IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: **A46/2019**

In the matter between:

FMP CONTRACTORS (PTY) LTD Applicant

and

THE MANGAUNG METROPOLITAN MUNICIPALITY 1st Respondent

BULA MAHLO TRADING AND PROJECTS (PTY) LTD 2nd Respondent

MWETI CONSTRUCTION (PTY) LTD 3rd Respondent

BLACK TOP CIVILS (PTY) LTD 4th Respondent

BATALALA CONSTRUCTION (PTY) LTD 5th Respondent

LESOLE AGENCIES (PTY) LTD 6th Respondent

CALANDRA TRADING 61 (PTY) LTD 7th Respondent

CORAM: **CHESIWE, J *et* MEINTJES, AJ**

HEARD ON: **12 AUGUST 2019**

JUDGMENT BY: **CHESIWE, J**

DELIVERED ON: **29 AUGUST 2019**

[1] This is a review application that was enrolled as an urgent matter in terms of Rule 6 (12) and brought in terms of Rule 53 of the Uniform Rules of Court. The review application was launched on the 27 March 2019. It was placed on the roll for the 6 May 2019 but did not proceed and was postponed to the 24 June 2019, where a court order was issued that the parties are to file further papers. On the 24 June 2019 another court order was granted in which the 3rd Respondent was granted condonation to file its answering affidavit and the matter was postponed to the 12 August 2019, and hearing of the matter proceeded on the latter date. The 1st, 2nd and 3rd Respondents opposed the application.

[2] The Applicant is FMP Contractors (Pty) Ltd, a company duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its main place of business at 39 Lily Vale Estate Bloemfontein, Free State.

[3] The 1st Respondent is the Mangaung Metropolitan Municipality, (the Municipality) a local sphere of government and organ of state as is meant in section 239 of Constitution of the Republic of South Africa, Act 108 of 1996, duly established in terms of the

Local Government: Municipality Structures Act, with main place of business at Bram Fischer Building Nelson Mandela Drive Bloemfontein, Free State.

[4] The 2nd Respondent is Bula Mahlo Trading and Projects (Pty) Ltd, a company duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at 1520 H Section, Botshabelo, Free State.

[5] The 3rd Respondent is Mweti Construction (Pty) Ltd, a company duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at Suite 403 Lougerdia Building 1262 Embankment Road Centurion, Gauteng.

[6] The 4th Respondent is Black Top Civils (Pty) Ltd, a company duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at 20 Victoria Road Willows Bloemfontein, Free State.

[7] The 5th Respondent is Batalala Construction (Pty) Ltd, duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at 4 Anandi Office Part West Wing 8 Burke Street Kesington B Randburg Gauteng.

[8] The 6th Respondent is Lesole Agencies (Pty) Ltd, duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at 58 Benbow Street Welkom, Free State.

[9] The 7th Respondent is Calandra Trading 61 (Pty) Ltd, a company duly registered and incorporated in terms of the relevant Statutes of the Republic of South Africa, with its registered offices at 1 Piet Street Hilton Bloemfontein, Free State.

[10] The Applicant sought the following relief in the application-

"1. THAT BID NO. MMM/BID442:2017/2018:APPOINTMENT OF PANEL FOR CONTRACTORS OF TRUNK ROUTES FOR IPTN ROADS INFRASTRUCTURE NETWORK (Phase 1C Chief Moroka Link Route) is reviewed and set aside alternatively is declared unlawful and is set aside;

2. The First Respondent is ordered to appoint the Applicant, together with those Respondents that scored nearest to the Applicant in the evaluation process up to an aggregate of 6 appointed contractors, for the works as set out in para 2.1 of the notice of motion."

