THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No.: 20384/2014

In the matter between:

AURECON SOUTH AFRICA (PTY) LTD **Appellant**

and

CITY OF CAPE TOWN **Respondent**

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

Coram: Maya ADP, Lewis, Bosielo, Petse and Willis JJA

Heard: 21 August 2015

Delivered: 9 December 2015

Summary: Administrative review – respondent seeking review and setting aside of its own decision to award tender for the decommissioning of Athlone Power Station to appellant – 180 day time limit envisaged in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 not met – no fraud or corruption involved in procurement process and irregularities, if any, not material – no case made out for

the extension of time limit under s 9(1) of the Act.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Yekiso J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the Western Cape Division of the High Court, Cape Town is set aside and replaced with the following:

'1 The application is dismissed with costs.

2 Aurecon South Africa (Pty) Ltd (Aurecon) was, and is, not precluded, in terms of clause 95 of the City of Cape Town's Supply Chain Management Policy, the Supply Chain Management Regulations made in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003 or for any reason, from bidding for the City of Cape Town's Tender 459C/2010/2011 or for any tender pertaining to the decommissioning of the Athlone Power Station which is based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd.

3 The City of Cape Town is ordered to pay the costs of Aurecon's counter-application.'

JUDGMENT

Maya ADP (Lewis, Bosielo, Petse and Willis JJA concurring):

[1] This is an appeal against the judgment of the Western Cape Division, Cape Town (Yekiso J). The court a quo reviewed and set aside the decision of the City of Cape Town (the City)[1] to award Tender No. 459C/2010/11: Provision of Professional Services: Decommissioning of Athlone Power Station (the tender) to the appellant, Aurecon South Africa (Pty) Ltd, a provider of engineering, management and specialist technical services (Aurecon), and any contract which may have come into existence between the City and Aurecon as a result of the tender award. The court a quo further dismissed Aurecon's counter-application for a declaratory order that it is not precluded, under paragraph 95 of the City's Supply Chain Management Policy (the SCMP), the Supply Chain Management Regulations (the regulations),[2] or for any other reason, from bidding for any tender pertaining to the decommissioning of the Athlone Power Station (the power station) which was based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd.

[2] The litigation was instituted by the City which sought a judicial review of its own decision on the basis that reviewable irregularities occurred in the course of the evaluation of the tenders submitted to it and in the ultimate award of the tender. The irregularities were said to arise from its officials' 'ignorance as to the requirements of the various stages of the consideration and award of tenders' and did not entail 'any fraudulent, dishonest or corrupt behaviour on the part of the

[1] A metropolitan municipality as defined in s 1 of the Local Government: Municipal Structures Act 117 of 1998.
[2] Made in terms of s 168 of the Local Government Municipal Finance Management Act 56 of 2003.

City, any of its officials or [Aurecon]'.

[3] The background facts are briefly these. In 2008 the City appointed a joint venture (the JV) comprising Aurecon Engineering International (Pty) Ltd,[3] and ODA Consulting (Pty) Ltd[4] to conduct a high level prefeasibility study into the redevelopment of the defunct power station's site.[5] The JV's brief involved a 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 specifications 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.

[4] Around this time, the City considered expanding the JV's brief to include the preparation of the tender documents for the decommissioning of the power station. The idea was, however, aborted because some of the City's officials took the view that the City had the necessary skills to perform the task internally. The JV therefore did not assist in the compilation of the tender documents. It appears, though, that it was expected by relevant City officials that Aurecon would tender for the project management of the decommissioning works. At a meeting held in the City's Electrical Services Department on 1 April 2010 and in subsequent email correspondence, the City's head of Electricity Generation (Mr J Davidson) informed Aurecon's project manager (Mr J Webb) of such an assumption on his part and expressed the view that this would not give rise to any conflict of interest provided that Aurecon did not provide any input concerning the 'structure of preference', ie 'functionality vs price', and was not represented on the City's Bid

[3] Aurecon's wholly-owned subsidiary then known as Africon Engineering International (Pty) Ltd).
[4] A multi-disciplinary, non-engineering firm.
[5] Athlone Power Station has not functioned since 2003.

Evaluation Committee (the BEC) or Bid Adjudication Committee (the BAC).

[5] An invitation for tenders was duly advertised on 11 February 2011 as tender number 266C/2010/11. This bid was withdrawn on 13 May 2011 owing to queries raised about the tender document and a revised tender addressing those concerns was re-advertised as tender number 459C/2010/11. Aurecon tendered for the project on both occasions. In addition to Aurecon's tender, the City received five other tenders which were found non-responsive by the BAC (on the BEC's recommendation) for failure to comply with the relevant tender criteria. Only Aurecon's tender was considered to be responsive.

