



**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9466/2017

In the matter between:

**JOCASTRO (PTY) LTD**

Applicant

and

**EKURHULENI METROPOLITAN MUNICIPALITY**

First Respondent

**MEMOTEK TRADING CC**

Second Respondent

**BSA HOLDINGS (PTY) LTD**

Third Respondent

And

Case No: 15596/2017

**JOCASTRO (PTY) LTD**

Applicant

and

**EKURHULENI METROPOLITAN MUNICIPALITY**

First Respondent

**ACTOM (PTY) LTD t/a SWITCHGEAR DIVISION**

Second Respondent

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**JUDGMENT HANDED DOWN 11 APRIL 2018**

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**Introduction**

[1] I have been tasked to consider whether, it is time that the Courts should assume a more interventionist role in the field of public procurement. In this instance, the allegations are made by the Applicant, that the main weakness in the regulatory framework of Public procurement is that the competitiveness of a tender process can be rendered illusory by adopting vaguely formulated “*acceptability*” criteria, which is then unequally applied in order to eliminate so-called unflavoured, but reasonably priced bidders. This, it is argued, results in tenders being awarded at hugely inflated prices to only “*technically competent*” bidder(s) and that, as a result, officials thus manage to manipulate the outcomes of these tenders.

[2] This review application is brought by the Applicant, Jocastro (Pty) Ltd (“Jocastro”) against a decision by the Ekurhuleni Metropolitan Municipality (“the Municipality”) to award tenders to bidders, Memotek Trading CC (“Memotek”) and BSA Holdings (Pty) Ltd (“BSA”), under case number 9466/2017 and Actom (Pty) Ltd t/a Switchgear Division (“Actom”) under case number 15596/17.

[3] At the hearing of the matter, both cases were consolidated as the facts and legal issues to be determined were in many respects the same. In both matters, the winning bidders did not oppose the review applications, leaving it to the Municipality to do so.

## **Factual Background**

[4] In the Memotek and BSA bid, it is common cause that the Municipality invited bids under contract number AEE04/2017, for the appointment of service providers to supply, deliver, and off-load New Metal Enclosed Ring Main Units (RMU) on an *as-and-when* required basis from the date of the award until 30 June 2019. The RMUs are used primarily to control, protect, and isolate electrical equipment and are important for purposes of secondary distribution of electricity within a distribution network. The RMUs are imported from overseas but, if required, they are installed into kiosks at the Applicant's factory in Atlantis.

[5] The Actom bid relates to the award of a tender under contract number AEE03/2017 for the appointment of a service provider for the supply, delivery, and off-loading of Miniature Substations (Mini Subs) also on an *as-and-when* required basis, from the date of the award until 30 June 2019 ("*the tenders*").

[6] The Mini Subs are important for purposes of secondary distribution of electricity within a distribution network. A mini-sub is the RMU, (which is the subject of the tender sought to be reviewed in case number 9466/17), which has been installed into a metal box. The Applicant similarly manufactures these metal boxes which house the RMUs at its factory in Atlantis.

[7] During March 2017, Jocastro was informed by the Municipality, that its bid were unsuccessful in both of the tenders because, it failed to meet the technical specifications by identifying a technical adviser as required in the tender document. According to Jocastro, the tender process was not competitive nor fair, and was therefore, contrary to section 217 of the Constitution and therefore invalid.

### **Facts relating to the Memotek and BSA award**

[8] On the 19 August 2016, the tender was advertised with the closing date of 21 September 2016. The bids were opened on the closing day. At the opening of the bids, the prices of Jocastro, Memotek and BSA were as follows:

8.1 Memotek's price was R132 493 489.26 for Schedule A, and R111 287 622.82 for Schedule B, with a total of R243 781 112.08.

8.2 BSA's price was R148 310 994.96 for Schedule A and R61 173 794.45 for Schedule B, with a total of R209 484 789.42.

8.3 Jocastro quoted R122 762 342.39 for Schedule A, and R58 922 730.57 for Schedule B, with a total of R181 685 072.96.

[9] It was also recorded at the opening of the bids, that Memotek had not submitted a tax clearance certificate, nor had BSA attached any financial statements.

