

Adjudication of bids within the public sector supply chain management process

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SUMMARY

Section 217 of the Constitution¹ states that, when organ of state within the national, provincial and local sphere contracts for goods or services, must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. A number of legislations were enacted to deal with supply chain management processes within the public sector which legislations and regulations are often contradictory and confusing with no clear legal status. Organs of state are required to issue out an invitation to tender which is not open for acceptance by the highest bidder, but an invitation to potential bidders to make an offer that will be considered after the closing date for the particular tender. For the offer and acceptance to be valid and enforceable must comply with certain requirements. Once the offer is accepted, a contract which reflects the consensus reached between the parties, is formed.

Once entered into, contracts are there not to be breached but entered into with the intention of having some benefit. However when parties breach the contract or when same is terminated and loss is suffered, parties may take a better look at the terms and conditions of their agreement. It is at that time that the parties may say their intention prior to signing the agreement is not correctly represented in the agreement and as such parties wish to state that the contract does not truly reflect their intention.²

It is at this point that process of interpretation becomes critical. It is the duty of the drafter to ensure that such invitation to do business is carefully drafted and has fully captured all the elements of the envisaged contract and excluded all elements of ambiguity which might create problems during the interpretation stage.

In this document I intend to indicate the legislative framework governing supply chain management processes within the public sector and challenges encountered in the implementation of such legislations, the impact created by the lack of knowledge and skills by the persons entrusted with the duty to implement the legislations and non-compliance with policies and regulations relating to process.

¹ Constitution of the Republic of South Africa, 1996

² Kirith P Haria *Contract Law: Parol Evidence Rule* www.polity.org.za (19 April 2013)

It is argued in this document that our law should be developed to fully recognize a bidding process as another form of contract creating rights and obligations and be interpreted in the same way as any other contract to eliminate most of the challenges in dealing with a bidding process. The further challenges created by the implementation of the myriad of legislations and policies regulating the public sector supply chain process be minimized by the enactment of a comprehensive integrated 'one stop' public procurement code.

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CHAPTER 1

1.1 INTRODUCTION

Organs of the state need goods and services to function. To achieve this they can set up factories to provide for their needs alternatively they can acquire their needs from an outside entity. The constitution as the supreme law of the country compels to, when procuring for goods or services, do so in terms of a system which is fair, equitable, transparent, competitive and cost effective.³ Further legislations were enacted to echo the sentiments envisaged in the constitution to regulate public sector supply chain management processes.

This study will indicate that the number of legislations enacted for the purpose of regulating the supply chain management process is, *inter alia*, the cause of challenges encountered and proposes solutions.

1.2 PROBLEM STATEMENT

In South Africa, a contractual relationship entered into by two or more people is regarded as a relationship entered into on equal footing and is governed by private law of contract. The law that governs public sector supply chain management process, defining the scope of government's powers, the way in which such powers should be exercised and the consequences that flow from the abuse of powers, is administrative law⁴. However the eventual contract that is entered into after the award to a successful bidder, is private law of contract as the contract is regarded as having been entered into by parties on an equal footing.

Section 33 of the Constitution affords every person a right to an administrative action that is lawful reasonable and procedurally fair. The section allows a bidder, whether successful or not to, to have *locus standi* to challenge government procurement decisions on the ground of lawfulness, reasonableness and procedural fairness. The section

³ Section 217(1)

⁴ Bolton P, *The Law of Government Procurement in South Africa* Chapter 1 page 17

creates a 'kind of a contract' to contract in the future between the organ of the state and the individual bidders.

Our law only recognizes two types of ancillary agreements being an option and preference contracts. In the case of *Steenkamp NO v Provincial Tender Board of Eastern Cape*⁵ the court acknowledged, although *obiter* that an invitation to tender is an offer made by the organ of state not from a position of authority and the submission of a tender in response is an acceptance of an offer to enter into an option contract by a private person who does so on an equal footing with the organ of the state.

The study will look into how the challenges encountered within the public procurement space will be minimized if our law can be developed to fully recognize a bidding process as another form of ancillary agreement and it be dealt with as another form of contract.

1.3 RESEARCH METHODOLOGY

The aim herein is to look into the legislative framework governing adjudication of bids within the public sector supply chain management process, the challenges encountered within that space in the implementation of the said legislations and other general problems.

The study is an academic one which include consultation of various sources such as textbooks, journal articles, case law and the like.

⁵ 2006 (3) SA 151 SCA

CHAPTER 2: ADJUDICATION OF BIDS WITHIN PUBLIC SECTOR

2.1 INTRODUCTION

It is a clearly defined principle of our law that all tender processes by organs of state must conform to the broader regulatory framework to South African procurement law. The Constitutional Court⁶ stated that

“Section 217 of the Constitution is the source of the powers and functions of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorized 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 constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)”.

Governments, South Africa included, need goods or services in order to function and in order to achieve this, they can set up factories to provide for their needs (in-house) alternatively they can acquire their needs from an outside entity (out-sourcing).⁷ In the Medium Term Expenditure Framework prepared for 1998/1999⁸ indicated a backlog for municipal services delivery. The findings indicated that if the backlogs are addressed through public sector resources only, many communities will receive adequate services only in 2065. As a result it is critical for government to outsource the provision of some of its services for it to deliver on its services to the citizenry within a reasonable time.

In the Budget Speech⁹, Minister of Finance, Pravin Gordhan stated that public procurement is an important strategic vehicle for developing local industries, broadening economic participation and creating work opportunities, a database of South African products and black-owned businesses so that the system can foster economic empowerment and

⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)

⁷ Bolton P, *The Law of Government Procurement in South Africa* Chapter 1 page 1

⁸ DPLG (2000) White Paper on Municipal Service Partnership, Department of Provincial and Local Government, General Notice 1689 of 2000, Government Gazette Vol 418 No 21126, 26 April 2000 s 1 headed ‘The Rationale for a Municipal Service Partnership Policy’ subheading “Backlog”

⁹ 2014 Budget Speech (26 February 2014)

dynamically contribute to growth is a requirement. Government spends more almost R500 billion annually on procurement of goods or services.

The Constitution of the Republic of South Africa¹⁰ afforded a constitutional status to public sector supply chain management process as an illustration of its importance in ensuring that government does deliver services to its citizens at the right time, right place and right price. Section 217 of the Constitution provides that:

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

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

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

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

The Preferential Procurement Policy Framework Act¹¹ and its Regulations was enacted to give effect to Section 217(3) of the Constitution. A number of other statutes were enacted with the intention to give effect to the Constitution and deal with public sector supply chain management process (public procurement). This study will attempt to show

¹⁰ Section 217

¹¹ Act 5 of 2000

the challenges experienced in application of the myriad of legislations within the public sector supply chain management process and proposes solutions.

2.2 LEGISLATIVE FRAMEWORK GOVERNING PUBLIC PROCUREMENT

Despite public procurement in South Africa having been afforded constitutional status, a myriad of statutes still exist that purport to deal with specific aspects of public procurement without a single coherent piece of legislation guiding the procurement in its entirety. The following statutes, *inter alia*, deals with public procurement: State Tender Board Act 86 of 1968; Public Finance Management Act 1 of 1999; Preferential Procurement Policy Framework Act 5 of 2000; Construction Industry Board Act 38 of 2000; Broad Based Black Economic Empowerment Act 53 of 2003; Local Government: Municipal Finance Management Act 56 of 2003; Prevention and Combating of Corrupt Activities Act 12 of 2004. The application of the statutes has proven to be a challenge not only supply chain practitioners¹² and but to bid committee members alike and has given rise to numerous litigation and delays in the delivery of services.

The Supreme Court of Appeal¹³ has recently commented that cases concerning tenders in the public sphere are coming before courts with a disturbing frequency and that the cases are sometimes based on the fact that the awards are tainted with fraud and corruption but more often than not, it is as a result of negligence or incompetence or failure to comply with one or more of the myriad rules and regulations which apply to tenders. The statutes are discussed hereunder:

¹² Consolidated General Report on National and Provincial Audit Outcomes PFMA 2014/15 page 31-32

¹³ *South African Post Offices v De Lacy and Another* 2009 (5) SA 255(SCA) at 256 para 1 *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) 359 (SCA) at 361 para 1; *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* 2013 ZASCA 186 at para 8

2.2.1 1996 Constitution¹⁴

Before 1994, public sector supply chain management process in South Africa was subject to both national and provincial legislations. The State Tender Board Act¹⁵ governed both public procurement at both national and provincial spheres of government while a various ordinances governed procurement at the local sphere. After 1994, the Constitution as the supreme law of the country in Section 187 of the 1993 Constitution and Section 217 of the 1996 Constitution afforded constitutional status to public procurement.

Section 217 of the Constitution states that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in the 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. It goes further to state that organs of state or institutions are not prevented from implementing a procurement policy providing for categories of preference in the allocation of contracts and for protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.¹⁶ The section makes provision for a national legislation which will prescribe a framework within which the policy referred to in subsection (2) will be implemented.¹⁷

Any procurement of goods or services and eventual conclusion of contracts by an organ of state or institutions identified in national legislation without following the principles as laid down in Section 217 of the Constitution will be reviewed and set aside.

The Constitutional Court¹⁸ has confirmed that Section 217 of the Constitution is the starting point for evaluation of a proper approach to an assessment of the constitutional validity of outcomes under the state procurement process. It lays down the minimum requirements for a valid tender process and contracts entered into following an award of a tender to a successful tenderer. In *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*¹⁹ the court also stated

¹⁴ Constitution Act 108 of 1996

¹⁵ Act 86 of 1968

¹⁶ Section 217(2)

¹⁷ Section 217(3)

¹⁸ *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 at para 33

¹⁹ 2008 (2) SA 481 SCA at para 4

that the tender process, preceding the conclusion of a contracts for the supply of goods or services, must comply with the principles laid down in the section.

Invitation to bid and contracts entered into for the provision of goods or services by organs of state which were not made and awarded in line with Section 217 of the Constitution are invalid and should be set aside. An organ of state's decision to award a tender is regarded as an administrative action in terms of Promotion of Administrative Justice Act, 3 of 2000 and any person affected by such a decision is allowed to review such a decision by a court or independent and impartial tribunal.

