Republic of South Africa

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

Case No. 11496/2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 29-30 August 2022
Date of judgment: 15 September 2022

In the matter between:

ALL 4 SECURITY SERVICES CC	First Applicant
SECURITEM (PTY) LTD	Second Applicant
SECURITY SA HOLDINGS (PTY) LTD	Third Applicant

and

THE CITY OF CAPE TOWN	First Respondent
CBRE EXCELLERATE FACILITIES MANAGEMENT (PTY) LTD.	Second Respondent
AFMS GROUP (PTY) LTD	Third Respondent
EXCELLERATE SERVICES (PTY) LTD	Fourth Respondent
METRO CLEANING SERVICES (PTY) LTD	Fifth Respondent

JUDGMENT

BINNS-WARD J:

[1] In November 2020, the City of Cape Town, which is the first respondent in the current proceedings, issued an invitation to tender in tender no. 226S/2020/21 (referred to in the papers

as 'the 2021 tender'). The background to and scope of the proposed contract were summarised in §13.1, at p. 101, of the tender documentation as follows:

> 'The Directorate: Transport has been managing the implementation and operation of the MyCiti system through various service providers appointed through public tender processes. One such service provider is the station management contractor appointed to manage the services on the stations and routes. This contract is drawing to a close, creating an opportunity for prospective service providers to the CCT to tender on this service.
>
> The CCT has, in the meanwhile, combined the departments managing the MyCiti system and other public transport services into a single unit and formed a Facilities Management Branch. In doing so, it has grown the scope of services required from that in the original contract. The scope of the current tender therefore includes provision of services for the MyCiti system and at Public Transport Interchanges (PTIs). Services include the potential provision of:
>
> - Facility staff (such as security, cleaning, ambassadorial and surveillance personnel)
> - Maintenance services (including maintenance contracts)
> - Landscaping services
> - Event personnel
> - Project personnel
> - Equipment rented
> - Cash management services'

[2] The invitation was advertised in the print media and on the City's website under the following description:

> 'TENDER NO: 226S/2020/21: The Provision of Facility and Cash Management Services in respect of selected public transport facilities including MyCiti and Public Transport Interchanges on behalf of the Directorate: Transport City of Cape Town'.[1]

[3] The tender is an important one. The City stands to incur expenditure of about R700 million over a three-year period in connection with it. The applicants allege that about

[1] The Afrikaans version read '*Die voorsiening van fasiliteits – en kontantbestuurdienste ten opsigte van uitgesoekte openbarevervoerfasiliteite insluitende MyCiti en openbarevervoerwisselaars namens die direktoraat vervoer: Stad Kaapstad*'.

28% of that expenditure will be in respect of the provision of security services component of the contract work. The City's response is that the contract does not require to be componentially evaluated, but it admits that '*the provision of security services was a substantial and material component*' of the tender contract.

[4] Four parties submitted tenders for the contract. Three of them were excluded as non-responsive. The contract was awarded to the only tenderer whose submission was adjudged by the City's officials to have been responsive. The successful tenderer was a joint venture comprised of the third, fourth and fifth respondents. The third respondent is a company that specialises in the provision of facility management services, the fourth respondent is a private security services provider, and the fifth respondent is a company that provides cleaning services.

[5] The City has explained that the joint venture comprised of the third to fifth respondents has been providing the facility management services covered by the impugned tender at the City's MyCiti stations for a number of years, having been awarded a contract for the *'provision of station management and related services for phase 1A and 1B of MyCiti*'[2] pursuant to tender no. 392S/2011/12. That contract was in force until 30 June 2021, and the impugned tender was advertised to replace it with a contract of an expanded ambit. The City's Transport Directorate determined that it would be more efficient if a contract were to be concluded with a single contractor to manage and provide '*all the necessary services (cleaning, maintenance, security, landscaping etc.)*' at MyCiti and Public Transport Interchanges. A different way of dealing with the contracting out of the necessary services would also fit in with the internal restructuring that had resulted in the combination of the departments managing the MyCiti

[2] I quote the description given in para 23.1 of the City's answering affidavit delivered in response to the application for interim relief in terms of part A of the notice of motion.

system and the other public transport services into a single unit and the formation of a Facilities Management Branch.

[6] The applicants commenced proceedings by applying for an interim interdict prohibiting the implementation of the award of the tender contract pending the determination of an application for the review and setting aside of the award. That relief, sought in part A of the applicants' notice of motion, was subsequently abandoned, and the applicants were ordered to pay the respondents' costs incurred in connection therewith. The first applicant thereafter withdrew from the application, and the current application for judicial review is pursued only by the second and third applicants.