### **Facts relating to the Actom award**

[10] The Municipality published an invitation to bid for the tender on 19 August 2016. The closing date for the submission of bids was 20 September 2016. A compulsory information session was held for all bidders on 30 August 2016, prior to the submission of bids. After the submitted bids were opened, they were assessed. The recordal of the prices submitted by the various bidders indicated the following:

10.1 Jocastro quoted an amount of R 228 million; and

10.2 Actom quoted an amount of R236 million.

[11] According to Jocastro, during March 2017, it heard rumours that the bid had been awarded. To request clarification, Jocastro through its attorney, sought clarification from the Municipality and addressed a letter requesting details of the award, given that it had not received any form of notification.

[12] On 31 March 2017, the Municipality informed Jocastro that its bid was unsuccessful for the following reason:

*“According to the departmental bid report the reason for **JOCASTRO (PTY) LTD**’s bid being unsuccessful is as follows:*

***Does not comply with Bid Specification.***

- *“The bidder did not indicate having a technical adviser with ECSA registration as a Pr Tech or Pr Eng, as required on page 65 of the bid document.”*

*Therefore bidder no 9 **JOCASTRO (PTY) LTD** was not evaluated for further allocation of procurement preference points.”*

### **Notification of the awards**

[13] According to Jocastro, it was not notified that the awards were made, and had to direct correspondence to the Municipality requesting confirmation of same. In the Memotek bid, Jocastro sent the letter on 17 March 2017, advising that it had not received any form of notification that the tender had been awarded, or whether, it had been successful or not. On the same day, the Municipality informed that the

tender was awarded to Memotek and BSA in February 2017, and a rejection letter addressed to Jocastro dated 13 February 2017, was attached. According to Jocastro, as at the date of deposing to the affidavit on 29 May 2017, it had still not received the rejection letter. It claimed that the Municipality *posts* rejection letters, yet *emails* successful bidders. This contention was not seriously disputed by the Municipality. It was however, accepted, that the Municipality did in fact publish tender awards on its web site every month, however, in this instance, it was not clear when the awards to Memotek and BSA were placed on its website. This practice, to my mind is undesirable, as it would most certainly to some degree impact upon the timeframe in which unsuccessful bidders would have to lodge complaints, appeals, or in certain cases seek relief in the form of interdict proceedings if this was a route contemplated. I will return to this issue later. Nothing prevents the Municipality, or any such organ of state from similarly notifying unsuccessful bidders via e-mail of its decision. This would not only be a more effective form of communication over and above the written posted notification, but it would also provide the bidders with certainty on a decision taken.

[14] On 20 March 2017, the Municipality conveyed its reason why Jocastro had been unsuccessful. It stated that

*“According to the departmental bid report the reason for **JOCASTRO (PTY) LTD**’s bid being unsuccessful is as follows:*

***Does not comply with Bid Specification.***

- *“The bidder did not provide the technical adviser as requested in page 59 paragraph 10.3.2 of the bid document which clearly states that the incumbent shall be registered with ECSA as a Pr Tech or Pr Eng.”*

*Therefore bidder no 9 **JOCASTRO (PTY) LTD** was not evaluated for further allocation of procurement preference points."*

## **Review Grounds**

[15] The Applicant's case is based on the following grounds of review:

- 15.1 With regard to both matters, that the Applicant's bid was responsive, or "acceptable" within the meaning of section 1 of the Preferential Procurement Policy Framework Act 5 of 2000, ("PPPFA") and its exclusion was unlawful. Had it not been unlawfully excluded, the tender had to be awarded to it because its bid was much lower than those of Memotek and BSA.
- 15.2. Memotek's bid was non-responsive or "not acceptable" in terms of the PPPFA for failing to comply with numerous material and mandatory conditions in the bid document as well as the regulatory framework. The award to Memotek was accordingly inconsistent with section 6(2)(b) of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA") and invalid.
- 15.3 BSA's bid was also non-responsive or "not acceptable" in terms of the PPPFA for failing to comply with numerous material and mandatory conditions in the bid document as well as the regulatory framework. The award to BSA was accordingly inconsistent with s 6(2) (b) of PAJA and invalid.

15.4 In terms of the stated reason given by the Municipality, the Applicant did not have to be excluded, but rather was not to be evaluated for further allocation of procurement preference points.

