



**IN THE HIGH COURT OF SOUTH AFRICA  
[WESTERN CAPE DIVISION, CAPE TOWN]**

[REPORTABLE]

Case no. 5276/23

In the matter between:

**MOHAMMED ZUNADE LOGHDEY t/a  
STREET PARKING SOLUTIONS**

Applicant

and

**THE CITY OF CAPE TOWN**

First Respondent

**SA-iPARK (PTY) LTD**

Second Respondent

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**JUDGMENT DELIVERED (VIA EMAIL) ON 29 NOVEMBER 2023**

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**SHER, J:**

1. This is an application to review and set aside a tender for the provision of kerbside parking management services for a period of 3 years, which was awarded by the City of Cape Town to the 2<sup>nd</sup> respondent on 6 March 2023.
2. The applicant and the 2<sup>nd</sup> respondent were the only bidders who submitted bids. The 2<sup>nd</sup> respondent abides the decision of the Court. The City opposes the review and seeks to defend the award.

**The factual background**

3. The applicant has been providing parking management services to the City for 16 years, in terms of successive contracts which were awarded to him pursuant to

previous tenders. The current contract which he has with the City comes to an end on 30 November 2023.

4. The 2<sup>nd</sup> respondent is a company which has its principal place of business and registered address in Bloemfontein. It provides parking management services at several shopping malls and medical centres in the Free State, Gauteng, Kwazulu-Natal and the Western Cape, and at the King Shaka and Cape Town International Airports. According to its bid submission it was established in 2013 to support the B-BBEE initiative of its Bloemfontein mother company Federal Parking Services (Ltd), which holds a 49% shareholding in it.
5. It is common cause that the bays for which parking management services are currently being provided by the applicant are located in areas which are covered by the tender under review, including the City/Gardens, Claremont/Kenilworth and Bellville CBDs, and Sea Point and De Waterkant. The tender makes provision for a later roll-out of parking services to other areas, as far afield as Simonstown in the south, and Somerset West and Strand in the north.
6. When the tender was advertised on 14 October 2022 the applicant took issue with its bid specifications and sought to engage the City in respect thereof, at a briefing which was held on 4 November 2022.
7. He was unhappy that the tender required bidders to adopt a wholly cashless parking revenue collection system. It was his experience that motorists within the metropole predominantly settled their parking charges in cash rather than by way of card payments, especially for transactions involving minimal parking charges, where vehicles occupied parking bays for short periods of time. The applicant was of the view that moving to an entirely cashless system would be impractical for a service provider and would place its ability to collect parking fees at risk, as motorists who were unable to make payments electronically by means of a credit or debit card would be tempted to drive off without paying. In addition, the volatility which was being experienced with current levels of 'loadshedding' and the additional 2-3% fee which banks charged for processing electronic card payments, made a cashless payment system an unfeasible and unattractive option for a service provider.

8. In addition, the applicant pointed out that the tender pricing schedule invited bidders to bid a percentage of the parking fees which they would collect, as a commission which they would receive in lieu of payment for their services. But, as the bid specifications did not impose a minimum revenue that was to be collected, although a bidder might offer what appeared to be an attractive percentage of the parking fees which they would collect, to the City, it could be an offer that in real terms meant very little and was less competitive than one made by a competitor.
9. In his founding affidavit the applicant illustrated what he meant by way of an example: the value of a bid which tendered 50% of the revenue that would be collected but when implemented only recovered 10% of the parking charges that were due, would be far less than one which was put up by a competitor which only offered 30% of what was to be collected but was able to recover 90% thereof.
10. Thus, the applicant contended, without minimum 'performance' criteria being set in the tender specifications the 1<sup>st</sup> bidder would nonetheless score higher on the price component of his bid than his competitor. Consequently, the applicant submitted that given the City's failure to impose such criteria in the tender specifications by way of a minimum parking revenue which was to be collected monthly, it would be impossible for the value propositions of competing bids to be properly assessed, as the City would be unable to determine which of the competing bids would generate the most income for it. This fundamentally undermined the requisite competitiveness of the process and was not only inconsistent with the constitutional imperatives which were set out in s 217 of the Constitution, but also contrary to clause 180 of the City's Supply Chain Management Policy, which required that in a percentage-based tender the compensation which a winning bidder was to receive was to be performance-based and there was to be a 'cap' on it i.e. a maximum amount that was to be paid.
11. The applicant pointed out that although a previous tender (in 2017) had also provided for percentage-based compensation, its specifications had included performance-based criteria for each of the 3 years for which it was awarded. To this end minimum collection revenues were set by having regard for the period of time that bays could ordinarily be occupied in a single working day, and based on

this a notional determination was made of the total revenue that could be collected in a month. Thus the 2017 tender required the supplier of parking management services to make payment to the City, in the 1<sup>st</sup> year, of an amount equal to no less than 70% of the total daily parking fees that could be collected, which increased to 80% and then 90%, in the 2<sup>nd</sup> and 3<sup>rd</sup> years respectively. Thus, the service provider was required to make a percentage-based payment of what should have been collected and not what was actually collected. Implementation of the tender was carried out via a parking sensor system, which monitored the occupation of bays that were under management on a real-time basis.

12. The applicant sought to raise his dissatisfaction with the tender specifications not only before, but also after, the closing date for the submission of bids. On 20 December 2022 he addressed a letter to the City in which he pointed out that notwithstanding the concerns he had raised the bid specifications had not been amended. Whilst he had no intention of meddling in the City's supply chain management processes and was inclined to let the tender 'unfold' and, if necessary, to contest the result thereafter, he was concerned that if he did so he might be accused of acquiescing therein. Consequently, he asked the City to indicate whether, in the circumstances, it required him to challenge the tender before it was awarded or whether he should do so afterwards. Predictably, he did not receive a response to his query.
13. He was advised by his legal representatives that he should accordingly challenge the tender specifications and not wait for the tender to be awarded. This prompted him to launch the instant application on 30 March 2023, in which he initially only sought an order setting aside the tender specifications. According to the applicant, at that time he was unaware that the tender had in fact already been awarded to the 2<sup>nd</sup> respondent some 3 weeks earlier.
14. In compliance with the requirements of rule 53 the City first filed a record of its decision on 5 May 2023. From the documents which were contained therein it became evident not only that the tender had already been awarded but that the record was deficient, as it failed to include 2<sup>nd</sup> respondent's bid documentation and failed to include the deliberations of the bid specification, evaluation and

adjudication committees. Pursuant to a complaint which was lodged a supplementary record was filed by the City some two weeks later, which the applicant contended was still deficient, as material portions of the 2<sup>nd</sup> respondent's bid documentation were still not included therein, including schedule 15 of the 2<sup>nd</sup> respondent's bid, which set out the aspects which reflected on its functionality i.e. details of its experience, staffing and management of paid parking and its experience in the implementation and operation of an auditable electronic parking receipt system.