[11] Background on this matter is briefly summarised as follows: On the 24 November 2017, the Municipality advertised a bid, MMM/BID 442:2017/2018,[1] in which a Panel of Contractors for construction of trunk routes for the Integrated Public Transport Network (IPTN) road infrastructure be appointed for a period of two years. The Municipality's intention is to construct bus lanes as part of the roads network due to its status as a Metropolitan Municipality. The Applicant and 2nd to 7th Respondents were

[1] Annexure "MPF1" attached to the Notice of Motion page 26.

appointed on this Panel of Constructors. However, four other companies were appointed on the panel but they are not part of the application before court neither were they cited in the application.

[12] The Bid Specification Committee was clear from the onset on the advert that the main objective of the advert was to appoint a Panel of Contractors. This was to ensure that all bidders be aware of the intention of the Municipality to appoint a Panel of Contractors was to capacitate contractors fast in order to avoid having to advertise every time if a contract for construction is to be put on tender. And thus this process remained cost effective.

[13] During the period between September and November 2018 the Municipality appointed 6 of the 13 successful tenderers from the Panel of Contractors for the construction of the bus lanes. The Municipality send out letters[2] to the 2nd Respondent up to 7th Respondent, including the Applicant were successfully placed on the Panel of Contractors.

[14] On the 17 September 2018 5th Respondent was appointed for the construction of the Moshoeshoe Road which is approximately 2.2 km at an estimated cost of R36 180 039.43. The 2nd Respondent was appointed on the 14 November 2018 for the construction of Chief Moroka Route which is approximately 2.6km at an estimated cost of R42 743 884.25. On the same date of

[2] Annexures MPF1 to MPF7 attached to the Notice of Motion.

14 November 2018 the 7th Respondent was appointed to construct the IPTN Depot – Civil and Earth Works at an estimated cost of R40 950 166. 00 and the 6th Respondent was appointed on the 14 November 2018 for the construction Fort Hare Trunk Route (Part B) which is approximately 1.1 km at an estimated cost of R26 693 238. 00. The 3rd Respondent was appointed for the construction of Moshoeshoe Road (Part B) which is approximately 2.2 km at an estimated cost of R68 894 185.26. The 4th Respondent was appointed for the construction of Fort Hare Trunk Route (Part A) which is approximately 1,5 km at an estimated cost of R49 710 744. 40.

[15] The Applicant on the 17 January 2019 with the assistance of the Legal Representative address a letter to the Municipality with objections to the appointment of the 2nd to 7th Respondents. the Legal Representative of the Applicant when no response was received, wrote a formal request in terms of section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) requesting written reasons and documents in respect of his unsuccessful allocation for work. The Municipality did not respond. The Applicant approached the Honourable court under case number 486/2019 for urgent relief.

[16] The Applicant was granted the relief sought on the 7 February 2019 as follows:

> "1.1 The Respondent shall provide the Applicant, within 10 days after the granting of this order, with full and written reasons for its decision to not appoint the Applicant for phase 1 of the execution of the works related to **BID** NO. **MMM/BID442:2017/2018:**

APPOINTMENT OF TRUNK ROUTES FOR IPTN ROADS INFRASTRUCTURE NETWORK, such reasons to include the following documents:

1.2 Copies of any and all Bid Adjudication Committee Meetings insofar as they relate to the appointment of **BULA MAHLO TRADING & PROJECTS (PTY) LTD, MWETI CONSTRUCTION (PTY) LTD, BLACK TOP CIVILS (PTY) LTD, BATALALA CONSTRUCTION (PTY) LTD AND LESOLE AGENCIES (PTY) LTD** for the execution of Phase 1 of the Tender at issue, in as far as it exist, and should same not exist, the Respondent will confirm in writing and give reasons for the non-existence thereof;

1.3 The original Tender Data and Criteria and all and any such documents indicating on what basis the Respondent would appoint specific contractors forming part of a Panel of Appointed Contractors to do specific and related work falling within the scope of the whole of the project.

2. The Respondent shall pay the costs of the application excluding the costs of the preparation of the application to be heard on the 7 February 2019 by the Applicant's advocate."

[17] The Municipality complied with the court order and provided the reasons and the documents on the 21 February 2019, and these are attached to the application.