Section 33 of the Constitution was introduced to safeguard the public against abuse of power by organs of the state or institutions listed in national legislation by defining the scope of their powers, the way in which such powers should be exercised and the consequences which flow from an abuse of powers. The section states that:

- (1) *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*
- (2) *Everyone whose rights have been adversely affected by administrative action has a right to be given written reasons*
- (3) *National legislation must be enacted to give effect these rights, and must*
 - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal*
 - (b) *impose a duty on the state to give effect to the rights in subsection (1) and (2); and*
 - (c) *promote an efficient administration”*

Promotion of Administrative Justice Act is the legislation which ensures that the state organs act within the confines of their constitutional and statutory powers, which ensures that organs of state may not fetter the discretion afforded to them and that persons affected by the administrative decisions are given an opportunity to be heard.²⁰

²⁰ Bolton P, Chapter 2 page 17

2.2.2 Promotion of Administrative Justice Act (PAJA) and Regulations²¹

PAJA is the legislation which gives effect to Section 33(3) of the Constitution.

The Act applies to organs of state when exercising a power in terms of the Constitution or provincial constitution or exercising a power or performing a public function in terms of any legislation.²² It also applies to a natural or juristic person, other than an organ of a state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affect rights of any person and which has a direct, external legal effect.²³ The Act, in Section 8, also make provision for remedies in proceedings for judicial review.

The law that governs the procurement process, pre-award until the award of a contract is private law of contract. The court held in *Logbro Properties CC v Bedderson NO and Others*²⁴ that public procurement process, which includes the evaluation of tenders and the award of a contract to a successful bidder are all forms of administrative action. An unsuccessful bidder has a *locus standi* to challenge government procurement decisions on the grounds of lawfulness, reasonableness and procedural fairness and on the basis of reasons given for such particular decisions.

Public procurement is governed by the principles of both law of contract and administrative law to cater for the unique nature of government's objectives and responsibility to always act in the public interest.²⁵

2.2.3 Promotion of Access to Information Act (PAIA)²⁶

The Act is promulgated in terms of Section 32 of the Constitution granting everyone the right to access to information held by the state and any information held by another person that is required for the exercise or protection of rights.²⁷ It contains the rules governing

²¹ Act 3 of 2000

²² Section 1(a)

²³ Section 1(b)

²⁴ 2003 (2) SA 460 at para 5

²⁵ Turpin C 1989 *Government Procurement and Contracts* page 215

²⁶ Act 2 of 2000

²⁷ PAIA Section 32(1) (a) and (b)

access to information held by both the state and private bodies. In respect of information held by the state, the Act grants unconditional access but also make provision for instances when an organ of the state can refuse access.

The Act opens doors to access to all documents relating to public procurement including all bids received, scoring documents and minutes of relevant procurement committees. It also makes provision for instances when access to information may be refused, mandatory protection of privacy of third party who is a natural person,²⁸ mandatory protection of certain records of SARS,²⁹ mandatory protection of commercial information of a third party,³⁰ mandatory protection of certain confidential information and protection of certain other confidential information of a third party,³¹ mandatory protection of safety of individuals and protection of property,³² mandatory protection of police dockets in bail applications and protection of law enforcement and legal proceedings³³ and mandatory protection of records privileged from production in legal proceedings.³⁴

2.2.4 Public Finance Management Act (PFMA) and Regulations³⁵

The PFMA is a general statute governing public procurement with the objective of securing transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of institutions to which the Act applies.³⁶ The Act applies to all departments, public entities listed in Schedule 2 or 3, constitutional institutions and provincial legislatures.³⁷ The Act adopts an approach to financial management that focuses on the outputs and responsibilities rather than the rule-driven approach followed in the past. It promotes accountability and serves as a fertile ground for effective and

²⁸ PAIA Section 34

²⁹ PAIA Section 35

³⁰ PAIA Section 36

³¹ PAIA Section 37

³² PAIA Section 38

³³ PAIA Section 39

³⁴ PAIA Section 40

³⁵ Act 1 of 1999

³⁶ PFMA Section 2

³⁷ PFMA Section 3

efficient service delivery as it places emphasis on value for money and return on investment.³⁸

The procurement principles enunciated in the Constitution have been given a further legislative impetus by Section 38(1)(a)(iii) which provides that the accounting officer for a department, trading entity or constitutional institution must ensure that a department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

Section 76(4)(c) empowers the National Treasury to make regulations or issue instructions applicable to all institutions to which the Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

However those regulations must remain within the framework as determined by National Treasury and under supervision of National Treasury.

The Treasury Regulations³⁹ set out a broad framework of what must be included in an organ of state's supply chain management system without prescribing the details of organ of state's system. The Regulations include the threshold of values in terms of which particular methods of procurement must be adopted,⁴⁰ the minimum requirements of officials staffing supply chain management units⁴¹ and ethical standards to be adhered to.⁴²

Regulations⁴³ gives the accounting officer or accounting authority the power to develop and implement an effective and efficient supply chain management system in his or her institution for-

³⁸ Crouse M, 2002 *Service Delivery in the South African Public Service: Implementation of the Batho Pele Principles by Statistics South Africa*, unpublished M Admin dissertation University of Pretoria

³⁹ Treasury Regulations in terms of Section 76 Published under GNR 225 in GG 27388 dated 15 March 2005

⁴⁰ Regulation 16A6.1

⁴¹ Regulation 16A5

⁴² Regulation 16A11

⁴³ Regulation 16A3.1

- (a) *“the acquisition of goods and services; and*
- (b) *the disposal and letting of state assets, including the disposal of goods no longer required”*

In Regulation 16A3.2 it is stated that a supply chain management system referred to in paragraph 16A3.1 must be fair, equitable, transparent, competitive and cost-effective.

Regulation 16A6 states that procurement of goods or services by way of quotations or through bidding process must be within the threshold as determined by National Treasury. A supply chain management system must, in the case of procurement through bidding process provide for⁴⁴ -

- (a) *“the adjudication of bids through a bid adjudication committee;*
- (b) *the establishment, composition and functioning of bid specification, evaluation and adjudication committees;*
- (c) *the selection of bid adjudication committee members;*
- (d) *bidding procedures; and*
- (e) *the approval of bid evaluation and/or adjudication committee recommendations”*

The bid specification committee must compile the specifications for each procurement. The bid evaluation committee must evaluate the bids in accordance with the specifications for a specific procurement and points system as set out in the supply chain management policy of the procuring entity and as prescribed in terms of the PPPFA. The bid adjudication committee must, consider the report and recommendations of the bid evaluation committee and either depending on its delegations, make a final award or a recommendation to the accounting officer to make a final award or make another recommendation to the accounting officer on how to proceed with the relevant procurement.

The PFMA advocates for a decentralized financial management structure in terms of which the core function of financial management rests with the accounting

⁴⁴ Regulation 16A6.2

officer/accounting authority of each organ of the state.⁴⁵ The Act delegates to each organ of state the power to create the system in terms of which procurement will occur which includes the rules applicable to procurement within that system and the actual procurement, i.e. the acquisition of goods or services in terms of the system thus created.

The PFMA does not prescribe a supply chain management system to be followed by organs of state at national and provincial levels of government, but only indicate that the accounting officer or accounting authority must ensure that such a system is established within his or her institution. Once established, it is the duty of the organ of state to follow the developed system to the letter. In the case of *Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality, Intelligent Metering Systems (Pty) Ltd*⁴⁶ the court held that where an institution has adopted a supply chain management policy setting out the processes to be followed in the composition and adjudication of bids, it is important for the institution to uphold and comply with the said rules relating to the roles and composition of the committees tasked with adjudication and evaluation of bids. Deviation therefrom will result in the decision being reviewed and set aside. Where the provisions of the of a policy on supply chain management on composition of committees are peremptory, non-compliance will then render decisions of the said committee susceptible for review.

In an invitation to bid, the accounting officer or accounting authority must ensure that the bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act and Broad Based Black Economic Empowerment Act.⁴⁷

The Regulations⁴⁸ recognizes that in certain instances the demands of an effective and efficient administration will not always make it possible for accounting officers to follow the competitive bidding system in procuring for goods or services and circumstances will necessitate a deviation from complying with such requirement for competitive bidding. If it is impractical to invite competitive bids, the accounting officer may procure goods or

⁴⁵ Quinot G,2014 *An Institutional Legal Structure for Regulating Procurement in South Africa* Research Report African Procurement Regulation Research Unit, US

⁴⁶ [2008] ZANHC 73

⁴⁷ Regulation 16A6.3(b)

⁴⁸ Regulation 16A6.4

services by other means provided the reasons for deviating from the normal bidding processes are recorded and approved by the accounting officer.

2.2.5 Municipal Finance Management Act (MFMA)⁴⁹

Like in the case of PFMA, Section 112 of the MFMA confirms the procurement principles enunciated in Section 217 of the Constitution by stating that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management.

The MFMA allocates the responsibility for public finance management including procurement at local level to the individual municipalities and municipal entities. The municipal manager as the accounting officer is responsible for the development and implementation of a supply chain management policy which gives effect to section 217 of the Constitution, Part 1 of Chapter 11 and other applicable provisions of the MFMA.⁵⁰

The National and Provincial Treasuries exercises an oversight function over the municipalities. Unlike the PFMA, the MFMA contains significant procurement rules in chapter 11 which apply generally to all procurement undertaken by municipalities with exception of contracts between the municipality and another organ of the state.⁵¹

2.2.6 Preferential Procurement Policy Framework Act (PPPFA) and Regulations⁵²

PPPFA is the national legislation which is envisaged in Section 217 of the Constitution which must prescribe a framework within which the policy referred to in subsection (2) must be implemented. The Act mandates the organs of state to formulate their own preferential procurement policies and to procure on the basis of those policies.