15. In his supplementary founding affidavit the applicant pointed out that from a consideration of the supplemented record it also appeared that the City had failed to conduct a risk analysis of 2<sup>nd</sup> respondent's bid, prior to awarding the tender to it. This was contrary to clause 2.3.10.5 of the tender invitation, which required that such an analysis be performed on all bidders, with a view to determining whether they possessed the necessary technical skills, competence and capacity to fulfil their obligations. The applicant contended that the City had not verified the information which had been supplied by the 2<sup>nd</sup> respondent in support of its bid. According to the applicant, the 2<sup>nd</sup> respondent had not included any documentation in its bid which would enable the City to properly determine whether it could indeed supply the requisite services and pay over the tendered percentage of the fees it had collected.
16. Aside from these aspects, in a further supplementary affidavit the applicant also sought to challenge the tender process on several additional grounds, including that the 2<sup>nd</sup> respondent had claimed functionality points for 15 years' experience, which it could not have had as, according to its bid submission, it had only come into existence in 2013. Therefore the 2<sup>nd</sup> respondent had seemingly laid claim to the experience and parking management contracts which belonged to its mother company, and not to it. In this regard the applicant pointed out that from its portfolio it was evident that some of the parking facilities which 2<sup>nd</sup> respondent claimed to manage in the Free State, Gauteng and other provinces, were in fact managed by Federal Parking (Pty) Ltd, and not by it. Thus, the applicant contended that 2<sup>nd</sup>

- respondent had claimed and been awarded functionality points to which it was not entitled, and had failed to meet the requisite functionality threshold.
17. Pursuant to the filing of additional documents by the City in June 2023, the applicant lodged a further supplementary founding affidavit. In it he pointed out that the additional documents had only been filed after he had complained, in his 1<sup>st</sup> supplementary founding affidavit, that material portions of the 2<sup>nd</sup> respondent's bid documentation had been omitted from the record of decision. He noted that the City's attorneys had attempted to explain away the omissions on the basis of an alleged misunderstanding between themselves and City officials who were responsible for collating and supplying the record. They had claimed that whilst the City had delivered the complete record to them, in preparing it for the Court they had removed certain documents from it which they considered should not be disclosed on the grounds that they were subject to privilege, or confidential to the 2<sup>nd</sup> respondent, and in doing so they had inadvertently left out documents they should not have.
  18. The applicant disputed that the further documents which had finally been produced had been omitted as a result of an oversight. But he contended that, in any event, it appeared from a consideration of these documents that the applicant's complaints about the irregularity of the award of the tender were substantiated. In this regard, aside from the grounds previously raised the applicant contended that the 2<sup>nd</sup> respondent's claim to 'Level 2' B-BBEE status, on the basis that its annual turnover was less than R 10 million could not be correct, and was implausible if, as it claimed, it had 35 520 parking bays under management and 120 employees.
  19. In June 2023, after the City filed the last tranche of documents in supplementation of the record of its decision, the applicant amended his notice of motion to seek a further order, reviewing and setting aside the award of the tender.

### **An assessment**

20. It is by now trite that an invitation to tender (which contains its bid specifications and bid evaluation criteria), together with the applicable constitutional and legislative procurement provisions, constitutes the legally binding framework within

which all public tenders by organs of state have to be submitted, evaluated and awarded.<sup>1</sup>

(i) Ad the legislative framework

21. As far as the constitutional provisions which are applicable is concerned, it is equally notorious that s 217(1) of the Constitution provides that when an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. These constitutional imperatives are, in turn, reiterated and given substance to in several legislative instruments, including the Preferential Procurement Policy Framework Act ('the PPFA'),<sup>2</sup> the Public Finance Management Act ('the PFMA'),<sup>3</sup> the Local Government: Municipal Systems Act<sup>4</sup> and the Local Government: Municipal Finance Management Act ('the MFMA')<sup>5</sup> and the various regulations promulgated in terms of these statutes.<sup>6</sup>
22. For procurements at a local i.e. municipal level the MFMA requires<sup>7</sup> that each municipality must adopt a 'supply chain management policy', and the Supply Chain Management Regulations (the "SCM Regulations") stipulate<sup>8</sup> that the policy must determine the criteria to which bid documentation for a competitive bidding process must comply, which must include bid evaluation and adjudication criteria.
23. The City adopted a supply chain management policy in March 2008<sup>9</sup> which, it is common cause, sets out such criteria. The policy expressly states<sup>10</sup> that its objectives are to give effect to s 217 of the Constitution, by implementing a procurement system for the City that is fair, equitable, transparent, competitive,

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<sup>1</sup> *Chief Executive Officer, SA Social Security Agency & Ors v Cash Paymaster Services (Pty) Ltd* 2012(1) SA 216 (SCA) para 15; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC) para 38; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC)* 2016 (3) SA 1 (SCA) para 43.

<sup>2</sup> Act 5 of 2008.

<sup>3</sup> Act 1 of 1999.

<sup>4</sup> Act 32 of 2000.

<sup>5</sup> Act 56 of 2003.

<sup>6</sup> These include the Preferential Procurement Regulations promulgated in terms of the PPFA, the Treasury regulations promulgated in terms of the PFMA, and the municipal Supply Chain Management Regulations promulgated in terms of the MFMA.

<sup>7</sup> Section 111.

<sup>8</sup> Regulation 21(b).

<sup>9</sup> Which was amended in February and December 2011, July 2013, March 2017 and May 2019.

<sup>10</sup> Clause 8.

and cost-effective, and which complies with the statutory procurement provisions which are applicable.

(ii) Ad the price component of the invitation to tender

24. As far as the invitation to tender is concerned, clause 2.1.1.1 of its conditions stipulated that the tender and its evaluation and acceptance, as well as any resulting contract which might be entered into pursuant to an award, were subject to the City's supply chain management policy, and tenderers submitting bids and the City were to comply with the conditions of the tender.
25. As the value of the tender was said to be less than R 50 million it made provision for an 80/20-point scoring system: 80% of the points were to be allocated to price and 20% to preference, on the basis of B-BBEE status. According to Clause 2.3.10.3 points for price would be allocated in accordance with a formula, which was based on the percentage which was set out in the Price Schedule in Part 5 of the invitation.
26. The Price Schedule in turn contained the tender's 'Pricing Instructions'. It is a curious and confusing document, that appears to be an adaptation of a template that is in common use. Thus, on the one hand it stipulated that tenderers were to state their 'rates and prices in percentage'<sup>11</sup> (sic) and should include all expenses, disbursements and costs therein,<sup>12</sup> whilst at the same time it required them to provide their 'prices' in accordance with the 'units' specified in the schedule'<sup>13</sup> (none were), and to provide 'rates and prices' which were fixed for the duration of the contract and which would not be subject to adjustment. Attached to Part 5 was a so-called 'Schedule of Rates', in blank, on which the total number of bays that were put out to tender and the areas in which they were located, were set out, but no provision was made for rates (i.e a charge or fee per bay, day per day/month), to be offered.<sup>14</sup>

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<sup>11</sup> Clause 5.1.

<sup>12</sup> Clause 5.3.

<sup>13</sup> Clause 5.4.