[18] The issue for determination is whether the court may review and set aside the allocation of the work to the contractors on the panel on a rotational basis and whether the court may sanction the criteria which the Applicant favours that the points scored during the tender process is the basis for the allocation.

[19] The Applicant's contention is that the appointment of the successful contractors is tainted with irregularities; that the only reason the Applicant was not appointed was that the Applicant was involved in another tender. Counsel on behalf the Applicant during oral argument and in the Heads of Argument submitted that the Applicant scored the highest points and said it is very rare that a tenderer who scored the highest points do not get appointed as the successful bidder.

[20] Counsel on behalf of the 1st Respondent submitted in oral argument that if the Applicant is granted the relief sought, this will cause disruption in the progress of the existing contractors who have done a certain percentage of the work. Counsel submitted that the Applicant is not a stranger to the tender process that is done on a rotational basis, as the Applicant has previously done such work and received a tender of R16 million. Counsel mentioned that the Applicant want the court to prescribe new terms of the contract and want to instruct the court what the terms of the criteria should be. Counsel further indicated that the Applicant out of the 14 contractors is the only one who complained. Counsel submitted that the process was fair as there is no dispute over the tender process, except that the Applicant scored the highest point and quoted the lowest costs. He mentioned that the Applicant did not allege that there was fraud, nor bias, except that the attack on the Municipality is simply there was no objective criteria. He further submitted that the other contractors on the panel were not joined in the application and these contractors would be prejudiced if a court

order is granted and will have an impact on them. He submitted that these contractors must be joined in the current application.

[21] Counsel on behalf of the 3rd Respondent in oral argument submitted and emphasised that the disruption will be major if the Applicant is granted the relief sought. She stated that the 3rd Respondent has already established a site office; costs have been incurred for security and that some of these costs have already been paid; and labourers have been appointed. She submitted that the 3rd Respondent has appointed five subcontractors who are already on site. Counsel submitted that the prejudice to the 3rd Respondents far outweighs the Applicant's interest.

[22] Section 5 of PAJA provides that:

> "(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
>
> (2) The Administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administration action."

[23] Section 6 of PAJA provides that:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administration action.

(2) A court or tribunal has the power to judicially review an administrative action if-

(a) the administrator who took it-

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) …….

[24] The Supply Chain Policy of the Municipality which was effective from 1 July 2018 states that:

"2.1 Effective and efficient service delivery implementation requires the integration and co-existence of various systems and processes. One of these processes which require successful implementation in order to be effective is the supply chain management process as prescribed in section 110 of the MFMA;

2.2 …….

2.3 The Primary task of the Municipality's supply chain management system shall always be to find, cost effective services providers for the Municipality. B-BBEE companies will not be treated any differently from the norm with regard to quality, expected services delivery and technical performance. On the other hand, it is required that all personnel associated with the Municipality's

supply chain management system must be made aware of this initiative and are expected to commit themselves to its implementation through good faith, efforts and appropriate purchasing procedures."

[25] Section 217 of the Constitution is the starting point for an evaluation

of the proper approach to an assessment of the constitutional validity of state procurement processes. It reads as follows:

"1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with 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) must be implemented."

[26] In order to comply with s 217(3) the legislature adopted the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"). "Acceptable tender" is defined in s 1 of the PPPFA as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". In Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others [2005] 4 ALL SA 487 (SCA) at paragraph [19] Scott JA pointed out that the definition of

"acceptable tender" must be construed against the background of s 217 of the Constitution and continued as follows:

> "In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values." In terms of s 2(1) (f) of the PPPFA "the contract must be awarded to the tenderer who scores the highest points (calculated in accordance with s 2(1)(b)), unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."

[27] The Local Government: Municipal Finance Management Act, 56 of 2003 is equally applicable. Procurement is dealt with in Chapter 11 and the wording of s 112(1) echoes that of s 217(1) of the Constitution.

