

# **The Public Procurement Process in South Africa and the Law of Contracts**

By

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## SHORT SUMMARY

In South Africa the government relies greatly on the tender process as regulated by various legislation and legal principles in order to obtain contracts for the procurement of goods and services needed to maintain, upgrade and advance the public assets.

Since the Constitution<sup>1</sup> came effect in 1997, various rules and principles regarding the public procurement process in South Africa was changed and expanded to recover and improve the new democratic South Africa.

Chapter 1 consists of the introduction, objectives and the scope of this study.

In chapter 2, I will discuss the public sector tender process, what it consists of and the applicable legislation and legal opinions in regards to the public procurement process.

Chapter 3 will be a discussion about the drafting of the various tender documentation with a detailed focus on the drafting of an invitation to tender, the submitted tender, the awarding letter of a tender and the final contract.

In chapter 4, I will discuss how the interpretation of contracts influences the public procurement process. I will discuss the applicable presumptions in detail and at the hand of recent case law.

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<sup>1</sup> Constitution of the Republic of South Africa, 2006;

Chapter 5 of this study will consist of a conclusion and I will attempt to answer the research statement and questions above.

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## **CHAPTER 1**

### **INTRODUCTION, OBJECTIVES AND SCOPE OF THIS STUDY**

- 1.1 Introduction**
- 1.2 Problem Statement**
- 1.3 Research Objectives**
- 1.4 Research Methodology**
- 1.5 Structure of this study**

## 1.1 INTRODUCTION

In South Africa the government relies greatly on the tender process as regulated by various legislation and legal principles in order to obtain contracts for the procurement of goods and services needed to maintain, upgrade and advance the public assets.

Since the Constitution<sup>1</sup> came effect in 1997, various rules and principles regarding the public procurement process in South Africa was changed and expanded to recover and improve the new democratic South Africa.

The Constitution provides in section 33(1) and (2) the right to administrative action that is lawful, reasonable and procedurally fair.<sup>2</sup>

The Constitution furthermore provides in section 217 as follows:

*“217. Procurement –*

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

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<sup>1</sup> Constitution of the Republic of South Africa, 2006;

<sup>2</sup> As stated in the Constitution of the Republic of South Africa, 1996 as well the preamble of the Promotion of Administrative Justice Act;



- (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.”*

As dictated by the Constitution, various National and Provincial legislation was drafted and implemented to regulate the tender and procurement process in South Africa.

Although the Constitution and the legislation that flow from it is vital to ensuring a legally binding procurement process, specific legislation cannot be the only rules that apply and this study will help to clarify further rules of law that needs to be adhere to during the public procurement process.

## 1.2 PROBLEM STATEMENT

In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>3</sup> Harms JA held the following:

*Seen in isolation, the invitation to tender is no doubt an offer made by a state organ not acting from a position of superiority or authority by virtue*

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<sup>3</sup> 2006 (3) SA 151 SCA;

*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 who does so on an equal footing with the public authority.*

The judgment of Harms JA had the effect that the tender process in itself now became a contract, and more specifically, a *pactum de contrahendo*. The Question now to be answered is how much of the law of contract principles would be applicable to the government procurement process and what exactly would the extend of the law of contract influence be on the government procurement process.

### **1.3 RESEARCH OBJECTIVES**

The aim of this study is to analyse the impact of the law of contract on the public procurement process in a South African Context.

During the course of this study, I will attempt to answer the following questions:

- How and why does the state procurement process form part of the law of contract in South Africa?
- What is the implication of the law of contract on drafting process of documents that form part of the public procurement process?
- How would the public procurement process be classified and interpreted?

## 1.4 RESEARCH METHODOLOGY

In order to answer above problem statement I will use a critical approach when researching same, as the letter of the law cannot be used is complete quarantine from outside influences.

The reason for a more critical approach is because I agree with many critical legal scholars that the law is not abstract, objective and neutral as one might want to think.<sup>4</sup> In my study I will follow a more subjective approach that allows for the specific facts of each case to influence the outcome of the matter. The law is manmade and is therefore susceptible to change and errors.

## 1.5 STRUCTURE OF THIS STUDY

Chapter 1 consists of the introduction, objectives and the scope of this study.

In chapter 2 I will discuss the public sector tender process, what it consists of and the applicable legislation and legal opinions in regards to the public procurement process.

Chapter 3 will be a discussion about the drafting of the various tender documentation with a detailed focus on the drafting of an invitation to tender, the submitted tender, the awarding letter of a tender and the final contract.

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<sup>4</sup> Klein & Viljoen *Beginners Gids vir Regstudente* 2002 (3<sup>rd</sup>e uitgawe) Juta Law, page 333

In chapter 4, I will discuss how the interpretation of contracts influences the public procurement process. I will discuss the applicable presumptions in detail and at the hand of recent case law.

Chapter 5 of this study will consist of a conclusion and I will attempt to answer the research statement and questions above.

## **CHAPTER 2**

### **THE PUBLIC SECTOR PROCUREMENT PROCESS**

- 2.1 The public sector procurement process (Tenders)**
- 2.2 An overview of applicable legislation**
  - 2.2.1 The Constitution**
  - 2.2.2 Promotion of Administrative Justice Act**
  - 2.2.3 Public Finance Management Act**
  - 2.2.4 Local Government: Municipal Finance Management Act**
  - 2.2.5 Preferential Procurement Policy Framework Act**
- 2.3 The procurement process as a contract**
- 2.4 Conclusion**

## 2.1 THE PUBLIC SECTOR PROCUREMENT PROCESS (TENDERS)

Tendering can be described as the process of making a formal written offer to carry out work, supply goods or purchase goods or services for a stated, certain, fixed price.<sup>5</sup> In South African administrative law, tendering is well known as the process by which the public sector can procure a wide range of goods and services from the private market.

It is common knowledge that the government needs goods and services in order to fulfil its daily tasks and functions. Bolton explains that the government's needs can be met in mainly two ways, firstly the government can establish its own factories and hire its own professionals in order for goods and services to be obtained "in-house".<sup>6</sup> Secondly, the government can obtain goods and services from the private market, in other words through public sector procurement contracts.

Goods and services obtained by the public sector (the government), is funded mainly (and in various cases solely) by public money. Bolton states that the public as taxpayers has an interest in the way in which the money is spent as ultimately the government is working with the taxpayers' money.<sup>7</sup> Due to the outflow of large amounts of public money, it is of the utmost importance that proper measures are in place to regulate the acquiring of goods and services by the public sector.

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<sup>5</sup> *The South African Concise Oxford Dictionary* 2005 Oxford University Press Southern Africa: Cape Town;

<sup>6</sup> Bolton P (2007) 1;

<sup>7</sup> Bolton P (2007) 4;

According to Ngwakwe approximately 34% of government expenditure is done at local level and that this fact should call for greater accountability on how the public funds are managed.<sup>8</sup>

Two further reasons for the strict regulation of the public sector tender process would be to increase the use of previously disadvantaged companies and individuals (Broad Based Black Economic Empowerment) and to limit possible corruption.<sup>9</sup>

Section 217 of the Constitution<sup>10</sup> regulates the process of procurement by an organ of state and in section 217(3) the Constitution places an obligation on the legislator to prescribe a framework within which the procurement policy of an organ of state must be implemented.

The Public Finance Management Act<sup>11</sup> (hereinafter referred to PFMA) came into effect on 1 April 2000 and shortly thereafter the Local Government: Municipal Finance Management Act<sup>12</sup> commenced.

Section 76(4)(c) of the PFMA ordered the National Treasury to create regulations or issue instructions concerning “*the determination of a framework*

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<sup>8</sup> Ngwakwe (2012) 47 *Journal of Public Administration* 318;

<sup>9</sup> Ngobeni S (2011) 2;

<sup>10</sup> Constitution of the Republic of South Africa 108 of 1996;

<sup>11</sup> 1 of 1999;

<sup>12</sup> 56 of 2003;

*for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.”*

The National Treasury accepted the challenge imposed on it by the PFMA and published the National Treasury Practice Note no 8 of 2007/2008.<sup>13</sup> The mentioned practice note determined in paragraph 3.4 that National Departments should invite competitive bids for all procurement above R 500 000.00.

Paragraph 3.4 of the National Treasury Practice Note no 8 of 2007/2008 furthermore states that competitive bids should be advertised in the Government Tender Bulletin and, if necessary, in other appropriate media.<sup>14</sup>

Bolton states that the government procurement process consists of 4 main periods namely:<sup>15</sup>

1. Pre - award period, which consists of all stages prior to the awarding of a tender;
2. The award period;
3. The conclusion of the contract period;
4. The period after conclusion of a contract until the contractual performance is completed.