[6] On 31 October 2011 the BAC resolved to accept Aurecon's tender 'in the amount of R9 748 973. 15 (excl. VAT), from the date of commencement of contract until a date to be determined during the Section 33 [of the Local Government Municipal Finance Management Act 56 of 2003] (MFMA) process' and duly notified Aurecon of its decision.[6] Thus, the award of the tender was final, but subject to the fulfilment of the requirements of s 33 of the MFMA. These regulate the conclusion of long-term contracts which will impose financial obligations on a municipality beyond a financial year. The award was also subject to a 21 day appeal period envisaged in the Municipal Systems Act[7] after which Aurecon would be notified if any appeals had been lodged against the decision. A few days later, Aurecon received word that an appeal had been lodged against the award, which was being resolved, and that it would be informed of the commencement date of the contract once that process was finalised.

[7] On 17 January 2012 Aurecon received two letters from the City's Director:

[6] On 4 November 2011.
[7] The Local Government: Municipal Systems Act 32 of 2000.

Supply Chain Management (Mr L Shnaps). The first one advised that the appeal against the award of the tender had been resolved and that it would be contacted by the project manager for implementation of the project. The other reiterated that the commencement of the contract was subject to the conclusion of the process under s 33 of the MFMA and that Aurecon would be notified in due course when the said process had been completed. All was quiet and Aurecon did not hear from the City for several months. On 29 August 2012, the approval of the award served before the City's council meeting at which concerns, which were later widely reported in the media, were raised by some council members that the tender process was tainted by corruption and irregularities. The concerns arose from Aurecon's involvement in the prefeasibility study and drafting the applicable scope of work which was alleged to have given it unfair advantage over the other tenderers. These developments prompted the City's mayor to commission auditors Ernst & Young[8] to investigate, mainly, the process followed in Aurecon's appointment and whether it complied with the relevant legislation and the City's procurement policies and to make appropriate recommendations.

[8] The auditors' forensic report, which was submitted on 22 October 2012, recorded a number of irregularities which allegedly took place during the procurement process. Its conclusion, which prompted the review proceedings, was that Aurecon had been afforded an unfair advantage over the other tenderers which took part in the procurement process for the following reasons:

- the final scope of work that formed part of the bid specifications for the tender was based directly on the draft scope of work prepared by the JV in 2010, allegedly in contravention of clause 95 of the SCMP and regulation 27(4);
- Aurecon was included in internal City email communication concerning the pending tender;

[8] Ernst &Young Fraud Investigation & Dispute Services, a Division of Ernst & Young Advisory Services Ltd.

- the BEC did not meet as a collective to evaluate the functional scoring of the bidders as required and this omission compromised the validity of any decisions taken during this process;
- an unauthorised member of the BEC[9] participated in the scoring in breach of the Rules of Order;
- the correct evaluation stages were not adhered in scoring the bids as the Price and Historically Disadvantaged Individual equity ownership eligibility criteria were impermissibly scored first and submitted for technical evaluation in breach of MFMA Circular No. 53;[10]
- the BEC meeting of 5 August 2011 had no chairperson and was therefore not properly constituted in breach of clause 200 of the SCMP;
- Aurecon was permitted to withdraw a qualification contemplated in Schedule 15 of the bid document ie its initial refusal to submit audited financial statements, which impermissibly rendered its non-responsive bid responsive, in breach of clause F.3.8.2 of the SCMP which obliges the BEC to reject a non-responsive tender offer and not allow it to be made responsive by correction or withdrawal of the non-conforming deviation or reservation;
- the BEC evaluated Aurecon's bid after the bid validity period had expired as the SCM department allowed the period to be irregularly extended in breach of clause 140 of the SCMP, which permits the chairperson of the BEC to extend the period only where the original bid validity has not expired and all the bidders are given the opportunity to extend the period;
- the BEC's report to the BAC contained material factual errors without which the BAC may not have made the award.

[9] Upon receipt of the report, the City furnished Aurecon with a copy thereof

[9] Mr Eybers, the City's Mechanical Maintenance Manager, Electricity Generation.
[10] Issued by National Treasury on 3 September 2010 to provide a guideline in respect of bids that include functionality as a criterion and prescribes the two stages in which the evaluation of bids must be conducted.

and informed it that it was precluded from bidding for the tender and any future tender based on the draft scope of work prepared by the JV. The City further invited Aurecon's representations as to why the award should not be invalidated. Aurecon submitted its representations, to which there was no response, on 31 January 2013. What followed instead, on 16 April 2013, was the launch of the review proceedings.

[10] The court a quo found that in terms of clause 95 of the SCMP and regulation 27(4) Aurecon's prior involvement in the preparation of the draft scope of works precluded it from bidding for the tender. In the court's view, the inclusion of its tender rendered the procurement process unfair and constituted a ground for review under s 6(2)*(c)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[11] The court held that the defects discovered by the auditors, even if immaterial and which could therefore have been condoned,[12] were not brought to the BAC's attention and were therefore not waived. Thus the BAC 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.[13] The court further set aside 'any contract that may have come into existence between the City and [Aurecon] as a result of the award'.