[28] A tender process implemented by an organ of State is an "administrative action" within the meaning of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). See: Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) at para [5]. The Applicant in this case do not attack the tender process as the Applicant is entitled to a lawful and procedurally fair process, which in this case the procedure to the appointment to a Panel Contractors was fair and so was the awarding of the tender to the other contractors. Furthermore, it is well established that the executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. See: Sapela Electronics supra at para [26].

[29] The proper legal approach pertaining to procurement processes was set out in the following *dictum* by Froneman, J in Allpay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC) at para [22] which I quote:

"[22] This judgment holds that:

a. The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.
b. The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.
c. The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
d. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).
e. Black economic empowerment generally requires substantive participation in the management and running of any enterprise.
f. The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside."

[30] Froneman, J continued in *All Pay supra* at paras [28] and [29] to summarise the approach to be followed by a court considering a review application and I quote:

"The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of

compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established."

Once this exercise has been completed the court must consider the practical difficulties which may flow from declaring the administrative action constitutionally invalid, bearing in mind the just and equitable remedies provided for in the Constitution and PAJA.

[31] In **Bel Porto School Governing Body and Others v Premier, Western Cape,**[3] Chaskalson CJ stated at para [89] for a decision to be justifiable, "…. it should be a rational decision taken lawfully and directed to a proper purpose." Ponnan JA, relying **on Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others,**[4] expressed himself as follows: "It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given."[5]

[32] However, as Nugent JA pointed out in **Minister of Home Affairs and Others v Scalabrini Centre,**[6] "… an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is

[3] 2002 (3) SA 265 (CC).
[4] 2000 (2) SA 674 (CC).
[5] See Minister of Home Affairs v Somali Association of South Africa 2015 (3) SA 545 (SCA).
[6] 2013 (6) SA 421 (SCA) at para [65]

different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[33] In **Metro Projects CC v Klerksdorp Local Municipality,**[7] Conradie JA said the following in para [13]: "In the Logbro Properties case *supra*, at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness."

[34] In **Metro Projects** the Supreme Court of Appeal set aside the award by the Municipality to the successful bidder and I quote from

para [14]: "A high-ranking municipal official purported to give the ninth respondent (the eventual successful tenderer) an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."

[7] 2004 (1) SA 16 (SCA).

See also in this regard **Premier, Free State and Others v Firechem Free State (Pty) Ltd,**[8] in respect of the requirement that competitors should be treated equally.

[35] It is clear from the supply chain policy and Framework Agreement that the process of appointment to the Panel of Contractors and allocation of work was done fairly and the necessary due process was followed. The document dated 20 February 2019 attached to the application of the Applicant on page 56, the following is noted: "In addition to the normal supply chain process the Bid Adjudication Committee mandated the user department being IPTN & Project Consultants, SCM and Legal Services to negotiate the most cost-effective construction rates that will be averaged amongst all qualifying contracts as per the BAC Executive letter, attached is the BAC Executive Letter for MMM/BID 442 2017/2018 (annexure B).

Furthermore, it must be emphasised that the Preferential Procurement Policy Framework Regulations of 2011 relating to preferential points ceased to be applicable the moment the rate were negotiated on an averaged amount and having the panel being constituted.

For instance, the process for both projects unfolded in the following manner:

- The Panel for the NMT was approved by the Bid Adjudication Committee on the 12th April 2017;
- A total number of 28 contractors, ranging from CIDB Grading #CEPE to higher grades were appointed on the above-mentioned pabel;
- In the 2016/2017 financial year, the first batch of contractors from the panel were allocated work. The process unfolded as follows:

- Before the Allocation takes place the panel is recommended by the Head of Department with the support and advice of the HOD's

[8] 2000 (4) SA 413 (SCA)

Technical Managers, it is thereafter referred to the Chief Financial Officer for approval. The abovementioned process is documented in a panel book that is utilized by the user department for approval of the allocations from various Panels.