<sup>14</sup> The number of bays which are set out on this Schedule does not tally with the number of bays which are set out in annexure C to the Draft Contract which was included in the invitation to tender (which sets out a Database of the bays that are to be managed by the winning bidder): according to the Schedule the total number of bays for Group 1 (the first, immediate phase of the tender that is to become operative), amounted to 3920, whereas



27. In contrast to this clause 5.10 of the Price Schedule required bidders to bid a percentage of the 'actual collected' parking fees which they were to be paid monthly, as a fee for the services they were to provide. Thus, notwithstanding what was set out in the earlier clauses of the Schedule, bidders were not asked to tender on the basis of either a price (i.e. a cost) or a rate, per parking bay, per day or month. And once again, this was a somewhat curious formulation: instead of requiring bidders to indicate what percentage of their collections would come to the City, as one would expect, the invitation to tender required them to indicate what percentage of the collections would go to them. To this end, they would be required to pay over all parking fees which they had collected, to the City, and to invoice it monthly for their percentage of the parking fees that was to be paid to them by way of compensation.<sup>15</sup>
28. Thus, as far as the Price Schedule is concerned the bid criteria did not set out a minimum, prescribed level of revenue i.e. a fixed monthly amount (or percentage thereof) which was to be obtained and paid over to the City, from the parking charges that were to be collected by the winning bidder.
29. Although the Price Schedule did not prescribe a minimum revenue that was to be collected, for the purpose of scoring bids for price the formula in clause 2.3.10.3.1 provided that the fixed percentage of monthly parking fees which was tendered (i.e. the percentage that was to be paid to the winning bidder), was to be multiplied by an estimated monthly revenue of R 3 million. It was expressly noted that this figure was one that would be used for 'evaluation purposes' only and did not reflect the 'actual' parking fees which were to be collected.
30. How this estimate was arrived at was not elucidated by the City in its answering papers. According to the figures set out on an extract which it provided to bidders from its historic database,<sup>16</sup> for the 14 month pre-COVID period between January 2019 and March 2020 the total reported average monthly parking fees which were collected for the CBD, Bellville, Claremont and Sea Point areas came to R3 761

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according to annexure C the actual total was 3930. Likewise, the total number of bays for groups 2 and 3 (for the later roll-out of the tender to other areas) also do not correspond.

<sup>15</sup> Clause 5.10.

<sup>16</sup> Table 4 of Annexure D.

764 per month, whereas over the 8 month period from November 2021 to July 2022 the average monthly parking fees collected for the self-same areas came to R3 050 938. Presumably, the estimated monthly revenue which was set in clause 2.3.10.3.1 was therefore a conservative projection of the average monthly earnings which could be derived for the duration of the 3-year tender, following its award at the end of 2022.

(iii) The City's case

31. The City's answering affidavit was deposed to by the Manager of its Transport Network Facilitation & Development branch. It dealt only in perfunctory terms with the principal averments in the founding and supplementary affidavits which underpinned the applicant's case. In this regard it responded meaningfully only to the challenge which was directed at the price component of the tender, and not to that which was directed at the functionality and preference components thereof.
32. So, in relation to the complaint that by not setting a prescribed minimum revenue which was to be collected by the winning bidder the City failed to set the necessary performance-based criteria required in terms of its supply chain management policy, the Manager said it was 'preposterous' to suggest the City should do so, as the revenue 'structure' which potential bidders wished to include in their bids would differ from bidder to bidder. He said that this was (nonetheless?) an important 'component' which featured when the competing bids were assessed. He claimed that the tender invitation in any event required each bidder to set out the 'price' at which it intended to offer its services, even though, as previously pointed out, this was not the case.
33. He claimed further that, in contending that the invitation should have set out performance-based criteria for the compensation that was to be paid to the winning bidder, the applicant was confusing terms which were to be included in the contract which was to be concluded with the winning bidder, after the tender had been awarded, with the invitation to tender. Put simply, he contended that clause 180 of the City's supply chain management policy only applied to the subsequent contract which was entered into with the winning bidder, and not to the tender invitation.

34. He said that the provisions of the clause could not apply to the tender invitation as the supplier i.e. the winning bidder was not capable of being identified at the time when the invitation went out and would only become known after the award of the tender to it. He contended that, in any event, any requirement which may have existed to impose performance-based criteria was simply aimed at getting the winning bidder to perform the services required of it, to a satisfactory level, and in this regard the invitation to tender did set out several key performance indicators ('KPI'). It was thus not intended or necessary to impose performance-based criteria beyond that, in relation to revenue collection, as the winning bidder would automatically be incentivised to collect a high percentage of revenue because it would share directly therein and the more it collected the more its percentage share thereof in lieu of compensation would increase. Thus, any profit-driven supplier would obviously endeavour to maximise the collection of revenue and it was not necessary to specify any performance-based criteria in respect thereof.

(iv) Ad Regulation 51 and clause 180: an interpretation

35. It is by now well-established and more than trite that the act of determining the meaning which is to be attributed to words which are used in a document or statutory instrument is an objective and unitary exercise by means of which regard is to be had to the text (the language used) in the light of ordinary rules of grammar and syntax, in the context in which it appears, and the apparent purpose to which it is directed.

36. From a perusal of the City's supply chain management policy it is evident that it largely constitutes a wholesale adoption of the SCM Regulations. In their legislative scheme the Regulations are arranged in 2 chapters: the first (Chp 1) deals with the adoption of a supply chain management policy by municipalities and the second (Chp 2) sets out a framework which is to apply to such policies, and is in turn divided into 4 parts, headed 1) 'Demand Management' 2) 'Acquisition Management' 3) 'Logistics, Disposal, Risk and Performance Management' and 4) 'Other matters'. Regulation 51 is the last of the regulations and resorts under the final category/part. The City's supply chain management policy adopts a similar structure to that adopted in the SCM Regulations.

37. Clause 180 of the policy is a verbatim repetition of Regulation 51. It states that if a supplier acts on behalf of the City in providing any service or to 'act as a collector of fees, service charges or taxes' (sic) and the compensation payable to it is fixed as an agreed percentage of turnover for the service or the amount collected, the 'contract' between the it and the City must stipulate 1) a 'cap' on the compensation payable and 2) that such compensation must be 'performance-based'.
38. Although the tender specifications provide for key performance indicators ('KPIs'), these are to be used to monitor the performance of the winning bidder, and none of them apply to the collection of revenue i.e. to the parking charges that are to be levied, or the amount of compensation which is to be paid to the winning bidder. They are concerned with issues such as complaint response rates, the creation of a database within a week of implementation, the ratio of parking marshals to parking bays, a requirement that not less than 95% of all parked vehicles that have been audited by means of a physical count have been recorded by the provider, and the date by which parking fees that have been collected are to be paid over. As such, they do not constitute performance-based criteria, within the meaning of clause 180.
39. The clause is to be found in the 'Acquisition Management System' part of the City's policy, which has amongst its stated objectives that goods and services are to be procured by the City only in accordance with authorised procedures,<sup>17</sup> and bid documentation, evaluation and adjudication criteria and general conditions of contract are to accord with the requirements of the relevant legislation.<sup>18</sup>
40. As provided for in the Regulations, this part of the City's policy sets out the various procurement processes whereby the City acquires goods and services, which range from petty cash purchases (where the transaction value is less than R 2000), written price quotations (for transactions between R 2000 and R 10 000 in value), and formal written price quotations (where the estimated transaction value ranges from R 2000 to R 10 000), to competitive bids- which apply when the estimated transaction value exceeds R 200 000 or involves a 'long-term' contract for the

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<sup>17</sup> Clause 39.1.