[11] In response to the City's prayer for condonation 'to the extent necessary' of its failure to adhere to the 180 day period stipulated in s 7 of PAJA for the institution of review proceedings, the court a quo reasoned that the time limit ran only from the date on which the City learnt of the 'full extent of the reasons for the award of the tender' from the auditors' report. And as the review proceedings

[11] Section 6(2)(c) of PAJA vests a court with 'the power to judicially review an administrative action if … the action was procedurally unfair'.
[12] Under clause 296 of the SCMP.
[13] Section 6(2)(e)(iii) of PAJA empowers a court or tribunal to 'judicially review an administrative action if … the action was taken … because irrelevant considerations were taken into account or relevant considerations were not considered'.

were launched within the contemplated period from that date, they did not fall foul of the statutory provisions. On these bases the review application was granted and Aurecon's counter-application accordingly refused.

[12] On appeal before us, Aurecon contested all the findings made by the court a quo and the charge that it had enjoyed an unfair advantage over the other tenderers. On the other hand, it was contended on the City's behalf that it had made out a proper case for an extension of the time period prescribed in s 7 of PAJA under s 9 of this Act. The City also supported the court a quo's interpretation of regulation 27(4)[14] and clause 95 of the SCMP as disqualifying Aurecon from bidding for the tender because of its previous involvement in the prefeasibility study. It was further contended that, in any event, the irregularities in the procurement process warranted the review and setting aside of the tender.

Delay

[13] I deal first with the issue of delay. Section 7(1) of PAJA prescribes the time frames within which judicial review of administrative action may be instituted. It reads:

'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–

(a) subject to subsection (2)(*c*), on which any proceedings instituted 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 actions and the reasons.'

On the other hand, s 9 provides:

'(1) The period of –

(*a*) …

[14] Municipal Supply Chain Management Regulations GN R868, *GG* 27636, 30 May 2005.

(*b*) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[14] The wording of these provisions is clear. In terms of s 7(1) judicial review proceedings must be instituted without undue delay and before the expiry of 180 days from the date of the administrative action in issue. However, s 9 empowers a court to extend the stipulated period if the interests of justice so require. As stated above, the impugned administrative action – the decision to award the tender to Aurecon – was made on 31 October 2011. The reasons therefor are contained in the BEC's report of the same date which was adopted by the BAC without qualification. The City's review application was launched 532 days thereafter, on 16 April 2013.

[15] The City's counsel conceded that it could not be argued that it was unaware of Aurecon's involvement in the prefeasibility exercise from the onset and that its application was brought out of time. The concession was, in my view, properly made. But he argued that it was nonetheless in the interests of justice, in light of the glaring irregularities in the procurement process and the City's obligation to comply with s 217 of the Constitution (which obliges organs of state to contract for goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'), to grant it an extension of the 180 day period under s 9(1)(*b*) of PAJA.

[16] The decision challenged by the City and the reasons therefor were its own and were always within its knowledge. Section 7(1) unambiguously refers to the date on which the reasons for administrative action became known or ought

reasonably to have become known to the party seeking its judicial review. The plain wording of these provisions simply does not support the meaning ascribed to them by the court a quo, ie that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity. That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions.[15] Contrary to the court a quo's finding in this regard, the City far exceeded the time frames stipulated in s 7(1) and did not launch the review proceedings within a reasonable time. In that case, it clearly needed an extension as envisaged in s 9(1)(*b*) without which the court a quo was otherwise precluded from entertaining the review application.[16]

[17] The question then is whether the City made out a case for such an extension. Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case.[17] The relevant factors in that enquiry generally 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

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[15] *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras 22 to 23; *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C); *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) paras 45 to 52.

[16] *Opposition to Urban Tolling Alliance & others v The South African National Roads Agency & others* [2013] 4 All SA 639 (SCA) para 40.

[17] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

of delay,[18] the importance of the issue to be raised and the prospects of success.[19] The grounds upon which the City's application for the extension was based, to which Aurecon strenuously objected, were scanty, at best. It merely acknowledged that the relevant time frames had expired and that it consequently required an extension under s 9(1); made a bare allegation that the interests of justice would be served if the extension was granted and the matter was allowed to proceed and then asserted that condonation may in fact not be necessary because it became aware of the full extent of the reasons for the award when it received the forensic report on 22 October 2012 and accordingly brought its review application timeously.

[18] Among its objections, Aurecon raised the obvious fact that the City must have had knowledge of the decision, and the reasons for it, by 31 October 2011 and of the alleged irregularities, before it commissioned the forensic audit. It also pointed out that the City's founding affidavit gave no information about the date on which the auditors were appointed, the nature of the prior complaints received by it and when it received them and provided no reasonable explanation for the lengthy delay in launching the review application. The City's response to the objections was as terse as its initial explanation. It disclosed only that the auditors were appointed in August 2012 following allegations of corruption in the award of the tender and that it had 'some relevant information at its disposal pursuant to which it appointed' the auditors but was unaware of 'any reviewable irregularities' at that stage. The exact nature of that information, when it came to its knowledge and its source were not revealed.