- The abovementioned process was followed in allocating work for FMP Contractors, for projects such as those; Maphisa Road Construction under NMT to a total project amount of R7 240 183.
- Again during the financial year of 2017/2018, the second batch of contractors from the same panel were allocated work in the same manner, to fast-track infrastructure rollout and FMP Contractors was allocated work, having to benefit for the second time, under the projects of Botshabelo NMT to a total project amount of R9 372 463.
- With the above being said, it is therefore evident that FMP Contractors were appointed and allocated work twice from the same panel list."

[36] The Applicant in the Founding affidavit paragraph 18.1 and 18.2 stated that:

"18.1 I have been advised that the Municipality must have some objective criteria by which it decides to appoint contractors on the panel to do specific work. This cannot be done willy-nilly and at the whim of whoever is deciding functionary, because that would defeat the entire purpose behind section 217 of the Constitution, the Preferential Procurement Policy Framework Act and the National Legislation enacted to give effect to fair administrative process and regular state procurement.

18.2 I reiterate that FMP scored the highest points. This means that it must

be given preference when the first appointments were made."

[37] In a Letter of Acceptance on page 68 of the Founding Affidavit, in which the Applicant accepted and signed it on the 20 August 2018, which states as follows: "I (Company Representative) Moloko Nduna, hereby on behalf of (Company name) FMP Contractors acknowledge that I understand and agreed with the negotiated price rate that are stipulated in Annexure A, below which were agreed upon in a price negotiations in a meeting that was held at Mangaung Supply Chain management offices on the 20 August 2019."

The letter was signed on the same day by the representative of the Applicant. Thus confirming that throughout the process the Applicant was involved and participated in the process for the appointment to the Panel of Contractors.

[38] In terms of section 2 (1) (f) of the PPPFA, it is obliged to award a tender to the tender with the highest scored points, "…. Unless objective criteria in addition to those contemplated in paras (d) and (e) justify the award to another tender. The Municipality's main criteria objective in this instance was that the bid was for a panel of contractors and awarding the ad hoc on a rotational construction contracts to the contractors on the panel.

[39] As correctly stated by Counsel on behalf of the 1st Respondent that the entire process was established to have a Panel of Contractors to avoid putting the work on tender every time contractors are needed for construction work. In my view, that the process was done fair and the court cannot find fault with the whole tender process. Indeed the court may not re-write a contract between the parties in the terms of the other party's

wishes or request. Thus the criteria objectives as put out by the 1st Respondent were not biased, nor irregular.

[40] After the tender process was completed, the appointed fourteen contractors on the panel all agreed on the uniform rates and costs that were reflected in the pro forma Bill of Quantities, this agreement thus rendered the points scored during the tender process irrelevant. The letter quoted above in paragraph [37] confirmed that the Applicant signed and agreed to the agreed rates. I must say that when the first tender was allocated to the Applicant on a rotational basis based on the contractors on the panel, the Applicant did not cry foul play. Now the same method was applied on a rotational basis, the Applicant raised the issue of objective criteria. Which was not an issue when the Applicant was awarded the first tender. This makes the Applicant's conduct questionable.

[41] The Preferential Procurement Regulations 2017 stipulated that the evaluation criteria should be objective in giving a fair shot for a tender to advance to the next phase of evaluation. Most tenderers are evaluated on functionality, but an Organ of State in this instance the Municipality will indicate in the tender how it will be evaluated. The Functionality Criteria as listed on the tender document, namely; the number of roads projects successfully completed by the contractors and projects successfully completed by the company. When the Organ of State sets these minimum criteria objectives, the scores are not to be too low, that it will compromise quality of the required services and may not be too high that it is impossible to attain. The Applicant's contention that he scored the highest points and must be allocated work in

the IPTN Projects cannot stand as all fourteen contractors that where appointed on the Panel scored high points, by virtue of these high points they were placed on the Panel of Contractors. The parties agreed in a meeting held on 20 August 2018 that a uniform basis of rates and costs in terms of the pro forma Bill of Quantities shall apply and the Applicant signed and accepted the terms of the agreement.