<sup>18</sup> Clause 39.4

provision of goods or services i.e. a contract which exceeds 1 year in duration. Clause 180 is located in the section of this part of the policy which deals with competitive bids i.e. where an invitation to tender is involved.

41. Clauses 108-114 in this section set out the requirements that apply regarding the formulation of bid specifications for tenders. These include that such specifications must be drafted in an 'unbiased manner' (sic) to allow all potential suppliers to offer their goods and services (clause 108) and shall, where possible, be described in terms of the performance which is required rather than in terms of 'descriptive characteristics for design' (clause 110). Clauses 123-143 in turn set out the requirements which apply to the compilation of bid documentation for invitations to tender. These include that the documentation must 'clearly indicate' the terms and conditions of contract and the bid specifications and criteria for evaluation (clause 125) and must not be aimed at 'hampering' competition but rather at ensuring fair, equitable, transparent, competitive and cost-effective bidding (clause 129).
42. On an ordinary and literal reading of clause 180 it appears as if the contents thereof are directed at the contract which is to be entered into with a successful bidder who has been awarded a tender after a competitive bidding process, rather than at the invitation to tender itself. But this is an impression that one obtains only after engaging in the initial phase of the act of interpretation. One is also required to consider the literal meaning of the clause in the context of the policy as a whole, with specific reference to the preceding clauses I have referred to, and their aim and purpose. As was pointed out in *Coral Lagoon*<sup>19</sup> it is the relationship between the words used, the concepts expressed in them and the place of the contested provision within the scheme of the document or statutory instrument as a whole, that 'constitutes the enterprise by recourse to which (a) coherent and salient' interpretation is arrived at. And, in this regard, when engaging in this exercise one is required to remember that inasmuch as the clause is a verbatim repetition of Regulation 51 of the SCM Regulations, and the policy as a whole is by and large an adoption of the legislative scheme, structure and wording of the Regulations, one is essentially dealing with a legislative provision which must be properly

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<sup>19</sup> *Capitec Bank Holdings Ltd & Ano v Coral Lagoon Investments 194 (Pty) Ltd & Ors 2022 (1) SA 100 (SCA) para 25.*

contextualised, interpreted purposively, and construed in a manner consistent with the Constitution.<sup>20</sup>

43. As far as the Constitution is concerned, as was previously pointed out s 217(1), which serves as the *fons et origo* of procurement legislation, states that when an organ of State 'contracts' for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
44. It has never been suggested that, because of the use of the word 'contracts' in s 217(1) rather than 'procures', in the context of procurements by organs of State the constitutional imperatives referred to in s 217(1) apply only to the subsequent contract which is to be entered into with a supplier after a transaction has been concluded with it, and in the case of a competitive bidding process, after a tender has been awarded, and not to the procurement process which preceded it; and the word is commonly understood to apply to the procurement process as a whole. Thus, the meaning which is afforded to the word 'contracts' in s 217(1) extends beyond a literal one: it is understood to refer to the process of transacting, as a whole, which the State engages in when procuring goods and services, which includes and culminates in the contract which is concluded with a supplier, be it after a transaction that arises informally such as a petty cash purchase or after a quotation is obtained (i.e. where the value of the transaction is less than R 200 000), or one that occurs as a result of the award of a tender pursuant to a formal, competitive bidding.
45. In my view a similar meaning should be given to the word 'contract' in the context of Regulation 51 of the SCM Regulations, and clause 180 of the City's supply chain management policy. An interpretation that holds that clause 180 of the City's supply chain policy (and by implication therefore also Regulation 51), only applies to the contract which is ultimately entered into at the conclusion of a procurement process by an organ of State, but not during it, would be nonsensical and unbusinesslike, as it would allow the State to contract, in the case of tenders, with bidders who were awarded them on a basis other than, or different from, that in

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<sup>20</sup> *Cool Ideas v Hubbard & Ano* 2014 (4) SA 474 (CC) para 28; *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 (5) SA 209 (CC) para 30.

terms of which they had been invited to make competing bids. It would allow contracts to be concluded with winning bidders in terms that are not transparent in the tender process, and which may be potentially unfair, inequitable and/or uncompetitive vis-à-vis the winning bidder or their competitors, and which are not cost-effective to an over-burdened and over-stretched State, at the expense of its citizens. It would allow for organs of State to obfuscate or hide the real, intended terms of a procurement in the contract which it concludes with a winning bidder, leaving bidders to compete on the basis of sham or bogus bid specifications and evaluation criteria, or specifications and evaluation criteria which, at the very least, are unclear and uncertain. And this would, for obvious reasons, open the door further than it already is, to acts of corruption.

46. In *Firechem*,<sup>21</sup> one of the earliest, leading cases on tenders, the SCA emphasised that one of the requirements for a credible tender process is that the tender invitation 'should speak for itself' and its real import should not be 'tucked away, apart from its terms'. Another requirement is that bidders should be treated equally in the sense that all should be entitled to tender for the same thing. Clearly, without the real i.e. actual tender specifications and bid evaluation criteria being openly revealed in a transparent tender invitation, competitiveness would not be served, as tenderers would not know what the true object of the tender was, or its real value.
47. As was pointed out in *Phoenix Cash & Carry*,<sup>22</sup> a tender process which depends on uncertain criteria lends itself to the exclusion of meritorious bidders and is opposed to fairness amongst them, and between them and the State; and likewise in *Tetra Mobile*<sup>23</sup> the SCA emphasised the importance of fairness and transparency in the tender process, and how these values 'permeate' the entire tender process.
48. The facts of this matter aptly illustrate the points which are being made. As is evident from the extracts of the historic database which the City provided as part

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<sup>21</sup> *Premier, Free State & Ors v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30.

<sup>22</sup> *Minister of Social Development v Phoenix Cash & Carry* [2007] 3 All SA 115 para 2.

<sup>23</sup> *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & Ors* 2008 (1) SA 438 (SCA) para 9.

of its tender documentation, immediately prior to the COVID epidemic the total reported average monthly parking fees which were being collected was in the order of R 3.76 million, and in the period immediately after the end thereof, it came to just over R 3 million, and the City used this figure as a projected estimate of what was likely to be collected per month for the duration of the 3 years of the tender, for the purpose of the formula which it set for the scoring of the 'price' component of competing bidders' offers. Thus, objectively (or at least in the eyes of the City) the value of the tender was, on the face of it, in the region of approximately R 108 million (R 3 million pm x 36 months).