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[18] *Ethekwini Municipality v Ingonyama Trust* [2013] ZACC; 2014 (3) SA 240 (CC) para 28.
[19] *Van Wyk v Unitas Hospital* paras 20, 22; *Camps Bay Rate Payers' and Residents Association v Harrison* [2010] ZASCA 3; [2010] (2) All SA 519 (SCA) para 54.

[19] Thus the period of a whole year between the date of the award (31 October 2011) and the submission to the City of the forensic report (22 October 2012) was barely accounted for. And the further two and a half month delay between the submission of Aurecon's response to the report (31 January 2013) and the institution of the proceedings on 16 April 2013 was not explained at all. The information furnished by the City for its delay was manifestly inadequate and simply did not provide any basis on which to determine the reasonableness thereof. And its terseness seems deliberate in light of the pertinent objections raised about the scantiness of its founding affidavit in this regard. One is left wondering why the City was not candid with the court. The delay was inexcusable and for this reason alone the court a quo should not have granted the application for review.

[20] Despite this finding, it is necessary to deal with the alleged irregularities, with which the City persisted on appeal so as to assess if the fair process demanded by the constitutional and legislative procurement framework to ensure even treatment of all the tenderers and the best outcome was followed.[20] As stated above, the City's counsel relied on what he labelled 'glaring irregularities in the procurement process and the City's obligation to comply with s 217 of the Constitution for his submission that the interests of justice warranted the grant of the extension of the 180 day time limit. The approach to be followed in this exercise has recently been formulated by the Constitutional Court as follows in *AllPay Consolidated v Chief Executive Officer, SASSA*:[21]

'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

[20] *AllPay Consolidated v Chief Executive Officer, SASSA* [2013] ZACC 42; 2014 (1) SA 604 (CC) paras 24, 38 to 40. See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 60.
[21] *Ibid,* paras 28 and 29.

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 extension of the validity period of Aurecon's bid

[21] Clause 140 of the SCMP provides for the extension of the validity period of tenders by the chairperson of the BEC, provided that the original validity period (60 days in this case) has not expired, that all tenderers are given an opportunity to extend it and that the extension is agreed to by the tenderer in writing. It was not disputed that the purpose of these provisions is to ensure that tenders are accepted while they are still open for acceptance by permitting the extension of the validity period thereof. And the extension is required to be in writing to provide proof that the extension has actually been agreed to by the relevant tenderer.

[22] In this regard, the complaint was that Aurecon and the other tenderers were not officially requested to extend the validity period of their tenders. What had happened is this. On 26 August 2011, the power station's project manager, Mr van Rooi, who was also a member of the BEC, instructed his colleagues, Ms J Parks and Ms N Gaffoor, by an email also copied to the BEC's chairman, to request an extension of Aurecon's bid which was about to expire on 11 September 2011. Mr van Rooi wrote to them again on 1 September to check if the extension had been obtained. This correspondence was forwarded to Mr Webb who duly offered the required extension by a period of 60 days by return email to Mr van Rooi and Ms Gaffoor on 2 September 2011. None of the other tenderers (who had already been found ineligible) were invited to extend their tenders. The complaint therefore was that Aurecon made its offer to extend by responding to an internal email. In respect of the other tenderers, it was contended that the SCM department had

allowed the tender to expire without inviting them, to their prejudice, to extend the period for making their bids, as the tender should have been taken as non-responsive and fresh tenders invited.

[23] It is unnecessary to require a 'formal' request from the tenderer in the present circumstances. Clause 140 merely requires an agreement by the affected tenderer in writing, and a decision by the chairperson before the expiration date, both of which were achieved in this case. In any event, if the procedure followed was irregular and the City should have issued a formal request to Aurecon, such irregularity is trifling and is purely a matter of form. And the complaint relating to the other tenderers has no merit whatsoever for the simple reason that they had already been found ineligible at that stage and were out of the picture. Significantly, the only appeal brought by one of the unsuccessful tenderers was dismissed by the City's delegated appeal authority and those findings have not been impugned.

The withdrawal of Aurecon's tender qualifications

[24] The tender document listed returnable documents to be completed by the tenderers. Among these documents was schedule 15 dealing with 'Proposed Amendments and Qualifications by Tenderers' which provided that

'The Tenderer should record any proposed deviations or qualifications he may wish to make to the tender documents in this Returnable Schedule. Alternatively, a tenderer may state such proposed deviations and qualifications in a covering letter attached to his tender … The Tenderer's attention is drawn to clause F.3.8 of the Standard Conditions of Tender referenced in the Tender Data regarding the Employer's handling of material deviations and qualifications'.