⁴⁹ Act 56 of 2003

⁵⁰ Regulation 2 of Municipal Supply Chain Management Regulations published under GN 868 in GG 27636 dated 30 May 2005

⁵¹ Section 110(2)

⁵² Act 5 of 2000

The Preferential Procurement Regulations of 2017 repealed the 2011 Preferential Procurement Regulations. The Regulations⁵³ which came into operation on the 1 April 2017, are a breath of fresh air and a step in the right direction in the campaign to redress South Africa's historical inequalities and to bring about the radical economic transformation within procurement by organs of state. The regulations go a long way to realize a dream of a more inclusive economy that benefits previously marginalized persons, local economic development of certain underdeveloped communities and development of small enterprises.

The regulation⁵⁴ states that if an organ of state decides to apply a pre-qualifying criteria to advance certain designated groups, the tender advertisement must include a condition indicating that the tender is specifically set aside for certain designated groups. The regulation⁵⁵ may be used to accelerate the economic empowerment of certain designated groups while Regulation 6(9) and 7(9) provides for flexibility for organs of state to negotiate price by stating that if the price offered by a tender scoring the highest points is not market related, the organ of state may not award the contract to that tender.

The Regulations, seems to be *ultra vires* the PPPFA in that section 2(1)(a) of the Act limits the advancement of historically disadvantaged individuals and promotion of RDP programmes to an allocation of 10 or 20 points out of 100 adjudicating tenders than additional measures envisaged in Regulation 4. The courts are yet to pronounce themselves on the issue.

Minister of Finance, Pravin Gordhan stated, when tabling the Medium Term Budget Policy Statement⁵⁶ that the Public Procurement Bill was being finalized and will be tabled for consideration by Cabinet soon. The Bill is aimed at consolidating the fragmented legal and policy framework for supply chain management. It will establish an apex procurement authority as the guardian of Section 217 of the Constitution which requires public procurement to be fair, equitable, transparent, competitive and cost-effective. The Bill would also provide the legal framework for the regulation, modernization and

⁵³ Preferential Procurement Regulations 2017(1 April 2017)

⁵⁴ Regulation 4

⁵⁵ Regulation 9

⁵⁶ Medium Term Budget Policy Statement to Parliament on 26 October 2016

transformation of public procurement and include preferential targeting, local content, supplier development and set out measures to achieve equity, job creation and local industrialization. The Bill would also introduce sanctions for wrongdoing and non-compliance, thus beefing up the provisions within the Public Finance Management Act, Municipal Finance Management Act and the concerns raised by the Auditor General⁵⁷ to the effect that measures taken by the organs of state in implementing recommendations for addressing noncompliance seems not to be deterrent enough.

2.2.7 Broad- Based Black Economic Empowerment Act (BBBEEA)⁵⁸

The aim of the Act is to establish a legislative framework for the promotion of black economic empowerment, to empower the minister to issue codes of good practice, to publish transformation charters and to establish black empowerment advisory council.

The BEE regime has been incorporated into Preferential Procurement Regulations 2017 and preference in the award of public contracts is given on the strength of bidders' status level. A tenderer may not be awarded points for BBBEE status level of contributor if the tender documents indicate that the tenderer intends subcontracting more than 25% of the value of the contract to any other person not qualifying for at least the points that the tenderer qualifies for, unless the intended subcontractor is an exempted micro enterprise that has the capability to execute the subcontract

2.2.8 Prevention and Combating of Corrupt Activities Act⁵⁹

The long title of the Act states that the aim of the Act is to prevent and combat corruption and corrupt activities by creating a number of offences relating to corruption and providing sanctions for such offences. The offences created in the Act includes corrupt activities relating to contracts, corrupt activities relating to procurement and withdrawal of tenders and corrupt activities relating to acquisition of private interest in contract, agreement or

⁵⁷ Consolidated General Report on National and Provincial Audit Outcomes PFMA 2014/15 page 31-32

⁵⁸ Act 53 of 2003

⁵⁹ Act 12 of 2004

investment of public body by a public officer.⁶⁰ The court per Moseneke DCJ and Froneman J⁶¹ also stated that

“there can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk”

The Act makes provision for the establishment of a Register for Tender Defaulters within National Treasury. When a person is found guilty of a corruption offence the court may in addition to other sanctions order that the person be endorsed on the register with the effect that the person is debarred from future public contracts for a determined period.⁶²

2.2.9 Construction Industry Development Board Act⁶³

In addition to other procurement rules, construction procurement is regulated by the Construction Industry Development Board Act. The Construction Industry Development Board is given powers to implement policies, programmes and projects aimed at standardization and uniformity in procurement documentation, practices and procedures. The board is also mandated to establish a register of contractors which provides for categories of contractors in a manner which facilitates public sector procurement.⁶⁴

The minister is empowered to prescribe the manner in which public sector construction contracts may be invited, awarded and managed within the framework of the register

⁶⁰ Sections 12, 13, 17

⁶¹ *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 47 (CC); 2011(7) BCLR 651 (CC) para 166

⁶² Sections 12 and 13

⁶³ Act 38 of 2000

⁶⁴ Section 5(1)(a)(viii) and 5(2)(d)

subject to the general procurement policy.⁶⁵ Organs of the state are obliged to award construction contracts with reference to the register.⁶⁶

2.2.10 State Information Technology Agency Act⁶⁷

The Act creates State Information Technology Agency (SITA) for the purpose of providing information technology to the state administration.

It obliges all national and provincial state departments to procure all information technology related goods or services through SITA.⁶⁸

2.3 What are the challenges in implementing the public sector supply chain management process?

Despite the overarching provisions provided in section 217 of the Constitution of regulating public procurement in the country, it has been seen above⁶⁹ that there are a number of other statutory instruments purporting to regulate the area in question. Such regulation, has created challenges for the supply chain practitioners and organs of state in general mainly on what legislative provisions to apply and in the process service delivery was compromised.

Public sector procurement has proved to be a burning issue for the country as a whole. In his State of the Nation Address of 2014,⁷⁰ President Jacob Zuma announced potentially far reaching changes to government approach to procurement in the form of increased central adjudication of tenders in an attempt to curb corruption within procurement. The Minister of Finance, Pravin Gordan⁷¹ indicated steps to professionalize the public service and to overhaul procurement and supply chain management. In her report,⁷² the Public

⁶⁵ Section 16(3)

⁶⁶ Section 16(4)

⁶⁷ Act 88 of 1998

⁶⁸ Section 7(3)

⁶⁹ Paragraphs 2.2.2-2.2.10 above

⁷⁰ State of the Nation Address 2014 (13 February 2014)

⁷¹ 2014 Budget Speech (26 February 2014)

⁷² *Secure in Comfort*, A Report by the Public Protector (March 2014)

Protector, Adv Thuli Madonsela, found that organs of state involved in the Nkandla project failed to follow supply chain management prescripts and recommended that the President reprimand the ministers involved for the appalling manner in which the project was handled and state funds abused. In presenting his findings for 2014, the Auditor General, Thembekile Makwetu⁷³ highlighted supply chain management as a key risk area requiring attention at both national and provincial departments irrespective of all the statutes, regulations and interventions made to deal with the issue.

The courts⁷⁴ have also noted with concern, the number of cases relating to unsuccessful bidders approaching the courts seeking review of awards of tenders for one or another reason by organs of state.

The question is why?

1. Quinot⁷⁵ noted that the problems emerging from the implementation of public sector supply chain management process are caused by the fragmentation of the regulatory framework which includes:

- 1.1 overlap and duplication between different regulatory instruments leading to uncertainty as to which instrument to follow (section 62 of Systems Act and Regulation 49 of Municipal Supply Chain Management Regulations)

- 1.2 complicated questions about legal status of instruments at the lower end of the cascading regulatory structure (Constitution, legislation, regulations, Treasury Instructions, CIDB standards and codes, supply chain management policies)

⁷³ Auditor General 2014/15 Consolidated General Report on National and Provincial Audit Outcomes PFMA

⁷⁴ *Dr JS Moroka Municipality ; South African Post Office v De Lacy ; Moseme Road Construction CC* note 13 above

⁷⁵ Quinot G, 2014 *An Institutional Legal Structure for Regulating Procurement in South Africa* Research Report, African Procurement Regulation Research Unit, US at 44; National Treasury 2015 *Public Sector Supply Chain Management Review* at page 11

- 1.3 inconsistencies in approach to similar issues(thresholds in national and provincial procurement methods in Treasury instructions and at local government level in regulations)
- 1.4 conflict between different sets of rules with no clear indication as to which one prevails
- 1.5 variation in scope of coverage of various instruments leading to considerable difficulties in establishing the complete regulatory regime
- 1.6 control by different stakeholders of different dimensions of the regulatory regime in a uncoordinated manner
- 1.7 capacity development is hampered
- 1.8 large number of standard bidding documents
- 1.9 the standard preferential procurement regulatory system makes it difficult to achieve government developmental and empowerment objectives due to its inflexibility

Quinot proposed that the challenges within public sector supply chain management could be minimized by the enactment of a comprehensive integrated public procurement code which will be a 'one stop' for all procurement issues within the country⁷⁶. The National Treasury agreed that the fragmentation of the legislation and policy framework for supply chain management is the main cause of problems within supply chain management. The proposed Public Procurement Bill 2017⁷⁷ by National Treasury, which will culminate in a single public procurement code / legislation addressing all the legislative and regulatory inefficiency in the system, is being finalized and will be introduced to Cabinet soon. The Bill is aimed at consolidating the fragmented legal and policy framework for public sector supply chain management. It will establish an apex procurement authority as the guardian

⁷⁶ Quinot G, 2014 *An Institutional Legal Structure for Regulating Procurement in South Africa* Research Report, African Procurement Regulation Research Unit, US

⁷⁷ SCM Review Update – 2016 page 8 and Medium Term Budget Policy Statement of 26 October 2016

of Section 217 of the Constitution which requires public procurement to be fair, equitable, transparent, competitive and cost-effective.

2. Lack of knowledge and skill is one of the greatest impediments to the success of the public procurement in South Africa.⁷⁸

Unlike the private sector, the public sector does not regard supply chain management as a strategic function that should be well positioned and that is critical to achieve strategic objectives and goals of government. The organizational structures and systems within which supply chain management takes place are in too many cases not ideal with inexperienced or under skilled leadership, high staff turnover and lack of motivation have led to bad governance within the country.