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<sup>13</sup>

<http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/Practice%20note%20SCM%208%20of%202007%208.pdf> accessed on 24 September 2014;

<sup>14</sup> Further advertisement guidelines can be found in The National Treasury Instruction No. 1 of 2015/2016 [http://OCPO.treasury.gov.za/Resource\\_centre/legislation/treasury%20Instruction%20NO%20%201%20of%2015](http://OCPO.treasury.gov.za/Resource_centre/legislation/treasury%20Instruction%20NO%20%201%20of%2015) (accessed on 19 March 2015);

<sup>15</sup> Bolton P (2007) 13;



According to Ngobeni,<sup>16</sup> the tender process in South Africa consists of mainly 6 stages, namely:

1. Preparing of the request for an invitation to tender;
2. The calling for tenders;
3. Submission and receiving of tenders;
4. Opening of tenders;
5. Assessing of tenders;
6. Awarding of tenders.

It is clear that Bolton's first period consists of various stages as explained by Ngobeni. Ngobeni's sixth step is the same as the second period in Bolton's explanation.

## **2.2 AN OVERVIEW OF APPLICABLE LEGISLATION**

### **2.2.1 CONSTITUTION**

The government procurement process obtained constitutional status when the 1996 Constitution of South Africa came into effect.<sup>17</sup>

Section 33 provides for just administrative action. Beukes finds that section 33 of the Constitution is vital due to the South African past. This section provides

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<sup>16</sup> Ngobeni S (2011) 10;

<sup>17</sup> Bolton P (2007) 33;

a safeguard and protects individuals against any abuse of power by organs of state.<sup>18</sup>

Section 33(3) gives the legislator the power to provide details and to define the values and principles as set out in the Constitution.<sup>19</sup>

Sections 215, 216, 218 and 219 directs the National Treasury to introduce uniform norms and standards within the government.<sup>20</sup> The uniform norms and standards imposed by the National Treasury have a direct impact on all spheres of the government procurement process.

Section 217 directly governs the procurement in all government spheres and institutes the main principles used by all spheres of government to procure goods and services.<sup>21</sup> Section 217 uses the word “must” in order to create an obligation on all government spheres in regard to the procurement process.

The principles instituted by section 217<sup>22</sup> of the Constitution are fairness, equity, transparency, competitiveness and cost-effectiveness. These principles must be used as a golden thread to guide all stages of the procurement process in the public sector.<sup>23</sup>

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<sup>18</sup> Beukes M (2003) 18 SAPR 291;

<sup>19</sup> Beukes M (2003) 18 SAPR 291;

<sup>20</sup> Bolton P (2007) 33;

<sup>21</sup> Tucker C (2013) 4;

<sup>22</sup> Constitution of South Africa, **Section 217: Procurement**

“(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 good or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

<sup>23</sup> *Minister of Social Development and Others v Phoenix Cash & Carry – PMB CC* (2007) 3 All SA 115 (SCA); *Toll Collection Consortium v South African National Road Agency Ltd and Another* (8422/2011) (2012) ZAKZDHC 43;

Section 217(3) determines that national legislation must prescribe a framework within which the procurement policy must be implemented.

## 2.2.2 PROMOTION OF ADMINISTRATIVE JUSTICE ACT<sup>24</sup>

As the government plays a large role in the public procurement process, it is essential that the entire procurement process adheres to the administrative law of South Africa.

Bolton states that organs of state must ensure that they act within the confines of their constitutional and statutory powers.<sup>25</sup> The Promotion of Administrative Justice Act<sup>26</sup> (hereinafter called PAJA) mainly regulates the administrative system of South Africa in order to ensure justice and to give all persons affected by administrative actions a right to be heard.

PAJA mainly gives effect to section 33 of the Constitution of South Africa and ensures that the principles of lawfulness, reasonableness and procedural fairness are upheld.<sup>27</sup>

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*Chief Executive Officer, South African Social Security Agency and others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA);

<sup>24</sup> Act 3 of 2000;

<sup>25</sup> Bolton P (2007) 17;

<sup>26</sup> Act 3 of 2000;

<sup>27</sup> The preamble of PAJA sums up its responsibility perfectly as follows:

*“And in order to –*

- *Promote an efficient administrative and good governance; and*
- *Create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.”*

Sections 3 and 4 of PAJA express the Constitutional value of procedural fairness and set down the requirements for procedurally fair administrative action.<sup>28</sup> Beukes explains that section 3 of PAJA deals with procedural fairness in respect of any person and that section 4 of PAJA deals with procedural fairness in respect of the public.<sup>29</sup>

Tucker explains that PAJA is the main source for judicial review.<sup>30</sup> PAJA is therefore a very important tool to use in ensuring that the public procurement procedure complies with the constitutional principles.<sup>31</sup>

PAJA deals with the rules and principles of general administrative law and binds all levels of government.<sup>32</sup> Due to the far reaching effect of PAJA, it is imperative that the public procurement process adheres to the rules and principles set down in PAJA.

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<sup>28</sup> Beukes M (2003) 18 SAPR 295;

<sup>29</sup> Beukes M (2003) 18 SAPR 297;

<sup>30</sup> Tucker C (2013) 10;

<sup>31</sup> In the matter of *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* (2014) 2 All SA 493 (SCA), Van Zyl AJA held that section 8 of PAJA empowers a court in judicial review to grant any order that is just and equitable and that the discretion must be exercised judiciously;

<sup>32</sup> Bolton P (2007) 18;

### 2.2.3 PUBLIC FINANCE MANAGEMENT ACT<sup>33</sup> AND REGULATIONS

The Public Finance Management Act (hereinafter referred to as PFMA) and the regulations thereto govern the procurement process on national and provincial government level as defined in the Public Services Act<sup>34, 35</sup>

The PFMA furthermore applies to listed major public entities, listed constitutional institutions and provincial legislatures.<sup>36</sup>

Bolton explains that section 38(1)(a) and section 51(1) of the PFMA give specific duties to an accounting officer of the state to ensure that the State has and maintains a “*transparent system of financial and risk management and internal control*”.<sup>37</sup>

According to Tucker the constitutional values are repeated in section 51(1)(a) of the PFMA which states that an accounting authority of a public entity must uphold a procurement system which is fair, equitable, transparent, competitive and cost- effective.<sup>38</sup>

The PFMA is effected through the regulations published in accordance with it and specifically mentions that the Preferential Procurement Policy Framework

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<sup>33</sup> Act 1 of 1999;

<sup>34</sup> Act 103 of 1994;

<sup>35</sup> Tucker C (2013) 4;

<sup>36</sup> Tucker C (2013) 5;

<sup>37</sup> Bolton (2007) 183;

<sup>38</sup> Tucker (2013) 2; Chief Executive Officer, South African Social Security Agency and others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA);

Act as well as the Broad-Based Black Economic Empowerment Act must be included in all tender documentation.<sup>39</sup>

The PFMA Regulations furthermore create guidelines and rules to ensure that the advertisement to tender is correct and inclusive of all necessary averments. The guidelines of publication of an advertisement to tender can also be found in the PFMA Regulations and it must be followed when a state organ wants to publish an invitation to tender.

## **2.2.4 LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT<sup>40</sup> AND REGULATIONS**

The Local Government: Municipal Finance Management Act (hereinafter referred to as MFMA) and the regulations thereto govern the procurement process at local government level.

The MFMA applies to all municipalities, municipal entities and national and provincial organs of state.<sup>41</sup>

Tucker explains that the MFMA regulates the manner in which municipal powers and functions are implemented and achieved and controls the management of financial affairs in municipalities.<sup>42</sup>

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<sup>39</sup> Bolton (2007) 183;

<sup>40</sup> Act 56 of 2003;

<sup>41</sup> Tucker C (2013) 5;

<sup>42</sup> Tucker C (2013) 2;

Chapter 11 of the MFMA governs goods and services and more specifically governs the supply chain management policy. Section 111 of the MFMA specifically directs:

*Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part.*

In section 112(1) the MFMA gives a prescribed framework with 17 main guidelines that the municipality must follow when drafting and implementing its supply chain management policy.<sup>43</sup>

The MFMA's supply chain management regulations furthermore dictates that evaluation and adjudication criteria must be included together with any criteria required by applicable legislation.<sup>44</sup>

Section 117 of the MFMA provides that no councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders and may furthermore not attend any such meeting as an observer. Dekker explains that this is an important provision as it will ensure that political influence in the evaluation of tenders is reduced.<sup>45</sup>

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<sup>43</sup> Dekker L (2004) October *IMIESA* 75;

<sup>44</sup> MFMA Supply Chain Management Regulations 21(b);

<sup>45</sup> Dekker L (2004) October *IMIESA* 75;

## 2.2.5 PREFERENTIAL PROCUREMENT POLICY FRAMEWORK

### ACT<sup>46</sup> AND REGULATIONS

The Preferential Procurement Policy Framework Act<sup>47</sup> (hereinafter referred to as PPPFA) and the regulations thereto govern the procurement process on all 3 levels of government.<sup>48</sup>

The preamble of the PPPFA accurately summarises its functions as follows:

*To give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith.*<sup>49</sup>

The PPPFA gives every state organ an obligation to determine its preferential procurement policy and to implement it within the framework of the PPPFA.<sup>50</sup>

The regulations<sup>51</sup> to the PPPFA contain all details necessary to interpret and understand the obligations and guidelines contained in the PPPFA and it is therefore important to read the regulations together with the PPPFA as a unit.