Clause F.3.8 of the contract document sets out the test for responsiveness of tenders, which includes a requirement 'to clarify or submit any supporting documentation within the time for submission stated in the employer's written request', failing which the tender will be considered non-responsive. In terms of

clause F.3.8.2 of the Standard Conditions of Tender, the employer must '[r]eject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation'.

[25] Tenderers were therefore invited in terms of these provisions to record any proposed deviations or qualifications they wished to make to the tender documents. Aurecon accepted the invitation and proposed certain additions to the documents including a clause in terms of which the City would indemnify it against liability resulting from exposure to hazardous substances such as asbestos. The BEC rejected the proposed qualification and asked Aurecon to withdraw it, failing which its tender would be considered non-responsive. Aurecon acceded to the request and unconditionally withdrew the proposed qualification. The City objected to this conduct on the strength of the auditors' finding that it afforded Aurecon an unfair advantage over other tenderers as they were not given a similar opportunity to amend their tender documents.

[26] In view of clause F.3.8.2, I agree with Aurecon's argument that the only valid criticism that may possibly be levelled against the BEC in this instance is that it did not reject its tender, as it had done with the other tenders, on the basis that the proposed qualifications rendered it non-responsive. In terms of clause F.2.8.2 of the Standard Terms of Contract, a responsive tender is one that conforms to all the terms, conditions and specifications of the tender documents without *material* deviation. Whether or not a deviation or qualification is material is obviously a question to be determined by the BEC in its discretion taking into account the eligibility criteria set out in the Standard Terms of Contract and the

Tender Data. It would appear from the BEC's conduct that it did not consider the proposed qualification to be of a disqualifying nature.[22]

[27] Importantly, clause F.4.2 of the Standard Terms of Contract makes provision for negotiations with preferred tenderers and permits the employer 'to negotiate the final terms of the contract with tenderers identified through a competitive tendering process as preferred tenderers provided that such negotiation: a) does not allow any preferred tenderer a second or unfair opportunity; b) is not to the detriment of any other tenderer; and c) does not lead to a higher price than the tender as submitted.' The similarly worded clause 231 of the SCMP grants the City Manager the same right. These provisions make clear that the mere proposal of qualifications cannot in itself render a bid non-responsive. It was common cause that when Aurecon was asked to withdraw its qualifications it had become the City's preferred tenderer. In that case the City was entitled to negotiate the final terms of the contract with it. Needless to say, the other tenderers had already been eliminated from the process in the initial evaluation for failing to meet the relevant eligibility criteria. There would, therefore, have been no room to negotiate anything with them. In any event, it is not known what amendments they should have been allowed to make so it is not possible to determine if the BEC could have exercised its discretion in their favour.

Aurecon's 'refusal' to provide its annual financial statements

[28] Clause F.2.18.1 of the contract enjoins a tenderer to provide 'on written request by the Employer, where the tendered amount inclusive of VAT exceeds

[22] Mr Davidson's concern about the qualification and his proposal to consider another tenderer, Kayad Knight Piesold (Pty) Ltd, which had been disqualified because it was not registered with the Engineering Council of South Africa, as was required in the bid specifications, seems to have fallen by the wayside.

R10 million … audited annual financial statements for 3 years, or for the period since establishment if established during the last 3 years, if required by law to prepare annual financial statements for auditing'. In terms of F.2.17 a tender *may* be rejected as non-responsive if the tenderer fails to comply with this request. The object of the provisions is obviously to enable the employer to assess the tenderer's financial credentials and its commercial capacity to execute a large contract.

[29] On the basis of these provisions Aurecon was asked to furnish the BEC with its audited financial statements. Citing confidentiality concerns, Aurecon offered to submit only summarised audited financial statements but tendered to make the required documents available for perusal 'around the table by the relevant parties at your convenience'. Thereafter, in a letter signed by a Mr Bindeman on behalf of Mr Shnaps, Aurecon was informed that its tender was deemed non-responsive for its failure to comply with the request. Preparations were set in motion to cancel and reissue the tender. However, Aurecon wrote back and lodged its objection to this decision. It argued that it had not refused to give the City access to the required information, had now reviewed its policy and was willing to accede to the City's request. It was then allowed to submit the documents and did so. As it subsequently turned out, Mr Bindeman, who wrote the letter merely to serve as a threat to Aurecon and get it to comply, was not a BEC member and neither had any involvement with the evaluation process nor any authority to act on the BEC's behalf. In fact Mr Shnaps disagreed with the contents of the letter purportedly issued in his name.