In her report,⁷⁹ the Public Protector, Adv Thuli Madonsela noted that lack of knowledge and skills resulted in flaunting of supply chain processes and recommended that officials within supply chain management division and members of the bid committees be trained on the prescripts of the national and provincial treasuries in respect of demand and acquisition.

Adequate capacity in the form of appropriate structures with fully skilled and professional supply chain management personnel is a key success factor for the proper supply chain management implementation.⁸⁰ A procurement system which is fair, equitable, transparent, competitive and cost-effective needs competent, objective and impartial people to run it.

⁷⁸ National Treasury 2015 *Public Sector Supply Chain Management Review*

⁷⁹ *On the Point of Tenders: A report on an investigation on the allegations of impropriety and corrupt practices relating to the awarding of contracts for goods and services by the Limpopo Department of Roads and Transport Report No. 10 of 201/13*

⁸⁰ Ambe M and Badenhorst-Wiesse JA, *Procurement Challenges in South African Public Sector 2012* Journal of Transport and Supply Chain Management 250

Accounting officers or accounting authorities must ensure that the supply chain management function within the institution is adequately staffed with appropriately qualified and competent personnel to support management in achieving the organizational mandate, strategy and goals.⁸¹ A well performing supply chain management unit within the public sector need public servants who are able to use and maintain the appropriate systems, have the knowledge, skills and attributes required to out the work efficiently and effectively.

Currently the public sector invests one percent (1%) of the budget for compensation of employees while leading private sector companies invests between six and eight percent (6/8%) in supply chain management human resources development.⁸²

Government has to date embarked on a process, through the newly established office of the chief procurement officer, of building capacity through partnerships with the private sector and institutions of higher learning in an attempt to improve the public sector supply chain management. The office promotes workplace coaching, mentoring, informal and formal workplace learning as a form of investment in its own people to achieve organizational supply chain management competence.

3. Non-compliance with policies and regulations

In the 2015 *Public Sector Supply Chain Management Review*,⁸³ National Treasury acknowledged that a number of reports submitted to it by accounting officers and accounting authorities indicate a continuous low level of compliance with supply chain management legal framework. The negative results of non-compliance include interruptions to the procurement of goods, services and works and failure to source goods and services at the right price and at the right time.

⁸¹ Regulation 16A.5.1 Treasury Regulations in terms of Section 76 as published under GNR 225 in Government Gazette 27388 dated 15 March 2015

⁸² 2015 *Public Sector Supply Chain Management Review* page 52

⁸³ At page 10

In the audit outcome for the year 2014/15 financial year, the auditor general's findings revealed that although the number of auditees with material findings on compliance decreased from the previous year (2013/14), their non-compliance caused or had a potential to cause financial loss to the state. Supply chain management processes were identified as the one area with the most non-compliance.⁸⁴ The report on non-compliance resulted from, amongst others, uncompetitive or unfair procurement processes, failure to invite three written quotations, failure to follow a competitive bidding process, deviation not approved or the approved deviation not reasonable or justified and non-compliance with legislative requirements on contract management.

The auditor general found that the high level of non-compliance with supply chain legislations caused 93% of the irregular expenditure for the financial year 2014/15. The non-compliance with the public procurement legislations is not only intrinsically problematic but also impacts adversely on overall good governance in public administration, including key administrative mandates such as service delivery. The auditor general noted, with concern, that although material non-compliance with legislation is reported with a recommendation that management must investigate the findings further, the level of which the findings continued to increase indicates that such investigations and consequences thereof have not yet had the desired impact of serving as a deterrent for such an improper behavior.

In her report⁸⁵, the Public Protector noted that, although the expenditure of an amount in excess of R215 million was spent by the Department of Public Works on the Nkandla Project, the prescribed open tender process was not utilized for the procurement of goods or services required at any stage of the project. Most of the deviations from the prescribed open tender were justified as, amongst others, security features and urgency.

⁸⁴ Auditor General *Consolidated General Report on National and Provincial Audit Outcomes* PFMA 2014/15 page 31 -32

⁸⁵ *Secure In Comfort: A Report of the Public Protector*, March 2014 page 30

In order to ensure compliance with policies and regulations, the proposed Public Procurement Bill 2017 will also introduce sanctions for wrongdoing and non-compliance, thus beefing up the provisions within the Public Finance Management Act and Municipal Finance Management Act. The proposed Bill will also go a long way in addressing the concerns of the oversight bodies raised above by introducing sanctions for wrong doing.

2.4 Bidding process as a contract

In South Africa, a call for tenders does not give rise to contractual rights but that does not mean that tenderers who participate in government procurement procedures are not protected.⁸⁶

Our law recognizes only two types of ancillary agreements also known as *pacta de contrahendo* (an agreement to conclude a contract in the future), namely the option and preference contracts.⁸⁷ Option contract is an agreement restricting an offeror's right to revoke the offer while a preference contract is an agreement whereby one person binds him/herself to give preference to another person should he or she decide to conclude some or other specified type of agreement. The right to be preferred is known as a right of first refusal or where a contract of sale is contemplated, a right of pre-emption.

Bidding process is not recognized in terms of our law as another form of a contract although there are constitutional and legislative provisions binding organs of the state in the form of Section 33 of the Constitution and Promotion of Administrative Justice Act 3 of 2000 to comply with its own conditions as set out in the bid documents. The above provisions gives rights to bidders whether successful or unsuccessful to hold the organs of state accountable for decisions taken or for failure to take decisions.

In the case of *Steenkamp NO v Provincial Tender Board of Eastern Cape*⁸⁸ the Supreme Court of Appeal recognized that bidding process is another form of agreement which our law must be developed to give effect to. The court stated that

⁸⁶ Bolton P, *The Law of Government Procurement in South Africa* at page 21

⁸⁷ Hutchinson *et al* at 62

⁸⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at 170-171

“Everything though is not administrative law. Seen in isolation, the invitation to tender is no doubt an offer made by a state not acting from a position of superiority or authority by virtue of its being a public authority and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern and does so on an equal footing with the public authority”

The court stated further that⁸⁹

“if we accept (as we must) that by submitting a tender an option contract is concluded and that the option is exercised by the award of the tender, it has to follow that because of Balraz’s non-incorporation the award to it did not lead to the conclusion of a valid contract”

It is submitted that should a bidding process be recognized as another form of contract and be interpreted in the same way as any other contract, some of challenges encountered within the public procurement space will be minimized.

2.5. CONCLUSION

Section 217 of the Constitution as the cornerstone of public sector supply chain management process in South Africa states that when organs of state in the national, provincial and local sphere contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. A number of other legislations were enacted with the object of echoing the principles outlined in Section 217 of the Constitution. Procurement of goods or services done by an organ of the state outside the parameters of the said section are unconstitutional and unlawful.

Traditionally supply chain management was misunderstood and undervalued and its strategic importance has not been recognized and has been under capacitated. To ensure good quality, efficient and cost effective delivery of services and in the process realize government’s objectives, the public sector supply chain management processes must be revamped.

⁸⁹ *Steenkamp NO v Provincial Tender Board of Eastern Cape* 2006 (3) SA 151 (SCA) at 170

Quinot has indicated that the fragmentation of the regulatory landscape pertaining to public procurement in South Africa is the main cause of challenges within the public sector supply chain management process and National Treasury correctly agreed. Quinot⁹⁰ proposed the enactment of a comprehensive integrated public procurement code which will be a 'one stop' for all procurement issues within the country.

The National Treasury⁹¹ acknowledged that a number of issues currently stand in the way of an efficient and cost effective public sector supply chain management system. A number of reforms were proposed, through the office of the chief procurement officer, which should result in good governance and accountability; cost effectiveness, both financially and in terms of human capacity; reduced barriers to entry for SMMEs and emerging contractors; effective supplier participation and improved contract management leading to increased savings and good quality on time delivery.

A Public Procurement Bill 2017, being one of the intervention measures, which will culminate in a 'single public procurement legislation' addressing all the legislative and regulatory inefficiency in the system, is being finalized and will be introduced to Cabinet soon. The Bill is aimed at consolidating the fragmented legal and policy framework for supply chain management. It will establish an apex procurement authority as the guardian of Section 217 of the Constitution which requires public procurement to be fair, equitable, transparent, competitive and cost-effective. The Bill would also provide the legal framework for the regulation, modernization and transformation of public procurement and include preferential targeting, local content, supplier development and set aside measures to achieve equity, job creation and local industrialization. The Bill will further fully establish the office of the chief procurement officer. It is submitted that the Bill will minimize the challenges within the space of public procurement as only one legislation will be applicable.

To achieve organizational supply chain competence it is essential for organs of state to invest in the people and the National Treasury⁹² has identified key activities to develop

⁹⁰ Quinot, G 2014 *An Institutional Legal Structure for Regulating Procurement in South Africa* Research Report African Procurement Regulations Research Unit, US

⁹¹ National Treasury *SCM Review Update* 2016 at para 8

⁹² 2015 *Public Sector Supply Chain Management Review*, page 56

and empower competent and committed supply chain management employees. The programs include promoting formal and informal workplace learning; promoting workplace coaching and supporting delivery of education, training and development programmes.

The proposed sanctions for wrongdoings within the Public Procurement Bill will go a long way in addressing the concerns of the Auditor General that although material non-compliance with legislation is reported with a recommendation that management must investigate the findings further, the level of which the findings continued to increase indicates that such investigations and consequences thereof have not yet had the desired impact of serving as a deterrent for such an improper behavior.

Our law recognizes only two forms of *pacta de contrahendo* being an option and preference contract.⁹³ Our law should be developed and recognize bidding process as another form of an ancillary agreement which must be dealt with as any other form of a contract due to the rights and obligations created by the constitutional and legislative provisions governing such space to organs of state and bidders alike.

CHAPTER 3: DRAFTING OF CONTRACTS

3.1 INTRODUCTION

Cornelius⁹⁴ states that the process of determining the written or spoken message which the author wishes to convey poses some problems. Language is inherently flexible and

⁹³ Hutchinson *et al* at 62

⁹⁴ Cornelius SJ, *Principles of the Interpretation of Contracts in South Africa* Chapter 1 page 1

often ambiguous and vague. The more complex the message that the author wishes to convey, the more difficult it is to translate into words and greater the possibility that the resultant communication may be ambiguous or vague. What is more a communication that is perfectly clear to one person or under certain circumstances, may be ambiguous or vague to another person or under other circumstances.