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<sup>46</sup> Act 5 of 2000;

<sup>47</sup> Act 5 of 2000;

<sup>48</sup> Bolton P (2007) 33;

<sup>49</sup> PPPFA preamble;

<sup>50</sup> Bolton P (2007) 269;

<sup>51</sup> Preferential Procurement Regulations 2001, pertaining to the PPPFA  
<[http://ocpo.treasury.gov.za/Resource\\_Centre/Legislation/pppfr.pdf](http://ocpo.treasury.gov.za/Resource_Centre/Legislation/pppfr.pdf)> (accessed on 19 March 2015);



The PPPFA Regulations are applicable to national and provincial state departments, municipalities, constitutional institutions, the parliament, the provincial legislators and the public entities as listed in the PFMA.<sup>52</sup>

Section 1(i) of the PPPFA provides the definition of an acceptable tender as follows:

*“acceptable tender” means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.*

In the matter of *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and others*,<sup>53</sup> Jafta JA held that the definition of an acceptable tender cannot be given a literal and wide meaning. It cannot be read that an acceptable tender must comply with immaterial, unreasonable and unconstitutional provisions.

Section 2 of the PPPFA provides that an organ of state must determine its preferential procurement policy and implement it within the framework provided for in the PPPFA. The importance of section 2 of the PPPFA was confirmed by Pillay J in the matter of *Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekwini Municipality and Others; Group Five Construction (Pty) Ltd v Ethekwini Municipality and Others*.<sup>54</sup>

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<sup>52</sup> Tucker C (2013) 5;

<sup>53</sup> (2008) 2 All SA 145 (SCA);

<sup>54</sup> (2012) 1 All SA 200 (KZP);

## 2.3 THE PROCUREMENT PROCESS AS A CONTRACT

In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>55</sup> Harms JA held the following:

*Seen in isolation, the invitation to tender is no doubt an offer made by a state organ 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 who does so on an equal footing with the public authority.*

The judgment of Harms JA clearly classifies the tender process as a *pactum de contrahendo* and more specifically finds that the invitation to tender is an offer made by the state and the submission of a tender is the acceptance of such an offer.

The *pactum de contrahendo* that is formed will be under the condition that the acceptance strictly complies with the offer and that the formal contract will be concluded with the best acceptance received.

The judgment of Harms JA is contradictory to the opinion of various legal writers and legal professors. Christie and Bradfield are of the opinion that the

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<sup>55</sup> 2006 (3) SA 151 SCA;

submission of a tender amounts to the making of an offer and the acceptance will only be made after the evaluation of the tenders.<sup>56</sup>

Bolton's opinion is very similar to that of Christie and Bradfield. Bolton explains that generally a call for tenders will be equal to an invitation. This will give the organ of state the option to accept or reject tenders.<sup>57</sup>

Hutchison and Pretorius hold the same view as Christie, Bradfield and Bolton as discussed above.<sup>58</sup>

The opinion of the abovementioned legal writers can be compared to an "auction with reserve", where the reserve price has been communicated to the potential buyers, as the same principles come into effect. When an auction is with reserve and the reserve price has been communicated to the buyers, the advertisement and the conditions of sale will constitute nothing more than an advertisement. An offer is made by entering a bid and the acceptance of such an offer is in the discretion of the auctioneer.<sup>59</sup>

Christie and Bradfield explain that the *Steenkamp* judgment was correct in finding that a *pactum de contrahendo* comes into existence but that the offer was the submitting of a tender and the acceptance was only made after the evaluation of the tenders and in the discretion of the state.<sup>60</sup>

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<sup>56</sup> Christie RH and Bradfield GB (2011) 44;

<sup>57</sup> Bolton P (2007) 14;

<sup>58</sup> Hutchison and Pretorius (2009) 52;

<sup>59</sup> Hutchison and Pretorius (2009) 53, Christie and Bradfield (2011) 49;

<sup>60</sup> Christie and Bradfield (2011) 48;

## 2.4 CONCLUSION

The government procurement system, also known as the government tender system, is of vital importance for all 3 levels of state to function optimally.

In order to regulate the expenditure of public funds, empowerment of previously disadvantaged groups and to ensure a limited amount of corruption, the Constitution and various other legislative tools regulate the entire procurement process in South Africa. The public procurement process forms part of the administrative law sphere and all administrative principles and regulations must be adhered to.

The opinion of various legal writers and the opinion of Harms JA must be consolidated. Once consolidated it is established that the procurement process indeed does form a contractual relationship between the organ of state and the tenderer in the form of a *pactum de contrahendo* on the following grounds:

1. The advertisement to tender is merely an invitation to submit an offer.
2. The submission of a tender is an offer made by the tenderer in accordance with the advertisement to tender and all relevant legislation and regulations.
3. The awarding of a tender amounts to an acceptance of the offer and must also be made in accordance with the original advertisement to tender.

4. The whole process must comply with relevant legislation and the regulations thereto.

In the chapter to follow, the drafting of the procurement documentation will be discussed with a deeper focus on the advertisement, the offer and acceptance of the offer. This will be followed by a discussion about the establishment of the formal contract.

## **CHAPTER 3**

# **DRAFTING OF CONTRACTS AND THE PUBLIC SECTOR TENDER PROCESS**

- 3.1 Introduction**
- 3.2 The systematic context and a public tender as a written legal instrument**
- 3.3 The tender process and the substantive dimension**
  - 3.3.1 The invitation to tender**
  - 3.3.2 Offer and the submitting of a tender**
  - 3.3.3 Acceptance and the awarding of a tender**
  - 3.3.4 The formal contract**
- 3.4 Conclusion**

### **3.1 INTRODUCTION**

In chapter 2 it was found that the tender process has become a vital part in the procurement of goods and services for the public sector as the public sector deals mainly with public funds and is regulated strongly by the Constitution and all acts that flow from it.

It was furthermore established in chapter 2 that the call for tenders is merely an advertisement, the submitting of a tender will be an offer made and the awarding of a tender will be the acceptance.

In this chapter the drafting process and the importance of an accurate and detailed approach on the drafting of all procurement documents will be discussed.

### **3.2 THE SYSTEMATIC CONTEXT AND TENDER AS A WRITTEN LEGAL INSTRUMENT**

The dictionary definition of 'systematic' is defined as doing or acting according to a fixed plan or system.<sup>61</sup> The dictionary definition of 'context' is defined as the circumstances that form the setting of a statement or idea and in terms of which it can be fully understood. It is also more accurately defined as the parts

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<sup>61</sup> *The South African Concise Oxford Dictionary* 2005 Oxford University Press Southern Africa: Cape Town;

that immediately precede and follow a word or passage and clarifies its meaning.<sup>62</sup>

By consolidating the above meanings from a contract drafting perspective, it is clear that a 'systematic context' should be seen as the writing and compiling of a written legal instrument according to the applicable legal structures taking into account the reasons and circumstances that necessitated the written legal instrument.

Since the implementation of the 1996 Constitution, various Acts have come into operation in order to regulate the public sector procurement process<sup>63</sup>. The word 'document' is frequently used, in different forms, throughout the various acts. For example the MFMA<sup>64</sup> governs in section 112(1)(g) that each supply chain management policy, as implemented by the different municipalities, must regulate the bid documentation, advertising of and invitations to tender. In the PPPFA<sup>65</sup> it is stated that only acceptable tenders may be considered.<sup>66</sup> In section 1 of the PPPFA an acceptable tender is defined as *"any tender which in all respects, complies with the specifications and conditions of tender as set out in the tender document"*.