15.5 The tender process was neither competitive, nor fair, and was therefore, contrary to section 217(1) of the Constitution and invalid.

15.6 Actom's bid document *inter alia* did not comply with the bid specifications

## **The Legislative Framework**

[16] In *AllPay Consolidated Investment Holdings (PTY) LTD And Others v Chief Executive Officer, SASSA And Others 2014 (1) SA 604 (CC)*<sup>1</sup>, the court, referring to Steenkamp<sup>2</sup> stated as follows:

"Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)." (My emphasis)

[17] Section 217 of the Constitution provides as follows:

"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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<sup>1</sup> At para 31

<sup>2</sup> Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 3



(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[18] It is trite that the grounds for judicial review of administrative action arises from the provisions of PAJA. Section 6 of PAJA provides that:

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

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

(a) the administrator who took it-

- (i) was not authorised to do so by the empowering provision;
  - (ii) acted under a delegation of power which was not authorised by the empowering provision;
- or

(iii) was biased or reasonably suspected of bias;

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

(c) the action was procedurally unfair;

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

(e) the action was taken-

- (i) for a reason not authorised by the empowering provision;
- (ii) for an ulterior purpose or motive;
- (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

- (i) contravenes a law or is not authorised by the empowering provision; or
- (ii) is not rationally connected to-

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful."

[19] The legislation prescribing the framework within which procurement policy must be implemented is the PPPFA. It distinguishes between "*acceptability*" and "*functionality*" of bids:

19.1 In terms of section 1 of the PPPFA, an "*acceptable tender*" is any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

19.2 In terms of PPPFA Regulation 1,<sup>3</sup> "*functionality*" means the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents.

[20] According to Jocastro, bids must be screened for their *acceptability* in order to ensure that like services or products are compared.

[21] A *functionality* test on the other hand, is necessary when the delivery of goods and services are technically complicated. Bidders then need to be evaluated in order

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<sup>3</sup> Preferential Procurement Regulations, 2017 (GN R32 of 2017, GG 40553 of 20 Jan 2017). The 2011 Regulations, which applied to the assessment of the present tender are in material respects the same as the 2017 Regulations. Regulation 4 of those Regulations deals with assessment based on functionality.

to ensure that they have the technical ability and experience to perform. The PPPFA requires that such a functionality evaluation must take place in terms of “*objective*” criteria and in terms of a points system which must be specified in the bid document.<sup>4</sup>

[22] Ultimately, the fairness that is being referred to is the fairness in the procedure and not the substantive correctness of the outcome. The facts of each case will determine whether any shortfall in the requirements of the procurement system - unfairness, inequality, lack of transparency, lack of competitiveness or cost-inefficiency, may lead to procedural unfairness, irrationality, unreasonableness, or any other ground under PAJA. A court under the circumstances is not to focus on whether or not the decision is correct, but rather, on the facts and evidence presented, make an enquiry as to whether any one of the the alleged grounds of review exist, and if so, is obliged to conduct an enquiry with a view to formulating a just and equitable remedy, after the objective grounds have been established.<sup>5</sup>

### **The rejection of the Applicant’s bid**

[23] It is common cause that Jocastro’s bid was rejected in both tenders for failing to meet the technical specifications of the tender.

[24] Under the Staffing Profile of the RMU bid, the following clause is relevant.

“10.3.1 The appointed service provider will be providing the service throughout EMM boundaries for the items under this contract to ensure that deliveries are not delayed due to that the delivery team is busy in another area, the supplier must

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<sup>4</sup> PPPFA Regulation 5

<sup>5</sup> Allpay at p622A-E

have a minimum of two delivery teams. Each team shall comprise of a **driver** and **two assistants** to deliver and off-load and as well as administrative personnel which must include at least a **technical adviser** on the ring main units offered. Therefore information indicating fully the number of persons available to execute the project and their respective responsibilities must be provided on Staffing Profile and Proposed Key Personnel tables provided in the bid document.

10.3.2 The technical adviser indicated in 10.3.1 shall be an individual registered with ECSA as Pr. Tech or Pr. Eng (Electrical)."

[25] A similar clause is found in the Mini Subs tender, which states at Clause 9.1.3 that:

"The technical adviser indicated in 9.1.2 shall be an individual registered with ECSA as Pr. Tech or Pr. Eng."