[42] Aligning myself with what the court said in **Bel Porto School Governing Body** supra that for a decision to be justifiable, "…. it should be a rational decision taken lawfully and directed to a proper purpose." Thus logic dictates that the Municipality's decision was rational and directed to a proper purpose. The Municipality in the Answering Affidavit mentioned that the Applicant was not singled out for not being awarded any work. Their decision was mostly based on the fact that the Applicant was still involved in another project related to roads construction. Had the Municipality appointed the Applicant, it would have resulted in leaving the project it was involved in to attend to the new one. Thus availability of the contractors was of the essence. The Municipality mentioned that the Applicant was no stranger to the method use in work allocation on a rotational basis and has a long standing relationship with the Applicant.

[43] Both Counsels for the 2nd and 3rd Respondent submitted that the work is at this stage far advanced and it would be disruptive to stop all work if a court order is granted in favour of the Applicant. The 1st Respondent submitted two reports of consultants marked annexure "M1" and "M2" in respect of the projects. The

Consultants in annexure "M1" page 213 reported that: "Should the project be terminated the impact will be negative for the City of Mangaung and its citizens. The implications will be financial and will negatively affect services delivery as the project would not be finished on time in line with the programme." The report gives the various percentages of the various work the contractors have performed up to 30 May 2019. And further indicate that the percentages reflected for the contracts may not be a true reflection of all the works and effort that has taken place, and stated that: "A lot of planning was required prior to commencement of the construction and it is typical in the construction industry for the rate of construction to be slow at beginning, however, the rate of construction progress becomes exponential as the projects continues before slowing down again closer to completion."

[44] The second report annexure "M2" on page 219 of the Answering Affidavit, gives various percentage of the different constructions as to how far the contractors have performed. However, in terms of the contract none will have fully completed in terms of the agreed dates of completion of the respective contracts. The report gives the following reasons if the work is terminated that:

- "Current contractors could submit claims against the Client (MMM) for loss of profit and damage due to costs incurred to secure performance guarantees, public ,liability insurance, and any other penalties associated with the premature termination of contracts entered to for the purpose of the project.

- Works that have been executed thus far can be vandalised and would then be required to be re-done, at a greater cost to the client for removing the existing work and then again for new replacement installations. This would be classified as fruitless expenditure.

- The exposed layer works on the road beds would be exposed to the elements, possible resulting in a complete failure of the road base, requiring the complete rebuild of the road sections and not just refurbishment, again resulting in fruitless expenditure.

- Some of the projects have open trenches and layer works removed. This would cause public safety issues as there would be no one to ensure safety on site.

- The traffic management that is currently in place and would not be managed and this could cause extended inconvenience to the community, resulting in possible vehicle collisions and increased risk exposure to the pedestrians as the equipment will be removed and no safety measure in place.

- Currently employed labour for all projects will be terminated without any guarantees to be re-employed when the contracts recommences.

- The stagnation of progress could result in public service delivery protests, with the associated risks to public and infrastructure."

[45] Indeed it is such that the IPTN project is for and the interests of the community at large, this is for the convenience of the residents of Mangaung since the intention of the Municipality is clear that its intention is to have bus lanes and to make transport accessible and convenient for all. As these bus lanes will be indeed for a good purpose. Thus the decision of the Municipality is justifiable. The project involves people who have already being employed by the current contractors; costs have been incurred; the construction on site has been ongoing. It is correct that if any court order is granted in favour of the Applicant, indeed it will be a major disruption of services that are need for poor people

who need to make use of these bus lanes. The number of cases of unsuccessful bidders approaching court to challenge the process of Organ of State when a tender was not awarded in their favour is on the increase. The end result being while parties are in court litigating over tenders, the community is affected by this undue delay and the public interests at large is affected by way of a poor quality service or increased costs, as the contract takes longer to reach completion. Due to delay in the execution of such projects and pending court cases the Manguang Metro lose a lot of tax payers money. The interests of the community at large and the interests of the Mangaung Metro as well as those of the 2nd to 7th Respondent far outweighs the interests of the Applicant.