There are no legal rules or legal requirements that require contracts to be drafted in a particular way, certain legislations contain provisions which prescribes or restrict the contents of contracts that are subject to that particular legislation.⁹⁵

Organs of state are required when procuring goods or services to do so in terms of a system which is fair, equitable, transparent, competitive and cost effective.⁹⁶ An organ of state must always ensure compliance with the Constitution and a number of other legislations⁹⁷ in the procurement of goods or services. Bolton⁹⁸ lists six key events when tendering is used as a procurement method which includes the drafting of specifications, solicitation of bids (tenders); submission of the bids; receipt, evaluation and adjudication of the bids; award or acceptance of the bids and the eventual conclusion of a contract to be valid and in compliance with the said legislations.

In order to convey the correct message, organs of state must ensure that the relevant documents including the specification and invitation to tender are properly drafted and contain all the material terms of the envisaged agreement as there cannot be further matters that still have to be negotiated before the overall agreement can take effect. The words used must not have more than one meaning thus creating difficulties in determining precisely what message the emitter may have meant to convey.

Clearly drafted specifications and invitation to bid which meet all the requirements of an offer and acceptance will minimize the challenges faced by supply chain practitioners in

⁹⁵ Alienation of Land Act 68 of 1981, National Credit Act 34 of 2005, Consumer Protection Act 68 of 2008, Rental Housing Act 50 of 1999

⁹⁶ Section 217 of the Constitution

⁹⁷ Public Finance Management Act, 1 of 1999; Municipal Finance Management Act 56 of 2003; Preferential Procurement Policy Framework Act 5 of 2000 as examples

⁹⁸ *The Law of Government Procurement in South Africa* at Page 13-14

the implementation and interpretation of the tender documents and legislation relating to public procurement.

3.2 INVITATION TO BID

Section 217 of the Constitution prescribes a system in accordance with which organs of the state in procuring for goods or services must use a system which is fair, equitable, transparent, competitive and cost-effective. Depending on the value of the goods or services required, an organ of state is required to issue out a public call/invitation to bid inviting the general public to submit written bids for the provision of the goods or services in response to the specifications advertised. Regulation 16A6.1⁹⁹ states that procurement of goods and services, either by way of quotations or through competitive bidding process, must be within the threshold values as determined by the National Treasury. The Practice Note Number SCM 2 of 2005 issued by National Treasury, made a distinction between four types of procurement, petty cash purchases which are limited to R2000, written and verbal quotations limited to over R2000 but under R10 000, written price quotations which are over R10 000 but limited to R200 000 and competitive bidding which should be used for contracts above R200 000.

Hutchison¹⁰⁰ states that 'an invitation to the public to submit a bid or tender' for work to be done, is not an offer that is open for acceptance by the highest bidder. It is an invitation to potential bidders to make an offer that will be considered after the closing date for the particular tender. In the case of *Wentzel v Gemeenskapsontwikkelingsraad en Andere*¹⁰¹ the court held that a call for tenders is simply an offer like any other offer and must be accepted before a contractual relationship can come into being. The court went further to state that where tenders are called under the circumstances in question, interested parties are invited to make an offer, it is at most an invitation to potential contracting parties – 'an invitation to treat'. There is no obligation to consider or accept the tender.

⁹⁹ Treasury Regulations in terms of Section 76 of PFMA published under GNR 225 in GG 27388 dated 15 March 2005

¹⁰⁰ *Law of Contract* 2nd Edition 2012 at 52

¹⁰¹ 1981 (3) SA 703 (T) at 707

The requirements of a valid offer must be complied with in order to make an invitation to bid valid and enforceable. The requirements are that (1) the offer must be firm, (2) it must be complete and (3) it must be clear and certain. An offer which meets all the requirements will be valid and enforceable and once accepted a valid contract will come into being.

3.2.1 The offer must be firm

The offer must be firm, made with the intention that once it is accepted, a binding contract will come into being. The offer must not be made in an attempt to check whether the other party will be interested in entering into negotiations.

3.2.2 The offer must be complete

The invitation to tender must contain all the material terms of the proposed agreement as there cannot be further matters that still have to be negotiated before an overall agreement can take effect. The offer must have enough detail and be sufficiently precise as to what the proposed contract is.¹⁰²

In the case of *RHI Joint Venture v Minister of Roads and Public Works*¹⁰³ the court emphasized that ‘the tenderers must have complete knowledge of the criteria to be applied in the selection process and the fact that the tenders would be awarded on a basis of a policy that work would be fairly or equitably distributed amongst contractors should have been brought to the attention of prospective tenderers in the invitation to tender. Every tenderer was entitled to know, prior to tendering for the contract that preference would be given to tenderers who had not been awarded contract previously. Those contractors who had previously been successful would then have been able to decide whether or not the expense of preparing and submitting a tender was warranted.’

¹⁰² Hutchinson 47

¹⁰³ 2003 5 BCLR 544 (CK) at 559 at para 37

Organs of state must ensure that the invitation to tender has all the material terms of the envisaged contract and an indication of the criteria to be used in the evaluation and adjudication of the bids to enable bidders to properly respond to the bid.

The organs of the state are required, in terms of the Constitution and Preferential Procurement Policy Framework Act to ensure competitiveness and transparency, to indicate the types of goods or services required and to pre-disclose a criteria to be used in the evaluation and adjudication of the bids for bidders to make an informed decision whether or not to bid for the project in question. The inclusion of the five principles within the public procurement legislation, was to safeguard the integrity of government supply chain management process and to ensure prudent use of public resources aimed at preventing corruption.¹⁰⁴

Regulation 4¹⁰⁵ provides that if an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, the tender advertisement must include a condition indicating that the tender is specifically set aside for certain designated groups. The designated groups pre-qualified to respond may include:

- 1 bidders with a particular BBBEE level
- 2 exempted micro enterprise or qualifying small business enterprises as defined in the Code of Good Practice in terms of BBBEE Act
- 3 bidders that subcontract a minimum of 30% of their services to emerging micro-enterprises or qualifying business enterprises that are 51% owned by either black people, black youth, black women, black people with disabilities, black persons living in rural or underdeveloped areas and black military veterans

The court in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*¹⁰⁶ stated that competitors should be treated equally in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of the tender as that would deprive the public of the benefit of an open competitive process.

¹⁰⁴ Bolton P, *The Law of Government Procurement in South Africa*, 2007, Chapter 3 page 5

¹⁰⁵ Preferential Procurement Regulations 2017(1 April 2017)

¹⁰⁶ 2000 (4) SA 413 (SCA) para 30

3.2.3 The offer must be clear and certain

The offer must be sufficiently certain and not vague. If it is so vague that it fails to provide reasonably clear indication of what the offeror has in mind, no acceptance of the offer can create a binding obligation as it will be impossible to determine the content of the obligation.¹⁰⁷

The invitation to bid must be clear and certain for the bidders to get an indication of what goods or services are required and the criteria to be used in adjudicating and evaluating the bids. Where the invitation to bid is so vague as to the goods or services required or has failed to disclose the criteria to be used in the evaluation and adjudication of the bids, no valid offer was made and an award made in that regard will be set aside.

The court¹⁰⁸ recently decided that ‘the purpose of the invitation to tender is not to reward bidders who are clever to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, competitive and cost-effective. The tender invitation which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute a legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions.’ The Supreme Court of Appeal¹⁰⁹ ruled that

“the very fact that BTC (Board Tender Committee) resorted to strategic considerations without making them known to either Westinghouse or Areva, and without making them part of the bid evaluation criteria appears to be fundamentally unfair and that if any of the considerations caused BTC to award the tender to Areva is outside the parameters of the bid criteria and the decision is bad in law”

3.3 ACCEPTANCE

For acceptance to be effective it must be a clear and unambiguous declaration of intent by the offeree unequivocally assenting to all the terms of the proposal embodied in the

¹⁰⁷ Hutchinson at page 48

¹⁰⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency and Others* (2013) 2 All SA 501 (SCA)

¹⁰⁹ *Westinghouse v Eskom Holdings* (476/2015) [2015] ZASCA 208 (9 December 2015) at paragraphs 40 and 50

offer.¹¹⁰ In accepting and responding to the invitation to bid, the bidder must ensure that the acceptance is to the bid as advertised otherwise it will constitute a counter offer.

There are certain requirements to be met for an acceptance to be valid, namely, that the acceptance must be unqualified, it must be by a person to whom the offer was made, the acceptance must be a conscious response to the offer and that the acceptance must be in the prescribed form the offer was made.

3.3.1 The acceptance must be unqualified

The acceptance must be a complete and unequivocal assent to every element of the offer and there can only be a valid acceptance where the whole offer and nothing more or less is accepted.¹¹¹ If the offeree's acceptance is conditional or contains new terms or leaves out original terms, then there is no clear acceptance and no consensus is reached.¹¹² A qualified acceptance would constitute a counter offer which will be subject to acceptance to be valid and enforceable.

In submitting a response to a bid, a bidder must ensure that a full response is provided to the bid as advertised otherwise the bidder would have submitted a non-responsive bid and therefore susceptible to a disqualification. Where an organ of state can proceed to award a contract to a bidder who did not respond to the advertised bid or where a non-disclosed criteria was used to award the contract to a bidder, such an award will be set aside on review.

3.3.2 Acceptance must be by the person to whom the offer was made

An offer must be accepted by the person to whom it was made and once accepted a contract comes into being.

¹¹⁰ *Boerne v Harris* 1949 1 SA 793 (A) per Shreiner JA; *Hutchinson et al* at 55

¹¹¹ *Hutchinson et al* at 55

¹¹² *Hutchinson et al* at 55

In the case of *Tsantsabane Municipality v Thabula Trade & Investment (Pty) Ltd and The Registrar of Deeds, Kimberley*¹¹³ a full bench set aside a contract entered into between a municipality and the respondent on the ground that the party who signed the contract was not the party the municipality resolved to sell the property to. The court emphasized that it is a cardinal principle of the law of contract that a simple contractual offer made to a specific person can be accepted only by that person and that the identity of the parties to a written contract of sale of immovable property is an essential term of the agreement.