[7] In para 2 – 6 of the amended notice of motion, the second and third applicants claim orders in the following terms:

> '2. The first respondent's decision to advertise tender number 226S/2020/21 ("the tender") with the wording used, is declared unlawful and or unconstitutional.
>
> 3. The first respondent's decision to advertise the tender with the wording used, be reviewed and set aside.
>
> 4. Alternatively to paragraphs 2 and 3 above, declaring that the description of the services in advertisement (sic) of the tender materially failed to adequately describe the services sought in the tender.
>
> 5. The first respondent's decision to award the tendered (sic) to the third to fifth respondents, be reviewed and set aside.
>
> 6. Any contract concluded between the first respondent (on the one hand) and the third to fifth respondents (on the other hand) is invalid and set aside.'

The applicants pray that any declaration of invalidity be of only prospective effect and that its effect be suspended pended the completion of a fresh procurement process within a specified period.

[8] The second and third applicants carry on business in the provision of private security services. They are both currently contracted to provide such services to the City on an ad hoc basis, as and when required. Both companies were awarded their contracts with the City pursuant to the invitation to tender issued in respect of Tender No. 207S/2016/2017 ('the 2017 tender'). They have provided such services at various places within the metropolitan area, including at the City's Public Transport Interchanges and MyCiti sites.

[9] The contracts awarded in the 2017 tender were for a period of three years and have lapsed through effluxion of time. The applicants continued to render services under those contracts on a month-to-month basis pending the completion of fresh public procurement processes. The invitation to tender for the fresh private security contracts (in tender no. 213S/2020/21, referred to in the papers as 'the general security tender') was advertised at the same time as the abovementioned tender no. 226S/2020/21 that is in contention in the current matter. It was number 1 of 13 tenders advertised by the City in the press on 20 November 2020. The advertisement in tender no. 226S/2020/21 was number 8. The advertisements appeared almost side by side in adjacent columns of the three-column block of advertisements advertised in the *Cape Argus* under the City's logo and a heading in large print: 'INVITATION TO TENDER'. In *Die Burger*, the advertisements appeared next to the City's logo under a heading: 'MUNISIPALE KENNISGEWINGS / UITNODIGING OM TE TENDER'. The advertisement of the general security tender read as follows in material part:

> 'Provision of security services at various council facilities / ad hoc sites.'

[10] The second and third applicants' principal complaint in respect of the advertisement of the tender for the provision of facilities management is that it was impermissibly vague for want of any mention of the services that the City wanted to procure under the rubric 'facilities management', more especially it omitted any mention that the contract put out for tender

included the provision of security services. Pointing to the appearance of the advertisement virtually side by side with that in respect of the aforementioned advertisement for the provision of security services at ad hoc sites and facilities, the deponent to the applicants' supplementary founding affidavit averred '[c]*onsidered side-by-side, the advertisements give no inkling that the new general tender for security services would now exclude the provision of such services at PTI sites, and that such security services would be* [bound] *up in the new tender for "facility and cash management services" at PTI sites*'.

[11] The City's response was that the advertisements for the provision of security services to facilities and sites on an ad hoc basis did not 'ringfence' any such facilities or sites, and that the previously advertised tender in tender no. 392S/2011/12 in respect of MyCiti stations had included the provision of security services under the rubric of 'facility management' without specific mention of the security service component of the contract. The City contended that the applicants could easily have searched the tender documentation, which was freely available on the internet on the City's procurement portal, using the keyword 'security'. The City accused the applicants' staff charged with tracking advertisements issued by the City with having failed to do so '*with any level of attention or diligence*'. The applicants' retort was that there was nothing in the advertisement to alert their staff that undertaking the keyword search suggested by the City might be profitable. The applicants' contention was that the advertisement was completely opaque.

[12] The basis in law for the applicants' review challenge is their contention that the advertisement falls short of compliance with the requirements of s 217 of the Constitution and the applicable legislation that has been adopted to give specific effect to those requirements. It is well established that procurement disputes about the proper interpretation of s 217 raise constitutional questions and that the fairness and lawfulness of a public procurement process

must be assessed in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') that was enacted to give effect to everyone's right, in terms of s 33 of the Constitution, to administrative action that is lawful, reasonable and procedurally fair.[3] In *Steenkamp v Provincial Tender Board, Eastern Cape* [2006] ZACC 16 (28 September 2006); 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 33, Moseneke DCJ held that s 217 of the Constitution fell also to be understood together with the basic values governing public administration entrenched in s 195. Section 172(1)(a) of the Constitution prescribes that when deciding a constitutional matter within its power a court must declare any conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

[13] Section 217 of the Constitution provides:

> (1) When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
> (a) categories of preference in the allocation of contracts, and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
> (3) National legislation must prescribe a framework within which the policy referred to in subsection 2 may be implemented.

And section 195(1)(g) provides:

> Transparency must be fostered by providing the public with timely, accessible and accurate information.