[26] From the bid document, it is evident that Jocastro under the heading, "*Staffing Profile*", indicated *inter alia*, that it had drivers, painters and grinders under the sub-heading "*own staff*" and indicated, as requested, the number of staff in those positions. Under the heading "*Proposed Key Personnel*", the form called for the names, positions, qualifications and experience of the proposed key personnel. Here, Jocastro had inserted the name of one Edmund Stokes whose position was indicated as "*Design Electrical*" and who had stated his qualifications as '*Electrical/Mechanical/Eng*' with twenty years experience.

[27] According to Jocastro, the tender application form did not require under the heading of "*Staff profile and/or key personnel*", bidders to disclose who the technical adviser was. Tender condition 10.3.1 also merely required the bidders to indicate

fully the number of persons available to execute the project and their respective responsibilities. This was done by the Applicant. Furthermore, the Municipality did not consider the fact that it did in fact nominate a technical advisor who was registered with ECSA as a Pr Eng. Mr Stokes-Waller was nominated as a key staff member who would be utilised if the tender was awarded to it. They furthermore argued, that there was no requirement to provide *proof* that the technical advisor was registered with ECSA as a Pr Eng. The reason for this is, that the tender document provides that “*The attachment or inclusion of information not specifically asked for is not desirable, and lead to delays in the awarding of bids. This includes Company Profiles and CV’s if not specifically requested.*”<sup>6</sup> In any event, Jocastro argued that if there was any doubt, the Municipality could have very easily established from the ECSA website, that Mr Stokes-Waller was indeed so qualified, alternatively, they could have requested documentary proof of Mr Stokes-Waller’s credentials in line with the provision of the tender document at paragraph (m).<sup>7</sup> Jocastro undertook this exercise again<sup>8</sup> after the Municipality, in its answering affidavit contended that it did check on ECSA website “*as an abundance of caution*” and a search of Mr Stokes did not elicit any results. I agree with Jocastro’s contention that in the absence of any supporting evidence in support of this allegation, that this amounts to impermissible hearsay which in any event is not supported by the objective facts as presented by Jocastro on this point.

[28] Jocastro also argued that the reason for their exclusion from the bid had changed since the filing of the Municipality’s answering affidavit. It seemed the

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<sup>6</sup> Item 3 of page 5 of the Tender document

<sup>7</sup> (m) agree that documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the EMM.

<sup>8</sup> And attached a copy of the search result which clearly indicated the name of Edmund Stokes-Waller – Professional Engineer, Electrical - on the ECSA website

Municipality now contended that Jocastro did not “*identify*” the technical advisor. Jocastro argued that it was impermissible to change the reason for excluding a bidder in the answering affidavit.

[29] According to the Municipality, Jocastro did not indicate a technical adviser as required by Clause 9.3.1 of the tender Specification, although, it did admit that the name of “*Edmund Stokes*” did appear on Jocastro’s “*Proposed Key Personnel*” table. They further argued that Jocastro’s reading of the tender document was incomplete, and therefore, incorrect because on its interpretation of the clause 9.3.1, the tender document clearly and unambiguously required that a bidder must “*make known*” its technical adviser. Jocastro ostensibly overlooked the fact that it failed properly to “*[indicate] fully the number of persons available to execute the project and their respective responsibilities*”. This reasoning is flawed in my view. Firstly, the Municipality’s argument that it was simply unable to ascertain from Jocastro’s bid document whether it had a technical advisor is simply unbelievable by virtue of the simple fact that Jocastro indicated the qualifications of its core key personnel, and most importantly, that of Mr Stokes, and its own provision provided for the option to have requested proof of registration with ECSA, which it failed to do.

[30] Secondly, the Municipality’s interpretation of what was required in clause 9.3.1 of the Tender document is also flawed. In *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*, the court held thus:

“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax;

the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. ("My emphasis")

[31] Our courts have consistently held that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve and in so doing, the court must consider all the relevant circumstances surrounding the contract to determine what their intention was in concluding it.<sup>9</sup> From a plain reading of this clause, it is clear that the objective is to fulfill the mandate of the tender which is to ensure, *inter alia*, that the appointed service provider has the necessary capacity to ensure deliveries are not delayed. Furthermore, the information that is required after the use of the adjective "*fully*" in the last sentence of the paragraph, denotes the information of the number of persons available to execute the project and their respective responsibilities. No where does this clause call for the identity of the persons to be stated.