[30] The City's argument, based on the auditors' findings in this regard, was that once Aurecon's tender was deemed non-responsive it could not be revived and that the City officials, who allowed the submission of the financial statements,

acted in breach of clause F.3.8.2. That breach, it was contended, founded basis for the review of the award of the tender in terms of s 6(2)*(b)*,[23] *(c)* and *(e)*(iii) of PAJA. This argument has no merit in view of Mr Bindeman's lack of authority to issue the 'deeming' letter in the first place; the purpose of clause F.2.18.1; the use of the permissive word 'may' in clause F.2.17 and the simple fact that Aurecon did not refuse to comply with the City's request. And even if it had, the BEC allowed the submission of the relevant documents in the exercise of its clear discretion which was not criticised in any manner in the papers.

(a) BEC members did not evaluate the functional scoring of the tenders as a collective; (b) a non-member of the BEC participated in the scoring in breach of the Rules of Order; and (c) the meeting of 5 August 2011 was not properly constituted

[31] The City complained that the BEC had not complied with its Rules of Order[24] which, in its view, require it to conduct bid evaluations as a collective and convene properly constituted meetings and that a non-member of the BEC participated in the scoring process. This was so, it was contended, because the administrative evaluation for price and HDI (Historically Disadvantaged Individual) criteria had been conducted by one member, Ms Park. The functionality technical evaluation was done in part by Mr Eybers, who was not a member of the BEC, on the instructions of the chairperson, Mr Davidson, who merely checked the scoring sheet. The City argued that once the tenders passed administrative evaluation, the BEC should have scored the functionality of the tenderers as a group and their failure to do so breached clause 5.3.3(f) of the

[23] In terms of s 6(2)(*b*) of PAJA '[a] court or tribunal has the power to judicially review an administrative action if … a mandatory and material procedure or condition prescribed by an empowering provisions was not complied with'.

[24] The City of Cape Town Terms of Reference, Rules of Order and Implementation Guidelines Regulating the Conduct of meetings of Bid Specification, Evaluation and Adjudication Committees.

Rules of Order,[25] compromised the validity of the award and constituted a reviewable irregularity in terms of s 6(2)(b) and (c) of PAJA.

[32] Regarding complaint (a) the first point is that the Rules of Order merely provide that quorums do not apply and that no decision of a Bid Specification, Evaluation or Adjudication Committee will be valid if the relevant committee is not properly constituted.[26] They contain no provisions which require the BEC to act as a collective when evaluating tenders. Interestingly, clause 201 of the SCMP provides that the Responsible Agent (ie internal project managers who are City officials or external consultants appointed by the City responsible for the administration of a project or contract),[27] shall carry out a preliminary evaluation of all valid tenders received and shall submit a draft tender evaluation report to the BEC for evaluation. Furthermore, rule 14.2 contemplates matters being decided 'by a supporting vote of a majority of the members present' where decisions cannot be made by consensus. These provisions show beyond doubt that it was not envisaged that the BEC would perform the entire evaluation process as a collective. In any case there was only one eligible tenderer here which was nonetheless scored for quality and met the requirements even after the other tenders were found non-responsive. Therefore the fact that the BEC did not score and evaluate the tenders as a collective did not amount to an irregularity.

[33] As for complaint (b), no provision in the Rules of Order or any other relevant document precludes a non-member of the BEC from participating in or advising the BEC in connection with the scoring process or attending committee

[25] The clause stipulates that where points are allocated for functionality, each member of the BEC must, during the evaluation, consider the score allocated to each tenderer, whether functionality was scored by the BEC members or by an advisor/technical person assisting the BEC.
[26] Clause 13.
[27] As defined in clause 1.48 of the SCMP.

meetings in an advisory capacity. Instead, clause 198 of the SCMP allows that '[w]here appropriate, a representative of Internal Audit and/or Legal Services may form part of [the BEC], which may also include other internal specialists/experts as necessary … [e]xternal specialists/experts may advise [the BEC], as required'. And clause 5.1.4 of the Rules of Order provides that '[w]hen appropriate, a representative of Internal Audit and/or Legal Services may assist the BEC, which may also include an internal or external specialist expert, when necessary. The regulatory framework therefore allows participation by non-members of the BEC in the evaluation of tenders and Mr Eybers' involvement in the scoring process was not irregular.

[34] The validity of the BEC meeting of 5 August 2011 was challenged on the basis that its constitution was irregular as Mr Davidson was absent and a non-member of the committee, Mr Tshivase, attended as an observer in the company of Ms Park and Mr van Rooi. I have already dealt with the right of non-members to participate in the business of the BEC and nothing more need be said in this regard. As for the absence of the chairperson, it appears that the meeting was not legally required anyway and that there would have been no cause for complaint if it had not been held as long as the BEC performed its functions, which it did. At worst, the resolutions taken there would not be invalid. The next meeting of 25 August 2011 was, however, attended by all the BEC members and the proceedings of the previous meeting were unanimously adopted. Importantly, the decision to make the recommendations contained in the BEC's report to the BAC, signed by all its three members to signify their agreement with its contents, was taken by consensus reached at the properly constituted meeting of 25 August 2011 in accordance with the provisions of rule 14.1 of the Rules of Order.[28] The chairperson's absence at the earlier meeting was thus of no moment.