49. As provided for in the Preferential Procurement Regulations, the City's supply chain management policy stipulates<sup>24</sup> that in the case of preferential procurements, where scoring is to be based both on price and preference, a 90/10-point scoring system is to apply to competitive bids with a Rand value greater than R 50 million. Despite this, the invitation to tender declared that an 80/20-point scoring system would apply, a scoring system which is only applicable to competitive procurements with a Rand value of between R 30 000 and R 50 million. The City was able to get away with this apparent anomaly because of the opaqueness in the bid specifications.
50. Despite repeated requests, the City refused to provide a copy of the contract which it concluded with the 2<sup>nd</sup> respondent pursuant to the award of the tender to it, so the true value of the tender is not known. It could well exceed the projected, or estimated value thereof, as was used for scoring purposes. But assuming nonetheless, for the purpose of the exercise, that it is in the region of R 108 million, this means that the 2<sup>nd</sup> respondent, which won the tender on the basis that it was to be paid a shocking 78.5% of the value thereof (78.5 % of the fees collected by it), will effectively stand to make R 84.78 million out of it, whilst the City will only make a paltry 21% of the value thereof i.e. R 23.2 million.
51. In my view, Regulation 51 of the SCM regulations is aimed at ensuring that winning bidders in percentage-based municipal procurements are not to profit unduly by being paid large commissions, such as the one in this matter, in the form of high

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<sup>24</sup> Clause 430.2.



percentages of the turnover they derive from the collection of municipal fees, service charges or taxes from residents and ratepayers, without some limitation being placed thereon, and without some form of performance criteria (as opposed to inducement or incentive), being imposed in order to ensure delivery. In a country that is being ravaged by tenderpreneurs it is necessary for these forms of control to be imposed. Without such conditions in tender invitations which offer percentage-based commissions, there is little to no risk for opportunists to respond to them, in circumstances where they don't intend, or won't be able, to see the resultant contract out to its end and merely wish to derive an income from the tender, at a level that suits them, rather than ensuring that the State derives the income and/or services that it is supposed to, from it. Without such criteria being imposed in the evaluation and award of a municipal tender there will be a temptation for a supplier to apply for it without the necessary commitment and resources, only to 'backslide' after the award thereof, to an earnings/turnover level which it is comfortable generating, with minimal effort.

52. Placing a cap or limit on what is to be paid to a winning bidder in percentage-based tenders ensures that they are not to be paid an exorbitant commission which is not justified by the efforts and services involved, and which at a certain level is wholly disproportionate to what is derived by the municipal entity and those who are supposed to benefit from the services which are to be supplied in terms of such tenders. Placing performance-based conditions on bids for such tenders is aimed at ensuring that the State derives value for money, which ultimately, is what is expected, fundamentally, from tenders. Performance-based criteria therefore also serve to hold winning bidders accountable to the organ of State and its municipal residents and ratepayers, for the cost-effective delivery of the services envisaged by the tender.
53. In addition, by clearly stipulating performance-based criteria (such as, in this instance, a minimum, prescribed turnover) and a maximum cap on the commission which is to be derived, in an invitation to tender, bidders can properly weigh up whether it is worthwhile for them to apply for it, and to this end they can properly cost the tender with reference to their running expenses and the capital costs of

any equipment or resources that they must acquire to discharge their duties in terms of it, before bidding for it. Not putting these conditions in invitations to tender would place winning bidders in an invidious position when presented with a contract in which these conditions are later included: whilst they may have elected not to put in a bid for the tender had they known of the conditions beforehand, once the tender has been awarded to them they may have little option but to accept the onerous conditions attached to it, in terms of the contract they are required to enter into. Finally, requiring performance-based criteria and caps on percentage-based tenders to be set out in the tender documentation and not just in the contracts which are subsequently concluded after they have been awarded, will not only allow bidders, but the public as well, to scrutinize and evaluate the bid specifications for their value or lack thereof, which will assist in holding State functionaries accountable for the proper expenditure of public monies.

54. As the applicant therefore rightly points out, without the inclusion in the tender invitation, in this matter, of performance-based criteria which required competing bidders to tender based on a prescribed, minimum level of turnover and a cap on what they could charge, the value of competing bids was not capable of a proper assessment, as the City was not able to assess their real value- all it could compare and assess was the difference between the percentage commissions claimed by competing bidders.
55. The formulation of the bid specifications pertaining to the price component of the tender ran contrary to clause 2.3.10.1.1 of the conditions of tender, which required the City to set the specifications out in a manner which would allow it to 'reduce' each responsive bidder's offer to a 'comparative price'. The formulation which was adopted did not allow for the submission of bids to be reduced to a proper, comparative 'price'- a price represents a cost or rate which is to be paid per unit, (in this case a parking bay). It seems that the Bid Specifications Committee realized that the bid specifications were problematic, because at their meetings on 1 and 16 September 2022 they suggested that clause 2.3.10.3.1 of the tender invitation should be amended to reflect that the fixed monthly percentage fee which

- the winning bidder would get would be multiplied by the estimated number of bays which would go out to tender and the 'estimated tariff' which would be charged.
56. As formulated, the tender specifications therefore exposed the City to the risk of awarding the tender to an opportunistic supplier, and were unfair to potential other bidders, whose offering may in fact have meant more to the City in terms of the revenue that would be collected, than the bid by the 2<sup>nd</sup> respondent.
57. In the result, the tender specifications did not allow for a fair, equitable, transparent, properly competitive and cost-effective procurement to take place, as required by s 217(1) of the Constitution and various provisions of procurement legislation.
58. In my view, the provisions of clause 180 of the City's supply chain policy (and by implication Regulation 51 of the SCM Regulations), do not apply only to the contract which the City enters into with a winning bidder, but also to the preceding invitation to tender, and by failing to include the requirements of the clause in the bid specifications in this matter the tender was also rendered reviewable on the grounds that the City failed to comply with a mandatory condition or provision, contrary to s 6(2)(b) of the Promotion of Administrative Justice Act ('PAJA').<sup>25</sup> I may point out that, in the absence of disclosure by the City of the terms on which it contracted with the 2<sup>nd</sup> respondent there is no proof that the City even complied with the requirements of clause 180 in the contract it concluded with it. Whilst the City contended that clause 180 was only of application to the contract which it was to conclude with a winning bidder pursuant to the award of a tender, in its answering affidavit it did not allege that it had *in fact* complied with the provisions thereof when it contracted with the 2<sup>nd</sup> respondent.
- (v) Ad the functionality and preference components of the tender
59. The tender invitation specified that preference points would be allocated to bidders who qualified for them as per the Preference Schedule, which in turn provided that preference would be awarded to bidders who attained a specified 'level of contributor/contribution' status, in terms of the Broad-Based Black Economic Empowerment ('B-BBEE') Act<sup>26</sup> and the Codes of Good Practice published in

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<sup>25</sup> Act 3 of 2000.

<sup>26</sup> Act 53 of 2003.