3.3.3 Acceptance must be a conscious response to the offer

The object of analyzing a transaction into offer and acceptance is to ascertain whether the parties have reached agreement, it follows that a party who claims to have accepted an offer the existence of which he was ignorant at the time of his alleged acceptance is trying to place form before substance.¹¹⁴ For a contract to come into being, there must be consensus on the item on offer and the one being accepted. The offeree can only accept that which he is aware of.

3.3.4 Acceptance must be in the prescribed form

Where a particular form of acceptance is prescribed, acceptance can only be valid if it is made in that format. In the case of *Ficksburg Transport (Edms) Bpk v Rautenbach*¹¹⁵ the court decided that, where acceptance was made by way of affixing a notice to the front door of the owner's house on a farm and by handing over a copy to an employee who appeared to be in charge where the offer clearly prescribed "*lewing aan die eienaar*" as a method of acceptance, acceptance was not made in the prescribed format as a result not validly exercised.

¹¹³ (1114/06) [2012] ZANHC 5; [2012] 4 ALL SA 219 (NCK) at 224

¹¹⁴ Christie RH, *Law of Contract in South Africa* 6th Edition page 63

¹¹⁵ 1988 1 SA 318 (A)

Christie¹¹⁶ suggests that where the offer does not make it unequivocally clear that the prescribed method and no other is to be employed should be given an equitable interpretation to permit acceptance by a method equally advantageous to the offeror.

Organs of the state prescribes methods in terms of which an acceptable bid as defined in the Public Procurement Policy Framework Act will be submitted. Where a submitted bid is not in line with the methods prescribed, it will be deemed non responsive and disqualified from further assessment. There is always a danger that organs of state may apply the rule rigidly and in a mechanical fashion or worse as a means of manipulating the outcome of a tender process.¹¹⁷ The court¹¹⁸ held that it was not in the public interest to invalidate a tender process because of what it referred to as ‘inconsequential irregularities.’ The court defined ‘inconsequential irregularity’ as one which if corrected would still yield the same outcome. The Constitutional Court¹¹⁹ stated that an irregularity is inconsequential when, on a hindsight assessment of the process, the successful bidder would likely still have been successful despite the presence of the irregularity.

Organs of the state should be wary of a decision to exclude a bidder from a tender process since such a decision is subject to judicial review on the grounds that it is an administrative action in terms of Promotion of Administrative Justice Act of 2000.

3.4 AWARD AND CONTRACT

The bid adjudication committee must consider the report and recommendations of the bid evaluation committee and, depending on its delegations, make a final award or a recommendation to the accounting officer to make a final award or make another recommendation to the accounting officer on how to proceed with the relevant procurement. An award is a confirmation of acceptance of an offer made by the successful bidder and a contract comes into being.

¹¹⁶ *Law of Contract in South Africa* at page 69

¹¹⁷ Volmink Peter, *Legal Consequences of Non Compliance with Bid Requirements* (2014) 1 APPLJ 41

¹¹⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency and Others* (2013) 2 All SA 501 (SCA) paras 21 and 96

¹¹⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive SASSA* (No 2) 2014 (6) BCLR 641 (CC) at para 19

Our law does not prescribe legal rules or legal requirements that require contracts to be drafted in a particular way,¹²⁰ however certain legislations contain provisions which prescribes or restrict the contents of contracts that are subject to that particular legislation.¹²¹ There are no formalities in our law to the effect that contracts should be in a written format to be valid¹²² unless the law or the parties themselves specifically prescribes such writing as a formality.¹²³ In such cases a contract will only be valid once reduced to writing. Otherwise a written contract is there to facilitate proof. Contracts can either be written, oral or tacit. They are there to set out the parties' rights and obligations in respect of such contract and guide the future relationship of the parties. Contracts are fundamental in the nature of the business. They regulate and defines the boundaries of the manner in which parties intend to interact with each other and they are entered into with the view of profiting or benefiting the parties.¹²⁴

Challenges are usually encountered in the implementation of the contract due to poor drafting contracts or documents giving rise to a legal relationship in terms of which the intention of the parties was not clearly captured. Although there are no rules and requirements of how a contract should be drafted, a drafter must ensure that certain clauses must form part of the contract.

Contracts are not entered into with the view of breaching the agreement but they are entered into with the intention of having some benefit. However when the parties breach the contract or when it is terminated and loss is suffered, parties may say that their intention prior to signing of the agreement was not correctly represented in the agreement and as such do not correctly reflect their intention.¹²⁵

Plain and clear language understood by the parties themselves must be used as the drafter is drafting the agreement for the parties not for himself. Drafter must use organizational tools such as headings to guide the reader.

¹²⁰ Hutchinson et al at 396

¹²¹ Alienation of Land Act 68 of 1981

¹²² Hutchinson et al at 159

¹²³ Sharrock at 86 says that parties will not be liable for the agreement unless it has been reduced to writing and signed by the parties

¹²⁴ Kirith P Haria *Contract Law: Parol Evidence Rule* www.polity.org.za (19 April 2013)

¹²⁵ Kirith P Haria *Contract Law: Parol Evidence Rule* www.polity.org.za (19 April 2013)

The drafter must ensure that the parties to the agreement are clearly defined (usually in the front page of the agreement) and signature of the contract (usually at the back of the agreement) to reflect not only acceptance but also that the parties has reached consensus on the terms of the agreement.¹²⁶ The drafter must ensure that he/she is provided with all the documents indicating the identity of the person an organ of state has resolved to appoint to guard against entering into a contract with an incorrect person.¹²⁷

The drafter must ensure that words are properly defined within the definition clause, usually at the beginning of the agreement, to ensure certainty.¹²⁸

The obligations of the parties must be clearly spelled out, indicating the goods or services to be delivered, the purchase price to be paid, if any, and how and when such purchase price must be paid. Where price escalations are envisaged, they must be clearly indicated to avoid re-negotiation of the price.

The contract must clearly indicate how performance of the agreement is envisaged. It must outline the processes to be followed in case of impossibility of performance, whether the contract will terminate because of such impossibility. The drafter must ensure that performance is divisible from the rest of the contract and make provision for mechanisms to maintain liability by including warranties for the provision of services or force majeure to exclude liability.¹²⁹

The drafter must also make provisions for termination of contract clauses within the agreement in an attempt to make provision for any eventuality ie, that the contract will terminate by effluxion of time, by consent or by breach. In case of breach, the drafter must indicate the remedies available to the parties ie. penalty provisions.¹³⁰

The drafter must ensure that the contract is so tight that almost all eventualities are covered in the clauses of the agreement. The contract must have dispute resolution

¹²⁶ Van Eck MM, 2015 *The Drafting of the Contracts in South Africa University of Pretoria (LLD)*

¹²⁷ *Tsantsabane Municipality v Thabula Trade & Investment (Pty) Ltd and The Registrar of Deed, Kimberly* (1114/06) [2012] ZANHC 5; [2012] 4 ALL SA 219 (NCK at 224

¹²⁸ Van Eck MM at page 207

¹²⁹ Van Eck MM at page 217

¹³⁰ Van Eck MM, at page 234

mechanisms inclusive of mediation procedures and arbitration procedures in case mediation fails. Litigation must also be provided for and the drafter must ensure that jurisdiction of courts are not unnecessarily excluded.¹³¹

A clause indicating the *domicilium* of the parties for purposes of delivering notices and pleadings must clearly be indicated within the contract. Although contracts are not entered into with the intention of breaching them, provision must be made of where pleadings will be served should it be necessary to do so. A drafter must clearly indicate addresses for pleadings and notices and the acceptable method of delivery of notices or pleadings.¹³²

A signature block must be provided for in the contract to provide an indication of where and when the agreement was entered into. This can be used to indicate the court with jurisdiction on the matter and to facilitate proof. It is also there to indicate the mutual assent of the parties to the contract and to confirm the identity and capacity of the parties.

3.5 CONCLUSION

In procuring for goods or services, organs of state are required to do so by way of quotations or competitive bidding. In case of competitive bidding, organs of the state are required¹³³ to ensure that an invitation to bid for goods or services include evaluation and adjudication criteria in the advert calling upon for bids.

The invitation to bid being an invitation to do business, must be drafted in such a way that it is complete and all elements of the envisaged contract are captured as there cannot be further matters still to be negotiated before the overall agreement takes effect. The requirements of a valid offer and acceptance must be met for a contract to come into being.

Once an offer has been accepted, a contract is formed. Although our law does not prescribe the rules and requirements (save in certain instances) on how contracts should

¹³¹ Van Eck MM, at page 260-279

¹³² Van Eck MM, at page 299-302

¹³³ Regulation 16A6.3 of Treasury Regulations Treasury Regulations in terms of Section 76 of PFMA published under GNR 225 in GG 27388 dated 15 March 2005

be drafted, a drafter must ensure that certain essential clauses do form part of the agreement.

CHAPTER 4: INTERPRETATION

4.1 INTRODUCTION

Contracts are fundamental in the nature of the business and are entered into not with the view of breaching them but they are entered into with the intention of having some benefit. When the parties breach the contract or when same is terminated and loss is suffered, parties may take a better look at the terms and conditions of their agreement. It is at that stage when parties may say that their intention prior to the signing of the agreement is not correctly represented in the agreement.¹³⁴ As such parties wish to state that the contract does not reflect their intention. It is at that point that the process of interpretation becomes critical.

4.2 Interpretation of tender documents

In interpreting contracts, Greenberg JA¹³⁵ said that it must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain not what the parties' intention was, but what the language used in the contract means. The testimony of the parties to a written agreement as to what either of them may have had in mind at the time of conclusion of the agreement is irrelevant for purposes of ascertaining the meaning of the words used in a particular clause.