In *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28 (29 May 2000); [2000] 3 All SA 247 (A); 2000 (4) SA 413 (SCA) in para 30, Schutz JA, writing of the requirements for a '*credible tender procedure*', included the

[3] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) (hereinafter 'Allpay (1)') at para 4, 22 and 32.

observation that competitiveness was '*not served by only one or some of the tenderers knowing what is the true subject of tender*'. In *Allpay* (1)[4] at para 88-92, the Constitutional Court held that tender documentation that did not specify with sufficient clarity what was required of bidders offended against the right to procedurally fair administrative action prescribed in s 3(2)(b)(i) of PAJA. The Court held[5] that the '*purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution though a process that is fair, equitable, transparent, cost-effective and competitive*'. Those remarks were made in respect of the documentation in a tender pack, but logically they would hold equally true of the advertisement stage of the tender process, which is where the eliciting of bids commences.

[14] The Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') is legislation that is directed, in part, towards the effective implementation of the precepts in s 217(1) of the Constitution. Part I of Chap. 11 (ss 110-119) of the Act regulates supply chain management by municipalities and municipal entities. Section 111 requires each municipality and municipal entity to have and implement a supply chain management policy to give effect to the provisions of the Part. Section 112 (echoing s 217 of the Constitution) stipulates that such policy '*must be fair, equitable, transparent, competitive and cost-effective*' and cover various matters, including (in para (g) of subsection (1)) '*bid documentation, advertising of and invitations for contracts*'. Section 65(2)(i) of the MFMA imposes a duty on the City's accounting officer (i.e. the City Manager) to take all reasonable steps to ensure that the Municipality's supply chain management policy '*is implemented in a way that is fair, equitable, transparent, competitive and cost-effective*'.

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[4] Note 3 above.

[5] Citing *Minister of Social Development and Others v Phoenix Cash and Carry Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA) at para 2.

[15] The national government has, as contemplated in the MFMA, made regulations regarding municipal supply chain policies; see GN 868 published in GG 27636 of 30 May 2005 and amended by GNR 31 in GG 40553 of 20 January 2017. Reg 22(b) provides that a policy must stipulate '*the information a public advertisement must contain, which must include – (i) the closure date for the submission of bids, which may not be less than 30 days in the case of transactions over R10 million (VAT included), or which are of a long term nature, or 14 days in any other case, from the date on which the advertisement is placed in a newspaper ... and (ii) a statement that bids may only be submitted on the bid documentation provided by the municipality or municipal entity*'.

[16] The word 'include' plainly denotes that the expressly stipulated advertising requirements were not intended to be all embracing. The ordinary meaning of 'include' is '*comprise or contain as part of a whole*'. The *Oxford Dictionary of the English Language* indicates s.v. '*Usage*' that '*Include has a broader meaning than comprise. In the sentence the accommodation comprises 2 bedrooms, bathroom, kitchen, and living room, the word comprise implies that there is no accommodation other than that listed. Include can be used in this way too, but it is also used in a non-restrictive way, implying that there may be other things not specifically mentioned that are part of the same category*'. See in this regard *R v Debele* 1956 (4) SA 570 (A) and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) at para 18.

[17] In reg. 22(b), the word is used in its non-exhaustive sense. An advertisement of a tender contract could not possibly satisfy the requirements of s 217 of the Constitution or s 112 of the MFMA if it did not also convey with adequate clarity the nature of the goods or services sought to be procured.

[18] The City has duly adopted a supply chain management policy. Clause 8 of the policy records that its objectives are, amongst other matters, to give effect to s 217 of the Constitution and the applicable provisions of the MFMA and the regulations made thereunder. In terms of the policy, the process of advertising bids is preceded by one of bid specification. Clause 108 provides that '*Bid specifications must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services.*' Clause 112 prescribes that '*Bid specifications may not make any reference to any particular trade mark, name, patent, design, type, specific origin or producer, unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the words "or equivalent"*'. Clause 152 states that upon completion of the bid specification process, which includes the compilation of the 'bid documentation', the City shall publicly invite bids. The requirement that the bid specification process be completed before the invitation to tender is advertised is plainly intended to assist in insuring that the advertisement will clearly and accurately, even if succinctly, convey to potential bidders the character and material import of the contract that is available to be concluded.

[19] Clause 153 of the City's supply chain management policy stipulates that the invitation must be by notice published in the media 'and/ or any electronic platform that may be applicable or suitable'. Clauses 156 and 157 set out a number of requirements with which any notice given in terms of clause 153 of the policy must comply. Pertinent to the question in issue in the current matter are clauses 156.1 and 156.2, which state:

> 'The notice contemplated by clause 153 above shall specify:
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> 156.1 the title of the proposed contract and the bid or contract reference number;
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> 156.2 such particulars of the contract as the City deems fit;
>
> 156.3 ...'