[28] Which enjoins the committees to attempt to take decisions by consensus.

Aurecon had access to information not provided to other tenderers

[35] There was another complaint that was not raised in argument, but that was not expressly abandoned, that Aurecon, by virtue of its involvement in the pre-feasibility study, was in possession of a compact disc which contained additional information not contained in the tender documents which was not provided to the other bidders who were thus unfairly prejudiced. It was argued that Aurecon enjoyed an unfair advantage over the bidders in that it had been placed in possession of pertinent information relating to the tender even before the formal initiation of the tender. However, Aurecon's version that such information was not relevant for the tender and was in fact offered to tenderers for a different, though related contract, and prospective tenderers were supplied with all the necessary information, was not placed in dispute in the affidavits and that puts paid to the complaint.

Were clause 95 of the SCMP and regulation 27(4) contravened?

[36] The City's real complaint, and the only one of substance, was that Aurecon was precluded from bidding for the tender or any tender pertaining to the decommissioning of the power station which is based on the draft scope of work prepared by the JV. For its view, the City relied on clause 95 of the SCMP read with regulation 27(4).

[37] The City argued that because the JV's draft scope of work was incorporated almost in its entirety into the final scope of work prepared by the City's Bid Specification Committee (the BIC) Aurecon was 'involved with the bid specification committee' and was therefore disqualified from bidding for any tender connected with the decommissioning of the power station. It was argued

that it was not necessary, for purposes of these provisions, to show that a tenderer actively participated in the actual proceedings of the BIC, or actively attempted to influence the design or content of the specification, or even that the tenderer intended or hoped to influence the outcome of the tender process, or that the resultant outcome was indeed so influenced. This was so because the ambit of the relevant provisions, read against the backdrop of s 217 of the Constitution, is sufficiently wide that it need merely be shown that the tenderer was afforded an unfair advantage over the other tenderers who participated in the procurement process, so continued the argument.

[38] The court a quo favoured this line of argument. In its view 'to allow a party to bid for a contract, the specifications of which are to a significant extent determined by the same party, is inconsistent with the values underpinning fairness' even if the BIC and BEC may have bona fide believed that this conduct was lawful. The court a quo concluded that allowing Aurecon to tender rendered the procurement process unfair and constituted a ground for review in terms of s 6(2)*(c)* of PAJA.

[39] The provisions relied upon by the City form part of a framework with which municipal supply management policies must comply. To comply with s 111 of the MFMA, which requires each municipality and each municipal entity to implement a supply chain management policy, the City adopted the SCMP which reads in relevant part:

'81. Bid specifications must be drafted in an unbiased manner to allow all potential suppliers to offer their goods and services. . . .

89. All bid specifications and bid documentation must be compiled by an ad-hoc bid specification committee constituted for each project or procurement activity.

90. The Bid Specification Committee shall be comprised of at least three City officials, an appointed Chairman, a responsible official and at least one Supply Chain Management

Practitioner of the City.

91. Where appropriate a representative of Internal Audit and/or Legal Services and/or an external specialist advisor may form part of this committee.

94. The City Manager, or his delegated authority, shall, taking into account section117 of the MFMA [which bars councillors from serving on municipal tender committees], appoint the members of the Bid Specification Committees.

95. No person, advisor or corporate entity *involved with* the bid specification committee, or director of such corporate entity, may bid for any resulting contracts. [My emphasis.] . . .

102. The bid documentation and evaluation criteria shall not be aimed at hampering competition, but rather to ensure fair, equitable , transparent, competitive and cost effective bidding, as well as the protection or advancement of persons, or categories of persons, as embodied in the preferential procurement section of this Policy.'

[40] Regulation 27 sets out the requirements with which municipal supply chain management policies must comply. It reads:

'(1) A bid specification committee must compile the specifications for each procurement of goods or services by the municipality or municipal entity.

(2) Specifications–

(*a*) must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services;

(*b*) must take account of any accepted standards such as those issued by Standards South Africa, the International Standards Organisation, or an authority accredited or recognised by the South African National Accreditation System with which the equipment or material or workmanship should comply;

(*c*) where possible, be described in terms of performance required rather than in terms of descriptive characteristics for design;

(*d*) may not create trade barriers in contract requirements in the forms of specifications, plans, drawings, designs, testing and test methods, packaging, marking or labelling of conformity certification;

(*e*) may not make reference to any particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the work, in which case such reference must be accompanied by the words

"equivalent";

(*f*) must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity; and

(*g*) must be approved by the accounting officer prior to publication of the invitation for bids in terms of regulation 22.

(3) A bid specification committee must be composed of one or more officials of the municipality or municipal entity, preferably the manager responsible for the function involved, and may, when appropriate, include external specialist advisors.