Interpretation as explained by Wallis JA¹³⁶

“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 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. A sensible meaning is preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The

¹³⁴ Kirith P Haria *Contract Law: Parol Evidence Rule* www.polity.org.za (19 April 2013)

¹³⁵ *Worman v Hughes & Others* 1948 (3) SA 495 (A) at 505

¹³⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920)/2010) [2012] ZASCA 13 (15 March 2012) at para 18

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 of the document”

The Supreme Court of Appeal¹³⁷ recently confirmed that what the parties and their witnesses *ex post facto* think or believe regarding the meaning to be attributed to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise.

It is generally accepted rule in the South African law that, as far as interpretation is concerned there is no distinction between contracts, wills, statutes¹³⁸ and other documents so that the same basic rules apply to the various kinds of instruments although the rules about admissibility of evidence in this regard does a bit depend on the nature of the document, whether statutes, contract or patent.¹³⁹This is so to promote uniformity which in turn promotes legal certainty.

The starting point in interpretation is to give the ordinary grammatical meaning of the words unless such literal meaning leads to absurdity or a result never intended by the parties. In determining the meaning of words used, the words should not be considered in isolation but within their contextual setting. In the case of *Young v Liberty Life Association*¹⁴⁰ the court said that ‘if to give words their ordinary meaning would lead to an absurdity or to something which, from the instrument as a whole, it can clearly be gathered the parties could not have intended, then a court of law is justified in departing from the literal meaning of words so as to give effect to the true intention of the parties.’

The Supreme Court of Appeal in the recent case of *Bothma – Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*¹⁴¹ the court stated that whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation

¹³⁷ *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZANSCA 62 (17 April 2015) at 70

¹³⁸ *Steward and Another v Appleton Fund Managers* [2003] All SA 545 (N) at 549

¹³⁹ Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] 2 All SA 523 SCA para 39-40

¹⁴⁰ 1991 (2) SA 246 (W)

¹⁴¹ 2014 (2) SA 494 (SCA) at 499

does not stop at the perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. Interpretation is a unitary exercise.

In embarking on a process of interpretation, the contract or document in question must be read in its entirety so as to give contextual meaning of the words used in the said document and not in isolation divorced from their context. In order to attach a meaning to the specification or terms of reference as advertised in the tender or bid document, the whole document must be read. The court confirmed the above in the case of *K & S Lake City Freighters (Pty)Ltd v Gordon & Gotch*¹⁴² wherein Sir Anthony Mason CJ said:

“Problems of legal interpretation are not solved satisfactorily by the ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise”

Where the contract or document to be interpreted consists of more than one document, all relevant documents must be considered and the language used by the parties in all the documents to must be considered to determine the meaning of the relevant provision/s. The terms in the document subsidiary to the main document may prescribe how the provisions in the main document are to be construed.¹⁴³

In the procurement of goods or services by an organ of state must in terms of Section 217 of the Constitution all relevant documents including the invitation to bid, specifications, the evaluation and adjudication criteria and the minutes of the of the briefing sessions and committees should be taken into account in the interpretation thereof.

¹⁴² (1985) 157 CLR 309 at 315

¹⁴³ *Privest Employee Solutions (Pty) Ltd v Vital Distributions Solutions (Pty)Ltd* (2006) 1 All SA 111 (SCA) at 281 njk

4.3 Parol evidence rule

Traditionally a distinction was made between two related rules that limit admissibility of extrinsic evidence in the interpretation of contracts. Firstly, there is the so called parol evidence rule or 'integration rule' which provides that once a contract has been reduced to writing, the writing is in general viewed as the exclusive memorial of the transaction and no evidence is admissible to prove the terms of the contract. Secondly, the rule which is often referred to as the 'golden rule of interpretation' as referred to in the *Delmas Milling Co Ltd v Du Plessis*¹⁴⁴ provides that the ordinary meaning of the words in a written contract must be followed and that no evidence is admissible to prove the meaning of the terms contained in a written contract.

The court, however, in the case of *KPMG Chartered Accountants v Securefin Ltd*¹⁴⁵ confirmed that

“parol evidence remain part of our law and that if a document was intended to be a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning; that interpretation is a matter of law not fact as a result interpretation is for courts not witnesses; that rules about admissibility of evidence in this regard do not depend on the nature of the document whether statutes, contract or patent; that to the extent that evidence may be admissible to contextualize the document, since context is everything, to establish it's factual matrix or purpose or for purpose of identification, one must use it as conservatively as possible”

The parol evidence rule restricts the evidence which is admissible to prove the terms or content of the contract only. When a transaction is reduced to writing and integrated into a written instrument evidence of any abatement, negotiations, mental reservations or other facts relating to that transaction becomes inadmissible to determine the extent of the words, expressions, sentences and terms which constitutes the text of the contract. In general no words, expressions, sentences or terms may be added to the text, no words, expressions, sentences or terms may be replaced with other words, expressions,

¹⁴⁴ 1955 (3) SA 447 (A) at 453

¹⁴⁵ [2009] 2 All SA 523 (SCA) para 39

sentences or terms and no words, expressions, sentences or terms may be omitted from the contract.

The parol evidence rule prohibits evidence from adding to, detracting from, varying, or contradicting or qualifying the terms of a contract once that contract has been reduced to writing. Once a transaction has been reduced to writing, all talks and discussions between the parties regarding that transaction becomes irrelevant in the determination of the extent of the terms or the contract and no evidence in that regard may be tendered. This includes drafts and deleted words which are regarded as *pro non scripto* and not forming part of the contextual setting and no inference will be drawn from the fact that the word was in the draft agreement or that it was deleted.¹⁴⁶ Evidence to prove the intention of the parties insofar as it relates to the contents of the contract, is also prohibited as such evidence could have the effect of altering or qualifying the terms of the contract.

In the evaluation and adjudication process, which is a process of selecting a successful bidder/tenderer from the rest of the applications, regard must be had to the proposals submitted together with the specification or terms of reference as advertised, and all other relevant documents including the minutes of the briefing session to select a tenderer who best responded to the invitation to bid as advertised. Extrinsic evidence can only be allowed to contextualize the wording of the documents but not to add, modify, qualify or contradict the meaning of the terms within the said documents and if regard is to be had to such evidence then all relevant and admissible evidence, not only evidence limited to what either party considers favourable, must be considered.¹⁴⁷

4.4 Implied terms

Implied terms are those terms of a contract or document which are not explicitly agreed upon by the parties, but which nevertheless form part of the contract. They may be implied by operation of the law, by custom or trade usage, or from the facts surrounding the

¹⁴⁶ *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) at 3

¹⁴⁷ *University of the Western Cape Academic Staff and Another v University of the Western Cape* [2002] ZALC 29 (25 March 2002) at 32

agreement of the parties¹⁴⁸ and are not dependent on the actual or presumed intention of the parties. In the case of *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*¹⁴⁹ the court said that in a sense, implied term is in this context, a misnomer in that in content it simply represents a legal duty imposed by law, unless excluded by the parties, in the case of certain contracts. It is a *naturalium* of the contract in question. The implied terms regulate the many incidents of a contract that the parties may say nothing about or may not even know about.

Section 217 of the Constitution states that when an organ of the state what's to procure for good or services it must do in terms of a system which is fair, equitable, transparent, competitive and cost effective. The organ of state is also required to ensure that the tender documentation also include or make reference to the criteria prescribed in terms of the Preferential Procurement Policy Framework Act,¹⁵⁰ and other relevant legislations.

An organ of the state, including municipalities and municipal entities are not allowed to contract out of the provisions of Section 217 of the Constitution and any other legislations to safeguard the continued integrity of the government procurement process and to obtain the best possible value for money, which is taxpayers' money. At local government level, the Municipal Systems Act¹⁵¹ in its Section 81 has made mandatory provisions which provides a framework for the structuring of agreements to include *inter alia*:

1. That the municipality will continue to regulate the provision of the service in accordance with its performance management system
2. That the municipality will continue to monitor and assess the implementation of the agreement including the performance of the service provider within the framework of its performance management system
3. That the municipality must in terms of the agreement continue to perform its functions and exercise its powers in accordance with its integrated development plan and its performance management system

¹⁴⁸ Hutchison et al *Law of Contract in South Africa*

¹⁴⁹ 1974 (3) SA 506 (A) at 531

¹⁵⁰ Act 5 of 2000

¹⁵¹ Act 56 of 2003

4. The municipality must control the setting and adjustment of tariffs by the service provider within a tariff policy determined by the municipal council
5. The municipality must continue to exercise its service authority to ensure uninterrupted delivery of service in the best interests of the community

The Constitution¹⁵² requires the organs of state in acquiring goods or services to employ a system which is fair, equitable, transparent, competitive and cost effective. This means that the organs of state are required to call for tenders for the goods or services they require and also ensure that they pre disclose the evaluation and adjudication criteria they will use in selecting a successful tenderer. In advertising the bid and pre disclosing the criteria, the organ of state is required to do so in order to ensure that the process is as competitive and transparent as possible. The law has prescribed a threshold in terms of which if goods or services required are more than such threshold, then a call for tenders must be made and an organ of state cannot identify a service provider to render the service without following the process as laid down in Section 217.

4.5 Presumptions

4.5.1 Performance must take place in forma *specificata*

It is presumed herein that the parties intended that the performance should take place exactly as prescribed in the contract. This means that a creditor is entitled to refuse any performance which does not substantially comply with the description as contained in the contract or which is not reasonably suitable for the purpose described in the contract as confirmed in *BK Tooling (Edms) Bpk v Scope Prescription Engineering (Edms) Bpk*.¹⁵³

An organ of state, in the invitation to bid calls upon tenderers to submit a proposal in line with the invitation. It is expected that tenderers will submit tenders which are in line with the invitation. If the tender as submitted is not in line with the invitation, the organ of state is allowed to disqualify such a tender as being non responsive except in the case of minor

¹⁵² Section 217(1)

¹⁵³ 1979 (1) SA 391 (A) at 421

deviations which are immaterial.¹⁵⁴ The organ of state cannot accept the tender which is not in line with the invitation as this will be deemed to be unfair and deviation from the specification as advertised.