[46] It is trite that fairness in the procurement process is a value in itself. In **Tera Mobile Radio (Pty) Ltd v MEC, Department of Public Works** 2008 (1) SA 438 (SCA) para 9 the court said: "Fairness is inherent in the tender procedure. Its very essence is to ensure that before government national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competiveness. Fairness, transparency and the other facts mentioned in s 217 of the Constitution permeates the procedure for awarding or refusing tenders."

[47] According to Lawrence Baxter Administrative law (1984) at 446, I quote:

> "Administrative action based on formal procedure defects is not always invalid. Technically in law it is not an end in itself. Legal

validity is concerned not with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects."

[48] In **AllPay Consolidated Investments Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others**,[9] at para 96 the court said: "There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinized intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal."

[49] The Applicant raised an issue about the Supply Chain Policy that the Municipality approved the policy on 31 May 2018, and that the SCM was not in place when the Panel of Contractors was appointed. On the face of it the policy took effect July 2018. It baffles the mind that the Applicant participated in the process to be on the Panel of Contractors, to the extent that the Applicant signed the acceptance letter and agreed with the negotiated rates. The Applicant then had no issue with the Supply Chain Policy. When the Applicant realised that work was not allocated to the Applicant, the issue of the Supply Chain Policy is now placed in dispute.

[50] I am satisfied that no irregularities occurred during the appointment to the Panel of Contractors, as the whole process was followed in terms of the tender process. There is nothing unconstitutional about the tender process, as long as it was open,

[9] 2013 (4) SA 557 (SCA) (Allpay SCA)

transparent and fair. The Municipality complied with section 217 of the Constitution. There is nothing wrong that the Municipality did, and for the fact that the rotational arrangement was not implemented for the first time. The Applicant has been part of the ad hoc rotational system and previously benefitted in such arrangements and cannot now complain that it was not part of the objective criteria that allocation was on a rotational basis. In the documents submitted for reasons for the municipality's decision, there is nothing that one can detect that there was any irregularities or unlawful conduct of any person. The Applicant's Representative signed the letter of acceptance, in which it was agreed on the rates and costs that will be in line with the pro form Bill of Quantities. In my view, if the Municipality's decision was irrational, unlawful and hopelessly irregular, then such decision need to be set aside.

[51] I considered the requirements set out in **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another,**[10] **a**nd took into consideration what the court said in **Intertrade Two (Pty) Ltd v Mec for Roads and Public Works, Eastern Cape and Another**,[11] Plasket J cautioned that: "Courts, when considering the validity of administration action, must be wary of intruding even when with the best motives, without justification into the terrain that is reserved for the administrative branch of government. These restrains on powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process."

[10] 2015 (5) SA 245 (CC)..
[11] [2007] 149, 2007 (6) 442 (CK), [2008] ALL 142 (CK) (Intertrade) at para 46.

[52] The SCA in **Gauteng Gambling Board v Silvestar Development Ltd and Others,**[12] emphasized that: "since administrators are 'generally best equipped by the variety of [their] composition, by experience, and [their] access to sources of relevant information and expertise to make the right decision' a court is required to recognise its own limitations." I am thus not satisfied that the Applicant should be granted the relief sought. It would be wrong to direct the Municipality to enter into a contract with the criteria as set out by the Applicant. This means the court is requested to rewrite the contract between the successful contractors and the Municipality, as well as the Applicant.

[53] The 1st Respondent's contention is that the Applicant did not join the eight remaining contractors who have not yet been allocated any work. And that these contractors have a direct interests in the matter and have not been cited.

[54] I now turn to deal with the non-joinder of the remainder of the eight contractors who have not been allocated any work as they wait for their turn. Rule 10 (3) of the Uniform Rules of Court deals with who should be joined or cited as Applicants/Respondents. In **Fluxmans Incorporated v Lithos Corporation of SA (N0. 2),**[13] the court said at para 5: "Parties may only be joined as a matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgement of the court in the proceedings." In **Judicial Service Commission and Another v**

[12] [2005]ZASCA 19, 2005 (4) SA 67 (SCA) (Silvestar).
[13] 2015 (20 SA 322 (GJ).