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<sup>62</sup> *The South African Concise Oxford Dictionary* 2005 Oxford University Press Southern Africa: Cape Town;

<sup>63</sup> Constitution of the Republic of South Africa, Act 108 of 1996: Section 217(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."*;

<sup>64</sup> Local Government: Municipal Finance Management Act, Act 56 of 2003;

<sup>65</sup> Preferential Procurement Policy Framework Act, Act 5 of 2000;

<sup>66</sup> "acceptable tenders" as defined in section 1 of the PPPFA as *"any tender which in all respects, complies with the specifications and conditions of tender as set out in the tender document"*



It is interesting that the legislator has chosen to use the word 'document' when regulating the public sector tender process. The Oxford definition for the word document<sup>67</sup> is 'a piece of written, printed, or electronic matter that provides information or evidence or that serves as an official record'. It can now be ascertained that the legislator purposefully used the word 'document' and therefore specified that the tender process must take place in a written form.

The proper and diligent drafting of all aspects of the tender process now becomes a vital part of the procurement process as it will form the basis of the legal relationship between the state organ and the tenderer.

### **3.3 THE TENDER PROCESS AND THE SUBSTANTIVE DIMENSION**

Hutchison and Pretorius explain that a contract is a juristic act which means that the law attaches the consequences intended by the parties.<sup>68</sup>

Nagel *et al* state that juristic acts are actions whereby the law attaches consequences to, in line with the intention of the parties.<sup>69</sup> From the juristic act a legal relationship will flow that in turn will give rise to certain rights and responsibilities as intended by the parties.

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<sup>67</sup> *The South African Concise Oxford Dictionary* 2005 Oxford University Press Southern Africa: Cape Town;

<sup>68</sup> Hutchison and Pretorius *The law of contract in South Africa* 2009 First Publication, 6;

<sup>69</sup> Nagel *et al Commercial law* 2006 Third Edition, 23;

In the case of the state tender processes the legal relationship that forms will be a contractual relationship and will therefore be governed by the law of contract.<sup>70</sup> This was already confirmed and discussed under chapter 2 above.

The basic contractual principal pertaining to offer and acceptance comes into play. The invitation to tender is an advertisement that forms the basis to which the submitted tender must comply. The submitted tender will be the offer and the awarding of a tender would form the acceptance. These concepts will be discussed more clearly hereunder.

It is furthermore important that the drafter of any part of the tender process to keep the 5 elements of a contract in mind (and comply therewith) in order to ensure the validity of the document. The 5 elements will not be defined or discussed separately but must be kept in mind throughout this chapter.

In explaining the drafting of each step in the tender process, case law will form a vast part of explaining how all the elements of the tender process must be drafted. Dale E Turner states that:

*“Some of the best lessons we ever learn are learned from past mistakes.  
The error of the past is the wisdom and success of the future.”*

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<sup>70</sup> Refer back to paragraph 1.1 above for the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape*;

### 3.3.1 THE INVITATION TO TENDER

In normal practice an invitation to tender will consist of the published advertisement, the bid documents and, if necessary, a briefing conference and site visit.<sup>71</sup>

In order to initiate the tender process, an advertisement will be placed in the Government Gazette as well as a local newspaper. The advertisement will consist of a short summary of the invitation to tender, a tender deadline and contact details of the particular state organ. The advertisement will furthermore mention where and when bid documents can be collected and when a briefing conference and/or on site visit (if necessary) will be held.<sup>72</sup>

The bid documents must contain the complete invitation to tender with all necessary information, terms and conditions. The bid documents must be drafted clearly and unambiguously.<sup>73</sup> It is important that the drafter of such an invitation use all applicable legal sources and guidelines and keep the reason and circumstances that necessitated the procurement in mind.

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<sup>71</sup> Government Procurement Procedure by the Department of Government Communication and Information System <<http://www.gcis.gov.za/content/about-us/procurement/procedure>> (accessed on 30 June 2015);

<sup>72</sup> See Government Tender Bulletin, published by the Government Printing works for examples on the advertisement to tender. The following Government Tender Bulletin was used during the research of this paper: Government Tender Bulletin, Republic of South Africa, Vol 597, Pretoria, 20 March 2015, No 2860;

<sup>73</sup> Minister of Social Development and Others v Phoenix Cash & Carry – PMB CC (2007) 3 All SA 115 (SCA);

Tucker explains that the evaluation criteria for measuring technical specifications of tenders must be objective and must be clearly specified in the invitation to tender.<sup>74</sup>

The drafter must also remember to explicitly state the deadline date and time as well as how and where all tenders must be submitted.<sup>75</sup> Without this information, late tenders will need to be accepted as well as tenders handed in in any form. Without a strict deadline and submission process the tender process will become unfair and therefore unconstitutional, unenforceable and therefore void.

The National Treasury published a Government Procurement: General Conditions of Contract<sup>76</sup> in July 2010. The purpose of the document was to ensure a more detailed invitation for tenders as the general conditions must be used as a starting point to establish the rights and obligations of all parties. The preamble of the general conditions clearly states that in the event a conflict arising between the provisions of the general conditions and the special conditions of contract set out in the invitation to tender, the special conditions must prevail.

In drafting an invitation to tender it is important to include each and every term that will be applicable to the legal relationship between the parties, as the

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<sup>74</sup> Tucker C (2013) 8;

<sup>75</sup> Government Procurement Procedure by the Department of Government Communication and Information System <<http://www.gcis.gov.za/content/about-us/procurement/procedure>> (accessed on 30 June 2015);

<sup>76</sup>

<http://www.treasury.gov.za/divisions/ocpo/sc/GeneralConditions/General%20Conditions%20of%20Contract-%20Inclusion%20of%20par%2034%20CIBD.pdf>, assessed on 24 May 2015;

invitation to tender forms the basis on which an offer will be drafted and submitted. Without a complete and accurate invitation, the tenderer will not be able to submit a complete and accurate offer. This step will ensure that the parties duly reach consensus at the time of awarding of the tender, hence the acceptance of the offer.

Van Der Merwe *et al* state that the meeting of minds of the parties is the basis of a contract.<sup>77</sup> The parties must therefore be able to establish consensus through the process of advertising, making an offer and the acceptance thereof.

It was also confirmed in *Vodacom (Pty) Ltd and another v Nelson Mandela Bay Municipality and others*<sup>78</sup> that the invitation to tender must adhere strictly to all relevant legislation and guidelines. When drafting the bid document, it is important to keep the relevant legislation and guidelines in mind as this will determine the validity of the tender document and therefore the basis of legality of the entire process.

The legality of an invitation to tender became a point of debate in the matter of *SA Metal Machinery Co (Pty) Ltd v City of Cape Town*.<sup>79</sup> City of Cape Town issued a tender for the purchase and removal of certain loosely described obsolete electrical equipment. Prospective bidders could inspect the goods at several warehouses and were invited to attend a briefing session. The applicant did not submit a tender on or before the specified closing date and was

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<sup>77</sup> S Van Der Merwe et al *Contract General Principles* 2007 Third Edition, 21;

<sup>78</sup> 2012 (3) SA 240 (ECP);

<sup>79</sup> 2011 (1) SA 348 (WCC);

therefore not considered in the tender evaluation process. The applicant applied for an order reviewing and setting aside the invitation to tender on the ground that it did not comply with section 14 of the MFMA<sup>80</sup> in that the invitation to tender did not clearly specify the fair market value and/or the economic and community value of the merchandise, and that it was incapable of determination. Binns-Ward J held that the fair market value, economic and community value of the merchandise could be obtained by the inspection and enquiry as specified in the invitation to tender. The invitation to tender did make provision for the information to be obtained by contacting the respondent's contact person. Binns-Ward J held further that in his view the applicant could not show that the invitation to tender has an unlawful outcome.

It is quite clear from the judgment of Binns-Ward J that it is not necessary to specifically indicate the market value of an item being sold but that the information must be available and obtainable. If the judgment of Binns-Ward J is applied more widely to the tender invitation, the drafter may use this judgment to shorten the description of certain items and to make more details available on specific request thereof. This will help to lessen the burden on the drafter of a tender invitation to comply with all necessary legal requirements.

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<sup>80</sup> Local Government: Municipal Finance Management Act 56 of 2013, section 14 provides that:

- (1) *a municipality may not transfer ownership as a result of a sale or other transactions or otherwise permanently dispose of a capital asset needed to provide the minimal level of basic municipal services;*
- (2) *A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal counsel, in a meeting open to the public*
  - a. *Has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and*
  - b. *Has considered the fair market value of the assets and the economical and community value to be received in exchange for the asset.*

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,<sup>81</sup> Satchwell J held that a contract will be void if the proper procedure and regulations in accordance with the Public Finance Management Act are not followed. By utilising only this one sentence by Satchwell J the drafter of a tender invitation can understand the importance of ensuring that the tender invitation is in exact compliance with the relevant legislation.

