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

Case No. 14485 / 2021
Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 6 February 2023
Date of judgment: 20 February 2023

In the matter between:

JK STRUCTURES CC	Applicant
and	
THE CITY OF CAPE TOWN	First Respondent
THE CITY MANAGER, CAPE TOWN	Second Respondent
NEJENI CONSTRUCTION & MANAGEMENT (PTY) LTD	Third Respondent
MARTIN AND EAST (PTY) LTD	Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The Construction Industry Development Board Act 38 of 2000 ('the CIDB Act') was brought into operation on 1 December 2000. The current litigation arises out of a dispute between the applicant close corporation, which is an emerging enterprise in the construction industry, and the City of Cape Town. It concerns the interpretation and implementation of the CIDB Act and related regulations.

[2] The dispute arose out of the City's rejection of a tender submitted by the applicant for appointment to a panel of contractors to be used by the City for the replacement of sewer pipes. The invitation to tender issued by the City was directed at procuring up to three contractors to be available to undertake the work as and when required over a three-year period. The type of contractual arrangement in terms of which the contemplated panel of contractors would be constituted is known in procurement parlance as a 'framework agreement'. Because the currency of the framework agreement was to extend over a term of three years, the related tender was called a 'term tender'.

[3] The bid initiation documentation reflects that the City envisaged that it could expend as much as R180 million, in total, on the work during the stipulated period. The tender invitation was predicated on the work being undertaken by way of a series of individual works project contracts to be concluded with one or the other of the successful tenderers during the term of the contractors' appointment. The invitation made no mention of the forementioned amount of R180 million, but it did stipulate that the value of each of the works contracts to be concluded under the framework to be established by the award of the tender would fall within a range between R1 million and R6 million.

[4] The invitation to tender issued by the City stipulated that tenderers were required to be contractors registered in terms of the CIDB Act with a minimum grading of 7CE. I shall come to an explanation of the relevant grading system presently. It is sufficient at this stage to point out that contractors with a 7CE grading are considered qualified to undertake a civil engineering (hence the 'CE' designation) works contract with a tender value of up to R60 million.[1] The City determined the 7CE grading requirement by the dividing the envisaged expenditure of R180 million by 3, being the number of years over which the contractual relationship provided in the tender invitation was intended to extend. Hence its requirement that only contractors graded as qualified to undertake a construction works contract with a

[1] In terms of Table 8 in reg. 17 of the Construction Industry Development Regulations, 2004, published in GN 692 in GG 26427 of 9 June 2004, as amended in GenN 357 of 5 July 2019.

tender value of R60 million would be considered. In doing so, it purported to be acting in terms of reg. 25(1) and 25(1B) of the Construction Industry Development Regulations, 2004 ('the regulations').

[5] Regulation 25(1) and (1B) of the regulations provide as follows:

'(1) Subject to subregulation (1A), in soliciting a tender offer or an expression of interest for a *construction works contract*, a client or employer must stipulate that only submissions of tender offers or expressions of interest by contractors who are registered in the category of registration required in terms of subregulation (3) or higher, may be evaluated in relation to *that contract*.

….

(1B) Where *a contract* involves construction works over an agreed number of years-

(a) on an 'as and when required' basis;

(b) of a routine nature; or

(c) grouped into identifiable and similar components where an instruction to proceed to the construction of the next component is conditional on the successful completion of the previous component, the value of that contract may *for the purpose of subregulation (1)*, be taken at its annual value.'

Sub-regulation (3) referred to in sub-regulation (1) states:

'The category of registration for contractors whose submissions of tender offers or expressions of interest qualify to be evaluated in terms of subregulation (1), is-

(a) a contractor grading designation not lower than that derived from-

(i) the selection of a single class of construction work that best describes *the construction works contract* for which tender offers or expressions of interest is invited, or the broad technical capabilities required of the contractor, provided that if more than one class of works equally describes the construction work for which tender offers are invited, then an alternative class of work may also be selected in terms of this subparagraph, but not more than two classes of work may be so selected; and

(ii) the identification of the tender value range based on the estimated tender value where expressions of interest are called for or tenders are advertised and the tendered price where tenders are evaluated, and where that estimate is within 20 per cent of the lower limit of that tender value range, the tender value range immediately below that tender.

(b) from a date determined by the Minister in the Gazette, the recognition status in terms of a best practice contractor recognition scheme in relation to the capabilities of the contractor concerned but if a requirement in terms of this paragraph is set, it must be justifiable in respect of the quality of the procurement.'

(Italicisation provided to highlight that the quoted provisions are concerned only with contracts that are 'construction works contracts' within the meaning of reg. 25(1).)

It is common ground that sub-regulation 25(3)(b) found no application in the current case.

[6] The applicant's tender was not evaluated by the bid evaluation committee. It was rejected as non-compliant because the applicant's registered grading was lower than 7CE.

[7] The applicant's registered grading was 6CE when it submitted its tender for appointment to the panel of contractors with whom the City would contract to undertake the required works projects during the stipulated three-year period. A 6CE grading denoted a recognised capability to undertake a construction works

contract with a tender value of up to R20 million. The applicant's 6CE designation was supplemented by a PE designation. The 'PE' denotes registration as '*a potentially emerging enterprise*'. (Registration as a potentially emerging enterprise requires that the enterprise concerned be substantially owned and managed by previously disadvantaged persons.[2]) Notwithstanding the stipulated 7CE grading requirement, the applicant was under the impression that its tender would nevertheless qualify for consideration by virtue of reg. 25(8), alternatively, in terms of reg. 25(7A).