[20] The respondents' counsel submitted that s 156.2 of the City's supply chain management policy invested the compilers of its advertisements of invitations to tender with a very wide discretion as to what to include or leave out of their content, and that the court should accordingly be chary about second-guessing them. Relying on the observations of O'Regan J about 'judicial deference' in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), they submitted that this was a case in which the court '*should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government*'.[6] Echoing Blackwell J's words in *Jivan and Louw NO and Another* 1950 (4) SA 129 (T) at 131D-E, the third to fifth respondents' counsel submitted that the court should bear in mind that '*the Courts do not sit as super-civil servants to tell civil servants how to perform their duty*'.[7]

[21] It seems to me, however, that counsel's submissions in this regard did not pay sufficient regard to the context in which the judicial utterances on which they relied were made, and consequently misconstrued their true import. Mr Justice Blackwell made the remark about courts not acting as super-civil servants in the context of explaining his decision that it did not fall within the functions of the courts to entertain an application for a mandatory order directing the respondents in the case before him to exercise to exercise the discretion conferred upon them by the import control regulations in a bona fide manner. The learned judge held that although officials might be brought to book in the courts in respect of any particular action in which they were alleged to have acted in breach of their duty to carry out their functions in a bona fide manner, it was not within the judicial review functions of the court '*in effect, to say to a set of officials "You have been behaving badly in the past and I now order you to behave properly in the future".*' The judge distinguished the applicants' position in that case from one

[6] *Bato Star* supra, at para 48.

[7] See also *Sigudo v Minister of Higher Education and Others* [2018] ZAGPJHC 1; 2018 (1) SACR 485 (GJ)

in which the courts would exercise jurisdiction, saying, at 130 *fin*, '*If any discretionary act, on the part of an official affecting a citizen, is attacked as having been performed mala fide or without authority, then, no doubt, this Court has inherent jurisdiction to set aside that act*'. It is the latter type of case that this court is concerned with in the current matter.

[22] The remarks of O'Regan J in *Bato Star* are also often misconstrued. The learned judge, whilst cautioning that Courts should be mindful, in the context of the constitutional scheme of a separation of powers, not to trench impermissibly on the territory constitutionally reserved for executive decision-makers, nonetheless, at the same time, reiterated the Courts' duty to fulfil *their* constitutional function of judicial review. The following extract from the speech of Lord Hoffmann in *R (on the application of ProLife Alliance) v British Broadcasting Corporation*[8] was endorsed in para 47 of *Bato Star*:

> 'My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of civility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the Courts.
>
> [76] This means that the Courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The Courts are the independent branch of government and the Legislature and Executive are, directly and indirectly respectively, the elected branches of government. Independence makes the Courts more suited to deciding some kinds of questions and being elected makes the Legislature or Executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles ....(W)hen a court decides that a decision is within the proper competence of the Legislature or Executive, it is not showing deference. It is deciding the law.

And in para 48, O'Regan J summed up the position in this regard as follows:

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[8] [2003] 2 All ER 977 (HL).

> 'In treating the decisions of administrative agencies with appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision maker.
> (Underlining supplied.)

[23] The primary question in the current matter is whether the advertisement of the invitation to tender for tender contract no. 226S/2020/21 was compliant with the requirements of s 217 of the Constitution and the legislation adopted to give effect thereto. There can be no doubt that that is a question that, if it is in contestation, falls fair and square within the scope of the judicial arm of government to answer.

[24] The goal of the City's supply chain management policy is to promote compliance with the relevant provisions of the MFMA and ultimately s 217 of the Constitution. The discretion invested in the City's procurement functionaries by clause 156.2 is accordingly not an unfettered one. It is a discretion that must be exercised consistently with the achievement of the stated objectives of the City's supply chain management policy (as to which, see paragraph [18] above). A purported exercise of discretion in terms of clause 156.2 that undermined the achievement of the objects of the system adopted by the City to give effect to s 217(1) of the Constitution would be 'conduct inconsistent with the Constitution' within the meaning of

s 172(1)(a) of the Constitution and, on the basis rehearsed in the *Allpay* (1) decision discussed above,[9] reviewable in terms of PAJA.

[25] I am not persuaded that the decision concerning the framing of the advertisement was a complex one of the nature posited ex hypothesi in *Bato Star* supra, at para 48. The function involved nothing more than settling the wording of the advertisement in order to convey clearly enough to the reader the nature of the services that the City was seeking to procure. Clauses 152 – 158, and more especially clause 156, of the City's supply chain management policy are directed at guiding its officials concerned with procurement in the proper discharge of that function. Whether the function has been properly discharged in accordance with that guidance in a given case turns on the construction of the published advertisement.

[26] Construing documents is one of the Courts' quotidian tasks.[10] How it should be done has been spelled out in any number of authoritative judgments. As recently observed in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 (9 July 2021); [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) at para 49, reference to *Endumeni*[11] has become a 'ritual incantation' in this regard, and counsel duly recited it in this case too.