Chapter 11 of the MFMA and more specifically Part 1 thereof has direct implications on the drafting of an invitation to tender. Section 112 of the MFMA gives direct guidelines to each municipality for the drafting and implementation of its own supply chain management policy. Each municipality must therefore ensure that it drafts all invitations to tender within the ambit of its own supply chain management policy.

Section 116 of the MFMA requires that all procurement contracts and processes must take place in writing.<sup>82</sup> The procurement process and contracts must include clauses to regulate the termination of the contract, any dispute resolution mechanisms, and a review of the contract every 3 years if the contract is scheduled to be of long term.<sup>83</sup>

When drafting the invitation to tender and bid documents it is important to keep in mind that the performance required must be physically possible.

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<sup>81</sup> 2012 (4) All SA 555 (GSJ);

<sup>82</sup> MFMA Section 116(1)(a);

<sup>83</sup> MFMA Section 116(1)(b)(i) – (iii);

A state organ must decide whether the tender process itself will form the formal contract with the successful bidder or whether negotiations need to take place with the successful bidder after the tender process.

When drafting an invitation to tender it is important to include all necessary conditions that the State organ will rely on in an attempt to reduce the future risk of a fissure in consensus and the need to make a counteroffer. When a State organ requires the negotiation of a formal contract after the awarding of a tender, same must be stated clearly in the bid documents as a condition.

The importance of a comprehensive description of all terms arose in the matter of *Command Protection Services (Gauteng) Pty Ltd v South African Post Office Limited*.<sup>84</sup> In this matter the bid documents did not contain certain conditions, namely of maintaining a certain BEE rating and that the award of the tender was subject to the negotiating and conclusion of a formal contract. After SAPO (South African Post Office) awarded the tender to Command Protection Services (Gauteng), a letter of appointment was sent to the successful bidder with the conditions included therein and the successful bidder was requested to sign the letter of acceptance to indicate its acceptance of the appointment. The dispute arose as to whether the conditions contained in the signed letter of appointment constituted an accepted counteroffer to the initial tender. The Supreme Court of Appeal found that the letter of appointment, as signed by

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<sup>84</sup> (2012) ZASCA 160;



both parties, indeed did constitute the acceptance of a counteroffer and should therefore be complied with.

It is clear from the *SAPO* – case above, that when drafting bid documents it is best to include all possible conditions needed as this minimises disputes and increases the accuracy of consensus.

The way of the evaluation of the tenders must also be included in the bid documentation. The PPPFA’s preferential procurement regulation compels the State organ to indicate whether a specific preferential point system will be used or whether the submitted tenders will be evaluated on functionality and price.<sup>85</sup>

### **3.3.2 OFFER AND THE SUBMITTING OF A TENDER**

When submitting a tender, the bidder is in fact making an offer in line with the invitation to tender. It is of great importance that the bidder must submit a comprehensive proposal addressing all requirements as specified within the bid document, applicable law and guidelines.

According to the Department of Government Communication and Information System, all submitted tenders must be accompanied by:<sup>86</sup>

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<sup>85</sup> Preferential Procurement Regulations (2001) regulation 8.1;

<sup>86</sup> Government Procurement Procedure by the Department of Government Communication and Information System <<http://www.gcis.gov.za/content/about-us/procurement/procedure>> (accessed on 30 June 2015);

- “1. *A comprehensive proposal addressing requirements as specified within the bid documents;*
2. *All associated forms (SBDs) attached to the bid documentation;*
3. *A valid tax clearance certificate issued by the South African Revenue Services (SARS).”*

In an article published by the Western Cape Government, the government explained to prospective bidders that it is vital that all associated forms be completed accurately and that they must be submitted together with the final tender.<sup>87</sup> The applicable and necessary forms will be mentioned and in most cases attached to the bid document itself. The necessary forms are furthermore available on the website of the National Treasury.

The PFMA and the PPPFA gives the National Treasury specific duties in regulating the tender process. According to the National Treasury Guidelines, as published on the Government Communication and Information System (GCIS), all associated forms (as attached to the bid documentation) must be completed and attached to the submitted tender. A valid tax clearance certificate is a mandatory requirement in all tenders.<sup>88</sup>

In the Preferential Procurement Regulations of 2011 the importance of a Broad Based Black Economic Empowerment Status Level Certificate was emphasized and made compulsory to all bidders. It is therefore of vital

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<sup>87</sup> [http://www.westerncape.gov.za/tenders/how\\_to\\_tender](http://www.westerncape.gov.za/tenders/how_to_tender), accessed 19 March 2015;

<sup>88</sup> Published tender procedure: <http://www.gcis.gov.za/cnontent/about-us/procurement/procedure>, accessed on 6 June 2015;

importance that either the original or a certified copy of the bidder's BBBEE certificate be attached to its submitted tender.<sup>89</sup>

The 2011 Preferential Procurement Regulations furthermore impose certain conditions into the tender process. In regulation 11 of the regulations, certain requirements are made mandatory in order for a valid tender to be submitted. In regulation 12 of the Regulations, a mandatory declaration clause is again mentioned and explained in more detail. When drafting a tender it is imperative for the drafter to include the declaration as explained in regulation 12 of the Regulations in order for the tender to be valid.

When drafting the tender, the bidder must strictly follow the specifications and terms set out in bid documents received. Strict compliance with bid documentation was confirmed in the matter of *VE Reticulation (Pty) Ltd and others v Mossel Bay Municipality and others*<sup>90</sup> where the court decided that the offer (in other words the submitted tender) must be drawn in exact accordance with the invitation to tender to constitute a proper offer.

Bolton explains that bidders should always comply with the tender conditions as a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and it would amount to the process being unfair.<sup>91</sup>

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<sup>89</sup> Government Gazette No. 34350 Vol. 552 No. R. 502 published on 8 June 2011;

<sup>90</sup> (2013) 2 All SA 489 (WCC);

<sup>91</sup> Bolton P (2014) Vol 17.6 PER 2314;

When drafting a tender, the bidder must take special care in complying with specific tax provisions. In the Preferential Procurement Regulations, as published in 2011, it is clearly stated that a tender may only be awarded to a person whose tax matters have been declared to be in order by the South African Revenue Services.<sup>92</sup> In *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another*<sup>93</sup> the invitation to tender stated that an original tax clearance certificate must accompany the submitted tender. When the tender of the respondent was evaluated, it was found that the tax clearance certificate was a copy. Leach JA confirmed that a bidder must comply with the exact requirement as set out in the invitation to tender and the original tax clearance certificate was therefore required.

### **3.3.3 ACCEPTANCE AND THE AWARDING OF A TENDER**

After the closing date for the submitting of tenders, the submitted tender must be opened, recorded and evaluated.

The PPPFA's preferential procurement regulations implements an evaluation process that must take place with due regard and including a preference point system, the evaluation of functionality and price.

A tender may only be awarded to a bidder if the offer made is in exact compliance with the invitation to tender. This has been explained in more detail

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<sup>92</sup> Reg. 14 of the Preferential Procurement Regulation (GN R502 in GG 34350 of 8 June 2011);

<sup>93</sup> *Dr JS Moroka Municipality and others v Betram (Pty) Limited and Another* (2014) JOL 31209 (SCA);

above. In *Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and others*<sup>94</sup> as well as in the matter of *Metro Project CC and Another v Klerksdorp Local Municipality and others*,<sup>95</sup> the courts held that it is imperative for a State organ to abide by the terms and criteria as set out in the invitation to tender.

It is practice in South Africa that the acceptance letter be posted by registered mail and/or hand delivered to the successful bidder.

When drafting the letter of acceptance, the State organ must apply principles of the *SAPO* – judgment, as discussed above, and ensure that the letter of acceptance is as short as possible with no new terms included in the letter.

The letter of acceptance will create the *pactum de contrahendo* between the State organ and the successful bidder. A formal contract can now come into effect and same is discussed below.

### 3.3.4 THE FORMAL CONTRACT

After the awarding of the tender to the successful bidder a formal contract must come into existence in order to regulate the relationship between the State organ and the successful bidder.

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<sup>94</sup> (2002) 3 All SA 336 (T);

<sup>95</sup> 2004 (1) SA 16 (SCA);

The formal contract normally comes into existence in one of two ways. Firstly, the tender process itself can form the entire contract and the terms and conditions will be established and obtained from the invitation to tender, the submitted tender and the acceptance letter. In other words the *pactum de contrahendo* itself will become the formal contract.