[8] Regulation 25(8) provides:

'Within the framework of a targeted development programme promoted by a client or employer, that client or employer may accept for evaluation tender offers or expressions of interest by a contractor who is registered as a potentially emerging enterprise in terms of these Regulations at a contractor grading designation, one level higher than the contractor's registered grading designation, if that client or employer-

(a) is satisfied that such a contractor has the potential to develop and qualify to be registered in that higher grade; and

(b) ensures that financial, management or other support is provided to that contractor to enable the contractor to successfully execute that contract.'

And reg. 25(7A) provides:

'An organ of state may subject to its procurement policy and notwithstanding anything to the contrary contained in this regulation, evaluate and award a tender offer from a tenderer who is registered but who tendered outside of his or her tender value range as contemplated in regulation 17, provided that-

[2] See reg. 13 of the regulations.

(a) the margin with which the tenderer exceeded his or her tender value range contemplated in regulation 17, is reasonable;

(b) the award of the contract does not pose undue risk to the organ of state;

(c) the tender offer in all other aspects comply with these Regulations; and

(d) the report referred to in regulation 21 or 38(5) and (6), indicates whether this subregulation was applied in the award of the tender.'

[9] The applicant also contended that the City had in any event been misdirected in its application of the regulations. It contended that the value of the individual construction works contracts to be concluded under the framework arrangement at which the tender invitation was directed was the relevant determinant for specifying the minimum qualifying grading qualification that the tenderers needed to have, *not* the anticipated total expenditure by the City pursuant to the framework agreement. An alternative argument advanced by the applicant was that the City had erred by applying the provisions of reg. 25 as if the project works were to be undertaken by a single contractor, whereas the intention was to treat with a panel of contractors. In that regard it argued that where it was contemplated that the work would be done between three contractors the annualised tender value (R60 million in this case) fell to be divided by three for the purposes of determining the relevant tender value range in Table 8 of the regulations.

[10] The City's response to the applicant's reliance on reg. 25(8) was that the sub-regulation did not apply because the City does not have a 'targeted development programme'. As to reg. 25(7A), it explained that, for the purpose of para (a) thereof, it would not consider any margin greater than 20 percent to be reasonable. Having regard to what the City treated as the annualised value of the tender (R60 million), it considered that the applicant was exceeding its maximum tender value range (R20 million) by 300 percent.

[11] It bears relating that the applicant had previously been contracted, apparently satisfactorily, to render the selfsame type of construction work in terms of an immediately preceding framework contract with the City. The required grading stipulated by the City for the equivalent framework contracts in the preceding term when the applicant had successfully tendered to be appointed to the panel from which the works project contractors had been selected had been 4CE.[3] Indeed, the bid specification committee established to determine the specifications for the tender currently in issue also initially fixed a 4CE grading requirement.

[12] The bid specification committee's initial stipulation was in line with the guidance provided in the City's '*Guidelines for Compilers of Term Tender Contract Documents, Volume 1, Civil Construction Works*'.[4] The Guidelines refer to the type of contract involved in the tender in issue in the current case as a 'framework contract (panel type)' as distinct from a 'framework contract (winner-takes-all type)'. It is convenient to quote (warts and all) the Guidelines' description of framework agreements in full, for it gives a good idea of the nature of the agreement that was to be concluded between the City and the successful tenderers:

'FRAMEWORK AGREEMENTS

The CIDB's Practice Note # 15 on Framework Agreements (Version 3 -August 2010) introduces the subject as follows:

"Framework agreements provide a convenient means for employers to obtain goods, services or works from contractors within a defined scope on an "as instructed" basis over a set term without necessarily committing to any quantum of work. Normally the employer appoints a number of contractors to provide goods commerce services or works in terms of a framework agreement following a competitive selection process e.g. qualified procedure or open procedure."

[3] The applicant's appointment in terms of the preceding framework agreement was ultimately obtained after a litigious challenge to the City's initial decision to exclude it.
[4] Version 1, October 2014.

And also quotes from ISO 10845-1, Construction procurement – Part 1 : Processes, methods and procedures, which it says

“defines a framework contract as a “agreement between an employer and one or more contractors, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged”

and further quotes from ISO 10845-1 as follows

“when awarding contracts based on a framework agreement, the parties may not under any circumstances, make substantial amendments to the terms laid down in that framework agreement. Employers should not use framework agreements improperly, or in such a way as to prevent, restrict or distort competition.”

As can be seen from the above, the terms “agreement” and “contract” are not used consistently.

In these Guidelines, and in the example documents they apply to, “framework agreement” as used above is replaced by framework contract (except ...).

In conclusion, therefore, City of Cape Town contracts awarded in respect of term tenders comprise

a) The initial framework contract, under which

b) goods services or works are carried out as individual contracts (called “batch”, “task” or “package orders” in the abovementioned CIDB practice note), But which are intricately tied to the framework contract. As an example, in term tenders for **construction works** such contracts are called works project contracts (or simply **works projects**), and where

c) the framework contract document sets out in comprehensive detail, inter alia, the terms, conditions, pricing data and scope of work for works

projects which may be allocated in terms of a secondary selection process or on a winner-takes-all basis as stipulated in the contract, and

d) works project contract documents themselves contain, inter alia, the minimum necessary additional terms, conditions, pricing data and scope of work specific to that particular works project.'