[27] It is evident in the current matter that the published advertisements complied with clause 156.1 of the City's supply chain management policy. It set out the title of the proposed contract and the bid or contract reference number. But that is all that it did. It did not set forth

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[9] Note 3 above.

[10] In *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7 (13 March 2009); 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) at para 39, Harms DP issued a reminder that *'... interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: ...)*'. See also *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 (11 June 2021); 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) at para 68.

[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

any particulars of the contract save for those that might be discerned from the title. Clause 156.2 of the City's policy is somewhat ambiguous. It might be construed to require the procurement functionary to set forth some particulars, but to leave it within the functionary's discretion to decide on the nature and extent thereof. Equally, it could be construed to imply that it was up to the City to decide in each case whether it considered it appropriate to advertise any particulars at all.

[28] The manner in which the applicants' counsel approached the City's omission to publish any particulars of the contract beyond those discernible from its title was to submit that in certain cases the title would be sufficient, by itself, to convey to potentially interested parties what the services that the City sought to procure were. So, for example, an advertisement that, compliant with clause 156.1, gave as the title of the contemplated contract 'Provision of window cleaning services at the Civic Centre' would suffice without the furnishing of particulars in terms of clause 156.2 because the object of informing potential tenderers would have been adequately achieved. Thus, examining the 13 tenders advertised by the City in the *Argus* newspaper on 20 November 2020, the titles of the advertisements for tenders for '*Supply and delivery of refuse bags to the City of Cape Town*' and '*Term tender for lift and escalator maintenance of various Municipal facilities within the City of Cape Town*' would, on that approach, absolve the City from any obligation to furnish particulars in terms of clause 156.2. Whether only publishing the title of the contract, without any further particularity, sufficed in respect of the impugned tender therefore depends on whether the title '*Provision of facility and cash management services in respect of selected public transport facilities including MyCiti and public transport interchanges*' advertised to potential tenderers the nature of the services the City sought to procure with sufficient particularity.

[29] It seems obvious that a failure to give sufficient particularity in any advertisement of an invitation to tender concerning the nature of the goods or services sought to be procured would impact negatively on the extent of interest that the advertisement might be expected to attract from parties able to supply them. The potentially adverse consequence of inadequate advertising on the considerations of transparency, competitiveness and cost-effectiveness identified in s 217(1) of the Constitution is axiomatic.

[30] The term 'facility management' or 'facilities management' is defined in some of the well-known dictionaries. The *Oxford Dictionary of the English Language* gives the following definition and usage example: 'the maintenance of an organization's buildings and equipment: *she is director of operations for facilities management*'; the *Cambridge Dictionary*: 'the activity or job of looking after a company's buildings, equipment, land, etc' and various usage examples are listed (all taken from Wikipedia), none of which expressly identifies the provision of cleaning, landscaping or security (or guarding) services as included in the concept.[12]

[31] I must confess that as a mother tongue English language speaker the term 'facility management' or 'facilities management' was not familiar to me. The compounding of the two familiar words 'facility' and 'management' would suggest to me that the term denoted oversight or superintendence of a facility. That is the sense in which the term or its derivative 'facility manager' appears to have been used, for example, in clause 210 of the White Paper on National Health Insurance published in GN 1230 of 11 December 2015,[13] which refers to all 'health facility managers' being required to have a health management qualification, or in the call for public comment on the revised national norms and standards for funding TVET

[12] *Cambridge English Dictionary* https://dictionary.cambridge.org/dictionary/english/facilities-management accessed on 9 September 2022 at 10h55 SAST.

[13] GG No. 39506 of 11 December 2015.

colleges (GenN 615 of 22 November 2019),[14] where, at p. 135 of the Gazette, the term 'a facilities manager' is used synonymously with 'a campus manager'. It is also the sense in which the term has been used, apparently with reference to the relevant parties' job descriptions, in some judgments that I found using a keyword search.[15] It would not convey to me that the manager was the provider of landscaping, cleaning and security services to the facility it was managing.

[32] No doubt sensing that the import of the term in the sense intended in the advertisement might be adjudged to be an arcane one, the City adduced the evidence of a person alleged to be a specialist in the field of 'facilities management'. He was an executive director of the South African Facilities Management Association ('SAFMA'), which, according to the evidence, is accredited by the South African Qualifications Authority (established in terms of the National Qualifications Framework Act 67 of 2008) and the Quality Council for Trades and Occupations (established in terms of s 26G of the Skills Development Act 97 of 1998). The implication is that SAFMA is a '*professional body*' within the meaning of Act 67 of 2008. '*Professional body*' is defined in s 1 of that Act to mean '*any body of experts practitioners in an occupational field, and includes an occupational body*'. ('*Occupational field*' and '*occupational body*' are not specially defined.) All of this suggests that '*facilities management*' is recognised as a profession or occupation in which one is able to obtain a recognised qualification. Act 67 of 2008 operates in conjunction with Act 97 of 1998, in which '*occupational qualification*' is defined as '*a qualification associated with a trade, occupation*

[14] GG 42849 of 22 November 2019.