[32] There was also no specific instruction to identify the technical adviser, the drivers, assistants and administrative personnel by name. At best for the Municipality, tender condition 10.3.1 was vague and ambiguous as to what exactly was required. This meant that bidders should have asked to clarify who their technical advisors were, if this was regarded as crucially important. Jocastro argued

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<sup>9</sup> *Novartis v Maphil 2016 (1) SA 518 SCA at para 27*

that bidders should not simply be excluded based on vaguely formulated “*acceptability*” criteria. I am in agreement that on this basis alone, Jocastro’s bid was unlawfully excluded within the meaning of section 1 of the PPPFA. Even if I am wrong on this construction, I am of the view that the Municipality committed another irregularity. According to the rejection letter, the Municipality advised Jocastro that, because it did not provide the details of the technical adviser, that it was not evaluated for further allocation of procurement preference points. This in fact did not occur and instead, its bid was excluded all together. In my view, on this ground alone, the Municipality is in breach of section 6(2)(b) of PAJA.

### **Was the Municipality’s decision irrational and unreasonable?**

[33] I dealt earlier with the advantages of notifying unsuccessful bidders of decisions made by organs of state. In *casu*, when Jocastro had learnt that its bid had been unsuccessful, the Municipality directed a letter to Jocastro’s attorneys on 31 March 2017, advising it to forward a written complaint which would be dealt with by its Corporate and legal department. In this letter of objection, Jocastro reiterated that it should not have been disqualified because it did in fact provide a technical advisor who was registered with ECSA. On 13 April 2017, the Municipality advised Jocastro that the matter had been referred to Malherbe Rigg & Ranwell Inc. (“Malherbe”) for a determination of the objection. Of importance is the fact that Malherbe concluded that the objection was out of time. This is because Regulation 49 of the Municipal Supply Chain Management Regulations (which is consistent with Section 49 of the EMM Supply Chain Management Policy (“SCMP”)) provides that the supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality in the implementation of



its supply chain management system to lodge within 14 days of the decision, or action, a written objection or complaint to the municipality against the decision or action. Malherbe was also of the view that the SCMP did not provide it with the power or authority to extend or condone the relevant time period to lodge the written objection, i.e. within 14 days of the decision or action. As I have already stated, the timeous notification *via* email to unsuccessful bidders would go a long way in preventing these types of difficulties.

[34] Despite this however, Malherbe chose to deal with the merits of the objection. During the course of the determination, Malherbe rightly questioned whether or not, there was an obligation on Jocastro to provide more detail relating to their appointed technical advisor so as to satisfy the requirements of the Bid documentation. It found that it was not apparent from the Bid documentation, a clear requirement for Jocastro to attach copies of the qualifications of the technical advisor required to be appointed in terms of the Bid documentation. This particular clause did lend itself to some ambiguity but, to the extent that the bid document was silent on the inclusion of proof of registration of the technical advisor with ECSA, this documentary proof could have been requested from the supplier.

[35] It is common cause that determinations such as these are not binding in nature. What is however indicative is the fact that the Municipality's own independent consultant concluded that Jocastro did in fact comply substantively with the requirements of the Bid Documentation, and that the reasons given by the Municipality incorrectly recorded the content of the Bid Documentation. In my view, the Municipality could have, based on this determination and armed with this knowledge of potential irregularity, adopted a more proactive approach in resolving

the dispute. Its failure to rectify its decision, on the principle of fairness, was also contrary to the prescripts of section 217 of the Constitution.

### **The manner in which competing bidders were evaluated**

[36] The question as to whether, it was unreasonable to exclude Jocastro for the reason as stated, must also be viewed through the lens in the manner in which the Municipality dealt with the other so called omissions, by competing bidders. It is trite that a measure of fairness in dealing with bids and tenders is imperative in the evaluation process. This is the very reason why the PPPFA was established. Conradie JA in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* All SA 504 (SCA) 22 September 2003, on this issue stated the following:

“[12] There is another reason that the tender procedure of a local authority must be fair. Invitations to tender by organs of State and the awarding of tenders where it is done in the exercise of public power is an administrative process (see *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 465F-466C where the leading cases are collected). Section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 requires the process to be lawful, procedurally fair and justifiable. But primarily, in the case of a local authority, the process must be fair because s10G (5)(a) of the Local Government Transition Act 1993 requires it.

