendered upon the provisional sum in Item A50. The description however erroneously referred to Item A40.

Confirmation is required as to which item the percentage you tendered refers to.

Please indicate by ticking the appropriate box below.

A50 ☐

A40 ☐

- [24] On the same day Carp Civils ticked the box next to item A50 and emailed this back to the City. However, it still did not specify any rate for line item A60.

Rejection of the applicants' tender bids

- [25] On 4 July 2014 the City's Director: Supply Chain Management notified the applicants of the decision of its Bid Adjudication Committee ('BAC'), namely that their tender bids had been unsuccessful. Reasons were requested and subsequently provided in the form of a report of the Bid Evaluation Committee ('BEC') which had previously been submitted by it to the BAC and which bears the date of 20 June 2014.

- [26] The reasons provided by the City for the rejection of JK Structures' tender bid were that:

26.1 It had failed to complete a fully priced schedule of rates as per clause F.3.8.3 (F) of the tender document, because item A310 had not been completed; and

26.2 It had failed to attain the minimum score of 21 points out of 30 for functionality as per clauses F.2.1.1.3 and F.3.8 of the tender document. It had scored only 2 points, both relating to human resources experience and qualifications. It had scored 0 points for company experience. This was apparently because it had provided CVs which lacked the minimum information required; failed to attach proof of qualifications of key personnel; and failed to provide proof of experience relating specifically to pipe-cracking.

[27] Carp Civils was informed that its tender had been rejected because it had failed to complete a fully priced schedule of rates as per clause F.3.8.3 (F) of the tender document, in that it had failed to complete item A60.

[28] Curiously, the reason provided to JK Structures in respect of its “failure” to meet the minimum score for functionality is not reflected in the City’s minutes of its Bid Evaluation Committee (*‘BEC’*) of 15 May 2014 or 26 May 2014, which are contained in the City’s record provided to the applicants in terms of rule 53(1)(b). These pertain directly to the meetings of that committee when it considered, evaluated and recommended which bids should be determined responsive or non-responsive by the BAC.

[29] The minutes of 15 May 2014 reflect that JK Structures’ tender bid was recommended non-responsive only because it had failed to complete a fully

priced schedule of rates. (A similar recordal was made in respect of Carp Civils). The minutes of 26 May 2014 specifically draw a distinction between those listed unsuccessful tenderers whose bids were rejected for failing to achieve the minimum score for functionality (in which JK Structures does not appear) and those who failed to price for all items (in which JK Structures is listed along with Carp Civils and one other tenderer).

[30] This was raised with counsel during argument because neither party had dealt with it in their papers. It transpired that the applicants had not picked this up, and had simply approached the matter on the basis of the reasons which the City had furnished in its report of 20 June 2014. Counsel were given an opportunity to double check the rule 53(1)(b) record in order to ascertain whether any other relevant minutes existed which might give a contrary indication. They thereafter reported that no such minutes exist. The applicants adopted the position that JK Structures should not now be prejudiced by having relied in good faith on the non-functionality reason provided by the City. The City adopted the position that the minutes and subsequent reasons *'should be read together'*, although it was not explained why this should be so.

[31] The functionality score sheets pertaining to JK Structures showing a cumulative score of only 2 points are dated 23 April 2014, and thus pre-date the minutes of the meetings of the BEC of 15 and 26 May 2014. It is therefore fair to assume that, when the BEC held its deliberations, these score sheets were available to it.

In any event, members of the BEC itself had previously completed them. Furthermore, on the City's own version, a tenderer can only reach the second leg of the evaluation process (the scoring and ranking of rates) if it has met the minimum criteria on the first leg (functionality). Accordingly, the only reasonable inference to be drawn is that, despite its earlier internal scoring, the BEC thereafter recommended the rejection of JK Structures' tender bid on the non-pricing issue only. The minutes of the BEC do not detail their deliberations, and it is not the court's function to speculate on what may have transpired during those meetings to cause the BEC to reach this conclusion. Suffice it to say however that the evidence does not suggest that JK Structures lacked the necessary experience and it is accordingly not a question of foisting a wholly unqualified bidder onto the City (and its rate payers). In this regard, the evidence is that JK Structures has been active as civil engineering and trenchless pipelay and rehabilitation contractors for 27 years; is a specialist in the trenchless rehabilitation field using the pipe-cracking system; has undertaken and successfully completed work for the City in this and other fields for the past 12 years; and for the past 3 years has been the number one ranked contractor for all emergencies on the City's sewer network. It is also wholly owned by historically-disadvantaged individuals (HDIs).