(4) No person, advisor or corporate entity involved with the bid specification committee, or director of such corporate entity, may bid for any resulting contracts'.

[41] In order to give meaning to clause 95 of the SCMP and regulation 27(4) regard must be had to their wording, read in context, and having regard to their purpose and the background to the preparation and production of the SCMP.[29] The key words 'involved with' are not defined either in the SCMP or in the Regulations. Their ordinary grammatical meaning is 'connected, engaged typically in an emotional or personal relationship'.[30] Read against this backdrop, the plain wording of the relevant provisions and the scheme of regulation 27, which deals mainly with the composition of the bid specification committee, make clear that the provisions were meant to ensure a fair, equitable, transparent, competitive procurement process by combating corruption and nepotism. The wide meaning ascribed to the provisions by the City, which would preclude a prospective tenderer who has no personal connection whatsoever to the committee from bidding, does not make commercial sense and goes against standard engineering practice. This was attested to by Mr H Silbernagl, an engineer with extensive consulting engineering experience and knowledge of the accepted norms and practices in the consulting engineering industry. None of Mr Silbernagl's evidence

[29] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) paras 17 –26.

[30] Oxford University Press *The Concise Oxford English Dictionary* 10 ed (2002) at 746.

was gainsaid. He expressed the view that barring engineers with intimate knowledge of a particular project because of their prior involvement therewith from tendering would lead to unnecessary and wasteful expenditure, and would not be in the best interests of taxpayers and organs of state, and that they should rather be encouraged to tender and put such knowledge to good use. Indeed, his evidence finds support in the Treasury Guidelines which, inter alia, approve the appointment of consultants for tasks that flow from previous work carried out by them, and state that such consultants should be permitted to participate in any competitive process for 'downstream' assignments if they express interest.[31]

[42] The BEC did not act unreasonably by accepting Aurecon's tender offer as was found by the court a quo. The court, whose task was to determine whether the BAC's decision fell within the bounds of reasonableness and fairness, as required by the Constitution,[32] misinterpreted and misapplied the provisions of clause 95 of the SCMP and regulation 27(4) and, in that course, impermissibly usurped the BAC's function by making the order it granted.

[43] It is clear from the above discussion that none of the so-called irregularities constituted irregularities at all. In any event, it is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not with technical but also with substantial correctness which should not always be sacrificed to form.[33] I do not understand *AllPay* to overturn this principle. There the Court pointed out that

'Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms

[31] For example, paragraph 5.9.5.5 of the National Treasury MFMA Circular No 53: Amended Guidelines in respect of Bids that include Functionality as a Criterion for Evaluation dated 3 September 2010.
[32] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 45.
[33] Baxter *Administrative Law* (1984) at 446.

of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'[34]

[44] It bears repeating that Aurecon's tender was found to be the only responsive one among all those which were submitted (the other tenders having been disqualified for non-compliance with the tender requirements) and that the alleged irregularities occurred after the other tenders had been found ineligible. So no other tenderer could have been prejudiced in any event, having regard also to the City's own disavowal of fraud or corruption in the procurement process, Aurecon's evaluation for quality even after the other tenders were disqualified, and the BEC's uncontested conclusions that its price was reasonable, that it has the necessary experience, competence and resources to successfully complete the project. Aurecon is the only party which has suffered prejudice in the process, for the City's missteps which were seemingly challenged not to protect the public interest but solely for political expedience (as it was described in the affidavits).

[45] The public interest would undoubtedly be best served by bringing this long outstanding matter to finality for the benefit of the community; holding the City to the contract it concluded freely and voluntarily with Aurecon, an entity that has demonstrated its ability to provide the services required in a competitive tender process, and avoiding the potential prejudice arising from reputational damage to the innocent tenderer.[35] Aurecon has had to contend with baseless imputations of impropriety against it. The City simply did not make out a case for an extension in terms of s 9(1) and in fact failed to establish any basis for the review application at all. The court a quo should have dismissed its application on this basis and grant

[34] At Paragraph 40.
[35] *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010] ZASCA 13; 2010 (4) SA 359 (SCA) paras 15-17.

the counter-application.

[46] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the Western Cape Division of the High Court, Cape Town is set aside and replaced with the following:

‘1 The application is dismissed with costs.

2 Aurecon South Africa (Pty) Ltd (Aurecon) was, and is, not precluded, in terms of clause 95 of the City of Cape Town’s Supply Chain Management Policy, the Supply Chain Management Regulations made in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003 or for any reason, from bidding for the City of Cape Town’s Tender 459C/2010/2011 or for any tender pertaining to the decommissioning of the Athlone Power Station which is based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd.

3 The City of Cape Town is ordered to pay the costs of Aurecon’s counter-application.’

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MML MAYA

Acting Deputy President

APPEARANCES

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