[13] In the *Logbro Properties* case supra at 466H-467C Cameron JA referred to the ‘ever-flexible duty to act fairly’ that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness. (My emphasis)

[37] It was also held in *Allpay supra*, at 616A-B, that:

“Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This

legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established. (My emphasis)

[38] Tender processes also require strict and equal compliance by all competing tenderers on the closing day for submission of tenders<sup>10</sup>.

[39] A further point of review by the Applicant centered around the ability of the successful bidders to have fulfilled the mandate of the tender. It is common cause that Memotek did not submit a tax clearance certificate with its bid and BSA did not submit its financial information, as was required in the bid document. The Municipality however, afforded them an opportunity to provide same, and they were both requested to submit these outstanding documents in order to be awarded the tender. This request ostensibly complied with Circular 1 from the National Treasury in terms of which the EMM City Manager had issued a directive for the adjudication of tenders. In response to these requests, both Memotek and BSA provided the requested documentation and both were awarded the tender.

[40] According to Jocastro, Memotek's bid could never have been accepted, had the Municipality followed the obligatory mandatory criteria. Over and above the above complaints, Jocastro, *inter alia*, also stated that Memotek did not have the required storage space to execute the contract, and did not have the requisite experience of similar contracts nor did BSA have the required three years experience as required. Having considered these grounds, I find it apposite to only deal with a few of these complaints.

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<sup>10</sup> Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at paras 20-23

## Failure to provide a tax clearance certificate

[41] Page three of the tender document<sup>11</sup>, provides the following:

*“A BID WILL BE REJECTED:*

*If a **VALID ORIGINAL** tax clearance certificate or copy thereof (or in the case of a joint venture or consortium, of all the partners in the joint venture or consortium) has not been submitted with the bid document on closing date of the bid. (**An expired tax clearance certificate submitted at the closure of the bid will not be accepted.**)”*

[42] If the Municipality adopted the same stringent rules that it had with Jocastro, then on this basis alone, the bid of Memotek should have been rejected as well and subsequently excluded. According to Jocastro, the bid conditions made it very clear and explicitly provided that a tax clearance certificate and financial statements had to be submitted together with the bid. In fact, this requirement is written in big bold letters in the bid application and is incorporated under the reasons by which a bid will be rejected.

[43] The Municipality recorded that at the opening of the bids, there was no tax clearance certificate attached to Memotek's bid, and this aspect was not challenged by the Municipality in its answering affidavit. The Municipality on the other hand

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<sup>11</sup> Point 1

explained in its answering affidavit that some of the mandatory documents required to be submitted, could be provided on request after the closing day.

[44] I am in agreement with Jocastro that this explanation falls to be rejected. I say this for the following reasons. First of all, in terms of Regulation 14 of the Preferential Procurement Regulations, a municipal tender may not be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order.<sup>12</sup> In the *Moraka* case *supra*, where the court similarly dealt with an instance where the tenderer failed to submit original tax clearance certificates, the court opined that it was for a court to decide what should be a prerequisite for a valid tender and a failure to comply with the prescribed conditions would result in the tender being disqualified as an “acceptable tender” under the Procurement Act unless those conditions are immaterial, unreasonable, and unconstitutional. The argument in *Moraka* was that the Municipality had a discretion to condone a failure to comply with any of the minimum requirements as set out in the tender invitation.<sup>13</sup> If this was in deed the case, then fairness dictated that the same discretion should have been afforded to Jocastro to have satisfied the Municipality of the qualifications of Mr Stokes. The same argument was used in the BSA bid who similarly did not provide financials along with its bid. The same considerations apply and consequently, it too should have been excluded on the criteria adopted as against Jocastro.