4.5.2 Presumption that words are used in their ordinary meaning

This means that words as used in the contracts by parties are used in their ordinary everyday sense. In interpreting the words, it must be done so not only in their ordinary meaning but in accordance with the ordinary meaning as applied to the subject matter with regard to which they are used unless there is something which obliges to read them in a sense which is on their ordinary sense¹⁵⁵

As clearly outlined above, the first step in interpreting a contract is to determine the ordinary grammatical meaning of the words unless interpreting them as such will lead to an absurdity or what was never intended by the parties. In interpreting the invitation to tender and the proposals as submitted by the tenderers, the ordinary grammatical meaning will be attached to the words used in the documents unless such meaning will 'lead to absurdity so glaring that it could have never been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the court is justified in taking into account. The court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.

4.5.3 Presumption that the parties intend to conclude a legally binding contract

Where words are of doubtful meaning or susceptible of two meanings, the words will be construed in that sense which will give effect to the contract in question, rather than a sense which will render it inoperative.¹⁵⁶ It is presumed in our law that when a person

¹⁵⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of South Africa Social Security Agency and Others* [2013] ZACC 42 para 33

¹⁵⁵ Kellaway EA, *Principles of Legal Interpretation of Statutes, Contracts and Wills* 1995 at 244

¹⁵⁶ *Kotze v Frankel & Co* 1929 AD 418 at 423; *Inventive Labour Structuring (Pty) Ltd v Corfe* 2006 (3) SA 107 (SCA) at 108

concludes a contract, he or she wish to do so in accordance with the existing law and it is in the public interest that a contract that was concluded freely and voluntarily should be enforced. It is presumed that where certain formalities are required for the valid conclusion of certain types of contract, it is presumed that such formalities have been met. Secondly that where a contract may be interpreted or performed in two ways, one lawful and the other unlawful, it is presumed that the parties intended it to be performed in the lawful manner. Thirdly that the parties did not intend to make any provision which is futile, nugatory, unnecessary or meaningless, but rather to make an effective contract.

In calling for tenders, it is assumed that it is the intention of the organ of the state to evaluate the tenders to be submitted and appoint a successful tenderer and eventually enter into a contract with such tender. It is assumed that the organ of the state has obtained the necessary approvals and has the necessary budget to proceed and eventually pay for the goods or services to be rendered by the successful tenderer.

4.5.4 The parties do not wish to deviate from the existing law more than necessary

It is presumed that the parties did not intend to deviate from the existing law and where the parties did indicate a clear intention to deviate from the rule of law, it is presumed that they intended to vary that rule only to the extent that is clearly set out in their contract with the result that any clause which deviates from existing legal principles will be interpreted restrictively.¹⁵⁷ In arriving at the decision whether the parties intended to deviate from the existing law, the interpretation should always be contextual in the sense that a document must be read as a whole as well as in view of the relevant statutory provisions and the common law.

In the case in question, the documents must be interpreted in line with the principles as laid down in Section 217 of the Constitution and all other relevant legislative provisions as provided above.

¹⁵⁷ Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* 3rd Edition

4.6 Conclusion

The Supreme Court of Appeal¹⁵⁸ reiterated that ‘the inevitable point of departure in interpreting a statute 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. It should, however be borne in mind that, if the words of the relevant provision are unable to bear the meaning contended for, then that meaning is impermissible.’ Lewis JA¹⁵⁹ stated that ‘where an administrative body takes into account considerations that are extraneous to the tender evaluation criteria, as set out in the invitation to bid, it’s decision to make the award is unlawful and procedurally unfair.’

In interpreting the documents, all relevant documents must be taken into account unless the meaning attached leads to absurdity or a meaning not intended by the parties. If the ordinary grammatical meaning of the words cannot bring about the intention of the parties, the parole evidence rule allows that extrinsic evidence can be presented only to establish the intention of the parties but not to add, modify, detract from or contradict the meaning of the document or contract in question.¹⁶⁰

In order to procure for goods or services, an organ of the state is required in terms of Section 217 of the Constitution,¹⁶¹ to do so in terms of a system which is fair, equitable, transparent, competitive and cost effective. In order to comply with the aforesaid section of the Constitution, an organ of the state is required to call for tenders in which it pre discloses the evaluation and adjudication criteria in terms of which the tenders submitted will be assessed. When the tenderers have submitted the tenders all documents inclusive of the call to tender, the evaluation and adjudication criteria (and minutes of briefing session in certain instances) and the tender documents submitted by the tenderers will be used to select a successful tenderer.

¹⁵⁸ *Bothma – Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499

¹⁵⁹ *Westinghouse v Eskom Holdings* (476/2015) [2015] ZASCA 208 (9 December 2015) at para 40 and 50

¹⁶⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010)[2012] ZASCA 13 (15 March 2012) at para 18

¹⁶¹ Constitution Act 108 of 1996

It is critical for the organs of state to, at all times, adhere to the evaluation and adjudication criteria as advertised in the process of selecting a successful tenderer as any missteps in adhering to the criteria will render the process unlawful and subject for review.¹⁶²

¹⁶² *Westinghouse v Eskom Holdings* (476/2015)[2015] ZASCA 208 (9 December 2015) at para 40

CHAPTER 5: CONCLUSION

The Constitution¹⁶³ has afforded a constitutional status to public sector supply chain management process in that organs of the state are required when contracting for goods and services to do so in terms of a system which is fair, equitable, transparent, competitive and cost effective. The Constitution does not prevent organs of the state or institutions from implementing a procurement policy providing categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons, disadvantaged by the unfair discrimination.¹⁶⁴ The Preferential Procurement Policy Framework Act was enacted to give effect to the policy referred to in Section 217(2) of the Constitution.

Despite having the Constitution dealing with a system of how public sector supply chain management process is supposed to be dealt with, there are a number of other legislations also dealing with the same issue.¹⁶⁵ As discussed above, the implementation of the said legislative prescripts has proven to be challenging to both supply chain practitioners and bid committee members alike and has resulted in litigation and delays in service delivery. The implementation has proven to be confusing and at times contradictory with no clear legal status¹⁶⁶ which resulted in continuous non-compliance findings by the auditor general.¹⁶⁷

In South Africa, a call for tender process does not give rise to contractual rights and obligations but that does not mean that the tenderers who participate in the public sector supply chain management process are not protected.¹⁶⁸ Our law recognizes only two types of ancillary agreements (*pacta de contrahendo*) namely, option and preference

¹⁶³ Section 217(1)

¹⁶⁴ Section 217(2)

¹⁶⁵ See paragraphs 2.2.2-2.2.10 above

¹⁶⁶ Quinot G *An Institutional Legal Structure for Regulating Procurement in South Africa* (March 2014)

¹⁶⁷ Consolidated General Report on National and Provincial Audit Outcomes PFMA 2014/15

¹⁶⁸ Bolton P, *The Law of Government Procurement in South Africa* 2007, page 21

contracts. The Constitution¹⁶⁹ and Promotion of Administrative Justice Act¹⁷⁰ gives effect to the right of everyone to an administrative action that is lawful, reasonable and procedurally fair. The PAJA clearly outline actions which are regarded as administrative actions which includes the bidding process within the public sector supply chain management process. The court¹⁷¹ has decided that it is high time that our law must be developed to give effect to a bidding process as another form of contract which has the effect of creating rights and obligations.

An invitation to bid, as an invitation to treat or an invitation to do business, is not an offer open to acceptance by the highest bidder but an invitation to potential bidders to make an offer which will be considered at the closing date of such particular tender.¹⁷² The tender must comply with all the requirements of an offer and acceptance to be valid and enforceable. The invitation to bid must disclose the evaluation and adjudication criteria to be used in selecting a successful tender to ensure that bidders are not caught by surprise.¹⁷³ An invitation to bid which did not include a criteria to be used in the evaluation and adjudication of the bid will be susceptible to be reviewed and set aside.¹⁷⁴ The drafter must ensure that the invitation to bid is properly drafted containing all material terms of the envisaged agreement and complies with all the requirements of an offer as upon acceptance thereof a contract is formed and no further matters can still be negotiated before the an overall agreement can take effect.

Contracts are entered into with the object of having some benefit from it and once contracts are terminated and loss is suffered, the parties may decide to have a better look at the terms and conditions of the agreement, thus embarking on an interpretation

¹⁶⁹ Section 33

¹⁷⁰ Act 3 of 2000 Section 1(a)

¹⁷¹ Steenkamp NO v Provincial Tender Board, Eastern Cape 2006(3) SA 151 (SCA) at 170-171

¹⁷² Hutchison et al at 52

¹⁷³ *RHI Joint Venture v Minister of Roads and Public Works* 2003 5 BCLR 544 (Ck) at para 37

¹⁷⁴ *All Pay Consolidated Investment Holding (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* (2013) 2 SA 501 (SCA); *Westinghouse v Eskom Holdings* (476/2015) [2015] ZASCA at para 40 and 50

process. In interpreting the contract, the rule is to ascertain not what the parties' intention was at the time the contract was entered into but what the language used in the contract means.¹⁷⁵ What the parties and their witnesses *ex post facto* think or believe regarding the meaning to be attributed to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise.¹⁷⁶ The starting point will be to give effect to the ordinary grammatical meaning of the words within their contextual setting unless such literal meaning leads to absurdity or a result never intended by the parties. No words, expressions, sentences or terms may be added, replaced or omitted from the contract. All evidence which has the potential of adding to, detracting from, varying, contradicting or qualifying the terms of the contract once such contract is reduced to writing is prohibited.

The enactment of a comprehensive public procurement legislation which will serve as a 'one stop' shop as far as public procurement concerned will assist in minimizing the challenges encountered in the implementation of the myriad of legislative prescripts relating to public sector supply chain management process and the confusion caused by the implementation thereof. The chances of non-compliance as experienced currently will also be reduced. The properly drafted invitation to bid which meets all the requirements of an offer and acceptance and eventual contract which is formed thereafter will ensure that the evaluation and adjudication becomes easier and the implementation of the contract becomes a smooth ride. The development of our law to fully recognize a bidding process as a contract which creates rights and obligations will go a long way in reducing the challenges within the supply chain management process within the public sector.

¹⁷⁵ *Worman v Hughes & Others* 1948 (3) SA (A) 495 at 505

¹⁷⁶ *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZANSCA 52 (17 April 2015)

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