- [32] Compounding the confusion on the non-functionality issue, the report of the BEC dated 20 June 2014, and which constitutes the City's reasons, reflects that the functionality scoring of JK Structures by members of the BEC *was applied by the*

BEC when it recommended that the tender bid be declared non-responsive. As previously stated, its own records show that this was not in fact the case. Furthermore, the City's legal representatives submitted that the BAC itself '*does not evaluate tenders and does not have tender documents before it*' when making its decisions. It is thus safe to infer that the BAC relied exclusively on the recommendations of the BEC (as contained in its report dated 20 June 2014) in declaring which tender bids were responsive or non-responsive.

- [33] Having regard to the foregoing, I have concluded that it would be inappropriate, within the context of these proceedings, to further consider the applicants' non-functionality attack in respect of JK Structures. This would amount to delving into the determination of what is in reality a non-issue. What follows will thus focus only on the applicants' attacks on the non-pricing issue.
- [34] Both applicants lodged internal appeals against the City's decisions, JK Structures on 29 July 2014 and Carp Civils on 14 July 2014.
- [35] JK Structures raised what it considered to be a glaring irregularity in the City's analysis of its bid:

'Contrary to the BEC report, J K Structures has submitted for all items on page 118. There are 26 items on this page and there are 26 rates which makes the tender complete according to the requirements of R3.8.3 on page 15 of the document. What the BEC should have done is seek clarity in accordance with F2.17 on page 13 of the document but failed to do so – a corrupt practice.'

[36] On 9 September 2014 the City's appeal authority informed JK Structures that its appeal was unsuccessful. The reason provided by the appeal authority was that there was no obligation on it to have sought clarification or supporting documentation from JK Structures. It would have been improper for the BEC to have requested JK Structures to "complete a price" after the closing of tenders. In this regard the appeal authority relied on the decisions in *Bizstorm 51 CC t/a Global Force Security Services v Witzenberg Municipality and Another* (13794/13) [2014] ZAWCHC 83 and *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA).

[37] The basis for Carp Civils' appeal was that its tender had incorrectly been declared non-responsive on the sole ground of its failure to price item A60. Its appeal was similarly dismissed. Although the written reasons of the appeal authority were not included in the papers, it appears that the same reasoning as that in relation to JK Structures was applied.

Grounds of review in respect of non-pricing issue

[38] JK Structures contends that it was the City's own errors which led to confusion and to JK Structures' consequent patent error on the non-pricing issue. The City's failure to obtain clarification in circumstances where it was clear that 26 rates appeared on the same page as 26 line items, amounted to an unwarranted adherence to a fixed principle.

- [39] Three other grounds were advanced by JK Structures in its papers, namely bias on the part of certain City officials, the failure on the part of the City to afford it an oral appeal hearing, and that the City's appointment of only two contractors per works category was irrational and unreasonable. Of these, the first two grounds were not pursued in argument. In relation to the third, I was informed that this only required consideration if the applicants were not successful on any of the grounds pursued.
- [40] Carp Civils, whilst aligning itself with the grounds advanced by JK Structures, understandably focused on its own non-pricing issue. In essence, it contends that the City's failure to obtain clarity on item A60 in the particular circumstances, and where the City knew that Carp Civils had left it blank, was irrational and unreasonable.
- [41] It contends that the City's clarification letter after closure of tender bids did not make provision for any options other than stipulating whether the tenderer had intended to refer to item A40 or A50. It did not make allowance for the fact that a tenderer may have correctly appreciated that item A60 was incorrect and therefore did not insert a rate at all. It did not permit tenderers to respond to the line item as corrected and to thus insert a percentage in response to the corrected item at that stage. Carp Civils submits that, in so doing, the City unfairly favoured those who had correctly guessed that the City had intended to

refer to item A50 and unfairly disadvantaged any tenderer who had not included a percentage in item A60 at all because of the City's own error.