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<sup>12</sup> Dr JS Moroka Municipality and Others v Betram (Pty) Ltd Limited and Another (937/2012) [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) (29 November 2013) at para 8(c)

<sup>13</sup> Ibid, paras 9 and 12

[45] The other requirement, *inter alia*, which was considered to be an important criteria, was the ability of a bidder to have had appropriate infrastructure and resources available to store the ordered material on behalf of the Municipality, and to be able to have the financial ability to deliver its mandate. In this regard, it was a requirement that bidders have a turnover of Four Million Rand, with Two million Rand required as a minimum turnover for the previous financial year. According to BSA's bid documentation, BSA reported that its turnover for the previous financial year was nil and its financials did not indicate that it had the required minimum turnover. On the face of it, BSA did not comply with this requirement. According to Jocastro, not only did Memotek operate from a suburban home and could therefore, not have provided the required storage space as claimed by it, but it simply failed to provide the financial documents at all on the closing day. They were however, provided an opportunity to hand these in after the closing day, but, as I have mentioned before, this same opportunity was not afforded to Jocastro. In the Actom bid, they similar to Jocastro, did not identify a technical advisor in the Proposed Key personnel form, yet Jocastro's bid was excluded on this basis and Actom's bid was successful.

## **Conclusion**

[46] Mr de Waal for Jocastro indicated that it is precisely these types of pass/fail bid conditions which are stipulated in the bid document, which are used to exclude meritorious bids. He argued that while masquerading as "*acceptability*" requirements, these factors are often related to functionality, which is then assessed on a pass/fail basis rather than the points system prescribed by the PPPFA Regulations.

[47] In the present instance, twelve out of fourteen bids were excluded on the basis that they failed to provide information relating to technical ability, or simply stated, that they failed to “*identify*” their technical advisor. He argued that this had nothing to do with the concept of acceptability, but rather related to functionality, or the capability to execute the mandate and it is this perversion of the system, he argued, that resulted in a situation where an organ of state selected two completely unknown service providers, which operate from suburban homes and with no track record in the specified industry, at a price that was millions of rands higher than those well-established competitors. The justification given for this was that the two bidders offered the only ‘acceptable’ bids. This simply could not be.

[48] I am therefore of the view that on any rational construction, bidders Memotek, BSA and Actom, objectively viewed, could never have met the general criteria of the bid criteria. Furthermore, the tender process, as views holistically, could not be said to have been competitive or fair as contemplated by section 217(1) of the Constitution. Accordingly, the awarding of the tenders to them are invalid.

### **Request for substitution of Municipality’s decision**

[49] In argument, Mr. de Waal for Jocastro urged that this court ought to substitute the Municipality’s findings with its findings by virtue of section 8(1)(c)(ii) (aa) of PAJA. Reliance was also placed on *Trencon Construction (Pty) Limited v Industrial Corporation of South Africa Limited and Another*<sup>14</sup> where the Constitutional Court stated that, when a court exercises its authority in terms of the sub-section “*a court must be satisfied that it would be just and equitable to grant an order of substitution.*” I do not believe that it would be just and equitable to award the bid to Jocastro simply

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<sup>14</sup> 2015 (5) SA 245 (CC)

on the basis that I have found them to have been unlawfully excluded. On its own papers, Jocastro was but one of twelve bidders to have been excluded from the bid process. It would, in my view, be manifestly unjust to favour Jocastro simply on the basis that it decided to review the Municipality's decision as we do not know if financial constraints, as a simple example, prevented others from challenging same. The proper procedure in this instance would be for the matter to be remitted back to the Municipality to consider the matter afresh.

[50] The following order is made.

**Case Number 9466/17**

- (a) The decision to award tender contract AEE04/2017 for the appointment of service providers for the supply, delivery and off-loading of New Metal Enclosed Ring Main Units on an as-and-when required basis from date of the award until 30 June 2019 to the Second and Third Respondents is reviewed and set aside.

**Case number 15596/17**

- (b) The decision by the First Respondent to award tender contract AEE03/2017 for the appointment of a service provider for the supply, delivery and off-loading of Miniature Substations on an as-and-when required basis from date of award until 30 June 2019 to the Second Respondent, is reviewed and set aside.
- (c) Both tenders, AEE04/2017 and AEE03/2017 are remitted back to the First Respondent for fresh evaluation in compliance with the PPPFA.



- (d) The Applicant is awarded costs of the application against the First Respondent in both matters, such costs to include the costs of the Rule 30 Application.

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**KUSEVITSKY AJ**