A second way would be the negotiation and formalisation of a final contract after the awarding of a tender. This condition will need to be expressly stated in the invitation to tender as a term in the *pactum de contrahendo*. An example of the consequences of including or not including this clause was discussed above with specific reference to the matter of *Command Protection Services (Gauteng) Pty Ltd v South African Post Office Limited*.<sup>96</sup>

When a drafter starts to draft a formal contract, the first question to be answered is who the parties to the contract will be. This question is very important as it will bind the parties to a legal relationship and place certain rights and responsibilities onto the contracting parties.

In the matter of *Tsantsabane Municipality v Thabula Trade and Investment (Pty) Ltd and another*,<sup>97</sup> the Tsantsabane Municipality needed to sell a golf course and awarded the tender to Ms M Mokgoro and Ms S De Bruin. The invitation to tender required a formal contract to be concluded after the awarding of the tender. When the formal contract was entered into the parties to the formal

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<sup>96</sup> (2012) ZASCA 160;

<sup>97</sup> (2012) 4 All SA 219 (NCK);

contract were Tsantsabane Municipality and Thabula Trade and Investment (Pty) Ltd. Ms Mokgoro and Ms De Bruin were the directors of Thabula Trade and Investment (Pty) Ltd and therefore elected that the golf course must be sold to the company of which they were directors. This matter was placed before court in an attempt to cancel the contract between the municipality and the company as the initial tender was awarded to Ms Mokgoro and Ms De Bruin and not to their company. Kgomo JP agreed with the municipality and cancelled the contract between the municipality and Thabula Trade and Investment (Pty) Ltd. Kgomo JP held that a contract entered into after the awarding of a tender must be with the successful bidder. A conclusion that must be drawn from the judgment of Kgomo JP is that the parties to the formal contract must be the parties that the tender was awarded to. No other parties can be bound to the formal contract than those who successfully obtained the tender.

### **3.4 CONCLUSION**

In conclusion, the *pactum de contrahendo* comes into existence through the completion of 3 stages. Firstly, an invitation to tender must be advertised and comprehensive bid documentation must be drafted. Secondly, bidders must timeously submit tenders and ensure that the submitted tender complies with the invitation to tender. Thirdly, the State organ may award a tender in writing to a successful bidder after an evaluation process in accordance with the Preferential Procurement Regulations.

The *pactum de contrahendo* will form the basis of a formal contract and/or the negotiations thereto and must therefore be sound in law.

It is vital that all necessary legislation, regulations and case law be used when drafting any part of the tender documentation as one wrong step can have a detrimental effect on the validity of any contract, on the grounds of unfairness, inequitableness, and insufficient transparency.



## CHAPTER 4

### INTERPRETATION OF CONTRACTS AND THE PUBLIC SECTOR TENDER PROCESS

- 4.1 Classification of the public tender process**
- 4.2 The nature of a State tender**
  - 4.2.1 The parol – evidence rule**
  - 4.2.2 Implied Terms**
- 4.3 Applicable presumptions in the interpretation of contracts**
  - 4.3.1 Presumption against superfluous words and that no person will write what he/she does not intend**
  - 4.3.2 The presumption that the performance must take place *in forma specifica***
  - 4.3.3 The presumption that the parties have the legal capacity to contract and that the parties contract as principal**
  - 4.3.4 The presumption that the parties' intend to conclude a legally valid contract and**

**that the parties do not wish to deviate  
from the existing law more than  
necessary**

#### **4.4 Conclusion**

## 4.1 CLASSIFICATION OF THE PUBLIC TENDER PROCESS

The public sector tender process was discussed in detail under chapter 2 and 3 above and it is clear that the tender process consists of several written documents. According to Cornelius, a document must be classified according to certain criteria that reveal the nature of the document.<sup>98</sup> It is therefore important to classify the tender process in order for a proper interpretation to be achieved.

It is clear from the judgment in the *Steenkamp NO* – matter (also see chapter 2 and 3) that the court classified the invitation to tender and the submitting of a tender document as a *pactum de contrahendo* and, more specifically, similar to a type of option contract.

According to Cornelius, classification takes place by means of evaluation of the characteristics of a document.<sup>99</sup> An option is comprised of two main elements namely an offer to enter into a main agreement and an agreement to keep the main offer open for a certain time.<sup>100</sup>

An option is a legally binding contract about the possibility of contracting in the future.<sup>101</sup> In *Hirschowitz v Moolman*<sup>102</sup> it was stated that “a *pactum de contrahendo* is required to comply with the same requisites for validity, including

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<sup>98</sup> SJ Cornelius (2007) 139;

<sup>99</sup> SJ Cornelius (2007) 140;

<sup>100</sup> D Hutchison & C Pretorius (2012) 63;

<sup>101</sup> D Hutchison & C Pretorius (2012) 62;

<sup>102</sup> 1985 (3) SA 739 (A);

requirements as to form, applicable to the second or main contract to which the parties have bound themselves”.

When an invitation to tender is advertised the governmental is in fact inviting interested private entities or persons to submit offers and for the opportunity to contract in the future, subject to the administrative process of awarding a tender. The *pactum de contrahendo* will then come into existence when the offer is accepted by awarding of a tender to the private entity of person.<sup>103</sup>

A tender document can be recognised by the specific form it must comprise of as regulated by the Department of Government Communication and Information Systems (GCIS).<sup>104</sup> The GCIS determines certain compulsory forms to be part of the submitted bid proposals. The form of a bid document can therefore help to determine whether a certain proposal submitted by a private institution is an appropriate offer in accordance with the invitation to tender.

By classifying a document, the interpreter of such document can determine what terms, rules and substantive law will apply to the document.

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<sup>103</sup> Also see chapter 3 for a discussion about the offer and acceptance concept;

<sup>104</sup> G Storey *Tender Procedure* <http://www.gcis.gov.za/content/about-us/procurement/procedure> accessed on 06 June 2015;

## 4.2 THE NATURE OF A STATE TENDER

As the relationship between the parties has now been classified, the next step of interpretation would be to determine what terms form part of the agreement and what evidence will be admissible.

For completeness sake it is important to remember how the *pactum de contrahendo* came into existence. This was explained fully in chapter 3 above and will therefore not be repeated here.

### 4.2.1 The parol – evidence rule:

In order to properly determine the extent of the terms, the interpreter must know what sources may be considered to ascertain the content of a contract.<sup>105</sup>

The admissibility of extrinsic evidence is a very controversial issue in the South African law of contract.<sup>106</sup> Corbin explains that, in order to ascertain whether extrinsic evidence may be admitted, one of 3 factors must be an issue in dispute, namely:<sup>107</sup>

1. “Is there a contract between the parties?”
2. “Is the contract void or voidable because of illegality, fraud, mistake or any other reason?”

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<sup>105</sup> SJ Cornelius (2007) 95;

<sup>106</sup> SJ Cornelius (2007) 95;

<sup>107</sup> Corbin “The Parol Evidence Rule” 1944 *Yale LY* 603;

3. “Did the parties assent to a particular writing as the complete and accurate integration of that contract?”

It can be seen from Corbin’s explanation that if an interpreter is faced with the issue of whether a valid contract came into effect, he or she may admit extrinsic evidence to assist with obtaining the right answer to the issue at hand.

According to Jansen JA,<sup>108</sup> the parol – evidence rule is not a single rule but comprises of two independent rules. Jansen JA explained that the first rule would be the rule of integration which defines the limits of the contract. The second rule would be to determine when and to what extent extrinsic evidence may be presented to explain the effect of the meaning of the words contained in the written agreement.