[42] It argues that the City identified that Carp Civils had failed to complete item A60 *before* it sent all tenderers the clarification letter. Notwithstanding the City's awareness that Carp Civils had not provided a rate for item A60 at all, it nevertheless sent the notification letter asking for clarity on what Carp Civils meant in relation to the non-existent figure in item A60. In so doing, the City sent a notification to Carp Civils that the City was aware was meaningless and would serve no purpose.

[43] Carp Civils submits that a tenderer could have done one of three things when presented with the error in item A60:

43.1 First, guess what item A60 was supposed to refer to;

43.2 Second, insert an "incorrect" rate based on its own price for item A40 (as the tender document invited bidders to do). On the City's own version, however, this would have been absurd, given that commercial common sense dictates that the tenderers should have known that item A60 could never have referred to item A40; or

43.3 Third, simply leave the item blank, which would be the case where the bidder chose not to guess (option 1) and appreciated that it did not make sense to insert the incorrect rate with reference to item A40 (option 2).

[44] Carp Civils maintains that it chose the third option as it appreciated that item A60 could not have referred to item A40. It argues that, on the City's own version, the error was obvious. In the light of the obvious error, it made more sense for item A60 to have been left blank than for it to have been completed incorrectly with reference to item A40. The fact that other tenderers guessed correctly is not relevant to the fair bidding process which must apply to all tenderers. Accordingly, contrary to the City's assertions, its own error better explains a failure to insert a rate than it does the insertion of an incorrect rate.

[45] Carp Civils submits that the City was thus required to have issued a comprehensible tender document and, where it had made an error, to take the necessary steps to ensure that no bidder was prejudiced thereby. It patently failed to do so in respect of the pricing items of Carp Civils (and JK Structures). In so doing, it rendered the bid unfair.

[46] It is also contended that, as with the JK Structures non-pricing issue, the City failed to appreciate the discretion which it had, in circumstances such as these, to ask a tenderer to correct an obvious mistake, or call for clarification where it

would be fair to do so, or, indeed, unfair not to do so. This too amounted to an unwarranted adherence to a fixed principle.

The City's response to the grounds of review in respect of the non-pricing issue

- [47] The City maintains that it duly followed a process which was compliant with s 217 of the Constitution (namely one which was fair, equitable, transparent, competitive and cost-effective). The applicants were unsuccessful because they did not comply with material requirements of the bid. Had the applicants' complaints been addressed in the manner which they propose, this would have resulted in them receiving preferential treatment, thereby exposing the City to review proceedings at the instance of those who had fully complied with all of the requirements of the bid.
- [48] As regards the JK Structures non-pricing issue, the material deviation is contended to lie in the "strict compliance" requirement in the tender document. Strict compliance is allegedly required for purposes of applying the term tender to the specific work to be allocated in the future.
- [49] The City submits that the explanation given by JK Structures for failing to price line item A310 is a red herring, because it nonetheless left item A310 blank. Accordingly, there was nothing on which the City could seek clarity, given that it could not ask for clarity on a blank line item.

[50] The City argues that the same considerations apply to the Carp Civils non-pricing issue. By later ticking the box next to item A50 in the clarification letter, Carp Civils confirmed that it had previously correctly understood that item A60 in fact referred to item A50 (instead of the erroneous insertion by the City of item A40 in the original tender document). It was not incumbent on the City, but on Carp Civils itself, to have checked its own tender bid so as to ensure that it had completed item A60. Its failure to do so resulted in a fatal omission in the tender bid. To allow one tenderer to avoid or subvert this requirement in circumstances where others had “strictly complied” would have been unfair, unreasonable and unlawful. Pursuant to the award of the tender, specific works projects will be allocated, ranging in price from R100 000 (or even less) up to R4 million. It is conceivable that in the context of a smaller project, the pricing of item A60 could make a significant difference in the ranking of tenderers. The City also contends that from time to time tenderers deliberately leave certain rates blank in tender documents in order to renegotiate prices (to their own unfair advantage) at a later stage. This is a further reason why the City rightly insisted on strict completion of price schedules.

[51] Insofar as the failure to appoint four contractors is concerned, the City’s response is that although it had expressed *‘the intention’* to limit the pool of pipe-cracking contractors to four, this was obviously subject to tenderers complying with the tender criteria. No firm undertakings or commitments were given that four contractors would be appointed, come what may. As the tender process turned

out, the City was indeed forced to reduce the pool to two contractors. The City contends that this number would in any event be adequate to perform the available work.