[13] It follows that the framework agreements concluded with the successful tenderers did not directly engage them to undertake specific works. The 'works project contracts' or (to use the language of the regulations) 'construction work contracts' (as mentioned, each falling within a contract value range of between R1 million and R6 million) contemplated in the tender invitation fall to be separately concluded by the City with the successful tenderers on an 'as and when needed' basis during the three-year term of the framework agreement. Those contracts will be allocated in terms of a secondary selection process. The City might well end up expending much less on project works during that period than the R180 million figure used for the purposes of framing the tender invitation. What it will spend will be the sum of its expenditure on the individual construction works contracts concluded during the term of the framework agreement.

[14] The Guidelines provide that in a tender invitation pertaining to a framework agreement such as that involved in the current case '[t]*he* ***works projects value*** *must be stated, which also determines what CIDB contractor grading is applicable*'.[5] The 4CE grading initially determined by the bid specification committee was fixed in accordance with that provision in the Guidelines.

[15] The requirement was amended to 7CE only after an official in the City's supply chain management department drew attention to a directive-memorandum issued by the municipal manager to the City's director: supply chain management, dated 4 August 2020. The intended purpose of the memorandum was to clarify how bid specification committees should determine the applicable minimum grading

[5] Bold font in the original. Underlining supplied for emphasis.

qualification required of contractors in respect of multi-year contracts. The nub of the City Manager's opinion was expressed in the following passage of the memorandum:

'**Determining the total value of a tender**

Part of the duties of the BSC [bid specification committee] is the compilation of a tender document. Every tender is compiled with an estimated total value which would determine the applicable tender process and the documentation required from bidders. The tender value ranges set out in table 8 of regulation 17 accommodate the impreciseness of estimated total values. An employer can never know the exact value that the successful tenderer will offer and therefore the estimated total value of the tender is what an employer has at hand at the bid specification stage.

The provisions of regulation 25(1B) only provide a discretion to deviate from using the total value of the contract and to use an annual one.

What the Guidelines provide, the use of the value of each works project, has no basis in law. Every tender is specified with an estimated value in the bid initiation form and therefore the provisions of the CIDB regulation can and should be applied in all instances.'

The memorandum concluded:

'Applying the interpretive principle expressed by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6], regulation 25(1B) is discretionary in how a total value of a term tender can be broken down. However, exercise of the said discretion ought to be objective and in line with the purpose of implementing CIDB contractor gradings in public procurement.

[6] [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18. Reference to *Endumeni* loc. cit. was described 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 as having become '*a ritualised incantation*' in regard to questions of interpretation. The SCA cautioned '*It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations.*'. I venture that is liable to happen only when sufficiently close attention is not paid to everything that Wallis JA compressed into a single paragraph.

The manner in which the City has exercised its discretion, i.e. the adopting of the Guidelines undermines what is contained in the remaining provisions of the Regulations, which I caution against.

For your attention and action.'

[16] The argument addressed by counsel for the City was directed in essence at supporting the City Manager's expressed opinion on the application of the regulations. For the reasons that follow, I have concluded that the City Manager's criticism of the relevant provisions of the Guidelines was incorrect and that his construction of the applicable regulations was in fact undertaken at odds with the principles rehearsed in *Endumeni* supra, loc.cit.

[17] I would stress the following parts of para 18 of *Endumeni* for the purpose of the required interpretative exercise: (i) 'the "inevitable point of departure is the language of the provision itself", 'read in context and having regard to the purpose of the provision', (ii) 'whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax to the context in which the provision appears; [and] the apparent purpose to which it is directed', (iii) 'where more than one meaning is possible each possibility must be weighed in the light of all these factors' and (iv) '[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'. The stated principles highlight the particular importance when construing written language to be mindful of context and apparent purpose.

[18] It should be evident from discourse so far that it is the import of certain of the regulations that is centrally in dispute in the current matter. The regulations fall to be construed, as far their language allows, consistently with the governing Act, as their evident purpose is to facilitate the implementation of the statute. If the language of the regulations were, on any interpretation, irreconcilable with the Act, it would

suggest that the Minister had acted outside his or her powers in making them.[7] Reaching that conclusion would be a last resort.

[19] According to its long title, the purposes of the CIDB Act were the establishment of the Board and the implementation of '*an integrated strategy for the reconstruction of, growth and development of the construction industry and to provide for matters connected therewith*'. The preamble gives as one of the inspirations for the legislation Government's '*vision of a construction industry development strategy that promotes stability, fosters economic growth and international competitiveness, creates sustainable employment and addresses historic imbalances as it generates new construction industry capacity*'. It also speaks of '*the specialised and risk-associated nature of construction plac*[ing] *an onus on the public sector client to continuously improve its procurement and delivery management skill in a manner that promotes efficiency, value for money, transformation and the sustainable development of the construction industry*'. It is evident that by '*transformation*' the Act envisages the effective outcome of strategies to be implemented to advance meaningful participation in the construction industry by the '*emerging sector*'. The '*emerging sector*' is defined in s 1 as '*that sector of the construction industry which comprises emerging enterprises*'. An '*emerging enterprise*' is by definition '*an enterprise which is owned, managed and controlled by previously disadvantaged persons and which is overcoming business impediments arising from the legacy of apartheid*'. The facilitation of involvement in the construction industry by emerging enterprises is quite obviously part of Government's stated vision of a strategy that '*addresses historic imbalances as it generates new construction industry capacity*'. The applicant close corporation is an '*emerging enterprise*' within the defined meaning of the term. The self-declared objects of the Act include promoting the inclusion of enterprises like the applicant in the construction industry and broadening the contractor base from which organs of state and the private sector procure construction work services.