The rule of integration is designed to stop any party from adding, modifying, contradicting or eliminating any terms which form part of a complete written contract by way of extrinsic evidence and by doing so redefining the terms of a written contract.<sup>109</sup>

According to Cornelius, after the judgment of Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd*, the admissibility of extrinsic evidence will only be limited by the ordinary rules of the law of evidence if it is used to determine the meaning of terms in a contract.<sup>110</sup>

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<sup>108</sup> Johnston v Leal 1980 (2) All SA 366 (A);

<sup>109</sup> Johnston v Leal 1980 (2) All SA 366 (A);

<sup>110</sup> SJ Cornelius (2009) (4) TSAR 774;

If one is certain that a valid contract did come into effect, the interpreter needs to ascertain what terms and conditions form part of the contract. If the contract was reduced to a written form, the interpreter will encounter the parol – evidence rule. The parol – evidence rule will have the effect that, if the agreement between the parties was reduced to writing, the written document will be seen as the entire agreement between the parties and no extrinsic evidence would be allowed to add, remove or change the written agreement.<sup>111</sup>

If one examines the procurement process, most often used by all levels of government to choose the supplier of certain goods or services, the *pactum de contrahendo* will consist of 3 main parts. Firstly, the invitation to submit a tender or bid by the State organ would be the basis for the possible making of an offer.<sup>112</sup> The advertisement and briefing document would therefore be closely considered before an offer is made. Secondly, the submission of a tender in respect of the invitation to tender would constitute the making of an offer. Thirdly, the awarding of the tender would constitute the acceptance of the offer. It is clear that the tender process will naturally be reduced to writing as the process must conform to the prerequisites as set out in Section 217(1) of the Constitution.<sup>113</sup> Writing promotes transparency and that in turn will promote fairness, competitiveness and cost-effectiveness.

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<sup>111</sup> SJ Cornelius (2007) 96;

<sup>112</sup> Steenkamp NO v The Provincial tender board of the Eastern Cape 2006 (3) SA 151 (SCA) para [12];

<sup>113</sup> Constitution of the Republic of South Africa 108 of 1996;

The extent of the terms of the agreement will be interpreted by reading and evaluating the invitation to tender, the submitted tender and the award letter in respect of the tender. By examining the documents, one can establish whether the parties reached consensus as well as what the express terms of the agreement are.

In *Tsantsabane Municipality v Thabula Trade and Investment (Pty) Ltd and another*,<sup>114</sup> a matter that has been discussed above, the municipality awarded a tender to Ms M Mokgoro and Ms S De Bruin for the purchase of a piece of land. After the awarding of the tender, the contract for the purchase of the relevant immovable property was drafted and the name of the tenderers was substituted with the name of their company, being Thabula Trade and Investment (Pty) Ltd. Kgomo JP held that '*If there is no ambiguity in the terms of the agreement and no fraud or other impropriety is alleged then the interpretation has to be confined to the written instrument*'.<sup>115</sup>

It can be seen from the judgment of Kgomo JP that the parol – evidence rule must be upheld as far as possible and that the parties will not be allowed to go beyond the written tender documents. Due to the *pactum de contrahendo* between the municipality and Mokgoro & De Bruin, the *pactum de contrahendo* must be upheld when the contract to purchase the immovable property is drafted and signed.

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<sup>114</sup> 2012 (4) All SA 219 (NCK);

<sup>115</sup> *Tsantsabane Municipality v Thabula Trade and Investment (Pty) Ltd and another* (2012) 4 All SA 219 (NCK) paragraph 7;



The brief discussion of case law shows that the courts tend to take the parol – evidence rule into serious consideration when faced with a ‘tender’ challenge.

#### 4.2.2 Implied Terms:

Certain terms will be implied *ex lege* into the contract as a result of legislation and common law practice. Joubert explains that a difference can be drawn between a dispositive and imperative implied term.<sup>116</sup> Dispositive implied terms are the terms that the law reads into the contract if the parties failed to deal with same. Imperative implied terms will be the terms that are compulsorily imposed into the agreement due to legislation. The relevant legislation must be complied with in all tender contracts and procedures in order for the agreement to be valid and legally concluded.

As previously mentioned, section 217(1) of the Constitution<sup>117</sup> consists of certain values that a governmental institution must comply with when procuring goods or services. The provisions of the Constitution must be read into the *pactum de contrahendo* whether the parties would have explicitly agreed thereto or not. It is therefore implied that it is a contractual term that the organ of State has evaluated the submitted tender according to a system which is fair, equitable, transparent, competitive and cost-effective.

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<sup>116</sup> As discussed by SJ Cornelius (2007) 163;

<sup>117</sup> Constitution of the Republic of South Africa 108 of 1996;

Further implied terms into the *pactum de contrahendo* would be generated from the obligations created by the Preferential Procurement Policy Framework Act<sup>118</sup> (PPPFA), the Municipal Finance Management Act<sup>119</sup> (MFMA) and Promotion of Administrative Justice Act<sup>120</sup> (PAJA).

The PPPFA and the regulations published under it in 2011 will also impact the *pactum de contrahendo* as further implied terms will be inserted into the agreement.

The PPPFA provides in section 2 that an organ of State must determine its preferential procurement policy and implement it within certain frameworks.

Section 111 of the MFMA states as follow:

*Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part.*

It can now be seen that the extent of the tender agreement will be imputed from the invitation to tender, the offer, the acceptance and implied terms. The Constitution specifically imposes the value of transparency<sup>121</sup> on the parties and therefore the parol – evidence rule will assist in upholding this value. By strictly implementing the parol – evidence rule, all participants to the procurement

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<sup>118</sup> 5 of 2000;

<sup>119</sup> 56 of 2003;

<sup>120</sup> 3 of 2000;

<sup>121</sup> Constitution of the Republic of South Africa 108 of 1996, Section 217(1);

process will be able to ascertain the extent of the agreement and the validity thereof.

### 4.3 APPLICABLE PRESUMPTIONS IN THE INTERPRETATION OF CONTRACTS

In South African law there are various different presumptions that are applicable to the interpretation of contracts.

In 1980, Jansen JA indicated that the first step in the interpretation of a written contract is to read it.<sup>122</sup> During the first time an interpreter reads a written contract, he or she has already formed certain presumptions about what he or she would expect in and of the written agreement.

There are two categories of presumptions in South African law of contracts,<sup>123</sup> namely:

1. Presumption of interpretation; and
2. Presumption of substantive law.

Cornelius defines 'presumption of interpretation' as the field of interpretation that derives its strength from common sense, logic and usage that deals with

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<sup>122</sup> *Cinema City v Morgenstern Family Estate and others* 1980 (1) SA 796 (A) 802 as quoted by SJ Cornelius *Principles of Interpretation of Contracts in South Africa* 2007 Second Edition, 120;

<sup>123</sup> SJ Cornelius (2007) 118;

linguistic matters.<sup>124</sup> Whereas ‘presumption of substantive law’ is derived from rules of law and statutory implications.

When the procurement process is interpreted, the presumptions of interpretation must be accepted and will stand until the party who alleges the opposite can prove same.<sup>125</sup>

For the purpose of this study, only the most relevant presumptions, of both presumptions of interpretation as well as presumptions of substantive law, will be discussed hereunder.

#### **4.3.1 Presumption against superfluous words and that no person will write what he/she does not intend:**

It is a presumption of interpretation that there are no superfluous words in a contract and there will not be any purposeless words in the agreement.<sup>126</sup> It is furthermore a presumption of substantive law that a party will not write what he or she does not intend.<sup>127</sup>

The mere fact that there is a similar rule of presumption in interpretation and substantive law is a strong indication as to the importance of all the terms and words in a written agreement.

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<sup>124</sup> SJ Cornelius (2007) 118;

<sup>125</sup> SJ Cornelius (2007) 118;

<sup>126</sup> SJ Cornelius (2007) 122;

<sup>127</sup> SJ Cornelius (2007) 123;

It can therefore be argued that, as the tender process forms a contractual relationship between the parties, every word in the invitation to tender as well as in the submitted tender must be read and given effect to.

In *VE Reticulation (Pty) Ltd and others v Mossel Bay Municipality and others*<sup>128</sup> the invitation to tender requested that a certain document be attached to all submitted tenders. As only one bidder abided by this request and attached the document, only the abiding bidder was considered to have submitted an acceptable tender. *VE Reticulation* argued that the request for the specific document was unnecessary and it therefore want its tender to be considered. The court held that, according to the provisions of the PPPFA, only acceptable tenders<sup>129</sup> may be considered and that *VE Reticulation* therefore cannot prove that the tender process was unlawful or sufficiently tainted.

From above brief discussions of the current case law it can be seen that the courts will presume that no words in a tender process were unnecessary or superfluously added. The burden to prove the opposite of the abovementioned presumption will therefore be placed on the party alleging same. As seen in the *VE Reticulation* case, such burden of proof will be a difficult burden as the presumption is supported by legislation.

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<sup>128</sup> 2013 (2) All SA 489 (WCC);

<sup>129</sup> “acceptable tenders” as defined in section 1 of the PPPFA as “any tender which in all respects, complies with the specifications and conditions of tender as set out in the tender document”;

### 4.3.2 The presumption that the performance must take place *in forma specifica*:

It is a presumption of substantive law that the parties intended that performance should take place exactly as described in the agreement.<sup>130</sup>

This presumption can be read together with the presumptions discussed under paragraph 4.3.1 above as it is already presumed that no party will write what he or she does not intend and therefore the performance must be exactly as described.