Cape Bar Council and Another,[14] where the court held that: "it has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interests that may be affected prejudicially by the judgement of the court in the proceedings concerned."

[55] Indeed the eight remaining contractors have a direct interest in this matter as they are part of the contractors who were appointed on the Panel of Contractors. The relief sought by the Applicant will have a direct impact on their rights as contractors on the Panel of Contractors, if they are not joined in this application.[15] The parties will be bound by the new terms of a new contract; some will probably have to take over any of the unfinished contract at a reduced price and will be held liable for any work defective work that was done by the previous contractors. I am satisfied that the court order if granted in favour of the Applicant will prejudice any of the parties, specifically the non-joined parties. It will be just, equitable and fair to all contractors on the Panel of Contractors to allow everyone the opportunity to present their case before court.

[56] The 1st Respondent's contention is that the Applicant did not comply with Section 7 of PAJA which provides that: "Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date:

[14] 2013 (1) SA 170 (SCA) at par [12].

[15] Fisheries Development Corp v Jorgensen and Another 1979 (3) SA 1331 (WLD) at 1336H-1337C; Mega Papers (Pty) Ltd & Another v MEC, Province of the Eastern Cape Responsible for Education [2008] JOL 22613 (Ck) at which Sangoni J said: "The court agreed that they have a direct and substantial interest and should be have been joined as parties to the application."

(a) subject to subsection 2 (c), on which any proceedings in terms of internal remedies as contemplated in subsection 2 (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and reason."

[57] Although Section 7 (1) stipulates 180 days time limit, section 9 (1) allows for the granting of condonation in appropriate circumstances where the proceedings were instituted outside the 180 day. The 3rd Respondent was allocated work on the 19th September 2018 and the handover of the site was on 18 October 2018. The Applicant served on the 1st Respondent the application on the 1st April 2019. The Applicant indicated that it became aware of the allocation of the contract through the grapevine and was therefore not sure of the date when the allocation happened. It can therefore not be said by the Municipality that the application was outside the 180 days. Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date. In my view and in the absence of an application for condonation or the absence of an agreement by the parties, in this case an Organ of state, then the court lacks authority to deal with the review under the circumstances.

COSTS

[58] The 1st Respondent submitted that the establishment of the Panel of Contractors was not under attack, not was the appointment of the fourteen contractors under attack. And that the application was brought before court without any foundation or merit and that constitute an abuse of the court processes, thus the application should be dismissed with costs. The 2nd Respondent also submitted that the application was flawed from the beginning and should be dismissed with costs.

[59] The basic rule of costs is that all costs are in the discretion of the court. The court's discretion is wide, though not unfettered and must be exercised judicially upon a consideration of the facts of each case. In essence it is a matter of fairness to both sides. Taking into consideration the circumstances of the case; carefully weigh the issues, consider the conduct of the parties and consider any other circumstances which may have a bearing on the issue of costs. In my view the Applicant acted unreasonably to bring the matter to court without resolving the matter internally, for the fact that the rotational system was in place before and was applied in tenders where the Applicant was the successful contractor. In any event costs follow the successful party.

ORDER

[60] In the premises, the following order is made:

1. The Application is dismissed with costs, including the 3rd Respondent's costs.

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S. CHESIWE, J

I concur

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S.G. MEINTJES, AJ

On behalf of Applicant:	Adv. S. Grobler
Instructed by:	Graham Attorneys BLOEMFONTEIN
On behalf of 1st Respondent:	Adv. L. H Halgryn SC
Instructed by:	Phatsoane Henney Inc. BLOEMFONTEIN
On behalf of 3rd Respondent:	Adv. LWF Laughland
Instructed by:	Rosendorff Reitz Barry Attorneys BLOEMFONTEIN