- terms thereof,<sup>27</sup> and the Preferential Procurement Regulations.<sup>28</sup> Proof of a bidder's status was to be provided by way of a certificate issued by an authorised body, or a sworn affidavit, as prescribed by the B-BBEE Codes of Good Practice.<sup>29</sup>
60. In a sworn affidavit, dated 28 November 2022, which the 2<sup>nd</sup> respondent submitted in compliance with these requirements, it claimed 'Level 2 ' B-BBEE status on the grounds that 1) it was at least 51% black-owned and 2) according to its financial statements for the year ending February 2021 its annual total revenue (which would have been for the financial year March 2020 to February 2021, more than a year before) was less than R 10 million, thereby qualifying it as an 'Exempt Micro-Enterprise' (an 'EME') in terms of the B-BBEE Act. It is common cause that to qualify for this status the 2<sup>nd</sup> respondent needed to submit proof of compliance with both of these requirements, as at date of the closing of bids.<sup>30</sup>
61. As far as its functionality was concerned, in schedule 15 of its bid documentation the 2<sup>nd</sup> respondent claimed that it had 11 years' experience from 2011/15 years' experience from 2007, in the management of parking bays, and 120 staff and 35 510 parking bays under management. In support of these averments it referred to the portfolio it submitted and the 4700 bays it managed at King Shaka International airport, and the 4277 bays it managed at Loch Logan Waterfront, a shopping mall in Bloemfontein.
62. In his 2<sup>nd</sup> supplementary founding affidavit the applicant raised several issues he had with the information which was submitted by the applicant in support of its claim for points for functionality and preference. He queried how it was possible for it to claim 11 or 15-years' experience when, in the company documents it supplied it stated that it had been established in 2013, and it therefore could only have a maximum of between 8- and 9-years' experience. The applicant contended

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<sup>27</sup> The tender invitation made the generic scorecards as per the Amended Code of Good Practice applicable. (Clause 458 of the City's supply chain management policy provides that when no specific sector charter has been gazetted the generic Codes of Good Practice will be applicable, to qualify for a preference).

<sup>28</sup> Regulations 6(2) and 7(2).

<sup>29</sup> Clause 2.2.14.1 of the tender invitation.

<sup>30</sup> As per Code 4.1 of the B-BBEE Empowerment Code of Good Practice issued in terms of s 9 of the B-BBEE Act and clause 2.10.34 of the invitation to tender, which stipulated that if a bidder was going to claim B-BBEE status on the basis that it was an Exempt Micro-Enterprise it needed to show that its annual turnover was less than R 10 million.

that, from the portfolio and supporting documents which it had submitted it was clear that 2<sup>nd</sup> respondent was in fact claiming the experience of its mother company Federal Parking (Pty) Ltd, and if one went through the 2<sup>nd</sup> respondent's portfolio and excluded from it all the facilities which had been under parking management for longer than 9 years and those which had no employees, then in fact it appeared that the 2<sup>nd</sup> respondent (as opposed to its mother company), only managed 6 facilities with a total of 17 996 bays, none of which had been managed for more than 4 years.

63. The applicant also took issue with the 2<sup>nd</sup> respondent's claim that it had an annual turnover of less than R 10 million. He pointed out that according to the letter from the parking manager at King Shaka Airport, the value of the contract which 2<sup>nd</sup> respondent had for the management of parking bays there was R 743 000 per month, which equated to an annual turnover of R 8 916 000. If one considered that 2<sup>nd</sup> respondent claimed to manage several other parking facilities at various locations throughout the country, it was impossible that its turnover could be less than R 10 million per annum if it already earned R 8 .9 million from the King Shaka contract alone. The applicant pointed out that, in any event, the numbers did not make sense: if the 2<sup>nd</sup> respondent's turnover was less than R 10 million per annum i.e. a turnover of less than R 830 000 per month, and it employed 120 staff, even if one were to assume that all of them received equal remuneration this meant that each employee could be paid no more than R 6916 per month ( $R\ 830\ 000 \div 120$ ), before accounting for any other expenses, let alone any profit. He accordingly submitted that in the circumstances the 2<sup>nd</sup> respondent's claim for functionality was suspect and should have been investigated.
64. As previously pointed out, in terms of clause 2.3.10.5 of the tender invitation the City was required to conduct a 'risk analysis' of each of the bidders' abilities to fulfil their obligations on the basis that they had the necessary qualifications, competence, resources, capacity and experience, and it was required to verify the documents which were submitted in substantiation of the bidders' compliance with the functionality requirements and B-BBEE status, and the result of this analysis

- was to be taken into account in determining the acceptability of the bids which were submitted.
65. As far as the award of preference points is concerned, clause 460 of the City's supply chain management policy stipulates that preference points may only be allocated during a bid evaluation process, in accordance with the *verified* B-BBEE status level of contributors, as at the closing date of bid submissions. Thus, in terms of its policy also the City was required to verify 2<sup>nd</sup> respondent's claimed B-BBEE status, prior to awarding it points for preference.
  66. The Bid Evaluation Committee ('the BEC') met on 3 occasions to consider the bids which were submitted. At its first meeting, on 23 January 2023, it noted that bids had been received from the applicant and the 2<sup>nd</sup> respondent only, both of which were 'provisionally' responsive. It recorded further that, as the 2<sup>nd</sup> respondent's offer was 'better' than that of the applicant because it would provide 'better income', it would accordingly recommend that the tender be awarded to it, if any 'outstanding' information which was to be confirmed, was satisfactory. In this regard it noted that 2<sup>nd</sup> respondent had claimed 15 years' experience and had listed various parking areas under management but had not provided specific contract details for them. The BEC accordingly resolved that it would contact the reference which 2<sup>nd</sup> respondent had provided for the Loch Logan Waterfront mall, to confirm the years of experience it claimed. Consequently, it resolved that scoring for functionality would be completed during its 2<sup>nd</sup> sitting.
  67. As far as 2<sup>nd</sup> respondent's B-BBEE status was concerned the BEC recorded that 2<sup>nd</sup> respondent had submitted an affidavit in which it had claimed Level 2 status as an EME, and it could be assigned its preference points 'as claimed'. Thus, it is apparent that the 2<sup>nd</sup> respondent's claimed B-BBEE status was accepted on its mere say-so, on the strength of the affidavit it submitted, without it being verified.
  68. The second sitting of the BEC on 2 February 2023 was adjourned for a week, for the 2<sup>nd</sup> respondent to sign one of the returnable schedules it had submitted. At the resumption of proceedings on 9 February 2023 the 2<sup>nd</sup> respondent's scoring for functionality was revisited: as the Loch Logan Waterfront mall had confirmed that the 2<sup>nd</sup> respondent only had 9 years' experience the BEC resolved to award it only