[15] *Wellem v Silwana* 2016 JDR 0832 (WCC) at para 6; *PSA v MEC for Health: North West Province* 2013 JDR 0155 at para 4; *Mlalandle v RAF* 2011 JDR 0008 (ECG) at para 32 and *S v Gedu* 2018 JDR 0873 (FB). The latter three cases suggest that 'facility manager' is a job description used in the health departments for the post of the head of nursing services at a hospital or clinic.

or profession resulting from work-based learning and consisting of knowledge unit standards, practical unit standards and work experience standards'.

[33] The Quality Council is a statutory body, and the qualification details it has determined for various trades and occupations are a matter of public record. The Council's published definition of a 'facilities manager'[16] reads as follows:

'*A Facilities Manager organises, controls and coordinates the strategic and operational management of facilities in a public or private organisation.*'

The Quality Council's website records that:

'*The concept and implementation of Facilities Management is fairly new to South Africa but destined to become a major service and career focus. No formal qualification currently exists that marries all the skills sets Facilities Managers require, these include:*

- *Cost management.*
- *Space management and requirements. Space requirements and relocation.*
- *Maintenance management.*
- *Contract management.*
- *Statutory Requirements.*
- *Alterations.*
- *Technology basics concerning some of the large technical components, e.g. lifts, air-conditioning, lighting, etc.*
- *Building Control Systems devoted to information technology.*
- *Customer-orientated thinking and performance.*
- *Professional housekeeping.*
- *Catering Supervision and Food Management.*'

[34] The expert who testified on the City's behalf averred that the term '*facilities management*' has a well-established meaning in South Africa; which, of course, is not to say

[16] https://www.qcto.org.za/full---part-registered-qualifications.html accessed on 11 September 2022 at 15:26 SAST.

that that meaning isn't esoteric. He cited the definition posted on SAFMA's website: '*"facilities management" is an enabler of sustainable enterprise performance through the whole life management of productive workplaces and effective business support services*'. The expert witness proceeded *'at its essence and core, therefore, FM enables a particular facility, business or enterprise to deliver its core function'* and opined '*FM is thus a generic term which must be read and understood in context by reference to the specific facility, business or enterprise in relation to which the term is used*'.

[35] The statement that the term is only capable of understanding with reference to an identified function – an opinion that seems to be consistent with the description of 'facilities management' on the Quality Council's website - seems to confirm that its specific import is dependent in every case upon the provision of contextual particularity.

[36] The witness further opined that the context provided by the wording of the City's advertisement conveyed that the '*core function*' of the facilities concerned was '*the provision of transportation services to the inhabitants of the City of Cape Town*'. He went on to provide the following explanation:

> '*The use of the term "facility management" in this context contemplates:*
> 1. *"hard FM": which encompasses the maintenance and preservation of the assets involved in this core function (thus the functions of looking after the MyCiti and public transport interchange stations; the railings; glass ticketing machines and other assets) and*
> 2. *'soft FM': which relates to the more people based aspects of the core function, including cleaning, hygiene, pest control, building security, cleaning* [again]*, landscaping and so forth.*'

[37] I have not found the explanation helpful. It seems to convey that 'facility management' might involve the management of any number of functions related to a facility, and that the

nature of the functions might be expected to relate to the character of the facility. That much makes sense. The explanation does not, however, clarify whether the 'management' of the functions involved would also include 'the supply' of the services requiring management. One can easily understand that the management of a facility would include oversight over the cleaning and security services required for the facility to function optimally, but it is not clear that the service of *managing* such services should be equated with, or include, actually *supplying* them.

[38] In the current case, for example, qualification as a facility manager and registration as such with the relevant professional body, would not be sufficient to permit anyone to provide the security services that the City required the successful tenderer to provide to the identified transportation facilities. The evidence suggests that a facilities manager would be qualified to *manage* the provision of security services, but it is clear from the law related to the provision of security by private security providers that that service may be *provided* only by persons registered as security service providers in terms of Private Security Industry Regulation Act 56 of 2001. The requirements for registration as a security service provider, which are set out in s 23 of Act 56 of 2001, bear little or no relationship to 'facilities management', as that term is reportedly understood in South Africa. Thus, management of a facility might include attending to the procurement of a security service for it and oversight over the efficient carrying out by the security provider of its contractual duties, but it does not, and cannot, unless the facility manager is also a registered security service provider, include the rendering of the security service.