[7] Section 33(1) of the CIDB Act empowers the Minister 'to make regulations not inconsistent with this Act'.

[20] The Act requires the Board to keep and maintain a register of the prescribed particulars of contractors who are registered with the Board.[8] The Board is mandated to establish and maintain a national register of contractors that '*categorises contractors in a manner that facilitates public sector procurement and promotes contractor development*'.[9] A contractor may not undertake, carry out or complete any construction works for public sector contracts awarded in terms of competitive tender or quotation unless it is registered with the Board.[10] The evident purposes of registration and categorisation are the management of risk. In this regard the statute is directed at minimising the risk inherent in the conclusion of construction works contracts with contractors which have not shown that they are appropriately qualified and financially sound enough to undertake the work involved.

[21] The Minister[11] is charged with prescribing the requirements for registration '*taking into account the different stages of development of contractors in the construction industry, the development of the emerging sector and the objectives of the Act*'.[12] The Minister must also prescribe ' *the manner in which public sector construction contracts may be invited, awarded and managed within the framework of the register and within the framework of the policy on procurement*'.[13] Every organ of state '*must, subject to the policy on procurement, apply the register of contractors to its procurement process*'.[14]

[22] Insofar as relevant to the current matter, the CIDB Act is concerned with the regulation of contractors and construction works, as defined in s 1 of the statute. '*Contractor*' is defined to mean '*a person or body of persons who undertakes to execute and complete construction works*'. The specially defined meaning of '*construction works*' is '*the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including*

[8] Section 17.
[9] Section 16(1).
[10] Section 18.

[11] '*Minister*' is not defined in the statute, but it would appear that the CIDB Act is administered by the Minister of Public Works.
[12] Section 16(5).
[13] Section 16(3).
[14] Section 16(4).

building and engineering infrastructure'. The defined meaning of '*client*' also bears noting: '*a person, body or organ of state who enters into a contract to procure construction works*'.

[23] Reference to the employment of those defined terms in the body of the statute confirms that the legislation is centrally directed at the regulation of contracts for the undertaking of construction works. This is especially evident in the provisions of Chapter Three (ss 16-21) of the CIDB Act. The heading to the Chapter spells out that its provisions are directed at the creation of a register '*that will support risk management in the tendering process, provide a means to assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors*'. Section 18(1) prohibits a contractor from undertaking, carrying out or completing any construction works unless he or she is registered and holds a valid registration certificate. The registration certificate in question will reflect the contractor's 'category status'.[15] The contracts to which s 18 refers are the contracts in terms of which the construction works are undertaken, i.e. construction works contracts. Section 19 of the CIDB Act provides for the cancellation of a contractor's registration. The effect of cancellation is, in terms of s 19(5)(b), that the affected contractor '*may not perform any act which he or she was entitled to perform as a registered contractor*'. What acts are contractors qualified to perform in terms of their registration? Construction works. Section 19(7) bears out the answer; it provides: '*A contractor whose name and particulars are removed from the register in terms of this section, during the currency of a public sector contract, may be permitted to complete the construction works or portion thereof, as determined by the Board.*'. The reference in reg. 25 to '*construction works contracts*' is entirely consistent with that.

[24] A 'construction works contract' is, according to the ordinary contextual import of the words making up the term, an agreement in terms of which a client contracts with a contractor to undertake to execute and complete construction works. As

[15] Section 17.

apparent from the description thereof set out above,[16] a framework agreement is *not* a construction works contract.

[25] Counsel were agreed, correctly so, that the CIDB Act and the regulations do not contain any reference to framework agreements; they are concerned only with construction works contracts. Construction work is not executed in terms of a framework agreement. The construction work contemplated in terms of the provisions of a framework agreement is not undertaken in terms of that agreement, but rather in terms of the construction works contract(s) that the framework agreement contemplates might subsequently be awarded to the contractors who are party to the framework agreement. The regulations are relevant for the purposes of a framework agreement because there would be no point in concluding a framework agreement with contractors that were not qualified to enter into the construction works contracts to be made later in terms of the agreed framework. The framework agreement in the current matter limits the value of each of those possible contracts to a maximum of R6 million. Contractors with a 4CE registration are permitted to execute and complete construction works contracts with a tender value of R6 million.

[26] The City's counsel argued that notwithstanding the limits on the maximum anticipated value of the individual construction works contracts to be concluded during the three-year term of the framework agreement, the '*tender value*' was R180 million. He emphasised the use of the expression '*tender value range*' in the regulations, suggesting that the 'tender value' was the anticipated total expenditure in terms of the framework agreement, and not of the individual construction works contracts that might (or might not) be concluded pursuant to it. He submitted that it was the 'tender value', so understood, that was germane, not the contract values of the construction works contracts that might be concluded in terms of the framework.

[27] In my judgment the argument advanced on behalf of the City in that respect has to fail because it overlooks that the CIDB Act and the regulations are not concerned with framework agreements. They are concerned only with construction works contracts.