Applicable legal principles considered against the facts

[52] It is convenient to start by considering the two decisions upon which the City's appeal authority relied in dismissing the applicants' appeals on the non-pricing issue, namely *Bizstorm* and *Sapela Electronics (supra)*.

[53] In *Bizstorm* one of the grounds of review related to the unsuccessful tenderer's failure to quote on a particular item in a pricing schedule. The judgment records that the schedule itself, which was contained in the bid document, made it clear that bidders were required to quote a price for each and every item in the schedule, failing which a bid would be considered non-responsive. The court did not refer to any clauses in that particular bid document such as those contained in the one presently under scrutiny (i.e. clauses F.3.8.4, F. 3.10, F.2.17 or F.3.8.2). The applicant in that matter itself conceded that it would be unacceptable to seek supplementary information from bidders. Furthermore, it had no answer for its failure to fully complete the pricing schedule other than a bald denial that it had not done so. It is against that background that the court in *Bizstorm* found that:

[26] *The reason for considering such a bid non-responsive is not far to seek. The Municipality's answering affidavit states that all bids are opened simultaneously and the prices of the various bidders made known. If a bidder which did not quote a price on any service to be provided is allowed to do so after the closing date of a tender, it could adjust its tender price to below that of the lowest bidder. That is the very antithesis of a tender process. It would strip the process of the attributes of fairness, transparency and competitiveness contemplated in s 217(1) of the Constitution and 112(1) of the MFMA. ... In fact, the applicant itself concedes that it is unacceptable to seek supplementary information from bidders, particularly if this would allow them to adjust their price or other crucial aspects of their tender. This, the applicant says, is antithetical to fairness as a bidder would be allowed to adjust its bid, knowing how its competitors had bid.'*

[54] In the present matter, and in the case of JK Structures, it would simply have been a matter of moving three prices up by a line, with exactly the same result on the price quoted. In relation to Carp Civils, it was the City which, in terms of the discretion conferred upon it in terms of clause F.2.17, called for clarification *after* the closing date for submission of the tender bids. If its own error was as obvious as the City contends, the question that arises is why it was considered necessary by the City to obtain any clarification at all. The circumstances in which the City may call for clarity after submission of a bid could not have been intended by it to be exhaustive, if regard is had to the wording in clause F.2.17, namely that '*...this may include providing a breakdown of rates or prices and correction of arithmetical errors by the adjustment of certain rates or item prices (or both)...*' (my emphasis).

[55] While it is so that clause F.2.17 also stipulates that ‘*no change in the competitive position of tenderers or substance of the tender offer is sought, offered or permitted*’, the clarification sought by the City was, in the case of Carp Civils, in fact no clarification at all. There was no sense in the City asking Carp Civils to clarify whether it meant to refer to item A40 or item A50 when pricing item A60 in circumstances in which the City already knew that Carp Civils had failed to price item A60 at all. Furthermore, the tender bid document does not afford a tenderer the opportunity, of its own accord, to raise a previous omission after submission of a tender bid. The City blames Carp Civils for not having checked its tender bid document once clarification had been sought; but does not explain how it would have dealt with any price which *at that stage* was inserted by Carp Civils as a result of the City clearing up its own error.

[56] In *Sapela Electronics* the successful tenderer for three separate contracts (*‘Nolitha’*) had, in two instances, deliberately quoted nominal amounts for a section of work, knowing that it would not have to perform that work; and in the third instance, agreed with the employer after submission of its bid to reallocate amounts overtendered for two items of work, to items for which it had undertendered. At paras [14] – [15] and [19] it was held that:

‘[14] The definition of “acceptable tender” in the Preferential Act [Preferential Procurement Policy Framework Act 5 of 2000] must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is “fair, equitable, transparent, competitive and effective”. In other words, whether “the tender in all respects complies with the specifications and

conditions of tender as set out in the contract documents” must be judged against these values. Merely because each item is priced does not mean that there was proper compliance. What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of the work itemised in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all the work itemised in the schedule of quantities is to be performed. Whether work may later be omitted is of no consequence. What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and almost certainly also to the detriment of the public purse since he is likely to load other items to the detriment of the employer. Such a tender offends each of the core values which s 217(1) of the Constitution seeks to uphold. It would not be a tender which is “acceptable” within the meaning of the Preferential Act.