The matter of *VE Reticulation*, as discussed above, is a very good example where the court held that an advertisement to tender must be complied with exactly as set out in the invitation to tender. All submitted bids must therefore be in accordance with every word in the invitation to tender before same will be accepted as an “acceptable tender”.

In *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of South Africa Social Security Agency and others*<sup>131</sup> the invitation to submit a tender clearly specified that a separate tender must be submitted for each of the 9 provinces. The successful tenderer submitted only 1 bid and specified that the single bid was applicable to all 9 provinces. Allpay on the other hand submitted 9 separate bids for each of the provinces. In the

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<sup>130</sup> SJ Cornelius (2007) 134;

<sup>131</sup> 2014 (1) SA 604 (CC);

Constitutional Court, Froneman J held that the tender process must be assessed in accordance with PAJA and independent from the outcome of the tender process. The Constitutional Court further held that the tender process was irregular as the successful bidder had not specifically complied with the invitation to tender.

Above judgments indicate that it is of great importance that the submitted bids be *in form specifica* to the requirement as stipulated in the tender invitation as advertised. As the courts place a high value on the fact that the performance of a tender process must be *in forma specifica*, it can be presumed that all roll players in the tender process would also place the same level of importance thereon.

From the above it can be assumed that all performances in the state tender process will be *in forma specifica* and that the burden to prove the non-compliance thereof will be on the party alleging the irregularity.

#### **4.3.3 The presumption that the parties have the legal capacity to contract and that the parties contract as principal:**

According to Cornelius, when a party enters into a contractual relationship, it is a presumption in substantive law that such party has legal capacity to contract.<sup>132</sup>

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<sup>132</sup> SJ Cornelius (2007) 122;

There is a second presumption in substantive law that the party who contracts is presumed to be the principal.<sup>133</sup>

Both these presumptions can be read together to confirm that there is a presumption that the person submitting a bid, the person collecting, opening and recording the bid and the person/persons evaluating the bid have the capacity to do so and act in their own name (as principal) unless otherwise indicated.

It is of great importance that all parties involved in the tender process must have the necessary resolution and authorisation to act on behalf of their principal in the event that they are acting on behalf of a principal. All parties must identify themselves properly and state on whose behalf they act and with what authority. It is furthermore quite obvious that any resolution and authorisation must be done in accordance with the necessary and relevant law.

As discussed above, in the *Thabula Trade and Investment (Pty) Ltd* – case the municipality resolved to award the contract for the purchase of the immovable property to Mokgoro & De Bruin. It is therefore clear that the only parties with the necessary authority and resolution to contract would be the municipality and Mokgoro & De Bruin. The contract for the purchase of the immovable property was signed by a representative on behalf of *Thabula Trade and Investment (Pty) Ltd*. As the *pactum de contrahendo* was not afforded to *Thabula Trade*

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<sup>133</sup> SJ Cornelius (2007) 132;



*and Investments (Pty) Ltd*, the company could not contract for the purchase of the immovable property.

It can be seen from the judgment of Kgomo JP that it is vital that the parties to a tender process and a tender award must be correctly identified and only they will have the necessary capacity to enter into the final contract.

#### **4.3.4 The presumption that the parties intend to conclude a legally valid contract and that the parties do not wish to deviate from the existing law more than necessary:**

Cornelius explains that when the parties enter into an agreement, they wish to do so in accordance with the existing law and that the contract has been entered into freely with the intention of being enforced.<sup>134</sup>

It can therefore be presumed that in the tender process, the parties would always act in accordance with the relevant legal rules and would therefore conclude a valid and legally sound contract.

It must be presumed that the invitation to tender, the delivery of a bid and the evaluation of the bid will be done lawfully and with the intention to enter into a valid and binding contractual relationship.<sup>135</sup>

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<sup>134</sup> SJ Cornelius (2007) 125;

<sup>135</sup> It has already been explained in paragraph 4.1 above that the tender process in itself constitutes a contractual relationship between the parties;

The interpreter must presume that the parties intended to comply with the necessary legislation and common law. In the case of a State tender, it would be presumed that the parties intended to abide by PAJA, the PFMA and the MFMA to name but a few.

The interpreter must while reading and evaluating the contract presume and accept that the contract is a valid and legally sound agreement, until the opposite can be proven by the party alleging the contract to be void and or illegal.<sup>136</sup>

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,<sup>137</sup> Satchwell J held that a contract will be void if the proper procedure and regulations in accordance with the PFMA has not been followed. It will not be necessary for a declaratory order to this effect as the contract would be void from the onset if same is not in accordance with the laws of South Africa.

In *Indiza Airport Management (Pty) Ltd v Msundzi Municipality*<sup>138</sup> it was held that the tender process forms part of administrative action by an organ of State and therefore it must comply with PAJA.

In *KOPM Logistics (Pty) Ltd v Premier, Gauteng Province and Others*<sup>139</sup> it was held that the tender process and all post-tender processes derive from the

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<sup>136</sup> SJ Cornelius (2007) 115;

<sup>137</sup> 2012 (4) All SA 555 (GSJ);

<sup>138</sup> 2013 (1) All SA 340 (KZP);

<sup>139</sup> 2013 (3) SA 105 (GNP);

implementation of legislative power. Kruger AJ's judgment confirmed that the tender process must be procedurally fair and must comply with the Constitutional norms of fairness and openness.

The judgment in the *Thabula Trade and Investment (Pty) Ltd* – case again comes into play as the court held that due to non-compliance with section 2(1) of the Alienation of Land Act, the contract between the parties cannot be upheld and the court ordered the contract to be void.

The case law as briefly mentioned above is a clear indication that the laws of South Africa must be upheld and therefore it can be presumed that all parties would be inclined to act in accordance with these laws as they do not wish to entertain the negative impact of a void contract.

As all parties will be assumed to have contracted in good faith and in accordance with the laws of South Africa, the burden of proof would be on the party alleging the opposite of this assumption to prove that the relevant laws of South Africa have not been complied with.

#### **4.4 CONCLUSION**

Finally, the State tender process in itself has now been classified as a *pactum de contrahendo* and that the contractual rules of interpretation will always form part of the law governing the tender process.

The starting point to determine the terms that form part of the *pactum de contrahendo* will always be that of the invitation to tender (including the terms found in the bid documentation), the submitted tender and the awarding of the tender. The second step will be to determine the imputed tacit terms and implied terms that will form part of the *pactum de contrahedu*.

In interpreting the terms of the *pactum de contrahendo* it is important to keep the parol – evidence rule in mind. The parol – evidence rule will assist in ensuring that the principles as laid down in section 217(1) of the Constitution are adhered to at all times.

Alongside the parol – evidence rule, it is also necessary to use the contractual presumptions when interpreting the *pactum de contrahendo* formed through the tender process.

In conclusion, after classifying and interpreting the tender process, and awarding of a tender, it is clear why the drafter of such documentation must be vigilant and knowledgeable in the field of contract law.

## CHAPTER 5

### CONCLUSION

The public procurement process is of vital importance to ensure that the Republic of South Africa runs smoothly on a local, provincial and national sphere.

The process and scope of the public sector procurement process was discussed together with a detailed overview of the applicable legislation. It was mentioned that the public procurement process forms part of the administration law sphere and therefore all administrative law principles and regulations must be adhered to. It was furthermore confirmed that the public procurement process forms part of the law of contracts and the extend and impact thereof was discussed in detail.

It was established that, apart from the administrative sphere, the procurement process also forms part of the law of contracts. The procurement process in itself forms a *pactum de contrahendo* on the following grounds:

1. The advertisement to tender is merely an invitation to submit an offer.
2. The submission of a tender is an offer made by the tenderer in accordance with the advertisement to tender and all relevant legislation and regulations.
3. The awarding of a tender amounts to an acceptance of the offer and must also be made in accordance with the original advertisement to tender.

It was indicated that the law of contracts will always form part of the public procurement process and must be kept in mind during all stages of the procurement process. The terms and scope of the *pactum de contrahendo* will be determined as follows:

1. By reading and analysing the invitation to tender, the submitted tender and the award letter of the tender;
2. By determining the imputed tacit terms and implied terms;
3. By implementing the impact of the parol – evidence rule;
4. By measuring the impact of the relevant presumptions available in the law of contracts.

After reading this research, it must be clear that the legal implication of every stage in the public procurement process is vital and must therefore be dealt with and drafted with the necessary precision and in adherence with the necessary legal administrative and contractual principles and rules.

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