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[16] In paragraph [12].

[28] The expressions '*tender value*' and '*range of tender values*' are not defined in the CIDB Act and regulations, but contextually they can pertain only to the type of contract with which the legislation is engaged, viz. construction works contracts. The term '*tender value range*' does not appear in the CIDB Act, and '*tender value*' is used only twice (in s 22(3) and s 23(2)). Both occurrences of the latter term are in relation to '*construction contracts*'. As I have stressed, framework agreements are not '*construction contracts*'. Regulation 1, which is the definitions provision in the regulations, provides that '[i]*n these Regulations, unless the context otherwise indicates, every word takes the meaning as defined in the Act*'. As '*tender value*' is not specially defined in the CIDB Act, it takes its meaning, where it is used there, from the context; i.e. in relation to '*construction contracts'*, not framework agreements.

[29] Regulation 17, which contains Table 8 setting out the applicable gradings for which registered contractors can qualify, states '[a] *contractor registered in a contractor grading designation indicated in column 1 of the Table 8 below, is considered to be capable of undertaking a contract in the range of tender values indicated in column 2 of that table in the class of the construction works* [in this case, civil engineering] *to which the category of registration of that contractor relates*.' Table 8, which is periodically adjusted, in terms of reg. 17A, to take account of the changing value of money, has, since 5 October 2019, set out the following grading criteria in respect of the ability of a contractor to undertake a contract:

TABLE 8

Grade	**Current (TVR)**	**Proposed Adjustment (TVR)**
1	200 000	500 000
2	650 000	1 000 000
3	2 000 000	3 000 000
4	4 000 000	6 000 000

5	6 500 000	10 000 000
6	13 000 000	20 000 000
7	40 000 000	60 000 000
8	130 000 000	200 000 000
9	No Limit	N/A

The amounts in the third column of Table 8 have, since October 2019, been the respective upper limits for the corresponding grades identified in the first column. The amounts in the second column applied before the amendments effected from October 2019. 'TVR' is an acronym for '*Tender Value Range*'. A consideration of Table 8 shows that the term 'tender value range' relates to the range between the lowest and highest tender values for each of the grades identified in the first column. Thus, for example, the tender value range for Grade 7, which slots in between Grades 6 and 8, is between R20 million (the upper limit for Grade 6) and R60 million (the lowest value in the range applicable to Grade 8).

[30] The manner of determination of contractor grading determinations is regulated by regs. 11 and 12. It involves an evaluation of (i) the contractor's 'financial capacity'[17] and (ii) the contractor's 'works capability'.[18]

[31] One of the three factors to which the Board has regard, in terms of reg. 11(2), for the purpose of establishing a contractor's 'financial capacity' is the completion by the contractor within the preceding five years of at least one construction works contract exceeding a total <u>contract value</u> of an amount stipulated in the fourth column of Table 1 (which appears in reg. 12(1)). The heading to the fourth column is '*Largest Contract (22.5% of Upper Limit of <u>tender value</u> range. 20% for Grade 2*', which suggests that the expressions '*contract value*' and '*tender value*' are used synonymously. Acknowledging the synonymity is the only way to sensibly reconcile the provisions of reg. 11(2)(b) and reg 12(1).

[17] Reg. 11(2).
[18] Reg. 11(5).

[32] A contractor's 'works capability' is, in terms of reg. 11(5)(b), determined by establishing whether '*the contractor has during the five years immediately preceding the application completed at least one construction works contract in the category of construction works for which the contractor wishes to register, of which the value equals or exceeds the amount of that works capability designation as contemplated in regulation 12(7)*'. Regulation 12(7) provides '*To qualify to be categorised in a specific works capability designation as indicated in columns 1 and 2 of table 5 below, a contractor must, in addition to the requirements of subregulation (5)* [which, as currently worded, applies only to the class of construction works "Electrical Engineering Works – designation EB"]*, have successfully completed a contract of at least the value indicated in column 3 of table 5 below.*'.

[33] Table 5 is reproduced below:

TABLE 5

Works Capability		
Designation	**Maximum Value of Contract That A Contractor is Considered Capable of Performing (R)**	**Largest Contract Executed in The Last 5 Years in The Class Of Construction Works Applied For (R) Largest Contract (22.5% of Upper Limit of tender value range, 20 % for Grade 2)**
1	200 000	-
2	650 000	130 000
3	2 000 000	450 000
4	4 000 000	900 000

5	6 500 000	1 500 000
6	13 000 000	3 000 000
7	40 000 000	9 000 000
8	130 000 000	30 000 000
9	No Limit	90 000 000

One would expect the amounts for each grade in the second column of Table 5 to correspond with the upper limits for those grades in Table 8 in regulation 17. That they do is confirmed when they are checked against the amounts in the second column of Table 8.[19]

[34] One would also have expected Table 5 to have been revised to correspond with the amounts reflected in the third column of Table 8 once the latest revisions to the latter table came into effect on 5 October 2019, but judging by the copy of the regulations published in Juta's regulations service that does not yet appear to have been done. However, what is relevant for present purposes is that reading Table 5 with Table 8 provides further confirmation there is no difference in meaning between '*tender value*' and '(construction works) *contract value*' as those terms are employed in the regulations. A contractor is considered qualified to execute construction works of contract or tender value falling within the tender value range applicable in respect of the grading designation assigned to it in terms of its registration.