[15] It follows that in my view both Nolitha’s Drakenstein tender and Worcester tender were unacceptable and should have been rejected...

[19] It is well established that a tender process implemented by an organ of State is an “administrative action” within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). See eg Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424) para 5 and the cases there cited. As observed by Cameron JA “(t)his entitled the appellant...to a lawful and procedurally fair process”. What is fair administrative process “depends on the circumstances of each case” (s3(2)(a) of PAJA). In Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 (1) SA 16 (SCA) ([2004] 1 All SA 504) para 13 Conradie JA said:

“It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the

attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.”

In the present case, what in effect occurred is that Nolitha’s tender, with the latter’s written consent, was adjusted by the reallocation of an amount overquoted for one or, rather, two items, to “most of the remaining maintenance items for Installations A to P” for which Nolitha had underquoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer that was made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contract were correctly held by the court a quo to be reviewable.’

[57] In the present matter, on its own version, it would not have been open to JK Structures to reallocate an amount ‘*overtendered*’ (i.e. line item A320) when, already at the internal appeal stage, it had pointed out that there were 26 items and 26 rates on the same page. Insofar as Carp Civils is concerned, the insertion of a rate at line item A60 after receipt of the City’s clarification letter might of course have affected the bidding process. But that is the City’s problem, because it was occasioned by its own error.

[58] In the *AllPay* merits judgment (*AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at para [22]) it was emphasised that the tender

process must itself be fair and lawful, independent of the outcome of such process.

[59] At paras [28] and [30] it was held that:

[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established...

[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O’ Regan J succinctly put the question in ACDP v Electoral Commission as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. This is not the same as asking whether compliance with the provisions will lead to a different result.’

[60] In *Beach Clean Services South Africa CC v The City of Cape Town and 2 Others* (an unreported judgment of Blignault J in this Division under case no 24190/2012, delivered on 3 July 2013) the applicant’s tender bid had been

declared non-responsive for two reasons, the one relevant for present purposes being that it had not tendered any prices for waste removal in respect of seven out of sixteen beaches. The spaces provided for the insertion of these prices were simply left blank. It was the City's position that the failure to tender on all items per the pricing schedule constituted a failure to adhere to a material condition of the tender.

- [61] The court referred to the decisions in *Minister of Social Development and Others v Phoenix Cash and Carry – Pmb CC* [2007] 3 All SA 115 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA); and *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA); and emphasised at para [45] that:

'[45] The Supreme Court of Appeal confirmed in a number of recent decisions that an organ of State should not adopt an overly formal or technical approach when considering whether tender conditions have been complied with, even when they are couched in ostensibly peremptory language. It should apply a system which is "fair, equitable, transparent, competitive and cost-effective" as envisaged by section 217(1) of the Constitution.'

- [62] Blignault J held at paras [49] – [50]:

[49] In my view the City's officials erred by failing to adhere to the principles laid down by the Supreme Court of Appeal in the judgments to which I referred above. They adopted a technical and formalistic approach to

applicant's tender instead of focusing on the substance of the matter, namely the application of the constitutional values referred to above. It would not have been difficult for the officials to direct queries to applicant in order to clarify the issues in question. They do not concern complicated issues. The conditions of tender make provision for queries in regard to items that were not clear...

[50] *...There is no allegation that the defects in its tender (if there were indeed defects) were due to any mala fide conduct on [the applicant's] part. No other tenderer would have been prejudiced if applicant had been afforded an opportunity to clarify the alleged defects. Nor would the integrity of the process have been implicated.'*