- 20 points for functionality instead of 25, resulting in a total score, for responsiveness, of 95 instead of 100. As it considered the bid evaluation process to have been 'completed' the BEC proceeded to recommend that the tender be awarded to the 2<sup>nd</sup> respondent, even though it also resolved that a 'basic due diligence' should be performed on it by the supply chain management department.
69. A month later, on 6 March 2023, the Bid Adjudication Committee ('the BAC') met and resolved to award the tender to the 2<sup>nd</sup> respondent. No minutes were provided of the meeting of the BAC and there is no indication, from the record of its decision, that it raised any issue in connection with the BEC's scoring of the 2<sup>nd</sup> respondent, either for functionality or preference. There is also no indication that a due diligence was performed prior to the award, or that, if it was, its results were considered by the BAC, prior to it awarding the tender to 2<sup>nd</sup> respondent.
70. Although in its answering affidavit the City contested the cogency of the various aspects which were raised by the applicant in relation to the 2<sup>nd</sup> respondent's claims for functionality and preference, it did not dispute that, save for perfunctory enquiries that were made in relation to the Loch Logan Waterfront parking and other peripheral issues, it made no substantive enquiry into the merits of the functionality and preference which was claimed by the 2<sup>nd</sup> respondent.
71. In the circumstances, on a conspectus of the evidence as a whole it cannot be said that the City conducted a proper risk analysis of the 2<sup>nd</sup> respondent, with reference to these aspects, before awarding the tender to it, as was required, and it certainly did not verify the B-BBEE status that was claimed by the 2<sup>nd</sup> respondent.
72. In *AllPay*<sup>31</sup> the Constitutional Court held that, given the central importance of substantive empowerment under the Constitution and procurement and empowerment legislation, there is an obligation on an organ of state that has gone out to tender, to ensure that the empowerment credentials of bidders are investigated and objectively confirmed before an award is made, and a failure to do so could render the award reviewable in terms of PAJA, for failure to comply

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<sup>31</sup> Note 1 paras 68 and 72.

with a mandatory and material condition,<sup>32</sup> or for a failure to consider relevant considerations.<sup>33</sup>

73. But the duty on the organ of State extends beyond verifying bidders' B-BBEE status and includes verifying those aspects of their bids which, if properly reflected upon and considered, could affect the outcome of the tender. Thus, whereas in *Viking Pony*<sup>34</sup> the Constitutional Court held, with reference to the 2001 Preferential Procurement Regulations, that where an organ of State which has gone out to tender becomes aware of information which has been submitted by a bidder pertaining to its preference which may be false and which could, after investigation, give rise to a reasonable suspicion of fraud or misrepresentation, it is under an obligation to investigate the matter and to confront the bidder, the 2017 Preferential Procurement Regulations<sup>35</sup> have extended this obligation to investigate potentially false information which has been provided, not only in regard to a bidder's B-BBEE status, but to any other matter which may impact on an evaluation of the tender.
74. Even after the City was alerted to the possible misrepresentations which had been made by the 2<sup>nd</sup> respondent regarding its B-BBEE status and its claim to functionality, it failed to investigate these aspects. Startlingly, in the ultimate paragraph of the supplementary answering affidavit which it sought to have admitted in terms of the Rule 6(11) application which it launched on 15 September 2023, it claimed that the applicant had failed to put forward any 'primary facts' (sic) to justify its challenge to the 2<sup>nd</sup> respondent's claims to functionality and preference and there was no merit to it, and in support of this contention it attached a further affidavit which it had obtained from the 2<sup>nd</sup> respondent, dated 22 August 2023, in which the 2<sup>nd</sup> respondent sought to confirm its B-BBEE status on the basis only of

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<sup>32</sup> S 6(2)(b).

<sup>33</sup> S 6(2)(e)(iii).

<sup>34</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) paras 32 and 34. The matter concerned an interpretation of Regulation 15(1) of the 2001 Preferential Procurement Regulations, which provided that upon 'detecting' that a bidder had submitted false information regarding its preference status the organ of State was enjoined to act against it. Regulation 14(1) of the 2017 Preferential Procurement Regulations has now extended this obligation to circumstances where a bidder submits false information, not only regarding its B-BBEE status, but also regarding any other matter which will affect an evaluation of the tender.

<sup>35</sup> Regulation 14(1).



a 51% black ownership, and not on the basis that it was an EME. In this regard, 2<sup>nd</sup> respondent stated, in this affidavit, that in terms of its February 2023 financial statements its annual turnover for the February 2023 financial year ranged between R 10 million and R 50 million. Inasmuch as this reflected its earnings for the financial year March 2022 to February 2023 this would indicate that at the time when the 2<sup>nd</sup> respondent put in its bid in November 2022 it could not have qualified as an EME, as its annual turnover exceeded R 10 million, and it accordingly could not have claimed Level 2 B-BBEE status on the basis that it was an EME.

## **Conclusion**

75. From what has been set out above it follows that the award of the tender to 2<sup>nd</sup> respondent cannot stand, on the grounds that 1) the bid specifications which were set were not in compliance with the requirements of Regulation 51 of the SCM regulations and clause 180 of the City's supply chain management policy and 2) the City failed to assess the functionality and preference claimed by 2<sup>nd</sup> respondent by conducting a proper risk analysis of its bid and verifying its status.
76. In both instances the City's omissions constituted material irregularities<sup>36</sup> which occurred pursuant to a breach of mandatory provisions or conditions and/or a failure to take account of relevant considerations, contrary to the provisions of PAJA. In the circumstances it is not necessary to pronounce on the other grounds of review which were raised by the applicant, and the applicant's counsel did not press these in argument.
77. As far as the appropriate relief is concerned this matter is an instance where an order setting aside the award of the tender will be insufficient, and an order setting aside the bid specifications which were set in relation to the price component of the tender is also required, so that any fresh invitation to tender which is put out does not suffer from the same defects in its formulation as this one, and so that potential bidders in a fresh tender can have a fair and equitable opportunity to compete for the award thereof. Given that the bid specifications will be set aside

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<sup>36</sup> *AllPay* note 1.

this is clearly not an instance where a remittal or substitution order can or should be made.

78. In terms of s 8(1) of PAJA I am required, in upholding the review, to make an order which is just and equitable. As I see it this must be an order which does justice to the parties and which also has regard for the public interest, which in this case lies in the continued provision of kerbside parking services in the City metropole and surrounding areas. In this regard, in my view, and as provided for in s 8, an order which extends beyond merely setting aside the administrative action concerned and which includes a prohibition on the respondent from acting in a particular manner<sup>37</sup> and which grants a temporary interdict, is justified.<sup>38</sup>
79. In this regard the following aspects are pertinent. Prior to the closing date for the submission of bids the applicant drew the City's attention to the fact that the tender's bid specifications were deficient, in that they did not comply with clause 180 of the City's supply chain management policy and appealed to it to bring them in line therewith. His submission fell on deaf ears even though it would have been apparent to the City's officials, had they applied their minds, that there was a problem with the bid specifications, and the Bid Specification Committee itself had at some stage thought that the formulation of the price component of the bid needed to be amended.
80. The applicant approached the City again, after the closing date, and requested it to reconsider, but was ignored. Prior to launching his review in March 2023 the applicant again set out his difficulties with the bid specifications in correspondence which he addressed to the City, with a view to affording it an opportunity to avoid litigation. Once again, the City was not prepared to engage him. Consequently, he launched a review in which he initially only sought an order that the bid specifications be set aside, and the matter be remitted to the City to consider afresh.
81. The City elected to oppose the review notwithstanding the obvious deficiencies in the bid specifications. It failed to timeously file a complete and proper record of the

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<sup>37</sup> Section 8(1)(b).