[35] If the interpretation propounded by the City Manager were correct, it would give rise to startlingly anomalous consequences. In the context of the situation of a contractor like the applicant, it would imply disqualifying it from appointment to a panel of contractors constituted to undertake construction work contracts each not

[19] Table 8 was reproduced in paragraph [29] above.

exceeding R6 million in contract or tender value despite the applicant having been graded by the Construction Industry Development Board as capable of undertaking construction works contracts of up to R20 million in value. Put otherwise, it is an interpretation that would exclude any contractor from tendering for a framework agreement that would potentially lead to construction works contracts each worth no more than R6 million being awarded to it during a three-year period unless the contractor had been graded as able to execute construction works contracts up to ten times that value.

[36] The considerations identified in the preceding paragraph highlight the unbusinesslike results that would follow were the City Manager's interpretation applied. It is an interpretation that not only just does not make business sense; it is also one that, were it applied, would undermine some of the principal objects of the CIBD Act. It would imply that the City could employ only relatively large and well-resourced contractors to undertake works projects well within the established capability of much smaller contractors. It needs no explanation to appreciate that that would not foster the transformation of the construction industry at which the CIDB Act is in part directed.

[37] The foregoing analysis of the CIDB Act and the regulations in accordance with the precepts rehearsed in *Endumeni* supra, loc.cit. and stressed in paragraph [17] above impels the conclusion that the City Manager's interpretation was erroneous, and that the City's 'Guidelines' document referred to earlier[20] proceeded, in relevant part, in accordance with the correct construction of the relevant legislation.

[38] The City Manager's misconceived interpretation proceeded from a misunderstanding of the import of reg. 25(1B) of the regulations. He appears to have thought it could pertain to a framework contract of the type involved in the current case. Yet, as explained above, it is clear, when regard is had to reg. 25(1), 25(1A) and 25(1B) read together, that the word '*contract*' in reg. 25(1B) relates to a '*construction works contract*' within the meaning of that term in reg. 25(1).[21] The

[20] In paragraphs [12][12] to [14].
[21] Sub-regulations 25(1), 25(1B) and 25(3) are quoted, with relevant highlighting, in paragraph [5] above.

object of reg. 25(1B) is to modify the effect of reg. 25(1) in cases where the *construction works project* in question is to extend over more than one year on any of the bases stated in paragraphs (a) to (c) of reg. 25(1B). There has been no suggestion that any of the construction works contracts, each valued at no more than R6 million, that might be concluded under the regime to be set up by the framework agreement in issue will be executed over a period exceeding a year. The framework agreement's three-year term is also an entirely different concept to the term of any construction works contract that might be concluded pursuant to the framework agreement.

[39] It is well established that decisions made in respect of the implementation of public procurement, including issuing invitations to tender and adjudicating the elicited bids ordinarily constitute administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); see e.g. *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135 (18 October 2002; [2003] 1 All SA 424 (SCA); 2003 (1) SA 460 (SCA) from para 5. That is undoubtedly so in respect of procurement by municipalities, which is governed by the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA'). In relevant part, the MFMA reiterates and gives effect to s 217(1) of the Constitution, which requires organs of state in the national, provincial and local spheres of government to undertake procurement of goods and services '*in accordance with a system which is fair, equitable, transparent, competitive and cost effective*'. The City, correctly, accepted that its decisions in the tender process in issue in the current case amounted to administrative action.[22]

[40] The City is required by the MFMA to adopt and apply a supply chain management policy. Clause 123 of the City's policy provides that if a bid relates to construction works as contemplated by the Construction Industry Development Board Act, then the requirements of that Act must be taken into account in the bid

[22] For examples of cases where the contrary has been argued, see *Logbro* supra, *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2000] ZASCA 62 (9 November 2000); 2001 (1) SA 853 (SCA), *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148 (8 September 2014), *Mzanzi Fire and Security (Pty) Ltd v Durban University of Technology and Others* [2022] ZAKZDHC 12 (3 March 2022); [2022] 2 All SA 475 (KZD); 2022 (5) SA 510 (KZD) and *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* [2023] ZAWCHC 4 (19 January 2023).

documentation. That was purportedly done in the current case but, for the reasons discussed, it is evident that it was done based on a misconceived apprehension of the import of those requirements. The misconception, which led to a 7CE grading being stipulated as the minimum category status of contractor whose bids would be considered, when the regulations indicated that a 4CE grading would suffice, clearly resulted in unfairness to the applicant and probably also to other contractors who held the legally requisite grading to execute the contemplated construction works contracts but were excluded by the bid specification from tendering. It fundamentally tainted the procurement process, including the legality of the award to the two successful tenderers, Nejeni Construction & Management (Pty) Ltd and Martin and East (Pty) Ltd.[23] Those companies were cited in the application as the third and fourth respondents, respectively, but played no active part in the proceedings, thereby in effect abiding the judgment of the court.

[41] In its amended notice of motion, the applicant sought primary relief by way of an order in the following terms:

'2. In relation to the [City's] tender no. 134Q/202/21, a term tender for trenchless rehabilitation of sewers by pipe cracking ("the tender"), the requirement of the tender specification that bidders must have a CIDB grading of "7CE or higher" is declared to be unlawful;

3. Consequent on the declaration in prayer 2 above:

3.1 The approval of the tender specification is reviewed and set aside;

3.2 The approval and publication of the tender and the invitation of bids in response thereto is reviewed and set aside;

3.3 The tender evaluation process is reviewed and set aside

[23] *Cf. Seale v Van Rooyen NO and Others; North-West Province v Van Rooyen NO and Others* [2008] ZASCA 28; [2008] 3 All SA 245 (SCA); 2008 (4) SA 43 (SCA), at para 13.