[39] In my judgment, it follows that in the current case, in which the City was seeking a service provider that would not only *manage* the facilities identified in the title of the tender advertisement, but also *provide* certain services to them, it was incumbent upon it, when

inviting tenders for the contract, to provide further particulars as provided for in clause 156.2 of its supply chain management policy. As discussed, 'facilities management' is a generic term; one needs more to understand what precisely it denotes. One needs to be given an idea of the type of facility that is to be managed (which the advertisement does) and also, if something more than just management is entailed, which of the other services the tenderer is expected to provide (which the advertisement does not). As already noted, the City did not furnish any particulars beyond those discernible from the title of the advertisement.

[40] For the reasons discussed earlier, the City cannot shelter behind reliance on a non-contextual construction of the wording to assert that clause 156.2 gives it an unfettered discretion whether to provide particularity. The discretion afforded by clause 156.2 has to be exercised consistently with the undertaking of reasonable measures to achieve the objects of the policy. The objects of the policy were not satisfied when there was nothing in the advertisement to indicate that the tenderers were expected to provide - as distinct from managing the provision of - security services to the identified facilities.

[41] The assertion by the City that the applicants could have ascertained that the tender included the provision of security services by undertaking an educated search through the tender pack documentation available through the City's web-based procurement portal is also no answer to the inadequacy of the advertisement. The function of the advertisement is to provide potential bidders with sufficient information to attract their interest sufficiently to consider investigating the tender specifications. It is in that regard that the furnishing of particulars, as contemplated by clause 156.2 of the City's supply chain management policy, can play a pivotal role. Qualified suppliers of goods and services are placed at risk of being unfairly excluded if the advertisements are so lacking in relevant information as to leave them unaware of the existence of the business opportunity.

[42] When it omitted any mention in the published advertisement that the tender contract would involve the provision of security and cleaning services, the City failed in a material respect to comply with its supply chain management policy, and thereby offended against the prescripts of s 111 of the MFMA. The non-compliant advertisement tainted the subsequent stages of the tender process, including the award of the contract to the successful tenderer.

[43] The respondents argued, however, that the applicants lacked standing to move the court to review and set aside the tender. Of course, this is properly speaking an *in limine* question, but because it is to be determined in the applicants' favour it does no harm to deal with it here; as long as it is appreciated that the finding on the merits has in no way influenced or informed the determination of the challenge to the applicants' standing.

[44] The argument on standing proceeded from the contention that the applicants had not adduced any evidence to show that they had considered the advertisement in question and been misled by it. It was argued that the applicants' case was purely hypothetical in character, and that they had failed to establish a cognisable interest because if they had not considered and been misled by the advertisement, its inadequacies could not have adversely affected their rights. An infringement or threatened infringement of rights is a requisite for standing to bring an application in terms of PAJA; see *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC) at para 29 and compare *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13 (6 December 1995); 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 165.

[45] It is correct that the applicants have not alleged that any of their representatives read and was misled by the advertisement in question. Their evidence was that the advertisements placed by the City were perused on a regular basis to see if any of them might be of interest.

The applicants were aware of the advertisements published by the City on 20 November 2020. Their complaint is that nothing about the advertisement for facilities and cash management services alerted them to anything that would have made them pay particular attention to it. Their case is that they would have paid attention to it had it conveyed that the provision of security services to the MyCiti and public transport interchanges was involved. In my judgment, those allegations were sufficient to establish the applicants' standing.

[46] It can hardly be expected of someone who scanned a number of advertisements to say after the event that one of them that made no impact had misled him or her. The complaint was a different one. It was to the effect that 'we scan the advertisements for tenders of possible interest and consider those that are, but nothing about this advertisement, which we later discovered concerned a service that we could have tendered to provide, was sufficient to alert us to the fact that it concerned a matter in which we would have been interested. Had the advertisement been worded in a manner compliant with the legal requirements, it would have attracted our attention'.

[47] I consider that much to be plainly implicit in the averment, in para 111 thereof, by the deponent to the applicants' supplementary founding affidavit that '[t]*he applicants were not aware that the provision of security services at the PTI sites (that they were servicing) formed part of the ... tender*'. And at para 25 of the applicants' principal replying affidavit, the same deponent responded as follows to the averments in the City's answering affidavit (at para 12-13) that the applicants had failed to adduce evidence by any employees who had examined and been misled by the advertisement:

> '*25.1 The allegations contained in these paragraphs are denied. The facts demonstrate that the Applicants considered the advertisement, and could not ascertain that there were security services being sought by the city in the ... tender. This is self-evident from the fact that:*

25.1.1 The [impugned] *tender was published on the same date, and in the same manner as the general security tender; and*

25.1.2 it is not disputed by the City that the Applicants considered the advertisement placed in the newspaper, nor that the Applicants check the City's website.