[63] Subject to the qualification hereunder, the findings in *Beach Clean* apply equally in the present matter. First, it cannot be disputed that the errors made by both applicants had their source in the City's own errors. Second, it was unduly formalistic of the City, and amounted to an unwarranted adherence to a fixed principle, to ignore its own role in the confusion which it had engendered. Third, a perfunctory perusal of page 118 of JK Structures' tender bid shows that 26 prices were quoted for 26 items, and that JK Structures had made a patent error in failing to correctly match three prices quoted to three corresponding line items. In the case of Carp Civils, what the City should have done was to formulate its clarification letter in such a way that actual clarity could have been provided. Herein lies the qualification: other tenderers might have been prejudiced if Carp Civils was afforded the opportunity, after closing date of the tender, to explain its failure to insert a rate. If so, this could have rendered the bid unfair. But in my view the City cannot sweep its own responsibility for this under the carpet. It was

incumbent upon the City to find a fair, equitable, transparent, competitive and cost-effective solution to the procedural problem caused of its own making. The *AllPay* merits judgment has made it clear that the process itself must meet the s 217 requirement, irrespective of the outcome. In these circumstances, I do not believe that it would be appropriate for this court to endorse the City's outright rejection of Carp Civils' tender bid.

- [64] I am thus compelled to conclude that the City's approach resulted in irregularities in relation to the applicants' non-pricing of the items in question, and that such irregularities were material.

Just and equitable relief

- [65] In its amended notice of motion the applicants' main relief sought was twofold, namely to review and set aside the City's decisions to reject the tender bids submitted by the applicants; and to set aside the City's decision to award the tender to the second and third respondents. Coupled with this were orders sought to substitute the City's decisions by awarding the tender to the applicants only; alternatively, referring the matter back to the City for re-adjudication.

- [66] During argument the applicants submitted that if the court were to set aside the decision to reject the applicants' bids, it would not be necessary to consider or determine the relief sought in respect of the award to the second and third respondents. This is because: (a) it was the City's intention at the time of the

tender process to appoint a pool of four contractors per category; (b) the two successful tenderers do not oppose the relief sought and all of the other unsuccessful tenderers have not challenged the City's decisions; and (c) this is a term tender in which work will be allocated from the pool of contractors in accordance with the ranking of prices tendered. There is merit in this approach. There are various steps in the tender process. This court cannot and should not anticipate the City's next step. All that this court can do is to halt the process, correct the incorrect steps, and refer it back to the City to proceed.

- [67] I am in any event mindful that a court '*should be careful not to attribute to itself superior wisdom*' (the well-known *Bato Star* decision, i.e. 2004 (4) SA 490 (CC)). It is the City's designated officials, rather than this court, who are far better qualified to re-evaluate pricing in a tender bid and to conclude the tender process.

Costs

- [68] The applicants have been substantially successful and are therefore entitled to their costs, subject however to the following qualifications. On the one hand, the applicants did not persist with some of the relief sought and thus caused wasted costs to the City. On the other hand, it cannot be ignored that the City provided a reason for rejecting JK Structures' bid which was not supported by its own internal records. This in turn resulted in wasted costs to the applicants. In my view, and in order to avoid any dispute or confusion on taxation, the practical way

to deal with this is to simply regard the one set of wasted costs as neutralising the other.

Conclusion

[69] Having found that the first respondent did not in fact reject the first applicant's tender bid on the ground of non-functionality, the following orders are made:

- 1. The City's decisions to reject both applicants' tender bids due to a failure to price for all rates items, are reviewed and set aside.**
- 2. The first respondent's Bid Evaluation Committee is ordered, within 14 calendar days from date hereof, to reconsider and re-evaluate the first applicant's tender bid on the basis that line items A310 to A330 on page 118: Schedule A of its tender bid document correspond with what is reflected at paragraph [20] of this judgment, and to furnish the first applicant with written notification of the outcome within seven (7) calendar days thereafter;**
- 3. The second applicant is granted the opportunity, within fourteen (14) calendar days from date hereof, to explain its failure to specifically price line item A60 on page 117: Schedule A of its tender bid document after receipt of the City's clarification letter dated 3 June 2014, by furnishing written reasons therefor to the Chairperson of the Bid Evaluation Committee; and to inform the City of the price**

which it would have inserted had it been afforded the opportunity to do so;

4. The first respondent is ordered to reconsider and re-evaluate the second applicant's tender bid, only in relation to the non-pricing issue, within fourteen (14) calendar days of receipt of such written reasons, and to provide the second applicant with written notification of the outcome within seven (7) calendar days thereafter;
5. The first respondent shall pay the costs of both applicants in this application on the scale as between party and party, including the costs of two counsel where employed, and including all reserved costs orders.

J I CLOETE