3.4 The decisions holding the applicants bid non responsive are reviewed and set aside; and

3.5 The awards made to the third and 4th respondents in terms of the tender (and any contracts concluded with them pursuant thereto) are reviewed and set aside;
4. The [City] is granted leave to readvertise for the tender services on such lawful terms, conditions and specifications as it deems fit, having regard to the declaration in prayer 2 above'.

[42] The applicant's counsel submitted that it was entitled to the aforementioned relief on the grounds described in s 6(2)(d) and 6(2)(e)(iii) of PAJA, namely, that the administrative action was materially influenced by an error of law and that the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered. The submission was well made.

[43] The application for review was, however, arguably submitted outside the 180-day outer limit prescribed in s 7(1) of PAJA. If the 180-day limit was exceeded, the court would be precluded from entertaining it unless the time within which review proceedings had to be commenced was varied in terms of s 9(1) of PAJA.[24] Section 9(1) provides that the period may be extended by agreement between the parties, or failing such agreement, by the court on application. No agreement was made, and the applicant applied, in terms of its finally amended notice of motion, for condonation, if such were required, of the delay. The City opposed the condonation application. Section 9(2) of PAJA empowers the court to grant the application 'where the interests of justice so require'. Whether the period was exceeded depends on whether it fell to be calculated from the date the applicant first had knowledge of the 7CE grading qualification stipulation. It would not have been exceeded if the relevant date were either the date upon which it was informed of the rejection of its bid or date it was advised of the result of its internal appeal.

[24] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148 (9 October 2013); [2013] 4 All SA 639 (SCA) at para 26.

[44] The applicant was aware of the stipulated 7CE grading requirement when it read the invitation to tender. As mentioned, it considered that as the holder of a 6CE grading its bid would nonetheless qualify for consideration by virtue of reg 25(8). It did not appreciate that the City did not operate a targeted development scheme, and assuming that the City did, did not think to ask at the clarification meeting the City had with potential bidders about whether such a programme in fact existed.

[45] The stipulated grading in any event also begged the question about the role of reg. 25(7A) (quoted above), which affords an organ of state a qualified discretion in given circumstances '*to evaluate and award a tender offer from a tenderer who is registered but who tendered outside his or her tender value range as contemplated in regulation 17*'. In this regard, counsel on both sides acknowledged that there was what appeared at first blush to be what Mr *Newdigate* SC for the applicant described as 'a tension' between the provisions of reg. 25(1) and reg. 25(7A). Neither of them, however, ventured any argument on how the apparent tension fell to be resolved. It has proved unnecessary to do so in this matter, but without being determinative, it seems to me that the reg. 25(7A) could apply only when the applicable contractor grading designation referred to in reg. 25(3)(a)(ii) falls to be '*derived*' (rather than predetermined) in the second of two scenarios contemplated in that sub-paragraph.[25] That construction seems to me the only way in which the provisions of reg. 25(1), 25(3) and 25(7A) can be read harmoniously. On that approach, reg. 25(7A) would have found no scope for application in the adjudication of the tender in issue in the current case.

[46] The applicant was informed on 21 April 2021 of the rejection of its bid as non-compliant with the stipulated grading qualification and also because it omitted proof of the applicant's asbestos contractor certification. The applicant then lodged an appeal in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000. It requested certain information from the City to supplement its appeal. Some of the requested information was furnished by the City on 19 July 2021. The appeal was against both legs of the adverse decision. In respect of the first leg, the applicant

[25] Reg. 25(3)(a)(ii) is quoted in paragraph [5] above.

contended that the applicable grading requirement should have been stipulated as 4CE or 5CE. The applicant also contended that the City should not have rejected its bid without having due regard to the provisions of reg. 25(7A). In that regard it stressed that its ability to undertake the contract work had been demonstrated by its performance of construction works contracts under the previously subsisting framework agreement. (For the reasons given earlier I consider the applicant's invocation of reg. 25(7A) was misconceived, but that is by the by.)

[47] The City's internal appeal authority upheld the appeal against the rejection of the bid for non-compliance with the asbestos contractor certification requirement but dismissed the applicant's arguments based on reg. 25(7A) and (8). The appeal authority, consistently with the interpretation propounded in the City Manager's abovementioned memorandum-directive, held that the situation was regulated by reg. 25(1B). The appeal was dismissed on 6 August 2021, and papers in the current judicial review application were issued 19 days later, on 25 August 2021.

[48] The application for condonation is predicated on the assumption that the 180-day period stipulated in s 7(1) of PAJA fell to be calculated from the date it became aware of the stipulated 7CE grading requirement, which was sometime between 9 October and 13 November 2020. Mr *Farlam* SC for the City submitted that that was the time from which the clock started running. He contended that the time taken up by the internal appeal process did not stop the clock because the applicant's grievance about the 7CE stipulation was not susceptible to appeal in terms of s 62 of the Systems Act. The relevant regulations are not easy to construe, however, and I do not consider that the applicant's mistaken apprehension that reg. 25(7A) could afford the internal appeal authority the power to reconsider the rejection of its bid submission for non-compliance with the stipulated 7CE grading was unreasonable. The City certainly entertained the appeal.