<sup>38</sup> Section 8(1)(e).

decision and notwithstanding complaints in this regard took several months to supplement the record, in a number of tranches. Inexplicably, in its initial filing it left out the 2<sup>nd</sup> respondent's bid documentation as well as the minutes of the meetings of the bid evaluation committee and the record of the decision of the bid adjudication committee. Notwithstanding repeated requests, it failed to file a copy of the contract it concluded with the 2<sup>nd</sup> respondent pursuant to the award of the tender. It failed to comply with a notice which was filed by the applicant in terms of rule 35(12) calling upon it to produce the contract. It contended, in the affidavits it filed (in response to a striking out application) that the contract was irrelevant and immaterial to the issues which the Court was required to pronounce upon, notwithstanding that this was clearly not the case, given its contention that clause 180 of the supply chain management policy only applied to the contract which it entered into with the 2<sup>nd</sup> respondent, and that the prescripts of clause 180 had been complied with in such contract.

82. By June-July 2023 the record was still incomplete, as it transpired that the City's attorneys had improperly removed documents from it which they incorrectly considered should be left out, on the grounds of privilege and or confidentiality. This resulted in yet further, unnecessary delay and interlocutory skirmishes, while the date for the implementation of the award of the tender to the 2<sup>nd</sup> respondent was looming.
83. As a result of the City's dilly-dallying the applicant considered it prudent to launch an urgent application in mid-August, in terms of which he sought an interim interdict restraining the City from taking any steps to implement the award of the tender to the 2<sup>nd</sup> respondent and any contract which had been concluded pursuant thereto, and which directed the City to extend its current contract with him, pending the outcome of these proceedings. One would have expected that, given the circumstances and the delay which had been caused by it, as a reasonable organ of State the City would have agreed to the order which was sought and would have negotiated the terms thereof, with the applicant's attorneys.
84. Instead of doing so it elected to oppose the urgent application, thereby further incurring unnecessary costs. It fobbed off a request by the applicant's attorneys

that, to avoid the application from having to be heard, it should agree to the Acting Judge-President being approached for the allocation of an early date for the hearing of the review. As a result, the applicant was constrained to set the urgent application down for hearing. Before the matter was heard the applicant's attorneys again proposed to the City that the Acting Judge-President be approached, by agreement, for the allocation of a judge to hear the review. The request was again declined. When the urgent application came before me on 25 August 2023, I questioned why the City was not prepared to agree either to an approach to the Acting Judge-President, alternatively to interim interdictory relief in the terms sought in the urgent application. After some to-and-fro the City's counsel indicated that the City would be prepared to approach the Acting Judge-President with the applicant, for an early allocation of the matter to a date which suited both counsel. Subsequent thereto the review and the interdict application were postponed for hearing on 3 October 2023.

85. When the review was argued it was agreed that the interdict application would be postponed *sine die*. This was on the understanding that it would not be necessary to proceed with it, as judgment would be delivered before 30 November 2023, when the current contract which the applicant has with the City is due to expire. As a precaution, on 13 November 2023 the applicant's attorneys addressed a letter to the City's attorneys in which they requested that the applicant's existing contract be extended, for a further month, on a 'without prejudice' basis, to allow the Court time to complete and deliver its judgment. The request was refused.
86. As the applicant pointed out in his papers in the interdict application, he currently employs a large number of parking marshalls and office staff, and leases premises at which he has computer hardware and software, through which the parking services he provides are conducted. Were his services to come to an end on 30 November 2023 in circumstances where the 2<sup>nd</sup> respondent cannot substitute him because the tender award and the contract that was concluded pursuant thereto are to be set aside, this will cause disruptions and result in harm and prejudice not only to the applicant and his employees, but, importantly, to the City also, as it will no longer be able to continue to derive an income from the provision of kerbside

parking services, and the municipal ratepayers and residents of Cape Town will also suffer as a result thereof. When this aspect was broached with the City's counsel during argument, he freely conceded that the City needed the income it derived from the provision of kerbside parking and indicated that it did not currently have the necessary capacity, nor the intention, of taking over the provision of such services either on termination of the applicant's contract or on the setting aside of the tender.

87. In the circumstances, in my view, given that the tender will be set aside as well as the contract that was entered into with the 2<sup>nd</sup> respondent, it is necessary to provide, for the sake of continuity, and in the interest of the due provision of properly managed kerbside parking services in the metropole, that the applicant be allowed to continue to provide such services, pending a decision to re-award the tender, or the outcome of any appeal which may eventuate, or the City resuming control of the parking bays currently under contract. In addition, given the unacceptable manner in which the City has conducted itself in these proceedings, in my view this is a case where the applicant should be wholly indemnified for the costs which he incurred, on the attorney-client scale. Such an order will not only serve as a mark of the Court's displeasure at the City's conduct but, hopefully, may serve as a warning to it, as an organ of State, to ensure that it complies with the relevant prescripts of its own policy and procurement legislation, when setting bid specifications in tender invitations and that, where it fails to do so, instead of unnecessarily running up legal costs in seeking to defend an improperly made award, at the expense of its ratepayers and residents, it does the right thing by cancelling the tender instead, when it is entitled to do so.

88. In the result, I make the following Order:

1. The decision by the 1<sup>st</sup> respondent's Bid Specifications Committee to approve the tender specifications for tender number 180I/2022/23 for the provision of kerbside parking management services in the City metropole and surrounding areas, is set aside;
2. The bid specifications which were approved by the 1<sup>st</sup> respondent's Bid Specifications Committee for tender number 180I/2022/23 for the provision of

- kerbside parking management services in the City metropole and surrounding areas, is set aside;
3. The decision by the 1<sup>st</sup> respondent's Bid Adjudication Committee on 6 March 2023 to award tender number 180I/2022/23 (for the provision of kerbside parking management services in the City metropole and surrounding areas) to the 2<sup>nd</sup> respondent, and the tender which was awarded and the contract which the City concluded with the 2<sup>nd</sup> respondent pursuant thereto, are set aside;
  4. Pending the earliest of the outcome of any appeal process which may follow consequent upon this judgment or the award of a fresh tender for the provision of kerbside parking management services in the City metropole and surrounding areas, or the takeover of such parking services by the City:
    - 4.1 the applicant shall be allowed to continue to provide parking management services to the City on the same terms and conditions as the existing contract by which such services are provided, and to this end this order shall serve as an interim interdict; and
    - 4.2 the City is interdicted and restrained from implementing the contract it entered into with the 2<sup>nd</sup> respondent, pursuant to the award of the aforesaid tender to it.
  5. The 1<sup>st</sup> respondent shall be liable for the applicant's costs of the review (including the urgent application and the interlocutory applications incidental thereto), which costs shall include the costs of 2 counsel where so employed, on the scale as between attorney and client.

**M SHER**

**Judge of the High Court**

Appearances: (Heard on 3 Oct 2023)

Applicant's counsel: HJ De Waal SC and SG Fuller

Applicant's attorneys: Bradley Conradie Halton Cheadle (Cape Town)

Respondent's counsel: A Oosthuizen SC and N Gallant

Respondent's attorneys: Mathopo Moshimane Mulangaphuma Inc t/a DM5 Inc (Cape Town)