25.2 The Applicants both submitted bids for the general security tender [advertised on the same page].

25.3 Obviously, were the Applicants aware of the fact that security services were required in terms of the [impugned] *tender, they would in fact, then have proceeded to take steps to tender for such. They were not aware of such, and only became aware once they were advised that their services would no longer be required.*'

As noted above, [17] the advertisement for the general security tender appeared virtually side by side with, and in same block of advertisements, as the advertisement of the impugned tender. The fact that the applicants responded to one of the advertisements establishes, as a matter probability, that they had regard to the published advertisements as a whole, and substantiates their evidence that the impugned advertisement failed to attract their interest.

[48] The applicants also contended that the award of the contract to the joint venture fell to be reviewed and set aside on the grounds that the joint venture's tender had been non-responsive. They contended that certain of the 'key personnel' that required to be identified in the tender submission were not employed by any of the tenderers and that one of the individuals identified as key personnel did not possess the stipulated minimum experience for the position. It is not necessary, in the context of the findings made about the non-compliance of the advertisement, to go into these additional grounds for the review application. Suffice it to say, however, that in the event that the attack on the advertisement had not succeeded, I would have dismissed the application on the additional grounds because the applicants, who sued as so-

[17] See para [9] above.

called ‘own-interest litigants’, lacked standing to impugn the award. If the advertising process had been compliant, the applicants would have needed to have tendered unsuccessfully for the contract to show standing to challenge the award of the contract on the basis of the alleged non-responsiveness; cf. *Giant Concerts* supra, at para 42-43. If the advertisement had been regular, and the applicants had nonetheless failed to submit a tender, they would have been unable to demonstrate that their cognisable interests had been directly affected by the unlawful award of the contract to any of the persons who did submit tenders.

[49] Turning to the appropriate remedy. The applicants are plainly entitled to an order declaring the non-compliant advertisement and consequential award of the tender contract to the joint venture to be invalid. The question is what the consequential relief should be. The services being rendered in terms of the awarded contract are important and for the public benefit. The applicants’ amended notice of motion acknowledges that in the circumstances it cannot be expected of the court to make an order setting aside the contract with immediate effect.

[50] The City’s counsel argued that the contract period is so advanced that it may as well be allowed to run its course. Similar contentions were advanced on behalf of the third to fifth respondents. I do not agree. The court is given a wide discretion by s 172(1)(b) of the Constitution and s 8(1) of PAJA to make an order that is just and equitable. A just and equitable order should deal with the consequences of the invalidity in a manner that balances the need not to dislocate the provision for the public’s benefit of the procured services, on the one hand, with the importance, on the other hand, of upholding the rule of law and encouraging public administrators to discharge their duties faithfully in accordance with the Constitution and applicable laws. It should also provide the applicants with effective relief for the infringement of their rights. Endorsing the continuation of the awarded tender contract until its scheduled

termination by effluxion of time would not provide effective relief. On the contrary, in a practical sense, it would be tantamount to condoning the unlawful procurement process.

[51] It seems to me that the appropriate remedial relief would be to suspend the operation of the order of invalidity for a period adjudged reasonably sufficient to permit the City to make arrangements for the lawful procurement of the required services. Whether that is done by issuing a fresh invitation for a tender to provide the bundle of services currently being provided by the joint venture, or by way of some other arrangement, such as that which obtained before the impugned contract commenced in mid-2021, is for the City, not the court, to determine. Leave will be granted to the City to apply, if necessary, and on good cause shown, for an extension of the period afforded to it to make alternative arrangements if it is for any practical reason unable to comply timeously with that part of the order.

[52] The applicants have been substantially successful and are entitled to their costs of suit. Their employment of two counsel was reasonable in the circumstances. The costs order in favour of the applicants shall operate only against the first respondent, as the party responsible for the unlawful tender process. I do not consider that the opposition by the third to fifth respondents in defence of the commercial interests of the joint venture, albeit ultimately unsuccessful, was unreasonable. The effect of the costs order that will be made is that they will be left to bear their own costs.

[53] In the result, an order will issue in the following terms:

1. The first respondent's advertisement of tender number 226S/2020/21 is declared to have been non-compliant with the provisions of the City of Cape Town's supply chain management policy and the prescripts of s 217(1) of the Constitution, and consequently invalid.

2. Consequent upon paragraph 1, the award of the contract in tender number 226S/2020/21 to a joint venture comprised of the third, fourth and fifth respondents is also declared invalid, and reviewed and set aside.

3. The operation of the declarations of invalidity in paragraphs 1 and 2 and the setting aside of the contract in paragraph 2 is suspended for a period of six months from the date of the order to enable the first respondent to make such alternative arrangements as it may see fit for the lawful procurement of the services currently being provided in terms of the contract concluded in tender number 226S/2020/21.

4. The first respondent is granted leave to apply on good cause shown, and before the expiry thereof, for an extension of the period referred to in paragraph 2 if the practical exigencies so require.

5. The first respondent shall pay the applicants' costs of suit, including the fees of two counsel.

A.G BINNS-WARD
Judge of the High Court

APPEARANCES

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