[49] The City gave an undertaking, on 18 August 2021, a week before the institution of this application, that the tender award would not be implemented pending the determination of the litigation. The City's willingness to give the undertaking suggests that at the time it did not consider itself materially prejudiced by the institution of review proceedings. When the applicant required a

postponement on 12 October 2022 in order to amend its notice of motion when the matter came up before me for hearing, the City did at that stage complain of prejudice. Its complaint was addressed by the court directing, when it granted the postponement, that the City's undertaking would fall away.

[50] The character of the amended relief now sought by the applicant (described above as the 'primary relief') required that notice be given afresh to the third and fourth respondents because, unlike the case under the original notice of motion, the award of the tender to them became imperilled by it. It was for that reason that a postponement was necessitated so that those respondents could reconsider their non-participation in the proceedings. As mentioned, neither of them entered the fray, which suggests on the probabilities that they do not consider themselves materially prejudiced by the time and course the proceedings have taken. They have not placed any evidence before the court in opposition to the application for condonation or the primary relief.

[51] The case involves an important matter of principle affecting not just the current applicant, but potentially also many other contractors who are currently excluded from construction industry work because of the City's application of the CIDB Act and regulations in accordance with the instruction given by the municipal manager instead of the relevant provisions of the City's 'Guidelines' document. Mr *Farlam* acknowledged the importance, in the wider context, of obtaining clarity about how tender processes regulated by reg. 25 should be conducted. He argued, however, that the court should refuse condonation and strike the review application from the roll yet use the opportunity to opine in the judgment on the proper interpretation of the contentious provisions. That approach does not commend itself to me. It is not the courts' function to give advice, their function is to determine justiciable disputes. The general importance and usefulness of a determinative decision by the court on the questions in dispute weighs in favour of a conclusion that it would be in the interests of justice for the review application to be decided.

[52] For the reasons explained above, I consider that the delay caused by the appeal process was not unreasonable. It was adequately explained. No time was

wasted by the applicant in proceeding with the application after its internal appeal had been dismissed and there is no evidence that any of the respondents would be occasioned substantial prejudice if the application were entertained outside the prescribed time limit.

[53] Another factor weighing in favour of condonation is that, as apparent from findings made above on the proper interpretation of the regulations, the applicant enjoyed good prospects of success. It was because prospects of success in the main application are relevant to determining what might be in the interests of justice that applications for condonation in terms of s 9 of PAJA are often addressed at the end of the judgment rather than at the beginning as would ordinarily be appropriate on account of their preliminary character.

[54] All of the aforegoing considerations impel the conclusion that condonation, to the extent that it is required, should be granted.

[55] Mr *Farlam* argued that in the event that I came to the conclusion that I have done, the effect of any order reviewing and setting aside the tender process should be suspended for a reasonable period to enable the City, if so advised, to run a fresh tender process. His contention was in accordance with the course ordinarily followed in such circumstances.

[56] The applicant's counsel, however, resisted the idea. They submitted that it would be unfair, and result in the denial of meaningful relief to the applicant. In a post-hearing written submission, they argued that it would instead be just and equitable for the court to order '*that the declaration of unlawfulness and invalidity … be suspended in relation only to any construction works contracts allocated to the third and fourth respondents where work has already commenced as at the date of the court's order*'.

[57] The applicant's counsel submitted that while the City proceeded with a fresh tender process, it could contract for the necessary repair of its sewer pipes by

availing of reg. 36 of the Municipal Supply Chain Management Regulations[26] promulgated in terms of the MFMA and also clause 327 of the City's supply chain management policy. That course would be available - only (i) in an emergency; (ii) if the goods or services in question are produced or available from a single provider only; (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile; (iv) in respect of the acquisition of animals for zoos; or (v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes. The very object of suspending orders of invalidity in cases like this is to avoid situations of urgency and the creation of situations sufficiently exceptional to justify deviations from the prescripts of s 217(1) of the Constitution. I do not accept that the type of order proposed by Mr *Farlam* would deny the applicant effective relief.

[58] An order will issue in the following terms:

(a) Insofar as may be necessary, the period for the institution of these proceedings prescribed in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is extended, in terms of s 9 of the said Act, to 25 August 2021 (being the date upon which the proceedings were instituted).

(b) The City of Cape Town's tender process in tender no. 134Q/202/21 for the procurement of a panel of contractors with which to be able to contract for the trenchless rehabilitation of sewers by pipe cracking is declared to have been invalid and is reviewed and set aside, including the resultant award of the tender contract to the third and fourth respondents.

(c) The operation of the order in terms of paragraph (b) above is suspended for a period of six months from the date of this order to enable the City of Cape Town to make such alternative arrangements as it may deem meet to procure the services of a contractor or contractors to undertake trenchless rehabilitation of sewers by pipe cracking.

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[26] GNR 868 of 2005, published in GG 27748 of 30 June 2005, as amended by GNR 31 published in GG 40553 of 20 January 2017.

(d) The first respondent shall be liable to pay the applicant's costs of suit, including the fees of two counsel where such were engaged.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**J.A. Newdigate SC** **Nick de Jager**
Applicant's attorneys:	**Edward Nathan Sonneberg Inc** **Cape Town**
First respondent's counsel:	**P.B. Farlam SC**
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