The Hard and Soft of Tendering

Infrastructure & Public-Private Partnerships Bulletin

Authors

Katy-Lynne Kay
Johannesburg

Shannon Toner
Johannesburg

Lara Bezuidenhoudt
Johannesburg

Industries

Infrastructure & Public-Private Partnerships (PPP/P3)

Practice Areas

Government Relations & Ethics

Recently the Supreme Court of Appeal ("SCA") delivered a judgment against the City of Cape Town and in favor of Aurecon South Africa (Pty) Ltd ("Aurecon").[1] The judgment was based on the City of Cape Town's ("City") decision to award a contract for the decommissioning of the Athlone Power Station to Aurecon. The Supreme Court of Appeal found *inter alia* that the City had failed to establish any basis for the review of its decision. However, the case resulted in two notable decisions of the SCA. Firstly, the SCA found that the City had no legitimate reason for failing to comply with the 180 day rule prescribed by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), and accordingly, the SCA refused to grant an extension to the prescribed 180 day period. Secondly, notwithstanding Aurecon's prior involvement in compiling the scope of works for the decommissioning, the court found that Aurecon was not precluded from bidding for the City's tender for the decommissioning of the Athlone Power station, or for any tender pertaining to the decommissioning.

In 2008 the City appointed a joint venture comprising of Aurecon's wholly-owned subsidiary - Aurecon Engineering International (Pty) Ltd and ODA Consulting (Pty) Ltd (the "JV") to conduct a prefeasibility study into the redevelopment of the Athlone Power Station, which had not functioned since 2003. This involved a feasibility study of the site, the feasibility of its development and the process necessary to prepare the site for redevelopment, as well as the compilation of a scope of work and specification for the decommissioning of the power station. In 2010 the JV submitted a draft scope of work in collaboration with the City's Electricity Services Directorate.

The decommissioning works were put out to tender and after finding that the other five tenders submitted were unsuitable (because they were non-responsive to the tender criteria), the City awarded the tender to Aurecon.

Soon after, however, allegations of irregularities in the process emerged and a subsequent forensic investigation resulting in an auditors' report confirming the irregularities caused the City to approach the High Court for an order setting aside its own decision in awarding the contract to Aurecon. In addition to this relief, the City sought condonation to the extent necessary for its failure to comply with the 180 days as provided for in PAJA.

The court *a quo* found *inter alia* that in terms of clause 95 of the City's Supply Chain Management Policy ("SCMP") and regulation 27(4) of the Municipal Supply Chain Management Regulations ("MSCMR"), Aurecon's prior involvement in the preparation of

the draft scope of works precluded it from bidding for the tender. As a result, the court *a quo* held that the procurement process was therefore procedurally unfair and constituted

a ground for review under s 6(2)(*c*) of PAJA and that the City's Bid Adjudication Committee ("BAC") had failed to take relevant considerations into account when it considered the tender and its decision accordingly fell to be reviewed and set aside in terms of s 6(2)(e)(iii) of PAJA.

The effect of the High Court's decision was that a consulting engineering company that had participated in the preparation, for example, of a scope of work for the provision of professional services pertaining to a particular project, was then excluded from tendering for a subsequent contract for the professional services provided for in such scope of work.

The court *a quo* also found that the 180 day period provided for in s 7 of PAJA only ran from the date that the City learnt of the full extent of the reasons for the award from the auditors' report for purposes of launching its review application. Aurecon in its appeal to the SCA contested all the findings by the court *a quo.*

On appeal, the SCA dealt with the issue of delay first, which required an analysis of the provisions of s 7(1) and s 9 of PAJA. The questions to be determined were firstly, when the legislative timeframe commenced and, secondly, in the event of a delay, whether or not this timeframe could be extended for some or other reason, arising from interest of justice considerations. From an interrogation of the facts the City had not lodged the review proceedings within 180 days, as prescribed in section 7(1) of PAJA. In fact the City's review application was launched 532 days after its decision to award the tender to Aurecon. The SCA in its discussion of s 7(1) of PAJA found that the decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Having far exceeded the legislative timeframe provided by s 7(1) of PAJA, the City needed the extension envisaged in s 9 of PAJA which as stated above allows a court to extend the stipulated time period if it is in the interests of justice to do so. Factors which play a significant role into the enquiry whether it is in the interest of justice to condone a delay include- the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay which must cover the whole period of delay, the importance of the issue to be raised and the prospects of success. In conducting this enquiry the SCA found that the information supplied by the City as supporting the grounds for its very long delay was manifestly inadequate and did not provide any basis on which to determine the reasonableness thereof. The SCA therefore held that the court *a quo* should not have granted the application for review, as the City's delay was inexcusable.

Notwithstanding the above, the SCA decided that it was still necessary to deal with the alleged irregularities to assess if the fair process demanded by the constitutional and legislative procurement framework had been followed in ensuring that all tenderers were treated evenly. The court relied on the approach formulated by the Constitutional Court in *AllPay Consolidated v Chief Executive Officer, SASSA*:[2]

'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 has been established. … Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA.'

The SCA focused on the City's main argument; the contravention of clause 95 of the SCMP, read with regulation 27(4) of the MSCMR. Clause 95 provided that "*No person, advisor or corporate entity involved with the bid specification committee, or director of such corporate entity, may bid for any resulting contracts,"* and regulation 27(4) provided that "*No person, advisor or corporate entity involved with the bid specification committee, or director of such corporate entity, may bid for any resulting contracts."* The City argued that Aurecon was "*involved with*" the bid specification committee because the bid specification committee used the JV's draft scope of work almost in its entirety in the final scope of work that it prepared and as a result, Aurecon should be disqualified from bidding. The City further argued that it did not have to show actual involvement by Aurecon with the bid specification committee, but that in light of s 217 of the Constitution, merely showing that one tenderer was afforded an unfair advantage over the other tenderers was sufficient, and that Aurecon was afforded such an advantage.

In interpreting these clauses, the court considered the wording, context, purpose and background to the preparation and production of the SCMP. The SCA found that the words "*involved with*" were not defined. The ordinary grammatical meaning of "*involved* with" is "*connected, engaged typically in an emotional or personal relationship*." As such, it held that the phrase, considered in the plain meaning of the scheme of clause 95 and regulation 27(4), were clearly meant to ensure a fair, equitable, transparent and competitive procurement process.

As a result the SCA held that Aurecon was, and is, not precluded, in terms of clause 95 of the SCMP or regulation 27(4) of the MSCMR or for any other reason, from bidding for the City's tender for decommissioning of the Athlone Power station, or for any tender pertaining to the decommissioning. In reaching this decision, the SCA noted that it made no commercial sense to exclude engineers with intimate knowledge of a particular project merely due to their prior involvement. The SCA said that this should in fact rather be encouraged so that this knowledge could be put to good use.

In conclusion, it is important to reiterate that two important principles are highlighted in this case. Firstly, the City failed to make out a sufficient case to be granted an extension in terms of s 9(1) of PAJA, as the court was of the view that the City's reasons for their delay in bringing the review application were inadequate, and therefore inexcusable. The SCA further pointed out that it is entrenched in our law that administrative action based on formal or procedural defects is not always invalid; as legal validity is also based on substantial correctness which should not always be sacrificed to form. Secondly, the SCA decision clearly affirms that prior knowledge of, or involvement in a project, should not automatically disqualify consultants from tendering for subsequent phases of the project.

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[1] Aurecon South Africa (Pty) Ltd v City of Cape Town (20384/2014) [2015] ZASCA 209 (9 December 2015)

[2] [2013] ZACC 42; 2014 (1) SA 604 (CC) paras 28 – 29.